

**‘Victim’, ‘Deviant’, or ‘Worker’ but Nothing in  
Between: Revisiting Prostitution Discourse  
within *Bedford v. Canada***

by

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## **Abstract**

Controversy around the concept of prostitution and appropriate social policy responses to it has long existed. Perspectives on prostitution constantly conflate with notions of human trafficking, exploitation, and victimization, thereby influencing our understanding of choice, consent, and violence. From 1990 until very recently, Canadian courts failed to address the criminalization of prostitution related activities despite the actual acts of prostitution remaining legal. This study attempts to address current understandings of prostitution through a discourse analysis of the evidence tendered before the three levels of court in the 2013 Ontario *Bedford* challenge to the constitutionality of prostitution related offences in Canada. Three dominant discourses were identified, namely a victim discourse, a deviant discourse, and a worker discourse, with each providing opposing views of how prostitution should be viewed and what the most appropriate policy response to it entails. Until prostitution discourses are re-inscribed to include the voices of sex workers, the dispute pertaining to prostitution will persist, while the implementation of a favourable solution will remain inhibited.

**Keywords:** *Bedford* challenge; prostitution discourse; discourse analysis; prostitution related offences

*To the men, women, and transgender individuals  
involved in the sex industry, sex workers, and victims,  
including those who are no longer with us.*

## Acknowledgements

Apply the **2\_Acknow\_Normal** style to paragraphs in your acknowledgements. If 1<sup>st</sup>-line indented paragraphs are desired, you may press [Tab] the beginning of each paragraph.

# Table of Contents

Approval.....	ii
Abstract.....	iii
Dedication.....	iv
Acknowledgements.....	v
Table of Contents.....	vi
List of Tables.....	viii
List of Figures.....	viii

<b>Chapter 1. Introduction .....</b>	<b>1</b>
--------------------------------------	----------

<b>Chapter 2. Laws and Discourses Explaining the Story of Prostitution .....</b>	<b>7</b>
--	----------

2.1. A Historical Overview of Prostitution Law in Canada.....	7
2.2. The Legislative Approaches to Prostitution.....	17
2.2.1. The Swedish Model/Nordic Model .....	17
2.2.2. Symmetrical Criminalization.....	19
2.2.3. Decriminalization and Legalization.....	20
2.3. Former Discourses on Prostitution.....	21
2.4. A Note on Terminology .....	26

<b>Chapter 3. Analytical Framework .....</b>	<b>28</b>
--	-----------

3.1. Research Objectives.....	31
3.2. A Discourse Analysis Approach.....	32
3.2.1. Theoretical framework.....	33
3.3. Coding Data .....	34
3.4. Ethical Considerations .....	35

<b>Chapter 4. Discursive Findings .....</b>	<b>37</b>
---	-----------

4.1. The Experts.....	37
4.2. Major Themes .....	39
4.2.1. A victim in need of rescue .....	41
The victim as constructed in the Bedford case .....	41
4.2.2. The deserving deviant.....	50
A deserving deviant or a forgotten victim? .....	50
A victim rather than a deviant .....	52
4.2.3. The work in sex work .....	58
Sex work as a job in Canada .....	59
4.3. Contending Identities in the Face of the Law .....	65

<b>Chapter 5. The Application of the Victim, the Deviant, and the Worker Identity .....</b>	<b>72</b>
---	-----------

5.1. As a Victim, Deviant, and Worker before the Ontario Court of Appeal .....	74
--	----

5.1.1. The Impact of Prostitution Discourses on the Law: The Ontario Court of Appeal's Decision .....	81
5.2. The Portrayal of the Victim, Deviant, and Worker before the Supreme Court of Canada .....	85
5.2.1. The Final Determination: The Supreme Court's Interpretation .....	92
<b>Chapter 6. Discussion and Conclusion .....</b>	<b>95</b>
6.1. The Canadian Approach to Selling and Buying Sex .....	95
6.2. Disregarding the 'Worker' and Acknowledging the 'Victim' and 'Deviant' .....	102
6.3. Limitations .....	106
6.4. Conclusion .....	106
<b>References .....</b>	<b>108</b>

## List of Tables

Table 3.1.	Affiants and Interveners Categorized.....	30
Table 3.2	Categorization of Interveners by court and side of dispute.....	36
Table 4.1.	Classification of Intervener’s and Main Expert’s Resolution on Prostitution .....	38
Table 4.2	Summary of discourses presented in the Ontario Superior Court of Justice .....	69
Table 5.1	Coded themes from the Ontario Court of Appeal.....	73
Table 5.2	Coded themes from the Supreme Court of Canada .....	73

## List of Figures

Figure 4.1.	Initial major themes coded from trial court documents .....	39
Figure 4.2.	Additional themes coded from trial court documents.....	40



# Chapter 1.

## Introduction

Prostitution has come to be known as the exchange of services involving direct sexual contact for money and other considerations, including food, shelter, and clothing—essentially anything that could be asked for in exchange for sexual services (Betteridge, 2005). The commercial exchange of sex is a highly contested legal issue on an international level, affecting people worldwide. On a global scale, prostitution issues are simultaneously being explored in nations including but not limited to Britain (Kantola & Squires, 2004), Israel (Amir & Amir, 2009), Italy (Danna, 2004), Japan (Morita, 2004), the Netherlands (Outshoorn, 2004), Australia (Frances, 2004) and Sweden (Svanström, 2004). Although the effects of prostitution are felt on a global scale, there is little agreement on how to address the issue.

There are many forms of interactions within the sex industry including: phone sex operators, exotic dancers, webcam girls, exotic massage services, stripping, fantasy services (submission-domination, sadomasochism, bondage, and cross-dressing), and pornography (Betteridge, 2005; Willman & Levy, 2010). Various types of sex work within the area of prostitution include: street level prostitution, escorts/gigolos, call girls/boys, and independent workers. Some areas of the sex industry overlap with the aforementioned forms of interaction (House of Commons, 2006). The experiences of those working in the sex industry are not homogenous. There are many factors that contribute to an individual's involvement in the sex trade, as well as to their exit from the industry. Essentially, fluidity exists within the sex industry in the sense that an individual may not have only one kind of clientele and/or consistently stay within one sector of the sex industry (Benoit & Millar, 2001; House of Commons, 2006; Jeffrey & MacDonald, 2006; O'Doherty, 2007).

Due to the diversity of the sex industry, many different sources and methods of obtaining information must be utilized in order to better understand this phenomenon. Canadian knowledge on the prevalence of prostitution is based upon police reports that record rates of arrests, and research by academic scholars using self-reporting measures as well as collaboration with community outreach agencies and social workers. Since the publication of a special issue of *Juristat* in 1997 focusing on street prostitution in Canada (Duchesne, 1997), there has not been an equivalent publication of official statistics on prostitution in Canada. In the 1997 issue, Duchesne (1997) found the majority (92%) of reported prostitution incidents (n=7165) in 1995 involved communicating for the purposes of prostitution. With the prevalence rates of street level prostitution estimated to be between 5-20% of all prostitution-related activities (House of Commons, 2006), the rates of recorded prostitution incidents, as indicated in the *Juristat* issue, seems to exclude the 80-95% of indoor prostitution related activities which occur indoors. Some argue that prostitution is a gendered crime, as women make up 75%-80% of those engaged in selling sex (House of Commons, 2006). Many of those involved in street level prostitution have a criminal record, live in poverty, have a drug and/or alcohol addiction, and may be homeless (House of Commons, 2006; Special Committee on Pornography and Prostitution (The Fraser Committee, 1985).

Due to public concerns about the visibility of street level prostitution, the majority of research conducted in the 1980s concentrated on street level prostitution (Fraser Committee, 1985) as opposed to more recent academic research focusing on other sectors of the sex industry. For example, O'Doherty's (2007) research with off-street sex workers in British Columbia found her sample population to consist of "mainly well-educated, financially comfortable, local, white women near the age of 30" (p. 66). The stark contrast between the composition of those involved on the street and those off-street, speak to the diversity of those involved in this industry. Although research has expanded to include those working in sectors of the sex industry other than street prostitution, the illegal status of prostitution-related activities in Canada has led this group of people to conduct their business in secret. The many conflicting pieces of information not only attest to the diversity of the industry but also the lack of knowledge outsiders have of the sex industry. This thesis does not seek to differentiate between prostitution facts and myths, but rather the focus is upon how this information is

presented, who is presenting this information, and why. To this extent, understanding of the sex industry can be achieved through a discourse analysis of written material where other means of obtaining knowledge cannot be accomplished. In turn, the diversity of the sectors of the sex industry, the various types of prostitution, and the fluidity of movement between the types of prostitution, are among the many other topics that remain under-researched.

There are many macro-level issues underlying prostitution that contribute to its complexity. Poverty, inequality, patriarchy, colonialism, racism, and sexism are among the prominent fundamental root sources contributing to prostitution. However, these are not the sole reasons responsible for someone's involvement in the sex industry. Apart from these factors, while some may engage in prostitution due to the economic need for survival, others' involvements are an act of resistance to social conceptions of 'cheap labour' (Jeffrey & MacDonald, 2006). Resisting the limitations of social assistance, minimum wage, and service-sector work, Jeffrey and MacDonald (2006) explains, "sex work itself can be read as a resistant mode of female labour, a form of resistance that is constrained by the laws and social meanings that shape it, not by the work itself" (p. 20). In Canadian history there has been a constant struggle between understanding what prostitution consists of and protecting the public from nuisance caused by street prostitution, addressing the exploitation of children and women, and the desire to recognize a right to exercise free will over one's body (Lowman, 1998, 2011; Young, 2008). Similar to the assumptions around reading sex workers as "victims of poverty", where their involvement in the sex industry are perceived as a lack of choices for survival (Jeffery & MacDonald, 2006), our understanding of prostitution as outsiders differ from the real experiences of those directly involved in this activity. The arguments in the recent case of *Bedford v. Canada* (2010) reflect this struggle and the need to recognize the many different experiences and voices among those involved in prostitution.

In 2009, Terri Jean Bedford, Amy Lebovitch, and Valerie Scott, brought before the Ontario Superior Court of Justice a constitutional challenge against sections 210 (bawdy-house provisions), 212(1)(j) (living on the avails of prostitution), and 213(1)(c) (communication for the purposes of prostitution) of the *Criminal Code* (*Bedford v.*

Canada, 2010). Justice Himel from the Ontario Superior Court of Justice ruled at trial that all three provisions were unconstitutional and could not be saved under section 1 of the *Canadian Charter of Rights and Freedoms*. This marked a major turning point for the legal regime governing prostitution laws in Canada. However, the majority in the Court of Appeal felt that the appeal of Justice Himel's ruling should be allowed in part to the extent that the court should "read in" limitations to the scope of the living off the avails provision to allow the laws to serve their purpose in protecting the vulnerable. The Court of Appeal upheld Justice Himel's declaration of invalidity in regard to the bawdy house provisions. However, the appeal court found the communicating provision to be constitutionally valid. The Crown appealed the adverse aspects of this decision to the Supreme Court of Canada; however, that court upheld the trial judge's ruling declaring all three *Criminal Code* provisions to be invalid. Yet, at the Supreme Court of Canada, the court delayed the implementation of its decision until December 2014 to allow the government time to consider revising the law, leaving the future of Canada's approach to prostitution uncertain. In June of 2014, the Justice Minister of Canada, Peter MacKay, introduced Bill C-36, the *Protection of Communities and Exploited Persons Act* (PCEPA), which makes it illegal to buy and/or sell sex in public (Mas, 2014). An in-depth analysis of this Bill has yet to be conducted. This Bill was given royal assent November 6<sup>th</sup>, 2014.

At the time Bill C-36 was being debated in Parliament, there were four legal frameworks proposed as possible solutions for dealing with prostitution. The prominent legislative approaches to prostitution included: criminalization, decriminalization, legalization, and an asymmetrical approach known as the Swedish or Nordic model. Various countries around the world have adopted one of the four approaches used in dealing with prostitution. However, research on the effectiveness of each approach has yielded mixed results (Barnett, Casavant, & Nicol, 2011). These results may be due to the complexity of the issues surrounding prostitution along with the many different points of view on this issue. Each of these approaches and their argumentative foundation will be discussed in chapter two.

Each legislative approach to prostitution emphasizes different factors that are believed to contribute to a person engaging in prostitution. Those who support

criminalization seek to protect vulnerable victims from sexual exploitation by prohibiting the act of selling sex and all related actions allowing the sale of sex. In contrast, supporters of decriminalization recognize the existence of agency and free will within the decision to sell sex. Before the enactment of PCEPA, Canada upheld a quasi-criminalization approach to prostitution. Under this approach, the act of selling sex is not illegal but all activities associated with the selling of sex are criminalized. As a result of the *Bedford* challenge, people involved in the sex industry attempted to change Canada's legislative approach in dealing with those involved in the sex industry.

There are many methods that can be used to achieve an understanding of prostitution. One method of understanding the prostitution controversy is through the way prostitution is presented and described in the alternative legislative solutions to the issue. In an attempt to unravel the complexity of the issue of prostitution, this thesis will examine the arguments made by a number of experts who presented evidence in the *Bedford* case. The purpose of this study was to critically investigate the discourses these experts employed to justify the political goals and policy recommendations implicit in their testimony. This study comprises two main components: a) a discourse analysis of the affidavits of the various expert witnesses, with their cross-examinations as supplementary documents – as presented before the Ontario Superior Court of Justice, the Ontario Court of Appeal, and the Supreme Court of Canada; and b) an examination of Bill C-36 as a means of addressing the concerns raised by the *Bedford* (2010) case to determine whether this Bill satisfies the concerns raised at trial and on appeal.

The organization of this thesis consists of five main chapters. Chapter two begins with a discussion of the development of prostitution laws in Canada, followed by a description of the different legislative approaches and an outline of previous discourse analyses of prostitution. Chapter three describes the methodological approach selected for this thesis. A consideration of the backgrounds of the experts who testified in the *Bedford* case, and the key discursive findings are the focus of chapter four. After establishing the basis for this discursive analysis, chapter five considers whether this discourse changed in any way through the appeal process in the Ontario Court of Appeal and the Supreme Court of Canada. The thesis will conclude in chapter six with a discussion of the implications of the Supreme Court of Canada's ruling, the implications

of Bill C-36, and the recommendations derived from the effectiveness of other legislative approaches found in other countries.

## **Chapter 2.**

### **Laws and Discourses Explaining the Story of Prostitution**

In order to grasp the key issues pertaining to prostitution, it is crucial to have an overview of the criminal laws governing prostitution in Canada. The first section of this chapter discusses the development of Canada's prostitution laws before the *Bedford* challenge. A second section explains the different legislative approaches to prostitution that have been proposed and the differential terminology used in each framework. Lastly, previous discourses on prostitution will be examined to allow a comparison of the discourses that emerged in this study.

#### **2.1. A Historical Overview of Prostitution Law in Canada**

The activities necessary for prostitution to be carried out are all prohibited by Canadian law (House of Commons, 2006; Lowman, 2011). Before the first enactment of the *Criminal Code* in 1892, vagrancy and bawdy house laws had been in place to deal with prostitution. These laws treated street prostitution and brothels as violations of public order and the cause of nuisances (Russell, 1982). The bawdy house law, as it was initially found in the *Criminal Code*, penalized anyone for keeping a bawdy house, for being found in a bawdy house, and/or for being held in a bawdy house (House of Commons, 2006). The vagrancy law made it an offence for women to be found on the streets without a satisfactory reason for being there (van der Meulen, Durisin, & Love, 2013). Sections 175(1)(c), as it was in 1972, stated: "Every-one commits a vagrancy who. . . being a common prostitute or nightwalker is found in a public place and does not, when required, give a good account of herself" (as cited in Lowman, 2005, p. 4). As a result of this gendered law, women who could not account for themselves were charged, not for what they actually did, but for what they were presumed to have done.

In 1970, the *Report of the Royal Commission on the Status of Women in Canada* found the law to have failed to “respect the liberty of the individual to move about in freedom” (Canada, 1970, p. 370) and additionally as being arbitrarily applied by the police. As a result, the vagrancy law was repealed in 1972 under Prime Minister Pierre Elliott Trudeau’s leadership (Ranasinghe, 2010) and replaced with the soliciting law.

The soliciting law produced gender neutrality in the wording of the law, and criminalized the act of soliciting for the purposes of prostitution rather than criminalizing the person for their status as a prostitute (Ranasinghe, 2010; van der Meulen, Durisin, & Love, 2013). Despite this, there were also issues with this soliciting law. When first introduced in 1972, section 195.1 of the *Criminal Code*, read: “Every person who solicits a person in a public place for the purpose of prostitution is guilty of an offence punishable on summary conviction” (as cited in Lowman, 2005, p. 4). The broad wording of this section brought much ambiguity regarding how to enforce this law. In 1978, the Supreme Court of Canada in *R. v. Hutt* interpreted ‘soliciting’ to require the offender to be proven to have been “pressing or persistent” before a conviction could be sustained (p. 482). Although this ruling clarified the meaning of solicitation, the definition made it almost impossible to enforce. The mere offering of a price for a sexual service was neither pressing nor persistent, but that was the extent of communication between the majority of street prostitutes and clients/johns. Police found it impractical to enforce the solicitation law and thus soon stopped enforcing it.

Many municipalities began to develop their own means of controlling street solicitation. The city of Calgary, for example, enacted a by-law prohibiting the sale of sex on public streets. Those found to be in violation of the by-law would be subjected to fines or incarceration of no more than 60 days (on the first offence) or no more than six months (on a subsequent offence). The law was challenged in *Westendrop v. The Queen* (1983), with all nine justices of the Supreme Court of Canada agreeing the by-law was *ultra vires* – only the federal government held jurisdiction to create criminal law.

A Special Committee on Pornography and Prostitution was commissioned in 1985 to investigate and suggest national solutions on the issues of prostitution and pornography (van der Meulen, Durisin, & Love, 2013). This special committee,



commonly referred to as the Fraser Committee, (named after Paul Fraser, the Committee chairperson), concluded that all prostitution-related laws should be redrafted. More importantly, the Committee recommended that municipal, provincial, and federal governments work together to minimize or remove what the Committee believed was the greater root cause of prostitution, i.e., the social and economic disparity between men and women. Additionally, the Committee recommended adequate social programs should be ensured for those at greater risk of becoming involved in prostitution, and that exiting programs also should be developed (Lowman, 2005). Ultimately, the Fraser Committee suggested a shift of legislative approach towards partial decriminalization by regulating adult prostitution in certain restricted areas, while criminalizing the exploitation of children and youth in prostitution (House of Commons, 2006).

Despite the research conducted through the Fraser Committee, which produced recommendations centering on decriminalization, Canada's legislative approach to prostitution did not move in that direction. Instead, 1985 saw the soliciting law repealed and replaced with the communicating law that was in effect until *Bedford*. Section 213(1) of the *Criminal Code* stated:

Every person who in a public place or place open to public law

- (a) stops or attempts to stop any motor vehicle,
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purposes of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

This change in the law was a major step towards the penalization of both those who sold sex and those who bought sex (Lowman, 2005). Despite the fact that the communication law was then being equally enforced against both prostitutes and their customers, the sentencing outcomes between client/john and prostitute were disparate (House of Commons, 2006). The results from data gathered in multiple cities across Canada found that prostitutes charged with communicating for the purposes of

prostitution, even in cases of first time offenders, received more severe sentences than those who were buying sex (House of Commons, 1990; Lowman, 2011).

The Federal Provincial-Territorial Working Group on Prostitution was established in 1992 by the Provincial and Territorial Deputy Ministers Responsible for Justice with the mandate to review the policy, legislation, and practices in connection to prostitution-related activities ('Federal-Provincial-Territorial', 1998). The Working Group identified three major areas of concern: youth involved in prostitution, violence against prostitutes, and the harm caused to neighbourhoods as a result of street prostitution ('Federal-Provincial-Territorial', 1998). Although the majority of the recommendations presented by the Working Group were centered upon combatting juvenile prostitution, a lack of consensus on the best approach to deal with adult prostitution left the government back at square one in dealing with prostitution.

During 1990, three concurrent challenges were brought before the courts against the communicating law. In the first case, *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code* (also known as *the Prostitution Reference* case) the communicating law's validity under sections 2(b), 2(d), and 7 of the *Charter* was evaluated. Justices Wilson and L'Heureux-Dubé for the dissent strongly argued that the prohibition in section 195.1(1)(c) was unreasonable as it "prohibits all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance" (emphasis in original) (p. 1214). The only infringement out of the three *Charter* challenges that the court found was in regards to section 2(b); however, they ruled that the legislation was justifiable under section 1 of the *Charter* (*Prostitution Reference*). Since this case, the 2013 *Bedford* case was the only other *Charter* challenge, to date, brought before the Supreme Court on the communicating law.

The second ruling on the constitutionality of section 195.1 (1) (c), occurred in *R. v. Stagnitta* (1990). Relying on *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code* (1990) case and the third companion case, *R. v. Skinner* (1990), the Supreme Court held that the regulation of street prostitution to prevent nuisance was a

valid legislative objective, and hence that the section 2(b) violation was nonetheless a reasonable limit under the Oakes test<sup>1</sup> (*R. v. Stagnitta*, 1990).

In the third case, *R. v. Skinner* (1990), the courts were presented with a question as to whether section 192.1(1)(c) (the essence of which was found in section 213) infringed upon the freedom of expression guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms*. The majority for the Appeal Division of the Nova Scotia Supreme Court agreed with the reasoning from *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code* that the right to freedom of expression was violated on the basis that the limit prescribed by law “not only restricts freedom of expression directly by restricting the content of expression, but also restricts access by others to the message being conveyed by prohibiting the one attempting to convey the message from doing so” (p. 1189). The judges agreed that the law “went beyond what was reasonably necessary [as] it attacks not only the disorderly prostitutes but also those who quietly and discreetly stroll or stand around non-residential areas” (*R. v. Skinner*, 1987, para. 20). However, the Supreme Court of Canada found on appeal that this limit was justifiable given that the goal of the law was to prevent social nuisance associated with the public display of sex (*R. v. Skinner*, 1990).

A major contradiction within the established prostitution-related laws in Canada exists between the criminalization of visible street-level prostitution and the regulation of indoor prostitution (Lowman, 2011). Many cities including Windsor, Calgary, Edmonton, Red Deer, Vancouver, Victoria, Kitchener, and Toronto have enacted by-laws regulating prostitution-related services, treating them as licensed businesses, including: dating and

<sup>1</sup> Derived from the first section of the *Canadian Charter of Rights and Freedom*, the Oakes test is also known as the section 1 test. The purpose of this section is to define the extent of the permissible government limit on rights. The threshold for this test is determined by whether the law is proportional “between the means chosen to achieve that objective and the burden on the rights claimant” (Sharpe & Roach, 2009, p. 68). Aside from the requirement that an infringement caused by the law must be prescribed by law, there is a four step analysis that the infringement must pass in order for it to be justified. The law must seek to achieve an important government objective, it must be a law that is rationally connected to that objective, it must minimally impair the right or freedom in question, and there must be proportionality between the harmful effects of the government measure and the importance of the objective. For a more detailed explanation of the section one analysis, please see Sharpe, R.J., & Roach, K. (2009). Additionally, the basis for this test can be found in *R. v. Oakes* [1986] 1 S.C.R. 103.

escort services, massage parlours, and exotic entertainers (Barnett, 2008; Barnett & Nicol, 201). For example, in Calgary, the dating and escort service bylaw number 47M86 (2006) governs the circumstances under which these services can be carried out and it outlines eligibility for licensing. In Vancouver, the adult entertainment sector is regulated and governed by a liquor-licensing bylaw (Government of British Columbia, 2014). Since these indoor forms of sex work are regulated rather than criminalized, the majority of those arrested and charged with prostitution-related offences are those working on the street.

In 2009, Alan Young brought before the courts constitutional challenges against sections 210 (bawdy-house provisions), 212(1)(j) (living on the avails of prostitution), and 213(1)(c) (communication for the purposes of prostitution) of the *Criminal Code*. On behalf of Terri Jean Bedford, Amy Lebovitch, and Valerie Scott, Young alleged that the *Prostitution Reference* was no longer binding in light of three reasons. First, the legal arguments presented in this case were not presented in the *Prostitution Reference*. Additionally, the interpretation of the section 7 analyses of the principles of fundamental justice has evolved through the years. Second, the context of the amounts of violence experienced by prostitutes has drastically changed considering the Robert Pickton case, and evidence supported by two decades of new research. Third, the 1990 case was a reference case which differs from the present factual case. The three applicants were self-identified sex workers with many years of experience working in the industry. Terri Jean Bedford was the only applicant who was not actively working in the sex industry at the time of the court hearings; however, she plans to resume her work in the near future (*Bedford v. Canada*, 2010).

The respondent, the Attorney General of Canada, argued there were no new evidence as claimed by the respondents, and thus a re-evaluation of the prostitution related offences that were upheld in the *Prostitution Reference* in 1990 was unnecessary. Furthermore, the government asserted that the risks and harms that the respondents claimed were associated with street prostitution are a natural aspect of engaging in the act of selling sex. Thus, no matter what legal framework is adopted, prostitution will always be dangerous for the parties who are involved. Due to the nature

of prostitution and the parties involved, the *Charter*-right restrictions imposed by these laws are therefore justifiable under the *Oakes* test (*Bedford v. Canada*, 2010).

In contrast, the applicants argued that all three prostitution laws were in violation of the right to life, liberty and security of a person and were not in accordance with the principles of fundamental justice - a section 7 *Charter* right violation. Additionally, they claimed the communicating law violated the right to freedom of expression (s. 2(b) *Charter* right) (*Bedford v. Canada*, 2010). Lastly, the applicants argued that these three laws prohibit prostitution from being carried out in a safer environment, which increases the danger for those engaged in street prostitution by creating barriers for individuals to engage in this legal activity safely. The applicants argued the laws also contradict each other:

. . . [T]he state[d] objective underlying all three offences will never be achieved because the interplay of all three provisions is a “contradiction in action”. [The applicants] state that the Court held that the communicating provision is aimed at removing solicitation for the purposes of prostitution “off the streets and out of public view” (citing Dickson C.J. in the *Prostitution Reference* at p. 1136); yet, the other impugned provisions foreclose the possibility of moving indoors legally (*Bedford v. Canada*, 2010, para. 373).

In weighing the legislative objectives against the effects of sections 210, 212(1)(j), and 213(1)(c), in the lower court, Justice Himel found the evidence presented by the applicants had proved on a balance of probabilities that each of these laws disproportionality forced prostitutes to choose between their liberty and personal security. Justice Himel was satisfied that “sections 210 and 212(1)(j) are rarely enforced and that s. 213(1)(c) is largely ineffective” (para. 536). Moreover, the court determined that the current laws cause prostitutes to conduct their business in a way that increases their exposure to violent clients when they comply with the law and they risk incarceration when they do not comply. As a result, these three sections were declared constitutionally invalid.

The majority for the Court of Appeal for Ontario ruled differently than Justice Himel. Justices Doherty, Rosenberg, and Feldman agreed that the bawdy-house provisions (section 210) proved to be unconstitutional and should be struck down

because they violate the principles of fundamental justice in two ways. First, section 210 is overly broad as it limits conduct apart from that which Parliament sought to diminish. Secondly, since working indoors is significantly safer than working outdoors, the bawdy-house prohibition was found to be grossly disproportionate to the legislative objective and could not be justified under section 1 of the *Charter* (*Canada (Attorney General) v. Bedford*, 2012, para. 172). However, to allow Parliament the opportunity to redraft a *Charter*-compliant statute, a declaration of invalidity was suspended for twelve months. Given the principles of *stare decisis*, the justices agreed that the ruling on section 213 in the *Prostitution Reference* case of 1990 was fully binding. Due to the fact that this previous case was ruled by the Supreme Court of Canada, the majority found that the trial judge erred in reconsidering the constitutionality of the communicating provision in the context of s. 2(b) of the *Charter*. The majority reasoned:

[. . .] we conclude that the application judge did not err in considering whether or not the bawdy-house and communicating provisions violate s. 7 of the *Charter*. The reason is that both the legal issues raised, and the legal framework to be applied, are different now than they were at the time of the *Prostitution Reference*. By contrast, we conclude that the application judge erred in reconsidering whether or not the communicating provision is an unjustified infringement of s. 2(b) of the *Charter*. The Supreme Court definitively decided this issue in the *Prostitution Reference*, and only that court may revisit it (*Canada (Attorney General) v. Bedford*, 2012, para. 52).

The rationale behind this decision was in keeping with the purpose of *stare decisis*. Quoting *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* (2005), the court stated that “it promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law” (as cited in *Canada (Attorney General) v. Bedford*, 2012, para. 56). Justice Himel’s reasoning for revisiting section 213 in light of new evidence gathered over the last twenty years, was rejected by the majority of the Court of Appeal because allowing this reasoning as a rationale for lower courts to re-evaluate a higher court’s decisions will open the flood gates for re-litigating previously settled issues, resulting in citizens no longer being able to “plan their conduct in accordance with the law as laid down by the Supreme Court,” allowing the lower courts to “uproot and replace” constitutional interpretation (para. 84). In this case, they concluded that only the Supreme Court can overturn one of its own decisions.

In determining whether section 212(1)(j) violates the principles of fundamental justice, the majority found that the provision was not arbitrary because the legislative objective was targeted at preventing exploitation. However, they did agree with the ruling of the trial judge in that section 212(1)(j) was overbroad and grossly disproportionate due to the fact that this section encompasses conduct that is not exploitative, criminalizing non-exploitative relationships (*Canada (Attorney General) v. Bedford*, 2012, para. 221). In finding that the legislative objective to protect individuals from exploitation is important, a remedial approach to section 212 was taken, requiring a rule to be read in so that it would only apply in circumstances of exploitation.

The minority, Justices MacPherson and Cronk, agreed with the majority's analysis and outcome on sections 210 and 212. However, they disagreed with the majority's conclusion with respect to section 213 on seven points. Included among the seven reasons for their disagreement, the minority found that the enforcement of section 213, in comparison with sections 210 and 212, poses more serious negative effects in violation of the principles of fundamental justice. Although screening potentially violent clients is not an infallible mechanism for increasing safety, it is an essential tool for increasing safety. Therefore, not allowing prostitutes the opportunity to screen clients in the wake of being charged under section 213 for soliciting endangers prostitutes and is a grievous violation of security of a person.

Justices MacPherson and Cronk also found that the majority failed to take into consideration other means of obtaining protection, aside from screening clients, the communicating provisions deny prostitutes' ability to work safely. For various reasons, including addictions, some individuals are unable to work indoors. Working in pairs or in groups are other ways in which safety can be promoted, since license plates can be noted and the length of each business transaction can be recorded by those not with a client. Precluding these strategies increases the vulnerability of prostitutes. Comparing the legislative objective to the effects of the law, the minority found that the trial judge did not understate the objective of section 213. They reasoned that despite the many other social ills often associated with prostitution – drug possession, drug trafficking, public intoxication, and organized crime – the weight assigned to the legislative objective could not be increased. The above-mentioned social ills would exist regardless of the

communicating provisions' status in law. Therefore, if sections 210 and 212, which were documented by research to have fewer repercussions in the lives of those working the streets in comparison to section 213, were found to be grossly disproportionate to legislative objectives, the communicating provisions also should be found to be grossly disproportionate (*Canada (Attorney General) v. Bedford*, 2012, para. 337-369). With a three-two ruling, it was no surprise that this case was appealed to the Supreme Court of Canada in 2013.

The nine Supreme Court justices unanimously decided that all three provisions were inconsistent with the *Charter* and therefore void (*Canada (Attorney General) v. Bedford*, 2013). Writing on behalf of the Court, Chief Justice McLachlin agreed with the application judge's decision that all three sections pertaining to prostitution-related offences brought before the court violated principles of fundamental justice and could not be saved under section 1 of the *Charter*. Chief Justice McLachlin outlined in detail the principles of fundamental justice that apply under section 7.

All three principles – arbitrariness, overbreadth, and gross disproportionality – compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. . . they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7 (para. 123).

Although the majority of the Appeal Court ruled differently than the trial judge, regarding the application of section 7, the Supreme Court found that the laws suffer “from constitutional infirmities that violate the *Charter*” (*Canada (Attorney General) v. Bedford*, 2013, para. 165) because they endanger the lives of prostitutes. As a result of this infringement, all three provisions were found to be void; however, a declaration of invalidity was suspended for a year. The Court suggested that Parliament is not precluded from imposing limits on how and where prostitution may be conducted.



Despite the ruling on the unconstitutionality of these three provisions by the Supreme Court, the Justice Minister of Canada, Peter Mackay, introduced Bill C-36 in early June of 2014 as a means to address prostitution in Canada. This Bill makes it illegal to buy and/or sell sex in public (Mas, 2014). Contrary to the Supreme Court's recommendations, instead of legalizing and regulating prostitution, Parliament decided to criminalize the actions surrounding prostitution, in turn increasing the dangers that were outlined for the courts in the *Bedford* case. An in-depth analysis of the potential implications of and specific wording of this Bill will be undertaken in the discussion section of this thesis.

## **2.2. The Legislative Approaches to Prostitution**

Currently, the legislative frameworks on prostitution that have been advanced include: symmetrical criminalization, asymmetrical criminalization (the Swedish or Nordic model), decriminalization, and legalization. Underlying these frameworks are many different perspectives on how prostitution should be viewed; these include radical feminist, sex radicalist, liberal feminist perspectives, socialist feminist perspectives, prohibitionist, abolitionist, and neo-abolitionist perspectives (Barnett, Casavant & Nicol, 2011; Sutherland, 2004; Weatherall & Priestley, 2011). Although the majority of these perspectives align with one of the four proposed legal frameworks, the assumptions underlying each perspective and the reasons for supporting and/or advocating a certain framework vary. Each framework and the perspectives within each framework will be discussed in order to set out the available options to targeting the issue of prostitution.

### **2.2.1. The Swedish Model/Nordic Model**

In 1999, Sweden adopted an approach to prostitution that criminalize both the buying of sex and procuring for the purposes of selling sex. Rather than trying to manage the conditions of prostitution and exploitation, Sweden aimed to target the demand for prostitution (Government of Québec, 2012) by focussing on those (mostly men) who sought sexual services. Neo-abolitionists and some abolitionists strongly advocate for the Nordic model because the aim is to target the demand for prostitution in hopes of decreasing the number of people involved in prostitution (Barnett, Cassavant, &

Nicol, 2011; Hayes-Smith & Shekarkhar, 2010; House of Commons, 2006). In regard to this legislative framework, the House of Commons (2006) reported:

Persons selling sexual services should be treated as victims of crime and should never be criminalized themselves. Society must accordingly provide enhanced options for those working in prostitution by introducing social and economic reforms and programs making it easier for [sex victims] to exit the trade and reintegrate into society. . . Encompassing all forms of prostitution (indoor and outdoor), the law ensures that those selling sexual services are never criminalized, while clients and pimps are specifically targeted by the criminal law (p. 72).

This model is founded on the notion that the sex industry would fail without men's demand for prostitutes (House of Commons, 2006). The creation of harsh penalties for clients (those who purchase sex), those who promote, and/or "improperly financially exploit" others (Chu & Glass, 2013, p. 104) is based on the assumption that, in the long run, there will be a deterrent effect that will ultimately reduce the demand for prostitutes (Hayes-Smith & Shekarkhar, 2010). Similarly, in an attempt to eradicate organized crime and trafficking of persons for the purposes of sexual exploitation, punitive criminal sanctions against pimps (those who exploit and in some cases force others to engage in prostitution) will target the supply side of prostitution (House of Commons, 2006).

Under the Nordic approach, consent to engage in prostitution is irrelevant since advocates of this approach view prostitution as an obstacle to sexual equality because prostitution promotes the commodification of women (House of Commons, 2006). The men who purchase sex are seen as aggressors while the women selling sex are viewed as victims of patriarchal oppression and male violence (Chu & Glass, 2013). In fact in Sweden, prostitution is seen as intimately linked to human trafficking. As explained by the Special Advisor on Issues Regarding Prostitution and Trafficking in Human Beings to the Government of Sweden, Gunilla Ekberg states:

In Sweden, prostitution and trafficking in human beings for sexual purposes are seen as issues that cannot and should not be separated. Both are harmful, intrinsically linked practices (as cited in House of Commons, 2006, p. 72).

However, the accuracy of the above statement has been criticized, and the effect of implementing this model has produced mixed results and has been subjected to debate.

The details and controversy surrounding this debate will be examined in Chapter 5 of this thesis, where the implications of adopting this model, or any of the other three legislative frameworks, will be discussed.

### **2.2.2. Symmetrical Criminalization**

The criminalization of prostitution has long been debated amongst feminists, activist, and politicians. Radical feminists, abolitionists, and prohibitionists argue in favour of symmetrical criminalization, where both the act of selling and buying of sex are prohibited (Barnett, Casavant, & Nicol, 2011). From a radical feminist perspective, gender inequality defines sexuality (Sutherland, 2004). Sutherland (2004) explains the concern of radical feminists as centered upon the subordination of women to men, which occurs because men are socially constructed within the gender divide to have more power. The subordination of women arises by the way in which women are culturally brought up to conform to gender expectations (Sutherland, 2004). The focus of radical feminist research is on violence against women. From this perspective, those involved in prostitution are rape victims (Jeffreys, 2009).

Radical feminists argue that prostitution is a form of violence against women and therefore cannot be justified and must be abolished (Anderson, 2002; Barry, 1979; Jeffreys, 2009; MacKinnon, 1993). Prostitution is believed to be a form of degradation and a form of 'paid rape' (Farley, 2004, p. 1100). All who are involved in prostitution are viewed as victims of violence, rape, and exploitation because it is impossible for one to freely choose to sell their body for a living. Freedom and rational choice does not exist when a decision must be made between starving to death and selling one's body in exchange for necessities (Jeffreys, 2009). Prostitution is also viewed as allowing and maintaining male dominance over women. The proposed solution by radical feminists is to abolish the exploitation of women. Since prostitution is among the very embodiment of exploitation and inequality, prostitution must be abolished by criminalizing the sale of sex and all related activities (Anderson, 2002; Barry, 1979; Jeffreys, 2009; MacKinnon, 1993). Violators should be subject to punitive criminal punishment.

Due to overlapping feminists' views between those who advocate for criminalization and those who support the Swedish model, the reasoning between the two models seem similar. However, the notion of symmetrical criminalization is strongly promoted by feminists under the abolitionists and prohibitionist category. (van der Meluen, Durisin, & Love, 2013). Likening prostitution to sexual slavery, abolitionists and prohibitionists seek to end sexual slavery by prohibiting all related activities (van der Meluen, Durisin, & Love, 2013). Therefore, unlike the Swedish model where those who buy sex are targeted and criminalized by the law, both those who sell sex and buy sex are prohibited under the law in the criminalization regime, thus reinforcing the disapproval of such behaviours within society.

### **2.2.3. Decriminalization and Legalization**

Socialist feminists, sex radicals and some liberal feminists argue that some forms of prostitution are best considered as simply a form of employment, which raises issues of work, economy (Jefferys, 2009), and human rights rather than issues of morality (Sutherland, 2004). The term 'sex work' was coined by Carol Leigh (also known as Scarlot Harlot) in 1980. Leigh (1997) believed that the term 'sex work' reflects a person's occupation and not their status (p. 230), and that working in the sex industry is like any other kind of legitimate work, and hence that it should be treated the same as any other legitimate employment (Nagle, 1997).

Decriminalization involves repealing all criminal penalties associated with prostitution (Weitzer, 2000), which makes sense if one assumes that prostitution will never disappear and that individuals can freely choose to engage in it without being exploitative (House of Commons, 2006). The activities surrounding prostitution, including procuring, the bawdy-house provisions, living on the avails, and communicating for the purposes of prostitution should not be subjected to any penal consequences under this perspective. Under true decriminalization, prostitution related activities will not be regulated. The same laws that regulate other businesses would be the laws applied to the sex industry (Lutnick & Cohan, 2009). The list of applicable laws include, but are not limited to, taxing laws, zoning laws, employment laws, and

occupational health and safety laws (Lutnick & Cohan, 2009). Prostitution would not be viewed or treated any differently than any other professions (House of Commons, 2006).

The notion of legalization also involves repealing all criminal laws pertaining to prostitution. Any criminal laws relating to prostitution would be replaced by laws to regulate prostitution. The Subcommittee on Solicitation Laws described legalization as regulation with “the aim [to] control prostitution rather than criminalization or repeal of the criminal laws; in a sense, this is the meeting point between criminalization and decriminalization” (House of Commons, 2006, p. 82). Countries that have adopted legalization, like the Netherlands, have regulated prostitution by way of designated zones, health checks, and the licensing of brothels (Munro & Giusta, 2008). Although this model lacks penal consequences, the notion of legislative control over where, when, whom, and how prostitution can take place has caused tremendous debate. The implications of legalization and the debate around the notion of control will be discussed in further detail in Chapter 5.

### **2.3. Former Discourses on Prostitution**

There are many different perspectives on prostitution and the discourse around the aforementioned frameworks has also been examined (Barnett, Casavant, & Nicol, 2011; Sutherland, 2004; Weatherall & Priestley, 2001). Findings from previous research focusing on prostitution and the law, the portrayal of prostitution in the media, discourse research on sexuality, and sex trafficking will be discussed below. The discussion of these findings will assist in laying a foundational understanding of where this research stands in the literature and provide a basic outline of what we already know about prostitution.

The debate around what constitutes prostitution has been hampered by the formerly mainstream feminist political movements framing the analysis to exclude sex workers' voices (McGinnis, 1994; Stremmler, 1994). Stremmler (1994) argues that without the voices of those most affected by prostitution, positions on the topic of prostitution are hollow and incomplete. The way in which an individual views prostitution dictates one's construction of the issue. The prostitution debate fundamentally revolves around the

discourse on sexuality (McGinnis, 1994; McLaughlin, 1994). McGinnis (1994) explains sexuality as

. . . after all, not an easy topic for us. We have, after all, been barred from many things solely because of our sex, forced into others because of our sex, thought less of and had more demanded of us because of our sex. We have been damned for being too sexy, for not being sexy enough (p. 109).

Foucault (1978) explains sexuality in a social context as a private affair that can only be deemed proper between a husband and his wife. All other sexual relations outside of marriage are deemed improper. According to Foucault (1978), prostitution was deemed to be an improper outlet for sexuality. The standards of sexuality for women ultimately shape whether or not one believes the selling of sex is acceptable, a choice, or a job.

Feminism has changed the image of women from traditional gender identifying roles where women are seen as subordinate to men and as caregivers, to the contemporary recognition that women can be empowered and independent (McLaughlin, 1991). However, the images of prostitutes may not have changed from being viewed as “other” (McLaughlin, 1991, p. 250) – categorizing women who do not conform to society’s expectations of how women should behave. According to McLaughlin (1991), the discourse on prostitution portrayed in television, does not stray from dominant notions of sexuality. Despite the efforts of feminism to change how women are viewed, culturally labelled deviant women cannot rid themselves of that characterization. Similarly, Baldwin (1992) has noted the law distinctively distinguishes “prostitute(s)” as “other women” (p. 48). It seems that the discourse around prostitution and the stigma attached to the label of prostitute not only conforms to the findings of Jiwani and Young (2006), and Strega et al. (2014) but also to Baldwin’s (1992) findings, as she concluded the following:

. . . within the existing political and legal order, and the possibilities for change afforded some women, is embedded a profound bargain: take what you can, but it will always be at the price of abandoning prostitutes, of gaining your advantage at her expense (p. 119-120).

Specifically in the area of rape shield laws, Baldwin (1992) found that the laws victimize women by questioning their sexuality and diminishing their worthiness of being labelled a

victim unless they are not found to possess “whore” like attributes when questioned before the court (p. 71). In other words, in the case of some victims, the onus is placed on the individual to prove that their reputation confirms that they are indeed the victim.

In the early 1980s, ridding society of street related nuisance caused by prostitution dominated conversations around selling sex. Instead of addressing the needs of the prostitute, the focus became a “discourse of disposal”, where the focus was to eliminate prostitutes, thereby further marginalizing them and ultimately causing them to become easy targets for victimization (Lowman, 2000, p. 1003). Jiwani and Young (2006) examined how marginality was reproduced through the discourse on the missing and murdered women from the downtown eastside (DTES) of Vancouver in 128 news articles. They found that the language used in these articles, not only continues to frame these women as just another number within the group of missing women, but also reinforces the stigma of the expendable and invisible status of prostitutes, specifically among the Aboriginal women who went missing in the DTES. In like manner, Strega and colleagues (2014) looked into the way the group of missing and murdered women of the DTES were portrayed in the media after family members of the missing women inserted themselves into the media coverage. A vermin-victim discourse and a risky lifestyle discourse were found in which the descriptions of the missing and murdered women did not stray away from the negative connotations found in the discourse on prostitution.

Sutherland (2004) examined the difference between the theoretical background to radical feminism’s view on prostitution and the view of sex radicalism on sex work. The use of terminology is important because the terms used help frame and support their respective views on prostitution/sex work. For radical feminists, the term ‘sex work’ indicates hopelessness because from their point of view, selling sex is a form of exploitation. Recognizing this kind of exploitation as work is seen to only normalize the abuse and is not considered a way in which dignity and respect can be gained for those involved in the sex industry. The sex work discourse constitutes a metaphorical framework for understanding what sex work is about – sex work as a market exchange of goods or services for money (Weatherall & Priestley, 2001). Packaging prostitution as a business is conceivable because the discourse around sex work portrays the

exchange of sex for money such as any other business affair. However, with the focus of this discourse on the market exchange of sex for money, consent and free will of those engaged in sex work and the activities surrounding sex work is taken for granted and seen as either a given or not mentioned. The “market metaphor” as Weatherall and Priestly (2001) termed it, also shifts the focus of the effects of sex work only to be defined by the experiences of straight women. Whether intentional or not, lesbians, gay men and transgendered individuals are left out of the discourse.

Media portrayal of prostitution has continued to circulate around the offender and victim dichotomy (Chapman, 2001). Negative connotations are attached to the prostitute whether the label of offender or victim is used to describe them. The label of offender describes the prostitute as a threat to communities and a source of crime. The victim label is also portrayed negatively as the prostitute is seen as a product of poverty and abuse. Thus, the public’s knowledge of prostitution is situated upon the offender-victim dichotomy as these are the only descriptions the media has used to describe these women. Ultimately, prostitutes are further marginalized because both labels depict people in the sex industry as powerless, needing assistance and problematic. Actions and behaviours outside of either label, for example the self-determined sex worker, are met with resistance because those choosing to prostitute are “viewed as a threat to women and women’s liberation” (Chapman, 2001, p. 32).

The discourse on trafficking is hard to separate from the discourse on prostitution because one of the avenues of trafficking involves transporting people for the purposes of sexual exploitation. A prominent narrative in defining trafficking circulates around the notion of “white slavery” (Dozema, 2010, p. 4). Dozema (2010) explains, “white slavery refers to the supposed traffic in women and girls for the purposes of prostitution, primarily between the mid-nineteenth and mid-twentieth centuries” (p. 4). Dozema (2010) examined how this ‘white slavery’ narrative was replicated through the United Nations Trafficking Protocol drafted in 2000. The kind of language used in the ‘white slavery’ narrative and the moral panic that was generated as a result, has a strong influence over the politics of this issue. The debate on consent and the issues of missing the voices of men and sex trade workers are still concerns that arise from the past discourses on prostitution.



Other dominating discourses around prostitution included the public nuisance and the moral order discourse, each of which continues to deny the validity the sex work discourse (Kantola & Squires, 2004). Kantola and Squires (2004) found that this was the case in the United Kingdom. Specifically, when the discussion on prostitution is coming from politicians, prostitution is conceptualized as a discourse around street prostitution, “kerb-crawling”, and public nuisance (p. 78). In contrast, the moral order discourse is used to dominate the analysis around trafficking for the purposes of prostitution, where the focus surrounds the “innocent victim of imprisonment, abuse, and sexual exploitation” (Kantola & Squires, 2004, p. 88). With the focus of the prostitution discourse on policing and containing prostitution, the experiences of sex workers and what they truly need continue to be silenced. In applying Sykes and Matza’s techniques of neutralization, Copley (2014) found that where discourses are structured on gender constructions and expectations, the intersectional vulnerabilities of victims along with social norms contribute to normalizing the practice of sex trafficking.

Discourses around the world regarding prostitution have been built on similar themes. Outshoorn (2001) documents the shift in the prostitution discourse in the Netherlands (where prostitution is legalized) from the traditional moral discourse to a discourse on sexual domination. Outshoorn (2001) shows how this discourse evolved into the sex-work discourse by contrasting how the prostitute and the client were viewed in each debate. A study done in Finland, outlined three different levels for analyzing discourse on the sex trade (namely, at a megadiscourse level, a mesodiscourse level, and a microdiscourse level) and how it related to policies and practice among the Finnish professional elite (Jyrkinen, 2009). At the megadiscourse level, Jyrkinen (2009) defined the analysis as “consciously generated discourses . . . analyzed based on the interviewees’ roles as policy officials” (p. 83). Exploring the speech used by each interviewee in relation to their gender positions both consciously and unconsciously was the approach used at the mesodiscourse level. Jyrkinen (2009) analyzed the “personal level views of, and encounters with, the sex trade and silences about such” at the microdiscourse level of analysis. Each discourse found within these three levels of analysis, constructed prostitution in different ways; each perspective influenced by personal experiences and gendered notions.

Aside from the prior mentioned topics, academic writing on the *Bedford* case and the debate around the rulings and possible outcomes was a trending topic for academics, as the case was waiting to be heard by the Supreme Court of Canada (Craig, 2011; Kappel, 2013; Lowman, 2013; Lowman & Louie, 2012; Powell, 2013; Waltman, 2012; Wiseman, 2011). The main focus of these analyses involved predicting the potential outcomes to the Supreme Court's ruling based upon how the two lower courts ruled and the arguments presented by the experts in the lower courts (Craig, 2011; Kappel, 2013; Powell, 2013). Other scholars focussed their analysis on interpreting the evidence presented before the court's in contrast to the courts' interpretation of the evidence (Lowman, 2013; Waltman, 2012; Wiseman, 2011). The analysis was based on each scholar's own viewpoint; as a consequence, although the legal analyses of how the court ruled are very similar, the interpretation of the evidence itself varies depending upon where the expert stands on the issue of prostitution.

By examining the debate and varying commentary on the *Bedford* case, the goal of this thesis was to understand the discourse presented by the experts and their correspondence (or lack of correspondence) with the existing prostitution discourse found in previous research. More specifically, the latter chapters are devoted to examining (a) the discourse presented by expert witnesses and interveners in the *Bedford* case; (b) the court's consideration of the arguments and evidence those expert witnesses and interveners put forth; and (c) the discourse that accompanied the federal government's introduction of Bill C-36, which made it illegal to buy and/or sell sex in public (Mas, 2014).

## **2.4. A Note on Terminology**

Some terms within the sex industry are not universally accepted, despite the fact that they are commonly used. In the legal realm, prostitute and prostitution are commonly used to refer to individuals involved in the sex trade, as denoted by the use of these terms in the *Canadian Criminal Code* prior to the enactment of Bill C-36. However, the term 'prostitute' is usually associated with negative social stigma, criminal and moral deviance, imposed meanings and assumptions, and may imply a 'victim' label (AIDS Calgary, 2013; Betteridge, 2005; Jeffery & MacDonald, 2006). Prostitution as sex

work views the conduct in question as an occupation (Betteridge, 2005) and is typically viewed as a term that acknowledges dignity, respect, and human rights because it addresses the person as a worker and the activities as a job (AIDS Calgary, 2013; Betteridge, 2005). Others prefer to use the term 'prostitute' as a reminder of the harms associated with selling one's body and rejecting the normalization of prostitution within society (Jeffreys, 2009). For the purposes of this paper, the terms prostitute, sex worker, and people involved in the sex industry will be used in the context in which the terms were presented.

## Chapter 3.

### Analytical Framework

A total of 59 affidavits and factums were submitted to the Ontario Superior Court of Justice in 2010, when the *Bedford* case was heard before Justice Himel.<sup>2</sup> From these 59 affidavits and factums, the court yielded over 88 volumes of evidence including, curriculum vitae, research articles and excerpts, supplementary affidavits, transcripts, cross-examinations, commentary, and answers to undertakings. In order to distinguish the types of evidence within this extensive collection of information, I categorized the 59 individuals and organizations (see Table 3.1). This categorization was based on how each person identified himself or herself and what role they played in this court case. Due to the interveners being organizations or agencies that could possibly include perspectives from individuals who would fit into different categorizations in Table 1, they were placed on the side of the table to allow for this possibility.

Trial courts are responsible for fact-finding. As the lowest level of courts in the justice hierarchy, the trial courts hear all case related evidence and make a decision based on the weight placed upon each piece of evidence (Hausegger, Hennigar, & Riddell, 2009). Appeal courts, including the Supreme Court of Canada do not typically re-weigh the evidence that was presented before the trial judge, but rather they usually accept the facts as they were found to exist by the lower trial court. Legal interpretation is the role of all courts, but is an important focus in the upper level courts. If there are disputes regarding the interpretation of the law made by a lower court, or if new information and/or social change has come to light, or the upper courts disagree

<sup>2</sup> The total number of affidavits and factums were calculated from an indexed collection of *Bedford v. Canada's* Application record, prepared by Dalia Vukmirovic. The documentation found on this indexed record was cross-referenced with the volumes of evidence presented in court. All this information can be found on <http://mypage.uniserve.ca/~lowman/>

philosophically with the trial court, they usually exercise their power to review the lower court's decision (Hausegger, Hennigar, & Riddell, 2009). For this reason, factums submitted by the interveners in this case were also included in this analysis.

The documents available for analysis at the Ontario Court of Appeal and the Supreme Court were factums submitted by the appellants, respondents, and interveners, as well as the actual decisions of the courts. Intervenors are interest groups and non-parties to the dispute who have an interest in the outcome of the case, and have been granted permission to submit a brief to the court. They may also give an oral argument before the court if permission is granted (Hausegger, Hennigar, & Riddell, 2009).

I used six main titles to arrange the role of the person giving evidence before Justice Himel. These titles were chosen based on the role each person played in court. The categories include: main experts, former and/or current sex workers/prostitutes, secondary experts, law enforcement, interveners, and translators. Individuals were classified as main experts if they had done research in the field of prostitution and/or a research field related to prostitution and as a result have topic-related publications. Secondary experts are individuals who may have a research background but have not specifically researched prostitution or a similar topic area. These secondary experts' testimonies were mainly used to support the claims made by the individuals in the main expert category. The remaining four classifications were based on how the person introduced themselves, as this set the tone and background of the person before the court, leading to their classification.

The primary focus of this discourse analysis is on the information presented by the main experts in this case. The information provided by the individuals grouped into the main expert category is most suitable for analysis due to their academic backgrounds in researching prostitution and prostitution related topics. Additionally, the expertise and the information provided by the main experts were extensively contested before the court. At times, the affidavits, cross-examinations, and exhibits from the other three groups of experts will be referred to in hopes of further clarifying and/or emphasizing a point.

**Table 3.1. Affiants and Interveners Categorized**

Individuals Who Submitted Affidavits and Factums – Categorized (Ontario Superior Court of Justice)			
	Applicants	Respondents	Interveners
Main Experts	Augustine Brannigan Barbara Sullivan Cecilia Benoit Deborah Brock Eleanor Maticka-Tyndale Frances Shaver Gayle MacDonald John Lowman Ronald Weitzer	Alexis Kennedy Janice Raymond Melissa Farley Richard Poulin Mary Lucille Sullivan	Attorney General of Ontario  The Christian Legal Fellowship  Real Women of Canada  Catholic Civil Rights League
Current and/or Ex- Sex Workers	Amy Lebovitch Carol-Lynn Strachan Darlene Murganne Jody Paterson Kara Gillies Lauren Casey Linda Shaikh Susan davis Terri Jean Bedford Valerie Scott Wendy Babcock Wendy Harris	Natasha Falle D.S. H.C. (could not find affidavits; their testimonies can be found in the factum of the Attorney General of Ontario)	
Secondary Experts	Reena Weinberg Suzanne Wallace-Capretta Dan Gardner Elliot Leyton Libby Davies	Cheryl Parrott Dennis St. Aubin Diana Gayle Busse Donna Crown John Pratt Kathleen Quinn Lotte Constance Van Lucie Angers Ronald-Frans Melchers	
Law Enforcement		Eduardo Dizon Gene A Bowers Howard Page Jim Morrissey JoAnn McCartney Michelle Holm Oscar Ramos Randy Cowan Sonia Joyal	
Translators	Brent Annable Brian Mossop Michael JB Wood		

### 3.1. Research Objectives

There are three main research objectives in this study:

- To gain an understanding of the way in which each expert framed his or her perception on the issue of prostitution and how their understanding relates to a specific prostitution discourse.
- To evaluate whether these discourses changed over the course of appeals, from the Ontario Superior Court of Justice to the Court of Appeal for Ontario and the Supreme Court of Canada, by reviewing the court's decision and how that decision applied the presented prostitution discourses.
- To analyze and discuss the influences of the prostitution discourses on Bill C-36 in light of what was ruled by the Supreme Court of Canada in the *Bedford* case.

Each of these objectives contributes to understanding the debate over prostitution in Canada. Additionally, this information also assists in gaining a more comprehensive understanding of the implications of this court case.

The first objective was achieved by examining the factums and affidavits submitted by the lawyers and the individuals bringing forth this court case from the applicants and respondent's sides, along with the three intervening organizations/agencies, and the main experts in this case. Cross examinations and supplementary affidavits of each of the main experts were also examined. The cross examinations served to further clarify the wording used to describe each affiant's point of view and also detail the particular meaning conveyed by certain sentences within the affidavits. This analysis constitutes the main portion of this thesis.

In the second part of this discourse analysis, the factums provided by the team of lawyers by both parties on appeal to the Ontario Court of Appeal and the Supreme Court of Canada were examined and contrasted with what the experts presented before the Ontario Superior Court of Justice. As there were no affidavits submitted to the Court of Appeal and the Supreme Court, the data source for this second objective was based on the factums submitted by both the applicants and the Attorneys General of both Ontario and Canada, along with the interveners. The court's decision was compared to the discourse(s) and comprehensive concepts presented by each expert. The reasoning

provided by the court is derived from legal reasoning but also affirms to the discourse(s) reasoning that the court adopts and/or rejects.

The Justice Minister introduced Bill C-36 at the beginning of June in 2014 as a response to the Supreme Court's ruling on the prostitution issue in Canada. The third objective in this study focuses on which discourses dominant this new Bill.

### **3.2. A Discourse Analysis Approach**

Discourse analysis can be explained as “relations between linguistic/semiotic elements of the social and the other (including material) elements” (Fairclough, 2005, p. 916). These elements can include semiotic elements such as body language and visual images. The use of language is critical in further building on established meanings. Fairclough (1992) emphasized that discourse is constitutive as “it contributes to reproducing society (social identities, systems of knowledge and beliefs), as it is, yet also contributes to transforming society” (p. 65). For Fairclough (1992), discourse analysis is not just a linguistic analysis but it is concerned with specifying which “systems of rules make it possible for certain statements but not others to occur at particular times, places, and institutional locations” (p. 40). Although it is important to look at the linguistic/semiotic details that help shape our understanding of certain things by the way they are described and by the words that are used to describe them, it is just as important to understand why some things are spoken of while others are not, and why there is an emphasis on what certain people say and not others. In this sense, how social reality is shaped through the understanding of language (Alyesson & Karreman, 2000) is the way in which discourse analysis was utilized in this thesis.

Discourse analysis was utilized in two ways within this study. Which legislative regime should be adopted to deal with prostitution depends upon how each perspective is positioned and tailored for debate. An examination of the choice of words used and how these words were employed within the main experts' affidavits and the factums submitted by both parties involved in this case, was the focus of the first part of this discourse analysis. The second part of this analysis focused on which legislative regime each expert supported in their submission and how they argued for that regime.



Additionally, whether the language used for each perspective changed as the case was appealed, is also crucial to understand why certain discourses were brought before the courts while others were not. In this sense, the “system of statements” (Parker, 1992, p. 4) that contributes to the construction of the prostitution discourse presented before the Canadian courts can be analyzed.

An open inquiry approach or open coding method was used to organize the themes that emerge from within the documents (Berg, 2000). Scott and Garner (2013) explain the process of open coding where the researcher identifies themes by answering basic questions (e.g., “what is the best name or label to put on this phenomenon?”) (p. 95). As each affidavit and factum was examined on its own merits, organizing the findings into major themes helped arrange experts with similar theoretical arguments together. In like manner, by grouping experts with similar theoretical arguments together, the similarities and differences in how they argued and the specific terms they used in their arguments were compared.

### **3.2.1. Theoretical framework**

Due to the extensive research background that some of these experts have, their contribution to the field of prostitution research is well acknowledged. In essence, their perspective and the legal regime for which they advocate are well known. However, the way in which one argues for a particular legal regime is affected by the background of that person and how they have studied prostitution. For example, radical feminists typically advocate for the criminalization of prostitution because they view prostitution as violence against women, which cannot be tolerated in any society (Jefferys, 2009). Although a group of radical feminists are in favour of criminalization, the way in which each radical feminist argues for criminalization may differ from one another. The terminology used to describe prostitution, what they decided to include in their argument, and which rationale each chooses to emphasize in their argument, among other factors, all influence the variability within the debate. Therefore, it was important to keep in mind the major legal frameworks which discourse around prostitution tends to center upon, and also to stay attuned to how each affiant argued their position.

Despite the fact that the perspective on prostitution held by many of the experts is well known, in this research, each argument was evaluated on its own merits. Experts with similar arguments were grouped together. However, the bases for each of their arguments were examined individually. An inductive approach was suitable for arranging similar perspectives within the four proposed legislative frameworks. An inductive approach starts from observations and concludes with broader theoretical explanations from the observations (Palys & Atchinson, 2014). This inductive approach was used to observe the kinds of arguments and concepts the experts employed and the theoretical framework from which they argued before the courts.

### **3.3. Coding Data**

The major themes were coded in a process with each of the affidavits and factums examined twice. NVivo 10 was used in the process of coding. During the first reading of the affidavits and factums, the major themes were noted where the general ideas from each affiant emerged through the content of their arguments. The cross examinations and supplementary affidavits were then read to deepen the understanding of the specific wording each affiant used to describe the prostitution phenomenon. As each affiant was questioned by both the Crown and the defence, the meaning of what was written in their affidavits was clarified for the court during the cross examinations. Additionally, the cross examinations were also an opportunity for the opposing lawyers to question the affiant with the goal of weakening their arguments. Therefore, the results of the cross examination served both to strengthen certain points of each affiant's argument(s) and weaken certain portions of their arguments, resulting in clarification of the relative strength of their position. Each affidavit was then read a second time for further coding purposes. This second reading allowed for a more detailed coding process to occur. The goal of this second reading was to conduct a detailed analysis of the kind of terms used, and what points were included, which portrayed how each affiant presented their position before the court.

Of the five main themes that distinguished the material found in the affidavits and factums, four involved recommendations for actions – criminalization, legalization, decriminalization, or the Nordic model – while the fifth addressed the way prostitution

was described. Within these major themes, more defining and detailed themes emerged as the coding process proceeded. Additional themes were coded as the analysis evolved. As an example of a detail coded within a theme, when coding how the concept of prostitution was described, it was noted that some affiants stressed the importance of a certain proposition by including a fact or statistic to strengthen a claim.

The arguments submitted to the Ontario Court of Appeal and the Supreme Court of Canada quoted evidence from the trial court to support their legal conclusions. A similar coding process was used in the analysis of the factums available from the Ontario Court of Appeal and the Supreme Court as was used in the documents from the trial court. There were many interest groups that were granted intervener status before these two levels of court (see table 3.2). The groups of interveners were sorted by the level of court as well as the side of the appeal for which they argued. Two of the interveners' factums from the Supreme Court of Canada were not included in this analysis because they were submitted in French. As I do not understand French, these factums were not included. The major coded themes for these upper levels of court are similar to the themes coded in the trial division. The factums and legal documents from the Appeal Court and the Supreme Court are publically available documents, and some can be retrieved from the internet.<sup>3</sup>

### **3.4. Ethical Considerations**

All the affidavits and factums used for this discourse analysis are accessible to the public. Many of the experts are well known academics or advocates and/or associates from social agencies and organizations. These stakeholders' opinions on the controversies arising in regard to prostitution have been made public prior to this court case. As a result, there are no foreseeable confidentiality and/or anonymity issues involved in this research. Additionally, as this research relied exclusively on publicly available data, ethics review was not required.

<sup>3</sup> For example, all the documents submitted to the Supreme Court are available at <http://www.scc-csc.gc.ca/case-dossier/info/af-ma-eng.aspx?cas=34788>. The factums for the Appeal court are available at <http://mypage.uniserve.ca/~lowman/>.

**Table 3.2 Categorization of Interveners by court and side of dispute**

	Bedford, Lebovitch, & Scott	Attorney General of Canada/ Attorney General of Ontario
Ontario Court of Appeal	The British Columbia Civil Liberties Association (BCCLA)	Attorney General of Ontario
	The Canadian HIV/AIDS Legal Network & The British Columbia Centre for Excellence in HIV/AIDS	Christian Legal Fellowship Real Women of Canada & The Catholic Civil Rights League (CLF-RWC-CCRL)
	The Canadian Civil Liberties Association (CCLA)	"Women's Coalition": - Canadian Association of Sexual Assault Centres - Native Violence Women's Association of Canada - Canadian Association of Elizabeth Fry Societies - Action Ontarienne Contre La Violence Faite Aux Femmes - La Concertation Des Lutttes Contre L'Exploitation Sexuelle - Le Regroupment Québécois Des Centres d'Aides et Lutte Contre Les Agressions à Caractère Sexual - Vancouver Rape Relief Society
	"The Coalition": - Providing Alternatives Counseling Education (PACE) Society - Downtown Eastside Sex Workers United Against Violence Society - Pivot Legal Society	
	Prostitutes of Ottawa/ Gatineau Work Educate & Resist (POWER) & MAGGIE'S: The Toronto Sex Workers' Action Project	
Supreme Court of Canada *	Aboriginal Legal Services of Toronto INC	Christian Legal Fellowship Real Women of Canada & The Catholic Civil Rights League (CLF-RWC-CCRL)
	"HIV Coalition" -Canadian HIV/AIDS Legal Network -British Columbia Centre for Excellence in HIV/AIDS & - HIV/AIDS Legal Clinic Ontario	AWCEP Asian Women for Equality Society operating as Asian Women Coalition Ending Prostitution
	The British Columbia Civil Liberties Association (BCCLA)	"Women's Coalition": - Canadian Association of Sexual Assault Centres - Native Violence Women's Association of Canada - Canadian Association of Elizabeth Fry Societies - Action Ontarienne Contre La Violence Faite Aux Femmes - La Concertation Des Lutttes Contre L'Exploitation Sexuelle - Le Regroupment Québécois Des Centres d'Aides et Lutte Contre Les Agressions à Caractère Sexual - Vancouver Rape Relief Society
	Downtown Eastside Sex Workers United Against Violence Society PACE Society & Pivot Legal Society	
	The Secretariat of the Joint United Nations Programme on HIV/AIDS	
David Asper Centre for Constitutional Rights	Evangelical Fellowship of Canada	

\*Note: The Attorney General of Quebec and the Simon de Beauvoir Institute also submitted factums to the Supreme Court of Canada. These two factums were submitted in French, I did not analyze them because I do not speak/understand French. The other French agencies (i.e., Action Ontarienne Contre La Violence Faite Aux Femmes) submitted their affidavits as part of a larger group and their factums were in English; therefore, they were included in the analysis.

## **Chapter 4.**

### **Discursive Findings**

The seller of sex was unmistakably the focal point of this court case. This chapter will provide a detailed description of the way the prostitute was projected throughout the examination of the court material. The analysis will be divided into two parts. Part one will focus on the image of the prostitute and the connecting themes by way of the descriptions within the affidavits and factums made by the major contributing experts. Part two, which will be discussed in the following chapter, will focus on whether these projections and discourses changed as this case was appealed to the Ontario Court of Appeal and the Supreme Court of Canada.

#### **4.1. The Experts**

The main expert witnesses had research experience in the area of prostitution and prostitution-related topics that ranged from less than fifteen years to almost forty years. The categorization of the kind of resolution that each expert supported as the best solution towards this issue of prostitution was made through the interpretation of the court material (see table 4.1). While some experts explicitly stated their position, others stated their position by only referencing material relevant to one specific legislative regime. For example, Frances Shaver, an expert for the applicants stated in her affidavit: “My recommendations are for (1) the decriminalization of prostitution activities between consenting adults. . .” (Shaver Aff. 33). On the other hand, although some did not explicitly state their position, their views were anticipated by the content in their affidavit and cross-examination. For example, in the affidavit of Melissa Farley, an expert for the respondents, she speaks in her affidavit of her belief that prostitution is a form of violence against women (Farley Aff. 15) and the different kinds of abuse and harms that are connected to prostitution (namely physical, emotional, psychological, and

verbal) (Farley Aff. 32-36 &106-107). Throughout her affidavit there is not one statement on what she believes is the best way to deal with the issue of prostitution. Within her cross examination, however, she does state: “I admire the Swedish model” (Trial Tr. 12 March, 2008 ¶ 460). Additionally, she states:

The Swedish model law on prostitution does not just criminalize men who buy sex and decriminalize women. It also – which is important to me and many other people – it also instructs the state to provide exit services and support services to women leaving the sex trade. (Trial Tr. 12 March, 2008 ¶ 462)

From these statements and the lack of evidence supporting any of the other three regimes, it can be concluded that Farley does support the Nordic model. Additional examples will be detailed below.

**Table 4.1. Classification of Intervener’s and Main Expert’s Resolution on Prostitution**

	Applicant	Respondent
Legalization	Augustine Brannigan Eleanor Maticka-Tyndale Ronald Weitzer	
Decriminalization	Barbara Sullivan Cecilia Benoit Deborah Brock Frances Shaver John Lowman Gayle Macdonald	
Criminalization		The Christian Legal Fellowship Real Women of Canada The Catholic Civil Rights League
Nordic Model		Alexis Kennedy Janice Raymond Mary Lucille Sullivan Melissa Farley Richard Poulin

## 4.2. Major Themes

The conversation around prostitution and the description of a prostitute hardly departs from previous prostitution discourses. The victim discourse, the deviant discourse, and the work discourse are the three discourses that will be discussed in this chapter. These three themes emerged from the inductive approach conducted in organizing the themes from this analysis. For discussion purposes, all the major themes and relevant material were organized as components to these dominant discourses. Although the major discourses were not specifically coded for, these discourses were a result of organizing and rearranging the major themes, subthemes, and all other relevant materials (see figure 4-1 and 4-2). The discussion of each discourse is structured, beginning with a brief description and history of what has previously been stated relating to this specific topic; followed by the construction of the discourses within the *Bedford* experts' testimony.

### Major Themes

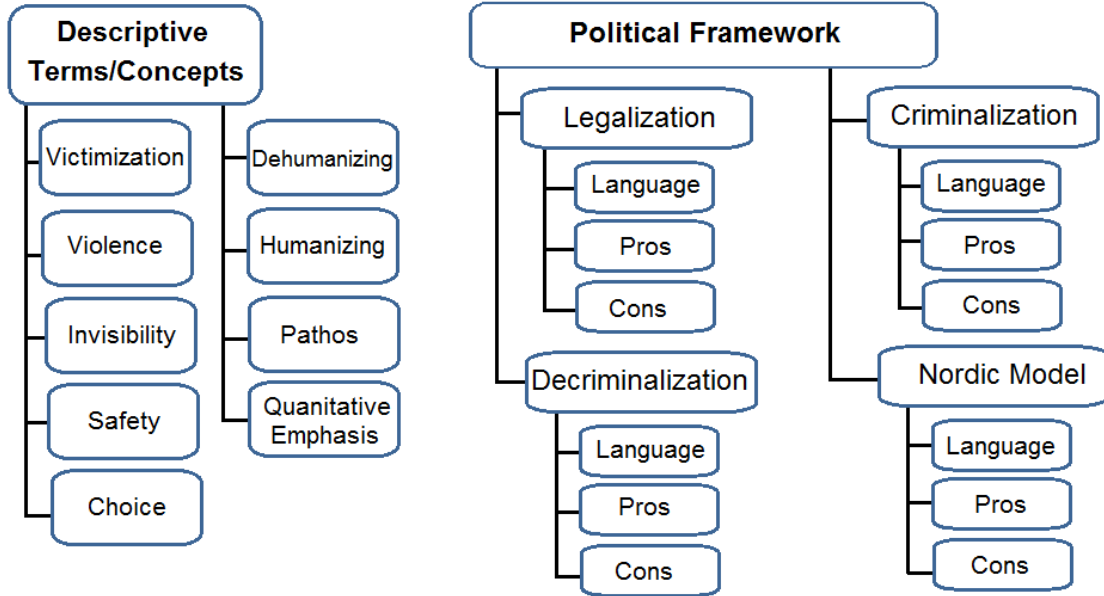


Figure 4.1. Initial major themes coded from trial court documents

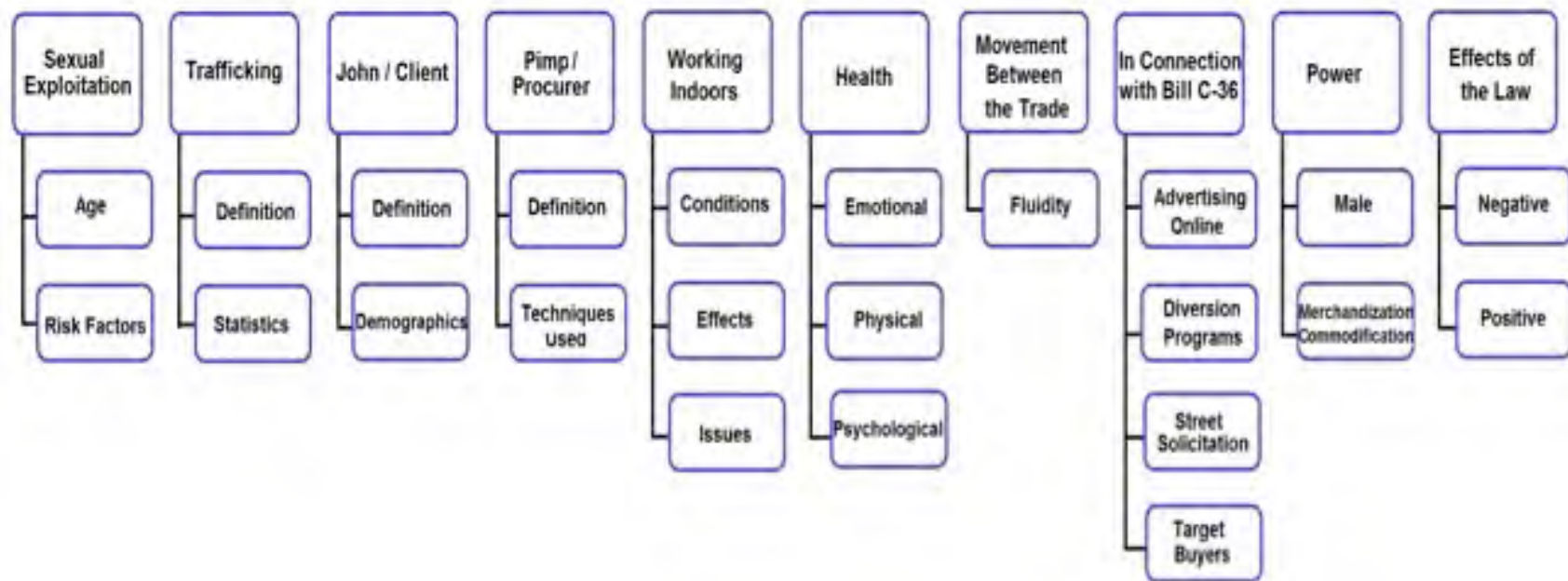


Figure 4.2. Additional themes coded from trial court documents



#### **4.2.1. A victim in need of rescue**

The victim discourse rests upon the notion that prostitution exists due to, and is the embodiment of, gender inequality. This inequality is believed to be at the root of violence and exploitation that prostitutes experience (Goodyear & Auger, 2013). The kind of injury that prostitutes encounter is constructed as both instrumental and symbolic. Being violently treated at the hands of male clients and other third parties constitutes instrumental injury. Symbolic injury is caused by male entitlement, male desire, and the imbalance of power between female and male (Goodyear & Auger, 2013). In this sense, the harm caused to those involved in prostitution justifies the rightful label of victim.

Since the purchase of sex is viewed as inherently exploitative, the concept of consent is absent. The belief is that no one would freely agree to be sexually exploited. In line with this thinking, those involved can only play one of two roles: the abuser or the victim. Without the abuser there is no victim. The abuser is evil and blameworthy while the victim is portrayed as helpless and needing to be rescued (Jeffreys, 2009). Similar descriptions are mimicked in the trafficking discourse, as well as the white slavery discourse. These additional discourses are seen as parallel discourses with the victim discourse.

#### ***The victim as constructed in the Bedford case***

“Lewd acts for payment for the sexual gratification of the purchaser” is how the Attorney General of Canada defined prostitution (Attorney General of Canada Factum ¶ 204). An expert for the respondents, Melissa Farley, described prostitution as similar to rape (Farley Aff. ¶ 40) and “domestic violence taken to the extreme” (Farley Aff. ¶ 16). The above definitions along with these descriptions connect prostitution to malicious behaviours. Comparisons with rape and domestic violence are consistent with fundamental notions of abuse and victimization.. Ronald Weitzer quoting from one of Melissa Farley’s studies, explains that prostitution within this construction is “best understood as a transaction in which there are two roles: exploiter/predator and victim/prey” (Weitzer Aff. ¶ 7).

The abuser was implicitly indicated from terminology such as “prostituted” [emphasis added] (Kennedy Aff. ¶ 4) and “survivors of prostitution” (Farley Aff. ¶ 90). Both terms indicate the cause of abuse from an external source. Only with the presence of a third party, blameworthy for the damage done, can this victim discourse proceed. The use of these words also creates emotional responses. The victim is viewed with empathy whereas the abuser is to be hated and brought to justice for their despicable actions. In this discourse, violence is the means that allows the exploiter and victim to fulfill their respective roles.

Violence is believed to be an integral part of prostitution. Richard Poulin, expert for the respondents, points out:

Violence in prostitution is systemic. It lies at the very heart of the dynamic of prostitution, no matter how prostitution occurs. While some of the conditions in which prostitution occurs may increase the risks of violence, the fact remains that prostitution is based on violence. It is sustained and amplified by such acts [emphasis added] (Poulin Aff. ¶ 41).

Violence occurs when one individual has more power over another (Benoit Aff. ¶ 5). Males, in the position of holding such power, dominate over females because men are the only claimed beneficiaries within the relationship of selling and buying sex. Poulin further points out in his cross-examination that “prostitution is a social institution at the sole benefit of males” (Trial Tr. 13 March, 2009 ¶ 575). Gender inequality is amplified through this power notion. In his cross-examination, Poulin described it thus:

Q[uestion by Mr. Young]: Just to make sure I understand this, so when a man and a woman negotiate for the exchange of a sexual service, by definition that’s violence, end of story, we don’t need to go further in the analysis.

A[nsWER by Richard Poulin]: No, this is not what I’m saying. I’m saying that this gives power to men. Just like when you buy a TV set, you have power over it, you can destroy it if you feel like it. In prostitution, you have this temporary ownership, or permanent when you buy something like a TV set, and of course it’s not every man who buys a TV set that is going to destroy it, just like it’s not every male who buys access to her body is going to aggress her, but the relationship of power does exist and power abuse may occur (Trial Tr. 13 March, 2009 ¶ 547).

As a result of this power relationship, women are property for enjoyment and disposal. This power imbalance creates a victim not only by the simple disposition of power but also by treating them as nothing more than an item purchased at the grocery store; after it has served its purpose, it is thrown away and forgotten. Essentially, each sexual act has a worth determined by a different body part. Poulin explains this fragmentation idea as

. . . the body of a prostitute . . . fragmented into parts that are worth different amounts. There is a break in the cohesion of the body in the sex act that money alone gives value to. The body becomes an instrument that is not asked to feel but rather to act (Poulin Aff. ¶ 80).

The transaction of payment for sexual gratification, allows men to treat women as “sexual instruments” for the purpose of male pleasure (Raymond Aff. ¶ 54). Prostitution is believed to allow this “culture of sexual commodification wherein women are objectified as mere bodies that may be bought, sold, or traded” (Christian Legal Fellowship, Real Women of Canada & the Catholic Civil Rights League Factum, 2010, ¶ 27) (hereinafter referred to as CLF-RWC-CCRL). Taken to the extreme, Poulin even refers to this commodification as women being “instruments of ejaculation” (Poulin Aff. ¶ 310). In Farley’s point of view, “women are turned into objects that men masturbate into or as an organ that is rented for 10 minutes” (Farley Aff. ¶ 90).

Objectification is but one of the many methods these experts utilized to construct the victim discourse. The victim discourse also described the victim in layers of abuse and violence. This first layer, for some individuals, began before entering into prostitution. The belief that all individuals involved in prostitution were coerced and/or exploited as a means into prostitution, allows speculation of prior abuse. Although, there is contradicting evidence supporting the claim that not all in prostitution have been abused or coerced into selling their bodies (Nagle, 1997; Ditmore, Levy, & Willman, 2010; Jeffrey & MacDonald, 2006; van der Meulen, Durisin, & Love, 2013), these experts refuse to accept this possibility. Choosing to enter into the trade is a misconception. From the view of these experts, entry was not a choice but resulted from psychological damage caused by those who exploited and victimized these women. In her cross-examination, Janice Raymond explains “it’s more compliance than choice. I think it’s a survival strategy for most women” (Trial Tr. 3 December, 2008 ¶ 125).

Pimps and other persons in power manipulate these individuals to believe that they have made the choice to sell their bodies. Melissa Farley defines a pimp as

A person, most often a man, who procures women in prostitution by enticing or kidnapping them into it, and who physically controls women in prostitution via rape or other violence. A pimp exploits women financially, at times taking all their money. A commonly used definition of pimp is “a person who is supported by the earning of a prostitute” (Farley Aff. ¶ 12).

Based on this description, the pimp is not only labelled as a man but also as an abuser and the cause of prostitution. Similar to the pimp, the client is also depicted as an abuser with extreme violence because they can turn violent at any moment regardless of where prostitutes work (Attorney General of Ontario Factum, 2010, ¶ 28). Violence leading to the hospitalization of prostitutes for trauma, fractures, stitches, miscarriages, and even paralysis are due to the physical and psychological injury suffered by prostitutes at the hands of clients. Amongst the threats to safety inflicted by clients, Poulin describes rape, rape at gunpoint, gang rape, beatings (with weapons such as baseball bats), strangulation, kidnapping, torture, and stabbings as having been reported by prostitutes (Poulin Aff. ¶ 53).

Pimps are described not only as extremely violent but also as using tactics of domination and brainwashing to gain physical control (Farley Aff. ¶ 55). Richard Poulin presented the sequence of control as a process of manipulation. He stated,

A procurer’s control over a prostitute is the product of a complex mechanism that often begins with seduction, followed by a phase of preparation for submission that is both psychological and physical. Some of the key elements in this preparation are isolating the person, manipulating her verbally, using blackmail, destabilizing her with conflicting messages and discrediting her, etc. The aim is to create dependency: alternating phases of aggression with one of calm or even displays of affection creates a system of punishments and rewards that make the young prostitute feel responsible for the violence suffered (Poulin Aff. ¶ 59).

This sequence of events reinforces not only the use of violence as a means to achieve control by a man over a woman, the possession of power by men over women, but also the vulnerability and accessibility of men over young girls. Poulin’s direct mention of

young prostitutes connects to his belief that these women enter into the sex trade prior to their eighteenth birthday and that they must be coerced to do so.

Poulin explains that evidence from the research referenced in his testimony states that “the average age of recruitment in prostitution . . . in Canada is 14 years old” (Poulin Aff. ¶ 24). Although there is no consensus as to the age of entry into prostitution in Canada, fourteen becomes a magical number. that appears again and again throughout the victim discourse as fact. Alexis Kennedy mentioned in her cross-examination that the most vulnerable to coercive manipulation are thirteen and fourteen year old runaways (Trial Tr. 22 October, 2008 ¶ 109). Furthermore, during cross-examination, Melissa Farley discussed choice as a meaningless concept when discussing choice upon entering into prostitution at ages of twelve or fourteen (Trial Tr. 12 November, 2008 ¶ 155). Without contention, these experts present these findings as general truths, which fortify their claim of underage entry into prostitution and therefore, challenge the concept of genuine choice to sell sex.

An excellent representation of how choice is constructed within this victim discourse is demonstrated by Melissa Farley, upon her cross-examination. She explains that

. . . choice is not meaningful for someone who is trafficked into some form of debt bondage or captivity or slavery in prostitution. . . The discussion of choice is also not meaningful for someone who is under pimp control, which is the case with many people in prostitution . . . The discussion of choice is also not meaningful for children who are pimped out by parents . . . (Trial Tr. 12 November, 2008 ¶ 155).

The outright denial of choice has been a focus within the victim discourse. However, as demonstrated by Farley, framing choice as meaningless in certain circumstances maybe more persuasive than complete denial. Despite this shift in wording, the situations in which choice would be considered meaningful are not part of the dialogue. With the exception of children, the experts for the respondents argue their disbelief of choice even if the prostitute reported that they freely chose to enter the trade. Alexis Kennedy explains this point based on her academic experience, that “all of the women who reported choosing to enter street prostitution by their own choice also reported experiencing childhood sexual abuse” (Kennedy Aff. ¶ 12). This statement is used to

support the claim that “women working in prostitution often have cognitive distortions about how or why they began working” (Kennedy Aff. ¶ 11). Further, Janice Raymond agreed with the statement in her cross-examination that “there is not one person who is working in the sex trade that hasn’t started their career without some degree of abuse” (Trail Tr. 3 December, 2008 ¶ 399). Thus, any perception of choice is no more than self-deception caused by some form of abuse and/or mental impairment.

Prostitution in general is not “a result of a free decision or rational, enlightened choice” as Richard Poulin claims in his cross-examination, especially when people under the age of eighteen are involved (Trial Tr. 12 March, 2009 ¶ 161). Most would even agree that sexual activity involving those under a certain age lacking the capacity to make conscious choices on sexual consent, are victims of statutory rape (Attorney General of Canada Factum, 2010, ¶ 13). However, notwithstanding the cognitive capacity to make conscious choices about sexual consent, adults within the sex trade are often labelled as vulnerable; in many instances, women and children are grouped together as victims, without the ability to consent to sex. Beginning with recruitment, women and children are classified to have been exposed to the same conditions of entrapment and violence (Poulin Aff. ¶ 25). Another example of how these two groups are integrated is shown in the Mary Sullivan’s statement: “importation of women for the purposes of prostitution, including sex trafficking and child prostitution has not been reduced” (Sullivan M. Aff. ¶ 3). In other words, sex trafficking and child prostitution are amongst the groups of people that are involved in the prostitution of women. The tendency to discuss women and children as a vulnerable population denies women’s ability to make decisions for themselves.

The ability to consent to sex is a fundamental aspect of determining adulthood. Despite the legal age and cognitive capacity for informed consent to sexual activity, those involved in the sex trade are neutralized to sexless children. Barbara Sullivan echoes Mary Sullivan and other radical feminist when she states, “sex workers, unlike other people, are not capable of sexual consent (or of withholding consent); they are always already raped” (Sullivan M. Aff. ¶ 19). In this sense, sexless pertains to the idea described by Mary Sullivan of unable to consent to sex. Melissa Farley explains that

Adult and child prostitutes are thus not two different classes of people, but the same people at two different points in times. It is questionable that an abusive situation one enters as a child suddenly disappears when one turns 18 (Farley Aff. ¶ 23).

With this in mind, there is no differentiation between “prostitution and other acts of physical or sexual assault that might occur in a prostitution transaction” (Sullivan M. Aff. ¶ 19). Women in the sex industry are unable to negotiate safe sex due to the reluctance of clients (mostly referring to men) to practice safe sex measures. Both women and children are under a power dynamic of male control. In other words, women and children both are characterized as powerless and inferior. The ability to negotiate and consent to sex is not within the power of the prostitute but rather in the hands of the clients.

The construction of objectification and sexless victims is also reflected in the trafficking discourse where humans (but mainly women) are treated as “reusable and resaleable commodities” (Raymond Aff. ¶ 91). Poulin explains that “millions of women and girls are recruited, purchased, sold and resold each year” (Poulin Aff. ¶ 90). In this sense, trafficking and prostitution are gender crimes with females claiming victim status. The language used in trafficking discourse appears repeatedly throughout the discussion of the harms associated with prostitution. In line with the abuser rhetoric, terms such as “sex trafficked” (MacDonald Aff. ¶ 50) and “victims of prostitution and trafficking” (Raymond Aff. ¶ 6) are used to describe the innocent. Certainly, it is hard to differentiate between prostitution and trafficking when trafficking is seen to be “feeding into the market of prostitution” or where “trafficking is specifically designed [to] fit into prostitution” (Sullivan M. Aff. ¶ 117).

One of the purposes of human trafficking involves the sale of humans into prostitution. However, prostitution is not the only intention of trafficking. By analyzing online newspaper articles of human trafficking incidents around the world, Erin Denton (2009) found financial stability to be a primary reason for illegal immigration, with those “trafficked” often complicit in searching for better economic opportunity; women being trafficked for sex were a small minority of all the cases reported in the media. Human trafficking can also include the purposes of organ harvesting and forced labour (Winterdyk, Perrin, & Reichel, 2012). An example of how the conditions of human

trafficking for the purposes of prostitution are treated as answers to the general issue of prostitution is demonstrated by the way Janice Raymond attacks the issue of on-street and off-street prostitution. Raymond believes that there is no difference between the safety levels of working on-street or off-street. She states that the levels of violence experienced by victims of trafficking in outdoor and indoor conditions are very similar (Raymond Aff. ¶ 78). Although there may be many similarities between the experiences of those who were trafficked into prostitution and those that ended up in prostitution by other means, not everyone selling sex has been trafficked. Considering the population that Raymond targets for her studies, those who identify as victims of trafficking and those that work in the street-level sector of the sex industry, it is hard to believe that her findings would depart from high levels of violence. Hence, the experiences of a portion of the population cannot be used to generalize the voices of all.

Parallel to the victim discourse, the trafficking discourse depicts the trafficker as comparable to a pimp. The use of scare tactics and the ways of control are similar in that both parties are portrayed as men with power over woman and children. As Poulin explains, “the victims are passed from trafficker to trafficker as they are transported, but their fate never changes: rape and other forms of subjugation are frequently used” (Poulin Aff. ¶ 108). The victims of trafficking are represented as objects similar to the victims presented in the victim discourse. Both groups of victims are viewed as less human, unable to make decisions for themselves and needing protection. These victims are part of a large number recorded by government officials and non-profit organizations pertaining to the frequency of those who are forced to sell sex. Janice Raymond provides an example of this numerical emphasis stating, “US government data in 2006 states that 600,000-800,000 persons are trafficked across international borders each year with 80 percent being women and girls and up to 50 percent minors” (Raymond Aff. ¶ 90). Canada is described as a country of destination, transit, and origin for human trafficking for prostitution (Poulin Aff. ¶ 111). For a comparison, Richard Poulin states that a yearly estimate of 600 to 800 people are trafficked into Canada, with rates of 1,500 to 2,200 people being brought annually from Canada into the United States for the purpose of sexual exploitation (Poulin Aff. ¶ 111). Poulin further implies that these numbers will rise as “the normalization of the prostitution industry” increases the demand



for sexual services just as it has in other countries like Thailand which have experienced economic benefits from sex tourism (Poulin Aff. ¶ 134).

The experts who advocate on behalf of these victims recommend that laws be implemented for their protection. As one should not blame the victim, the appropriate intervention is to punish abusers. Therefore, it is not uncommon for those who invoke the victim discourse to support the Nordic model or Swedish model as a possible solution to prostitution because this model “recognizes that prostitution is a serious problem that harms women and children” (Raymond Aff. ¶ 69). Traffickers, pimps, and clients are the evil ones in this scenario, and the Nordic model would impose harsh penalties that presumably will result in deterrence and thereby reduce demand. Additionally, exit programs created to “aid [women] in choosing alternatives to prostitution” will also be implemented as a strategy to eliminate the sex trade (Raymond Aff. ¶ 68). Decriminalization is considered inappropriate as it “may convey societal approval of the pimps’ current role as an exploiter and user” (Kennedy Aff. ¶ 67). The Swedish/Nordic model is believed to promote “gender equality and women’s human right to be free from sexual exploitation and to enjoy basic human liberty” (Raymond Aff. ¶ 70).

Prostitution is claimed to exacerbate the pre-existing problem of gender inequality. There is a contradiction that lies in the power dynamic of the advocates, the victims and the exploiters. Women are seen as powerless and vulnerable. However, the majority of experts supporting this discourse are women. Men are labelled with traits of dominance and power that are used in an abusive manner. Nevertheless, it is the same men who hold this power that are asked to protect women from exploitation. The presence of these false heroes only acts to silence sex workers from speaking for themselves and defining their own struggles. The victim discourse reduces the status of women involved in the sex trade to sexless children unable to consent and act for themselves. This dehumanization and victimization process continues as prostitutes and sex workers alike are silenced and those in power and control decide what kind of victim they should be labelled, and how they should be treated. Based on gender assumptions, men, women and children are the only roles available in this conversation, transgendered people and men as victims become non-existent concerns. In other

words, this discourse is limited in the extent to which it can successfully represent the voices of prostitutes.

#### **4.2.2. The deserving deviant**

Sexual acts not within a marriage arrangement are considered by some to be indecent (Foucault, 1978). Traditionally, and still held by some today, activities categorized as indecent include: sex before marriage; engaging in sex with strangers; sex outside of marriage; sex other than heterosexual intercourse (which includes sadomasochism, submission-domination, bondage, oral sex, and anal sex); sex with the same sex; the exchange of money for sex; as a female, taking sexual initiative and controlling sexual encounters (Pheterson, 1993, 1996). Due to the sexual nature of prostitution, the sale of sex becomes a public display of deviant behavior.

The deviant discourse emphasizes a perceived connection between prostitution and crime, child abuse, drugs, human/sex trafficking, and disrupting public order (Goodyear & Auger, 2013). Traditionally speaking, women's interest in sex was solely for the purposes of reproduction and satisfying her partner (Nead, 1987). Hence, "real women" would not combine money with sex (Baldwin, 1992, p. 76). Based on society's morality standards, women who deviate from the boundaries of socially acceptable femininity are cast away as "other," away from normality (McLaughlin, 1991, p. 250). Not only are the prostitutes labelled and treated as "other" because of their sexual desires, but also because they pose a threat to moral code and social order. As the sexual desire that prostitutes were believed to possess transferred into a perception of control over their own sexuality, men's fear of losing control over their sexual drive caused them to define and confine women's sexuality to marriage and the private sphere of the home (McLaughlin, 1991).

#### ***A deserving deviant or a forgotten victim?***

Prostitution is not only seen as sexual deviance contrary to moral standards, but also is contrary to what has traditionally been inscribed in Canadian law. Several interveners - the Christian Legal Fellowship, Real Women of Canada, and the Catholic Civil Rights League (CLF-RWC-CCRL) – argued that "the laws are a reflection of

society's views, soundly rooted in interfaith morality, which is that prostitution is an act that offends the conscience of ordinary Canadian citizens" (CLF-RWC-CCRL Factum, 2010, ¶ 2). This standard of morality is based on fundamental religious beliefs. CLF-RWC-CCRL provided evidential testimony stating support for this view on morality:

All four of Canada's major religions consider prostitution to be immoral. Christianity teaches that expressions of human sexuality should reflect a concern for faithfulness in relationships, and that the proper place for such expression is marriage. As such, prostitution is considered immoral and dishonourable to both participants and God. Judaism has consistently viewed prostitution as contemptible to morality. Both Hinduism and Islam recognize the need to protect marriage and the family; prostitution and other extramarital sexual behaviours are condemned as immoral and illicit (CLF-RWC-CCRL Factum, 2010, ¶ 20).

Therefore, as the moral compass of society is outlined by the various religions, prostitution in the public domain "leads to insurmountable adverse effects on the moral and social fabric of affected neighbourhoods" (CLF-RWC-CCRL Factum, 2010, ¶ 28). As long as the act or behaviour is considered harmful or has the potential to cause harm, the harm is then considered incompatible with the proper functioning of society and must be prohibited (CLF-RWC-CCRL Factum, 2010, ¶ 40). However, this standard of morality does not take into consideration the many reasons why someone may end up in prostitution.

Although this principle of morality has been used historically, and continues to be advanced up until this day, there is a question as to whether this measure of morality is still applicable to the twenty-first century. As our present society is increasingly influenced by sexualized advertisements presented in the media, sex becomes less of a taboo topic. The value of righteous acts and ethical behaviour continue to serve as a threshold to maintain society's order. However, the scale to distinguish right from wrong may have shifted as society changes over time. For example, homosexuality was once prohibited by law and homosexuals were labelled as dangerous sexual offenders punishable by incarceration (*Klippert v. The Queen*, 1967). Through decades of activism and a slight cultural shift on the views of sexuality and marriage, same sex marriages now share the same rights as heterosexual marriages (*Civil Marriage Act*, S.C. 2005, c. 33). Similarly, experts from the applicants argue in favour of a shift in our understanding

of prostitutes and sex workers such that they should no longer be criminalized and wrongfully labelled as deviants.

### **A victim rather than a deviant**

Regardless of how one becomes involved in the sex trade, whether it is via drugs, trafficking, pimps, by choice, and/or other means, involvement in the trade is a result of the push and pulls of larger societal forces, including but limited to poverty, inequality, patriarchy, colonialism, racism, and sexism. Further criminalizing their behaviours by enacting and enforcing laws prohibiting the selling of sex only serves to continue treating sex workers as less equal compared to the rest of society. Experts for the applicant contended that the deviant should in fact be viewed as a victim in this discourse because they are victimized by the legal system and labelled as an offender. John Lowman, an expert for the applicants, stated

. . . certain *Criminal Code* provisions actually contribute to legal structures which propagate the belief that a prostitute is responsible for her own victimization, and thus reinforces the line of “they deserve what they get.” In essence, they are “offenders” and not “victims”. The provisions also force prostitution to remain part of the illicit market. . . the provisions encourage the convergence of prostitution with other illicit markets, particularly the trade in illicit drugs (Lowman Aff. ¶ 8).

Essentially, the law further victimizes the prostitute who is often already a victim to societal circumstances. The applicants believe that “through the mainstream assumption that prostitution is immoral and harmful, ... sex workers are silenced, marginalized, stigmatized, and disempowered” (Applicants’ Factum, ¶ 149). The law acts to re-label the victim as an offender, justifying marginalization and stigmatization against this particular population.

The applicants in this case argued that “criminalization of sex work also leads to a high degree of stigma, dehumanizing sex workers in the eyes of johns, police and the wider public – turning them from women into ‘disposable people’” (Applicants’ Factum, ¶ 134). What the law prohibits is appropriately for the protection of law abiding citizens. Those who break the law should rightfully be punished and treated differently from the rest of society. Gayle MacDonald argued in her cross-examination that “the law perpetuates stigmatization by criminalizing them. A criminalized group is going to be

stigmatized by definition” (Trial Tr. 21 May, 2008 ¶ 93). The definitions of right and wrong created by the law permit the formation of labelling those that break the law as less human. In other words, “the law helps stigmatize these women as ‘evil’ or ‘unworthy’ of decent human respect” (Lowman Aff. ¶ 26). Additionally, stigma “denies sex workers concern and compassion from the public” (Applicants’ Factum, ¶ 114). Canadian law is believed to be not only the root cause of stigmatization that sex workers experience but also “reflects and reinforces the existing stigma” (Applicants Factum, ¶ 74). In the case of prostitutes, they are not only stigmatized and marginalized but they are also silenced and disempowered (Applicants’ Factum, ¶ 149).

A ripple effect is caused by the creation of laws prohibiting actions that are otherwise legal, but are characterized as deviant for this group in society, thus fostering negative social stigma and the belief that “prostitutes ‘deserve’ what happens to them because they are undertaking activities that are against the law” (Lowman Aff. ¶ 35). This in turn, creates an environment where a sense of safety from prejudice and discrimination is only achieved by becoming invisible or hiding one’s identity. Isolation and the fear of disclosing and/or being identified as a sex worker results in damaging a prostitute’s “self-esteem, integrity and overall sense of wellbeing” (Applicants’ Factum ¶ 110). Deborah Brock, provides an example of how the law stigmatizes people working in street-level sex trade,

The ‘living on the avails’ law purports to make the degrading assumption that sex-trade workers who live with men are automatically being exploited. The result is twofold. First, these women cannot live with male partners, as the men fear prosecution. Second, the exploitation stigma results in these women being labelled as social garbage (Brock Aff. ¶ 9).

While on the street working, prostitutes must be discreet in order to avoid arrest. In their private lives, sex workers must also remain hidden in order to avoid prejudicial treatment. Whether on or off the job, this population must remain clandestine just to survive.

The *Criminal Code* also precludes prostitutes from obtaining police protection. Police normally operate under the presumption that there are two groups of people in society, citizens and criminals. As selling sex is against the law, prostitutes are rarely

seen as victims or as ordinary citizens. These views are reinforced in popular crime television shows where the only time a prostitute is referred to as a victim is when their deceased body is found. Even though many experts argue that a history of abuse is prevalent among the reasons for entry into prostitution, prostitutes are not treated as victims and their complaints are not taken seriously. John Lowman argues that due to the unique history of abuse and encounters with the law, prostitutes are seen as unreliable witnesses; and as such, their allegations of victimization are usually dismissed by the police (Lowman Aff. ¶ 7). The numerous missing and murdered women of Vancouver's Downtown Eastside are vivid examples of this unfortunate reality.

Victims who are viewed as citizens have the right to be protected whereas victims who engage in the public display of selling sex are no longer worthy of any sort of protection. Without protection from the police, people engaged in the sex trade have no recourse, especially when they experience violence or mistreatment from law enforcement. Much of the testimony from prostitutes echoes their distrust of the police and the mistreatment experienced during their interactions with the police. Below are examples of testimony provided by the experts for the applicant regarding sex trade workers and their relationship with law enforcement:

“. . . because of the 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” (Applicants' Factum, ¶ 227).

“The police, I mean, my god, I don't think they care about us.” Another stated that “I think the police should . . . you know, when somebody has a bad date they should stop blaming the girls. . .” Many felt that . . . they could expect little help from the police, and that their complaints would not be taken seriously” (Benoit Aff. ¶ 25).

“Our interviews revealed that despite these extreme forms of violence, when sex workers do lay complaints with the police, the police often do not follow through on them. . . They feel as if the police fail to see sex workers as people and citizens worthy of protection” (MacDonald Aff. ¶ 9).

“Certain sex workers reported that when they attempted to report their victimization to the police, they were laughed at and told, “what do you expect, it's what you do!” (Maticka-Tyndale Aff. ¶ 21).

Along with the reasons presented above, many feel reluctant to communicate with law enforcement due to their fear of being arrested and their vulnerability from their lack of knowledge regarding their legal rights. The limited knowledge of legal rights increases sex workers' vulnerability and "undermine[s] their ability to insist upon respectful and appropriate responses by police" (Maticka-Tyndale Aff. ¶ 24).

The *Criminal Code* labels their behaviour as deviant, but it also has the effect of increasing the incidents of violence that prostitutes face. Gayle MacDonald argues that "the criminal law actually puts the sex worker in a more vulnerable position in terms of safety" (MacDonald Aff. ¶ 13). As an example, the communicating provision exacerbates the dangers that prostitutes already face on the street by forcing prostitutes into negotiating the terms of their transactions with their clients without the opportunity to fully assess the client's propensity to violence. Without the legal option of negotiating in an indoor setting, sex workers' only means to assess the potential danger of certain clients is through the time spent in negotiating the terms of their exchange before entering into a client's car. However, with the threat of being seen publicly negotiating the sale of sex, prostitutes are in a constant struggle jeopardising their safety by either being charged as a criminal or forfeiting their safety at the hands of a violent john they have not had an opportunity to adequately assess (MacDonald Aff. ¶ 13). This, in turn, forces prostitutes to work in unsafe secluded areas so that their work can remain secretive and untraceable (Brannigan Aff. ¶ 9).

In addition to the law causing an increased incidence of violence, it was argued that treating prostitutes as a disposable population allows abusers to escape criminal punishment. The need for secrecy on and off the job, "not only shields prostitution from [the] public view but provides a cover for violence against prostitutes" (Brannigan Aff. ¶ 10). The perception that prostitutes are criminals unworthy of protection and respect provides clients with a licence to commit acts of violence against prostitutes knowing that the probability of being punished under the law is unlikely. Without protection from law enforcement and being treated as liars by the justice system means the accusations made by prostitutes are typically overlooked and/or ignored.

The debate between whether the prostitute is a victim or a deviant is grounded in the negative social stigma and a traditional standard of morality, respectively. CLF-RWC-CCRL content that viewing prostitution as an indecent act is not restricted by the sensibilities of the time, they further explained

Prostitution is not viewed as being immoral simply because of prudish sensibilities of the time. To the contrary, these shared values of Canadian society are rooted in the fact that prostitution violates the human dignity of both prostitutes and those who are witnesses to it by encouraging the exploitative treatment of women and by commodifying the human body (CLF-RWC-CCRL Factum, 2010, ¶ 23).

Having a moral standard to guide the social fabric of society is not wrong, but given the testimony provided by the experts for the applicants, this moral standard contributes to the victimization of a vulnerable population. The belief that street level prostitutes are the weakest and most vulnerable population requires acknowledging they are victims and not offenders. Being victimized by poverty, inequality, patriarchy, colonialism, racism, and sexism and/or a combination of these societal factors are strictly viewed as unfortunate. Criminalizing and labelling this vulnerable population as offenders will only allow the justice system to continue the victimization process. The effectiveness of laws can be measured by the extent to which they protect the most vulnerable members of society; Deborah Brock explains that “Canadian law not only fails to protect victims – it creates them” (Brock Aff. ¶ 5). With very limited choices, having a criminal record exacerbates the situation in regard to the options available for housing and employment. The applicants noted this concept of continually cycling through the justice system as they presented before the court

. . .that the effect of the prostitution provisions is [a] burden to . . . workers with criminal records, making it more difficult for them to leave the sex trade if they so desired. Aside from economic and employment effects, the *Criminal Code* contributes to the social marginalization of sex workers, which in turn acts to enable violence and abuse against them (Applicants’ Factum, ¶ 151)

This explanation raises factors that contribute to an individual ending up selling sex on the streets, specifically poverty and inequality.



An interesting disparity between the forgotten victim and the deserving deviant is how the concept of choice is perceived. Arising from the assumption that breaking the law is based on a conscious choice, the interveners, CLF-RWC-CCRL attribute the active choice to break the law as a reflection of the decay of morality. This mentality ignores the possible underlying reasons that caused one to sell sex, and solely bases the decision to sell sex on the assumption of a rational choice, operating independently of social forces. In contrast, some of the experts for the applicants do not view choice as a given because many societal influences are viewed as causing men and women alike to make a living off their bodies. As an example, money can be a justifiable reason for entering into the sex trade. Ronald Weitzer explains,

. . . it can be quite lucrative for them, and that would be for the high-end workers, and economics is what drives pretty much everyone into the sex industry, either at the low-end, need for survival, to make money to survive, or at the high-end, the desire for a better lifestyle (Trial Tr. 6 March, 2009 ¶ 491).

The need for survival acts as a force pushing women and men with limited choices to make a living by selling sex. Pushing aside circumstantial restrictions, if choice existed in a vacuum, many people working in the sex industry may not choose to do what they have been doing.

While CLF-RWC-CCRL advocate for the continued criminalization of what they consider to be the indecent behaviour of selling sex, others believe the laws further victimize sex trade workers, thereby supporting the decriminalization of prostitution-related activities. Thus, parallel with the concept of choice, the relationship that morality creates between society and sex trade workers is a separation of 'them' and 'us'; 'offender' versus 'law abiding'; and 'worthless' versus 'worthy.' From this point of view, society becomes the victim from the display of indecency produced by the behaviour of those working the streets. In contrast, the argument that people involved in the sex trade should be viewed as victims, acts to humanize the people labelled as offenders. John Lowman stated that striking down the laws is a necessary condition for changing stigma and the dehumanizing effect that sex trade workers currently face (Trail Tr. 25 May, 2009 ¶ 1133). In this sense, the negative effects of stigma, discrimination, invisibility, and lack of respect will be alleviated if sex trade workers are no longer treated

as offenders. Through the process of destigmatization, people involved in the sex trade will have the chance to be viewed as equal human beings who have a different way of making a living.

### **4.2.3. The work in sex work**

The term “sex work” was coined by Carol Leigh (also known as Scarlet Harlot) around 1980 at a conference on violence portrayed in pornography and the media (Leigh, 1997, p. 229). From Leigh’s position, the term ‘prostitute’ “does not refer to the business of selling sexual services – it simply means “to offer publicly”” (Leigh, 1997, p. 229). The title of the workshop that she attended at the conference, “Sex Use Industry”, made Leigh feel like an object that was subject to being used. Instead, Leigh wanted a term that would allow her to be a political equal with the other attendees (p. 230). Instead of describing women as objects or something to be used, the terms ‘sex work’ and ‘sex worker’ allows women and men to be acknowledged for the work they do rather than defining the status of who they are (p. 230).

The sex work paradigm is structured on the premise that “prostitution is just a person selling their skills as with any other job” (Carpenter, 2000, p. 93). Focusing on associating sex work as an economic and labour activity, sex workers advocate for a change in policy where a non-criminal regulated environment is based on the many lived realities of sex workers’ lives (Goodyear & Auger, 2013, p. 217). Sex work should be viewed as any other job and regulated by existing laws, for example occupational health and safety regulations. There are no more risks in selling sexual services than the risks associated with many other jobs. This point of view allows the sale of sex to be viewed as part of the legitimate work force, and additionally it allows those involved in the sex trade to speak for themselves. In the two previous discourses, advocates were researchers and feminists who spoke for and/or on behalf of prostitutes. However, in the work discourse past and current sex workers who may also claim to be advocates, social workers, writers, feminists and the like, describe their experiences, what they want, and how they feel (Goodyear & Auger, 2013, p. 220).

## **Sex work as a job in Canada**

The kind of terminology used in the work discourse within the *Bedford* case indicates a sense of profession. In the cross-examination of Deborah Brock, she describes the sex trade as “sexual labour” (Trial Tr. 15 September, 2008 ¶ 137). Those involved in the sale of sex are described as “street-involved women” (Lowman Aff. ¶ 19), “street-connected women” (Lowman Aff. ¶ 31), or “women exchanging sex for money” (Lowman Aff. ¶ 45). In her cross-examination, Frances Shaver used the term “people working in the sex industry” because it helps others to understand that “these individuals simply work in the sexual service industry as opposed to being sex workers 24 hours, 24/7” (Trial Tr. 7 July, 2008 ¶ 7). Gayle MacDonald further explains in her cross-examination

I don't think people sell themselves, I think people sell a service, and that's the way sex workers describe it. They describe it as selling a service. They are not selling their bodies, they have their bodies back every day, they are selling a service. In fact, they don't call sex “sex” unless it's with an intimate. Everything else is business (Trial Tr. 21 May, 2008 ¶ 278).

In opposition to the terminology used in the previous discourses, women and men are viewed as using their bodies to provide a service rather than selling their bodies. The sex work industry is referred to as a job where the sale of sex can be viewed as a “sex work career” (Lowman Aff. ¶ 40).

Frances Shaver defines sex work in her cross-examination as the “earning of money through providing sexual gratification using fantasy and/or physical contact” (Trial Tr. 7 July, 2008 ¶ 260). As opposed to the negative connotations related to the sale of sex in previous discourses, the work paradigm focuses on the agency and choice that sex workers have in making decisions regarding their work. For instance, Deborah Brock testified that

In a study I conducted a few years back, I find that many women enter the sex-trade not because of desperation or degradation, but because they see it as a legitimate means for them to earn a living . . . For the most part, entering the sex-trade is a choice made by women in an effort to support themselves and their families. . . The fact is that the societal assertion of the prostitute as a ‘victim’ is an affront to the many assertive,

independent, adult women who state that they would not subject themselves to the more 'respectable' job ghetto. It ignores the fact that they may regard their jobs as a form of self-empowerment that provides them with a degree of financial well-being, and therefore more control over their lives (Brock Aff. ¶ 5).

Feminists and prostitutes who grasp onto the victim/offender dichotomy as mutually exclusive ways of understanding prostitution, tend to deny sex workers' claims of agency, choice, and power through prostitution. Deborah Brock warns against treating prostitution as a social problem, "relying uncritically on knowledge derived from 'authoritative' sources like the police, the courts, and the media, we unwittingly participate in the silencing, marginalization, and control of prostitutes" (Brock Aff. ¶ 5). Selling sex is only a fraction of who sex workers are and not their complete person. Allowing sex workers to define for themselves what their realities are provides the chance for the public to understand the person apart from social labels.

Interestingly, the work discourse is the only discourse among the three provided in this analysis that recognizes a difference between working indoors as compared to working outdoors. As a comparison, the victim discourse recognizes the risks of violence as inherent to the act of selling sex and classified prostitution as sexual exploitation regardless of where it occurs. However, in the work discourse, workers include "women working in massage parlours, escort services, or as independent operators" (Lowman Aff, ¶ 30). This separates indoor venues to sell sex from outdoor venues. Indoor prostitution is divided, but not limited to, in-call workers (sex workers who receive clients in their personal homes or work place), out-call workers (workers who serve clients at the clients' home or at another location such as a hotel), independent workers (workers who do not work under an agency), and escorts (workers who usually provide services through an agency) (Maticka-Tyndale Aff. ¶ 14-17). Within street prostitution, there are ranges of different 'strolls'<sup>1</sup> (Attorney General of Canada Factum, 2010, ¶ 32). Each stroll caters to different clientele. The trannie stroll is composed of transvestites; the kiddie stroll is where under-age prostitutes work; boystown is a stroll where, generally speaking, men can seek male prostitutes (Attorney

<sup>1</sup> This is a term commonly used by the police to refer to the different venues within street prostitution.

General of Canada Factum, 2010, ¶ 32). Additionally, there is a separation between high-track street sex workers and low-track street sex workers. Those amongst the high-track are described as non-drug addicted, under the control of a pimp, and receive higher pay for their services. Low-track street work is commonly used to describe those who are addicted to drugs and usually provide sexual services for money or drugs (Attorney General of Canada Factum, 2010, ¶ 33). The crucial difference argued for in the work discourse is that there exists a difference in the level of risk and exposure to violence depending on the type of work and the venue a worker provides services in, and that the law plays a role in determining what sorts of risks different sex workers face.

The physical safety of a worker depends on the organization of the work and the location where it takes place (Maticka-Tyndale Aff. ¶ 5). The divide between on and off street only provides a sense of the extent of services available and to some extent the amount of money one can make. The variance in the operation of sex workers were explained by Frances Shaver, who stated

There are significant differences in how sex workers operate depending upon (1) the way they exercise their profession, (2) the degree to which they view it as an occupation or profession, (3) the degree to which the work is a result of their own decision, and (4) whether they exchange their services for money or trade it directly for goods or services (Shaver Aff. ¶ 28).

In terms of risks, Lowman stated “you have to look at the particular circumstances of each venue to determine the level of risk inherent with each different venue” (Lowman Supplementary Aff. ¶ 35). The greater control one has over their environment, the greater the level of safety one can obtain. The way in which safety can be obtained is also described as being different between on and off street. Alluding to this point, Cecilia Benoit stated that “the nature of the street environment prevented street workers from having any real control at all over their own personal safety, although they try to exert some degree of control over their choice of clientele” (Benoit Aff. ¶ 17). Eleanor Maticka-Tyndale describes the importance of the ability to exchange information between street level sex workers regarding violent clients, as a screening mechanism for reducing the chances of encountering violence (Maticka-Tyndale Aff. ¶ 13). Working in pairs or in groups allows the women on the streets to note down license plate numbers

and track the length of a transaction (Maticka-Tyndale Aff. ¶ 12). However, the laws restrict the ability of these screening mechanisms to function effectively if street-level sex workers want to avoid detection from the police, complaints from residents and business owners, and fines or incarceration.

Working indoors is arguably safer than working the streets due to the amount of control workers have over their environment. Gayle MacDonald explains in her cross-examination that

. . . sex workers want the ability to refuse a client . . . They want – when they say safe and dry, they mean it. They want an ability to have a room that feels safe. They want to be able to take a shower or require the client to take a shower (Trial Tr. 21 May, 2008 ¶ 223).

The underlying notion is that safety is created by control; the more control one has over a transaction (who they service, what kind of services are provided, where this service is to take place, what restrictions must be abided) lessens the possibility of encountering a dangerous situation. It is argued that from the perspective of sex trade workers, violence is not viewed as inherent in prostitution; rather, sex workers “view the violence they experience as a product of stigma, public attitudes, and poor working conditions” (MacDonald Aff. ¶ 6).

To mitigate the exposure to violence that street level sex workers experience, the experts for the applicant suggest a regulatory regime replace the criminalized status of sex workers. Elimination of the prostitution related laws in the *Criminal Code* would allow sex work to be legitimated. Regulating sex work like any other business would entitle sex workers to basic rights in the work force. The regulations surrounding sex work should be no more (or less) than what is currently in place for other industries. In other words, regulation should not be more onerous for sex workers than it is in any other occupation. For example, occupational health and safety regulations for sex workers in Australia have included adequate lighting, condoms as personal protection equipment, the provision of alarms, and private areas for workers like occupation and work areas outside of the sex trade (Sullivan B. Aff. ¶ 25). In regard to health and the fear of spreading disease, sex workers should not be required to undergo health monitoring more than is required of doctors, nurses, and dentists. In response to

whether sex workers should be required to undergo health checks for sexually transmitted infections (STI), in her cross-examination Barbara Sullivan stated

I think that the requirement is there because it's seen as reassuring to the public so that it's politically palatable. I think the reality is that it doesn't ensure public safety, it's quite onerous for sex workers, it's a way of stigmatizing sex workers which contribute to violence, and it's discriminatory in that other workers aren't required to adhere to such an onerous regime, including workers who are in danger of transmitting disease to clients and other people they are engaged with (Trial Tr. 19 January, 2009 ¶ 485).

For example, dentists are not required to undergo mandatory health checks for viral diseases despite having transmitted HIV to a patient (Trial Tr. 19 January, 2009 ¶ 486).

To prevent the spread of diseases, dentists, doctors, and nurses self-manage the need for health checks on an individual basis. Requiring sex workers to undergo mandatory health examinations that can otherwise be self-managed is discriminatory. Barbara Sullivan continued, stating that if the government were to implement regulatory health checks exclusively on sex workers, they would be conveying that

. . . there's a particular problem with these people in the sex trade and, therefore, we're going to watch them closely. Well, that signals, I think, these people are not worthy of equal respect, these people are not citizens in the same way, and I think it's much more likely to produce a situation where violence is normalized (Trial Tr. 19 January, 2009 ¶ 486).

In other words, if sex workers were required to undergo health checks then doctors, nurses, dentists and even clients should also be required to undergo health checks because everyone has the same level of risk of transmitting diseases. Otherwise, sex workers are segregated as the only possible cause of STI's when clients are just as likely to transmit a disease. Although risks of injury and violence cannot be eliminated, being able to work in a clean, contained and regulated environment with the workers having more control is arguably safer because the risks can be mitigated.

Many critics are opposed to regulation and the underlying reasoning provided within the work discourse. Critics argue that even with the laws struck down, few street-level workers would be able to survive in the indoor environment. Drug addicted street

level workers would not be able to establish their own businesses due to their lack of managerial and business skills (Kennedy Aff. ¶ 39). Experts for the respondents claim that women working indoors have reported an economic deficit from working indoors as compared to working outdoors due to the need to meet the dress and hygiene standards (Kennedy Aff. ¶ 43). Additionally, they also report incidents of exploitation and harassment via obligatory sexual favors with the business owners (Kennedy Aff. ¶ 44). Despite the change in working environment from street level to indoor, this does not eliminate the levels of violence experienced by women in prostitution (Sullivan M. Aff. ¶ 85). From the perspectives of these experts, indoor prostitution is seen as an avenue for sex trafficking victims; while pimps facilitate outdoor prostitution, therefore no matter where prostitution takes place, violence is unavoidable (Raymond Aff. ¶ 23). However, this mentality is consistent with a point that Frances Shaver made, in that “sex work is a job in which society recognizes its workers to be at risk. However, rather than implementing job security measures, as we might do for other industries, society’s response is to do away with [the] profession” (Shaver Aff. ¶ 38).

Under a decriminalized or legalized regime, the issue of choice arises when victims of trafficking and sexual exploitation are treated as sex workers voluntarily engaging in prostitution (Raymond Aff. ¶ 87). This would act as a barrier for police to prosecute exploiters at the same time denying the claim of victim status for those who truly are not in the sex industry by choice. Furthermore, Janice Raymond believes that allowing prostitution to exist keeps sex workers in the sex industry rather than encouraging their exit into other occupations (Trial Tr. 3 December, 2008 ¶ 493). Despite the argument that the sex trade may be required for a certain population (for instance, males who are disabled), Mary Sullivan insists in her cross-examination that this reasoning does not “override the right of women to be free of the risk of violence in the workplace” (Trial Tr. 3 October, 2008 ¶ 222). In contrast, the work discourse argues that allowing sex workers a legal space to work has a positive impact on public perceptions of equality to which sex workers are also entitled (Sullivan B. Aff. ¶ 26). Seeing sex workers as citizens with equal rights, arguably increases the likelihood of their violent encounters and sexual assault complaints being taken seriously.



The concept of choice should not be absolute. John Lowman explains in his cross-examination that

The term choice is present in the continuum from survival sex through to opportunistic prostitution. At the extreme of survival sex end, the woman is making a choice to prostitute in a circumstance where she had few or no other choices. At the extreme other end of the continuum, you have women who do have other choices choosing to prostitute for opportunistic reasons, primarily the amount of money that they can make (Trial Tr. 8 May, 2009 ¶ 1150).

Diversity within the sex trade is not limited to the degree of choice that one may exercise but also each worker's experience as an individual. The deviant or victim labels are not inevitable. Recognizing the work in sex work and endorsing the experiences of those involved in the sex selling business, allows society to see that the core identity of those involved in the sex industry is not in the fact that they sell sex; rather, they are average people with family and friends whose job involves selling sexual services. Preconceptions of how society perceives sex workers are excluded from the work discourse by recognizing sex workers as a member of the work force. Despite these efforts, a shift in world-view will be required to re-inscribe the myths and stereotypes brought about by opposing perspectives characterizing those involved in the sex industry.

### **4.3. Contending Identities in the Face of the Law**

Men and women enter into the sex trade, remain in the sex trade, work in the sex trade, and leave the industry for myriad of reasons. It is reasonable to believe that the levels of danger, exposure to violence, and level of income in the sex industry vary. John Lowman explains this difference in his cross-examination,

To problematize the simple distinctions street and off-street, what you start to realize the more research that you do, is that there is a general difference between street and off-street prostitution, but there is a tremendous difference in different kinds of street prostitution. So that when we start to look at different prostitution strolls, we find very different characteristics of some of the people involved. We find different levels of risk. (Trial Tr. 7 May, 2009 ¶ 304).

The acceptance of diversity is not inevitable, as shown by the way the victim and deviant discourses perceive prostitution. Professor Ronald Weitzer, an affiant for the applicants, explained the need for recognition of this variance in his cross-examination,

. . . there are conditions under which prostitution can be and is oppressive, where people are victimized, and there is serious victimization going on out there, we know that, particularly on the streets. At the same time, there are those workers who have never experienced victimization and have not had bad experiences and enjoy their work and feel that their self-esteem has increased after they began working as – strange as it might sound – after they began working in the sex industry, an inflation in their self-esteem, because of – well, if you think of the high-end, many of the customers are continually flattering, complimenting, praising their providers (Trial Tr. 6 March, 2009 ¶ 508).

Despite the recognition that “race, sex and class are multiplicative risk factors for prostitution” (Farley Aff. ¶ 43), the reasoning used by the experts describing prostitution with the victim discourse most often led to a single cause explanation. Therefore the perspectives of selling sex, as described in the outlined discourses, comprise only a small fraction of the bigger picture.

Advocating a specific perspective may be counterproductive to the desired result. Justice Himel found that many of the experts “had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court” (*Bedford v. Canada*, 2010, ¶ 182). The vocabulary used by some of the experts departed from typical research terminology. Although the respondents argued that the applicants lacked proof of direct effect or even correlation between the laws and the impugned effect of endangering the lives of those who sell sex rather than protect them and/or society, they reasoned that decriminalization and/or legalization has been shown to increase rates of human trafficking, child prostitution, and the expansion of the sex industry (Raymond Aff. ¶ 43, 52; Sullivan M. Aff. ¶ 43; Poulin Aff. ¶ 135). These research results are referred to as causal findings without considering other possible contributing factors for these outcomes. In other words, the allegations proving that the laws cause the effects that are claimed are not strongly supported by the evidence. The claims that legalization and/or decriminalization causes the avenues of sexual exploitation (namely, child prostitution, and sex trafficking) to expand has little empirical support.

The unidimensional views of prostitution that are portrayed in the victim, deviant, and worker discourses does little to fully capture the experiences of those involved in the sex trade (see table 4.2). Research results, particularly when the writer uses pathos to attract an emotional appeal (Mshvenieradze, 2013), tend to be acknowledged and accepted as generalized truths that apply to nearly all if not to all who are involved in the sex trade. To illustrate, the victim label attracts pity and tugs on the strings of one's conscience through the description of abuse, whereas advocates for the work discourse have difficulty convincing society of the authenticity of empowerment through selling sex. Justice Himel agreed that "while the evidence provided helpful background information, it is clear that there is no one person who can be said to be representative of prostitutes in Canada" (*Bedford v. Canada*, 2010, ¶ 88).

From the evidence presented in disputing the levels of violence experienced by prostitutes, Justice Himel accepted as fact the following factors that reduce the level of violence experienced by prostitutes:

- (a) working indoors is generally safer than working on the streets;
- (b) working in close proximity to others, including paid security staff, can increase safety;
- (c) taking the time to screen clients for intoxication or propensity to violence can increase safety;
- (d) having a regular clientele can increase safety;
- (e) when a prostitute's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;
- (f) the use of drivers, receptionists and bodyguards can increase safety;  
and
- (g) indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring; financial negotiations done in advance can increase safety (*Bedford v. Canada*, 2010, ¶ 421).

The vocabulary used to describe the safer ways of which prostitution can be conducted, conform to the notions put forth within the worker discourse in treating prostitution as a form of business. Although Justice Himel did not use the term 'sex worker' to describe

those selling sex, she did referred to the buyers of sex as 'clients' and 'clientele'. Describing the exchange of sex for money as a business transaction, Justice Himel's analysis reflects the principal beliefs within the worker discourse.

In deciding the constitutionality of section 210, the bawdy-house provision, Justice Himel explained that the legislative goals of this section was to prevent and control immorality and common or public nuisance including the areas of health, safety, and neighbourhood disruption and disorder. (*Bedford v. Canada*, 2010, ¶ 255). Essentially, section 210 targets all direct participants engaged in the operation of a bawdy-house in three specific ways: (a) prostitutes, who are an inmate of a common bawdy-house; (b) clients or anyone, who is found without lawful excuse in a common bawdy-house; and (c) operators, who as an owner or someone in charge and/or in control of the place knowingly permits the place to be used for the purpose of a common bawdy-house (*Bedford v. Canada*, 2010, ¶ 244). Specially, the bawdy-house provision requires the proof of a victim by establishing that a person has "some degree of control over the care and management of the premises" who receives proceeds and has been aware of the activities that were taking place on the premises (*Bedford v. Canada*, 2010, ¶ 249). Although based on a morality argument conforming to the deviant discourse, this requirement of proof resists the automated labelling of victim presented in the victim discourse. Believers in the victim discourse, state that regardless of where prostitution takes place the underlying gender inequality that results in the violence experienced by women is not eliminated by allowing women to work indoors, thus claiming that the law is justified (*Bedford v. Canada*, 2010, ¶ 351). Despite the respondents' claim that not every prostitute would be able to work indoors due to numerous reasons including drug addiction, service fees, and hygiene and age requirements, just to name a few (*Bedford v. Canada*, 2010, ¶ 350), Justice Himel felt that denying sex workers the right to reduce the risk of harm to their well-being was a violation to their right to security of the person in a manner not in accordance with the principles of fundamental justice, and therefore unconstitutional (*Bedford v. Canada*, 2010, ¶ 428).

**Table 4.2 Summary of discourses presented in the Ontario Superior Court of Justice**

	View of Prostitution	View of Prostitutes	View of Clients	Research Focus	Implications for law
Victim	An inherently violent and exploitative interaction based on gender inequality	As victims because they did not choose and could not have chosen to be exploited	Typically men who are considered abusers, exploiter, or predators	Trafficking (including human trafficking and sex trafficking); pimps and pimping; organized crime; child prostitution; criminalization; Swedish/Nordic Model	Penalty should focus on abusers and not the victims; therefore need harsher laws to punish abusers and save victims of exploitation
Deviant	An offensive interaction that defiles society's social fabric of morality,	Considered immoral and labelled as 'other' or 'fallen women' while others argue that they should be viewed as victims under the law and not treated as offenders	Referred to as 'Johns' (the focus is on prostitutes and not on clients)	Prostitution law; traditional views of prostitution; history of prostitution; decriminalization	Some argue that the laws should be kept in order to maintain society's social fabric of morality; while others argue that the laws that victimize and/or increase the level of exposure to violence should be repealed
Worker	Should be viewed as a job and regulated by existing laws	Not everyone is a victim and therefore those who have the ability to chose, should be viewed as employees in a service industry and should be given respect and treated with equality	Customers and/or clients	Stigma cause by the law and/or the label of prostitute; labelling theory and its effects on prostitutes who have left the sex industry; HIV.AIDS; regulation of sex work	Regulate sex work like any other business with existing laws that are applicable (i.e., occupational health and safety regulations)

Section 213(1)(c) similarly based on a morality argument, prohibits the public display of solicitation and public communication for the purposes of prostitution (*Bedford v Canada*, 2010, ¶ 274). The deviant aspects of this criminal sanction rest upon the notion of shameless women openly enticing sexual behaviour. Justice Himel stated “a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values” (*Bedford v. Canada*, 2010, ¶ 225). Forbidding a certain group of individuals from freely expressing themselves strictly based upon the context of their expression was deemed unreasonable because the content of sex workers’ expression to sell sex was seen as part of their occupation and a way to reduce the risks of violent encounters. By focusing on the potential harm directed to others in public, witnessing the negotiation of sex for money, the risk of victimization that prostitutes face sacrificing the screening of clients become peripheral if not irrelevant. Denying the detrimental effects of the law by increasing the exposure and risk to violence faced by sex workers, also denies their right to protection from violence

The living off the avails provision as outlined in section 212(1) of the *Criminal Code* is “aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps” (*Bedford v. Canada*, 2010, ¶ 259). A parasitic element and/or relationship must be proven in order to obtain a conviction. Like section 210, the victim status within certain subsections of section 212(1) must be supported by proof. Justice Himel explains the differentiation of the need for acquiring a victim status in section 210,

However, the determination of what is parasitic appears to be different based on whether the person lives with a prostitute, or provides business services to a prostitute. In the former circumstance, parasitism requires an element of exploitation. In the latter circumstance, parasitism is found solely on the basis that the service is provided to a prostitute because they are a prostitute. No proof of exploitation is required (*Bedford v. Canada*, 2010, ¶ 272).

Although there is the requirement of needing to prove exploitation when living with someone who sells sex, the simple involvement of a business transaction due to the reason that one of the participants is involved in the sale of sex is discriminatory. This double standard increases prostitutes’ vulnerability and levels of exploitation when the laws were intended to protect this population. In other words, the relationship that

should not require excessive proof, a pimping relationship and also the relationship that this law intends to target require proof of exploitation, which under the previous wording of the law was hard to prove. The intention of the law was to protect potential victims but the wording and requirement of proof denies this victim status. Agreeing that the law does not serve its purpose to protect but increase the level of danger faced by prostitutes, Justice Himel ruled all the challenged laws as unconstitutional.

## **Chapter 5.**

### **The Application of the Victim, the Deviant, and the Worker Identity**

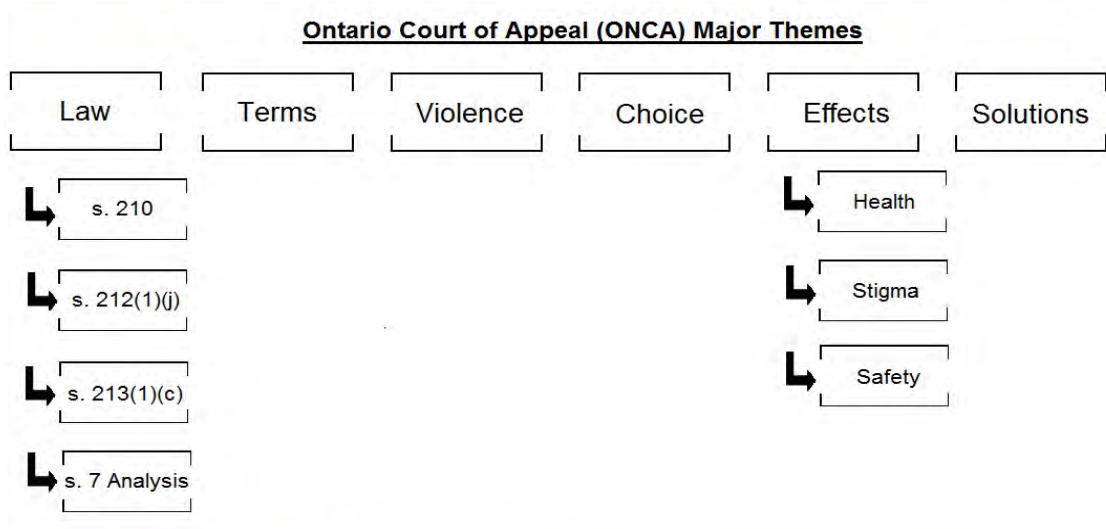
Debates regarding the topic of prostitution hardly diverge from the related issues of violence, choice, law, morality, and views on women. Therefore, it is not surprising that the victim, deviant, and worker discourses continue to appear through the appeals to the upper levels of court, namely the Ontario Court of Appeal and the Supreme Court of Canada. Similar themes were coded for from the Ontario Court of Appeal and the Supreme Court of Canada as they were presented at the trial court level (see Figures 5.1 and 5.2). As opposed to the evidential presentation of these discourses in the trial division, the arguments made before the two upper levels of court focused on their application to the law. In other words, instead of the presentation of raw data to convey the messages central to each of the discourses, the arguments presented in the appeal courts took the form of using the raw data to convince the court how the law should be interpreted. Experts from the trial division were not permitted to submit affidavits to the appeal division of court, however, their perspectives were incorporated into the factums presented by the parties on appeal. Although there may be philosophical differences in the understanding of prostitution, the extent of the harm associated with selling sex, and opposing views on how best to minimize those harms, these dissimilarities are still framed in one of the three discourses.

The focus of this chapter will be on the information tendered before the Ontario Court of Appeal and the Supreme Court of Canada, as well as the decision made by the judges involved in these court levels. The similarities in discourse between the three levels of courts will be discussed first, followed by the variances. The organization of each discussion will begin with the similarities and differences within the victim discourse, deviant discourse, and lastly, the worker discourse. Each discussion of the

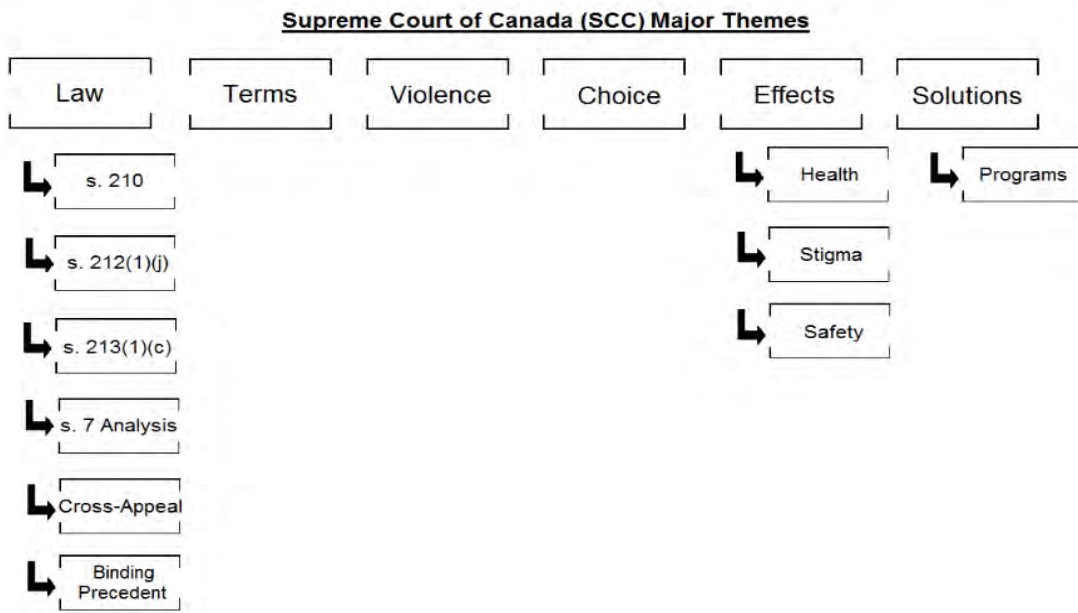


level of court will conclude with a summary of the court’s decision in comparison to the trial court’s outcome.

**Table 5.1 Coded themes from the Ontario Court of Appeal**



**Table 5.2 Coded themes from the Supreme Court of Canada**



## 5.1. As a Victim, Deviant, and Worker before the Ontario Court of Appeal

Those who support the victim discourse perceive law as a way to protect those who are victimized by their involvement in selling sex. In connection with each of the challenged *Criminal Code* sections, the Attorney General of Canada argued that the laws act as protective factors and/or do not increase the risks of violence to prostitutes in at least three ways. First, the bawdy-house provisions provide police the means to investigate cases of concealed child prostitutes and trafficked victims (Attorney General of Canada Factum, 2012, ¶ 136). Second, the prohibition against living off the avails of prostitution is broad in order to capture relationships that are not overtly exploitative in public but are indeed abusive in private. The distinction between an abusive relationship and a protective relationship by those who surround a prostitute is imprecise as “there is no bright line between a pimp and a bodyguard” (Attorney General of Canada Factum, 2012, ¶ 141). Third, the accuracy of assessing the extent of potential violence of a stranger can be very inaccurate and therefore regardless of the enactment of the communicating law, the potential levels of violence faced by prostitutes do not change (Crown Factum, ¶ 169).

In line with the legislative objectives for “combating neighbourhood disruption or disorder and safeguarding public health and safety,” the bawdy-house provisions are neither arbitrary nor grossly disproportionate (*Canada v. Bedford*, 2012, ¶ 192). The Attorney General of Ontario argued that forbidding indoor prostitution allows neighbourhoods to be at ease from the corrupting effect of foment attitudes between men and women’s interactions of prostitution activity in residential areas (Attorney General Ontario Factum, 2012, ¶ 81). Permitting prostitution to operate legally indoors is arguably turning a blind eye to the abuse that occurs behind closed doors. The victims of such horrific crimes are once again confined to girls and women. It has been contended that the process of ‘training’ captive victims’ obedience into acts of prostitution and other related organized crimes, begin where they are harboured and housed – behind closed doors (Attorney General Canada Factum, 2012, ¶ 21). Removing section 210 would eliminate the entry point law enforcement has to target and expose crimes like human trafficking for the purposes of prostitution.

The distinction between an abusive relationship and a non-abusive relationship is hard to decipher given the potential for intersecting relationships between a prostitute and another person. At times, a pimps' relationship with a prostitute may begin as a form of protection by a lover, friend, driver, and/or bodyguard (Attorney General of Canada Factum, 2012, ¶ 141). The main element that section 212(1) (j) targets is the parasitic profiting of those involved in prostitution with or without coercion (Attorney General of Canada Factum, 2012, ¶ 114). The law itself also eliminates the motive of parasites encouraging the activities of prostitution (Attorney General of Canada Factum, 2012, ¶ 115). The broad inclusion of prospective healthy relationships is therefore argued to be necessary to prevent the possibility of coercive relationships, as the need to protect the innocent outweighs the right of those involved in selling sex to have relationships outside of prostitute and client.

The legislative objective of the communicating provision is ostensibly “to address the detrimental effects of prostitution” by eradicating the social nuisance from the public display of selling sex (Attorney General of Canada Factum, 2012, ¶ 122). This purpose not only encompasses street nuisance but also social nuisance by eliminating the possibility of children and youth from being exposed to the exchange of money for sex (Attorney General of Canada Factum, 2012, ¶ 122). Maintaining the victim rhetoric, the victimizer is a physical entity. The lack of opportunity to assess the potential for violence when encountering a possible client is not a substantial claim to override the fact that danger is contributed from third parties and not from the law. As the majority of those who purchase sex are male, the violence experienced by prostitutes is believed to be perpetrated by men. Not only is the notion of “security of the person dependent on the possibility of a few more seconds to check for visible weapons or the odor of alcohol, illusory” (Women’s Coalition Factum, 2012, ¶ 43) but placing the responsibility for preventing male violence upon women is blaming women for their own victimization.

The Women’s Coalition argues that the notion of displacing street prostitutes due to the enforcement of the communicating law should be rejected because there is no physical place for prostitution to be safe for women. The streets confine the most vulnerable population by such traits as class, race, and disability, from working indoors (Women’s Coalition Factum, 2012, ¶ 44). This confinement creates a cycle of

continually victimizing the most vulnerable sector within our society. However, an indoor setting is arguably no less dangerous than the streets. The Crown suggests that despite the terms negotiated on the streets, the transactions occur in private where acts of violence take place. A client or john who appears and acts normal can turn violent unpredictability (Crown Factum, ¶ 169).

From these arguments, abuse experienced by prostitutes consist of violence caused by (most frequently) men and neither moving indoors nor taking more time to screen clients will eliminate the potential for violence. As harms caused to prostitutes are a result of the actions of third parties, the Crown argued these laws only act as a rightfully protective barrier against those harms. By situating the emphasis for these arguments on gender inequality and violence perpetrated by men onto women, women are portrayed as a lesser class to men and incapable of protecting themselves. The above allegations are in line with the victim discourse presented from the previous court. However, a major distinction in the victim discourse between the trial court and the Ontario Court of Appeal is the use of less inflammatory language. For example, Richard Poulin describes in his cross-examination at the Ontario Superior Court of Justice that violence by men to women in prostitution is inherently systemic where “these men consider them as merchandise, objects, instruments, [and] instruments of ejaculation” (Trial Tr. 13 March, 2009 ¶ 310); whereas at the Ontario Court of Appeal, the Women’s Coalition describes male violence towards female prostitutes as unpredictable because they can turn violent at any moment (Women’s Coalition Factum, 2012, ¶ 43).

The approach taken in this court also differed from the one taken at the trial court. Aspects of the deviant discourse and the victim discourse intertwined at the appeal division whereas at the trial court, the two discourses were independent. This may be due in part to the positions and interests of the intervener groups, but also to the way the legislative objectives of the challenged laws are interpreted. In contrast with the worker discourse, which was dominant at the trial court, protecting those involved in selling sex (an embedded objective of the victim discourse) is described alongside the need for prevention, deterrence, and addressing the concerns of the community (principle beliefs from the deviant discourse), all of which are essential themes within the

appeal court's analysis. As an example, in describing the prostitution related *Criminal Code* provisions the Crown claims they:

. . . operate together to prevent the harms associated with prostitution; to denounce and deter the most harmful and public emanations of prostitution; to protect those engaged in prostitution; and to reduce the societal harm that results from communities (Crown Factum, ¶ 113).

The deviant discourse is grounded upon morality, where the suppression of prostitution is designed to protect human dignity and ensure individuals are free from exploitation (Christian Legal Fellowship, the Catholic Civil Rights League, & Real Women of Canada (CLF - CCRL – RWC) Factum, 2012, ¶ 2). The message that criminal charges, enforcement activities, and convictions send is that prostitution is not acceptable in this society (Attorney General of Canada Factum, 2012, ¶ 33). By labelling prostitution unacceptable and undesirable, the government wishes to discourage and deter individuals from involvement in the sex industry. The purpose of these laws is to control the actions of society, and more specifically, those involved in the sex trade. The implementation of criminal punishments helps to enhance the control resulting from these laws. Overtime, as more laws are enacted, society's reliance on laws to regulate activities, behaviours and the lives of people becomes stronger (Vago & Nelson, 2009).

The need to regulate disorderly behaviours are sanctioned by the need to protect members of the general public from “excessive noise and traffic and including: increased violence, the accosting of women and girls, drug use, and needles around schools” (Attorney General of Canada Factum, 2012, ¶ 19). Other harmful activities alleged to be related to prostitution include the presence of gangs, organized crime, violence, and drugs (Attorney General of Canada Factum, 2012, ¶ 20). Further, it is prostitutes' efforts to evade the law that creates the problems, not the laws themselves. As the Attorney General of Canada stated:

Many of the harms alleged by the Applicants result from violating the law or from attempting to evade arrest, not from the laws themselves. Selling sex in isolated areas of the city or getting into vehicles quickly in order to avoid detection by police and attention of residents, simply amount to committing the offences more quickly and more secretively. The attendant risks are not attributable to the laws; the harms are caused by

the offender's decision to break the law while trying to avoid getting caught (Attorney General of Canada, 2012, ¶ 111).

Although the concept of choice was absent in the victim discourse – which invites our sympathy and desire to protect - the emergence of choice in the deviant discourse is limited to the decision to break the law – which invites our disdain and a desire to punish. Engaging in prostitution is not viewed as a choice, but the prohibited actions of soliciting, and/or keeping or being found in a common bawdy-house are informed decisions made consciously. The Christian Legal Fellowship, the Catholic Civil Rights League, & Real Women of Canada identify the four choices that prostitutes have when engaged in selling sex:

First, they do not have to be prostitutes at all; second, they can practice prostitution in a manner that is much safer (i.e., working indoors with regular customers and rarely advertising); third, they can practice prostitution in a manner that involves risky activities; and fourth, they can break the law (CLF - CCRL – RWC Factum, 2012, ¶ 39).

The first out of the four options is suggested as the safeguard between prostitution and violence. The availability of the second option is limited to a certain population within the hierarchy of those involved in the sex trade, namely those working in high-end escorting businesses. Options three and four may be interrelated because in order to avoid criminal sanction, prostitutes are said to put themselves at risk with hasty decision making and assessment of the probability of violent encounters. Of these four options, street level prostitutes can only engage in prostitution through risky behaviour because none of the other options are available to them. CLF – CCRL – RWC contended that this choice to violate the law breaks the causal link between the alleged harms that prostitutes experience and the effects of the laws (CLF – CCRL – RWC Factum, 2012, ¶ 41). In other words, the sex workers' choice to break the law exacerbates the risk of harm and therefore the cause of increased risk of violence is independent of the law (CLF – CCRL – RWC Factum, 2012, ¶ 6).

Stigmatizing labels and attitudes towards sex workers are exacerbated by the law, which identifies the behaviour of selling sex as undesirable. However, a similar

stigmatizing effect is not felt by johns, clients, or pimps. The negative stigma associated with the label of sex worker affects their day to day life outside of the sex trade. As an example, in terms of health management, many sex workers felt the need to conceal the fact that they are, or once were, involved in the sex trade in order to be treated equally with general quality healthcare (The Canadian HIV/AIDS Legal Network & the British Columbia Centre for Excellence in HIV/AIDS (Canadian HIV/AIDS & BC HIV/AIDS) Factum, 2012, ¶ 24). The negative stigma related to being labelled a 'prostitute' allows those without this label to treat those who bear this label as less than average, and without dignity due to their aberrant sexual behaviours. This kind of discriminatory treatment is more than enough to justify the victim status of sex workers, as experts such as John Lowman would argue as part of the effects of the deviant label. However, this victim status is denied to them.

The worker discourse deals with victimization by emphasizing sex work as work like any other job, and hence that sex workers, like everyone else, should be treated as worthy citizens. Instead of protecting sex workers, the laws threaten their safety. By not permitting sex workers to operate indoors, the law effectively prohibits them from having the safe working conditions the rest of us enjoy (Respondent's Factum, ¶ 11). Section 212(1)(j) prohibits sex workers from the protection of a safe working environment as the law restricts sex workers from hiring bodyguards and drivers solely because they are sex workers (Respondent's Factum, ¶ 11). The communicating provision hampers sex workers' ability to negotiate safer sex. Additionally, this law prevents sex workers from properly assessing the violent potential of clients (Canadian HIV/AIDS & BC HIV/AIDS Factum, 2012, ¶ 36). Other professionals such as police officers, airline pilots, and taxi drivers face an integral level of risk as part of their occupation but are provided with the means to mitigate those risks. The inability of sex workers to take basic precautionary measures for protecting their personal safety thereby constitutes an infringement on their personal right to life, liberty and security (Canadian Civil Liberties Association (CCLA) Factum, 2012 ¶ 30). In contrast, the Attorney General of Canada argued that the negative stigma attached to prostitution is caused by the act of selling sexual services and not a result of the laws prohibiting prostitution (Attorney General of Canada Factum, 2012, ¶ 22). The direct effects of these laws are to push sex workers into a vicious cycle of prostitution and engagement with the criminal justice system. The creation and

enactment of these laws perpetually confine sex workers to criminal convictions, which further stigmatizes them and thereby denying them the opportunity for other forms of employment (Women's Coalition Factum, 2012, ¶ 46).

The perceptions that sex workers are holders of disease were not mentioned within the previous discourses. However, as part of the worker discourse presented before the Court of Appeal, the Canadian HIV/AIDS Legal Network and the British Columbia Centre for Excellence in HIV/AIDS emphasize the effects of the law on the health of sex workers. Not only are sex workers able to engage in safer sex without the restrictions set forth in sections 210, 212(1)(j), and 213(1)(c), they also can decrease the health risks associated within their line of work when they are viewed and treated as a member of the work force. Allowing sex workers the time to negotiate the terms of a transaction reinforces the expectation of condom use; allowing sex workers to operate from an indoor setting also further strengthens the prospect of condom use with every transaction (Canadian HIV/AIDS & BC HIV/AIDS Factum, 2012, ¶ 4). If prostitution was decriminalized and regulated like a business, perhaps mimicking the business model implemented in Nevada, sex workers could be protected by the following means:

- a) Prices are negotiated up front while management listens in over an intercom;
- b) Cash is taken up front and brought to a manager, providing the sex worker with an opportunity to communicate any reservations she may have about the client;
- c) Panic buttons are available in every room to call management or set off an alarm if pressed;
- d) The brothel setting prevents clients from leaving very quickly and removes client anonymity; and
- e) After payment and before the sexual encounter, sex workers perform a visual scan for sores or other indications of sexually transmitted infections; if there are issues, the money is returned and the client is asked to leave (Canadian HIV/AIDS & BC HIV/AIDS Factum, 2012, ¶ 16).



Additionally, the laws act as a barrier between social workers and sex workers. Sex workers find it difficult to access health services such as “HIV testing, education, prevention, care, treatment, and support” (Canadian HIV/AIDS & BC HIV/AIDS Factum, 2012, ¶ 23). At the same time, social workers terminate any outreach work due to the enforcement of these laws against sex workers. Street level sex workers are concealed from outreach workers when the police displace them from one street corner to more secluded industrial areas (Canadian HIV/AIDS & BC HIV/AIDS Factum, 2012, ¶ 23). The claim of a displacement effect caused by the enforcement of the communicating provision is discredited by the applicants. The Attorney General of Canada contends that the law itself does not displace street level sex workers because the “*Criminal Code* does not mandate such enforcement decisions;” rather, this displacement is caused by the enforcement decisions of some jurisdictions (Attorney General of Canada Factum, 2012, ¶ 112).

Sex workers are treated unequally as members of society, specifically within the labour force. However, in keeping with the underlying principles of the worker discourse, this discriminatory treatment is a result of denying the sex workers’ social status and their involvement in the sex trade as an occupation. Apart from a stronger emphasis on the health concerns presented to sex workers as the result of criminalization, the fundamental elements that form the worker discourse were present.

### **5.1.1. The Impact of Prostitution Discourses on the Law: The Ontario Court of Appeal’s Decision**

Five Justices comprised the Ontario Court of Appeal panel that heard the *Bedford* appeal; Justices Doherty, Rosenberg, and Feldman for the majority, and Justices MacPherson and Cronk who dissented in part. The deviant and victim discourses dominated the majority’s analysis, whereas, Justices MacPherson and Cronk who dissented regarding the validity of section 213(1)(c) emphasized a crucial underlying notion from the worker discourse. The first part of this analysis will focus on the ruling provided by the majority, followed by Justices MacPherson and Cronk’s reasoning for their disagreement on the ruling regarding the communicating provision.

The focus of Ontario Court of Appeal in the analysis of section 210 was on how the laws actually make sex workers victims by “interfer[ing] with their ability to take steps to protect themselves while engaged in a dangerous activity” that is lawful (*Canada (Attorney General) v. Bedford*, 2012, para. 116). Although the interaction of selling and buying sex is a dangerous activity, the fact that prostitution per se is not illegal does not eliminate the effects of the law endangering the lives of those involved in a legal activity. The majority reasoned

This submission must fail. It implies that those who choose to engage in the sex trade are for that reason not worthy of the same constitutional protection as those who engage in other dangerous, but legal enterprises. Parliament has chosen not to criminalize prostitution. In the eyes of the criminal law, prostitution is as legal as any other non-prohibited commercial activity (*Canada (Attorney General) v. Bedford*, 2012, para. 123).

In recognizing that the concise choice to break the law does not mitigate the connection between the increase risk of harm caused by the law and the prohibited act, the majority ruled the bawdy-house provisions are unconstitutional. In other words, within this sections’ analysis, the deviant was deemed a victim of the effects caused by the exact law that created a categorization of these ‘other’ women. As a result of this infringement to the prostitutes’ security of the person, the Justices ruled in agreement with Justice Himel’s previous finding of striking down this *Criminal Code* section.

A strong emphasis on the victim discourse was found in the analysis of section 212(1)(j). The majority concluded that the legislative objective of the living off the avails provisions was to prevent “pimps from exploiting prostitutes and from profiting from the prostitution of others” (*Canada (Attorney General) v. Bedford*, 2012, para. 239). The objective was far more important than the potential of increasing the likelihood of exploitation by forcing prostitutes “to seek protection from those who are willing to risk a charge under this provision” (*Canada (Attorney General) v. Bedford*, 2012, para. 253). Simply keeping a bad law out of reason that it has a protective objective illuminates on the notion that prostitutes are inevitable victims without recognizing the ways that they are being victimized. However, in recognizing that the law may indeed victimize the population that it intends to protect, the majority found the need to read in specific wording of section 212(1)(j) to include:

Everyone who lives wholly or in part on the avails of prostitution of another person in circumstances of exploitation is guilty of an indictable offence. . . [original emphasis] (*Canada (Attorney General) v. Bedford*, 2012, para. 267).

Similarly focusing on the legislative objective, the majority ruled the importance of section 213(1)(c) in protecting society from the immoral displays of selling sex and the related activities to be more important than personal safety. In that regard, the majority found that the legislative objective of section 213(1)(c) was characterized in the *Prostitution Reference* (1990) as a means “to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex (*Canada (Attorney General) v. Bedford*, 2012, para. 284). The vulnerability of those involved in selling sex is not in dispute. However, the majority for the Ontario Court of Appeal ignored the evidence presented before Justice Himel testifying to the importance in screening clients and negotiating the details to a transaction before the interaction takes place, which helps reduce the occurrences of violence. Believing that prostitutes are incapable of protecting themselves when the client can be unpredictably violent reflects the victim discourse where no action on the part of a prostitute can mitigate the inherently violent act of prostitution. Rebutting the claim of effective screening, the majority reasoned that prostitutes lack the ability to properly assess the danger of clients, especially those who are under the influence of drugs and alcohol (*Canada (Attorney General) v. Bedford*, 2012, para. 312). Therefore in weighing the greater protective value of social nuisance, the majority were satisfied that the communicating provision does not grossly infringe upon the personal safety of prostitutes and accordingly should be saved under section 1 of the *Charter*.

Justices MacPherson and Cronk for the minority agreed with the analysis by the majority on all but one point; they held that the determination of the invalidity of section 213(1)(c), as ruled by Justice Himel should be upheld. In rationalizing this difference in opinion, seven reasons were given to detail the points of which Justices MacPherson

and Cronk disagreed with the majority's analysis<sup>5</sup>, two of which will be the focus of this discussion.

The first of the two reasons for discussion connects to the majority's analysis of the communicating law. Justices MacPherson and Cronk felt that the majority understated the importance of the screening technique because "any measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence . . . involves a grave infringement of that individual's security of the person" (*Canada (Attorney General) v. Bedford*, 2012, para. 360). The majority's reasoning, "because prostitutes' marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given less weight" (*Canada (Attorney General) v. Bedford*, 2012, para. 357), is antithetical to securing safety. In line with the reasoning in the victim discourse, screening or anything that prostitutes do and/or claim to mitigate or avoid violence is futile because nothing can be done to predict unpredictable violent men. However the dissenting Justices argue, from this reasoning, the victims that this law intends to protect are only further victimized because "the communicating provision closes off valuable options that street prostitutes do have to try to protect themselves" (*Canada (Attorney General) v. Bedford*, 2012, para. 360). The street prostitutes being referred in the above quote are those that may not have a choice and cannot work indoors due to various reasons.

The second reason is focused on the notions underlying the worker discourse. The majority reasoned that "the court must examine the effect of that legislation in the world in which it actually operates" in (*Canada (Attorney General) v. Bedford*, 2012, para. 370).

<sup>5</sup> Included in the seven reasons are: 1) the internal discrepancies between the standard applied by the majority to the analysis of gross disproportionality of the communicating provision, compared to their approach to the other two challenged provisions (*Canada (Attorney General) v. Bedford*, 2012, para. 344); 2) the overstated objective of the communicating provision to include associated criminal conducts such as organized crime, public intoxication, and drug possession that are not within the legislative objective (para. 345-346); 3) understated the importance of the screening technique (para. 348); 4) underestimated the significance of the adversely affects to safety by displacement (para. 351); 5) understated the effects of the law that increase the unique vulnerability of prostitutes (para. 354); 6) failure to see the parallel between the present case and the PHS case on the reasoning for section 7 violation (para. 363); 7) failed to take into account "the world in which street prostitutes actually operate" in that increase the levels of violence that they face on a day to day basis (para. 372).

Unfortunately, this principle fell short in the analysis of section 213(1)(c) as the dissenting Justices reasoned

The world in which street prostitutes actually operate is the streets, on their own. It is not a world of hotels, homes or condos. It is not a world of receptionists, drivers and bodyguards. The world in which street prostitutes actually operate is a world of dark streets and barren, isolated, silent places. It is a dangerous world, with always the risk of violence and even death (*Canada (Attorney General) v. Bedford*, 2012, para. 371-372).

This is a very important point because the worker discourse argues that in order to understand the dynamics of prostitution, there is the need to treat everyone as unique and not place every sex worker under the same umbrella (Nagel, 1997). The assumption that street level prostitutes will survive given the changes to the other two prostitution prohibiting provisions, neglect to acknowledge that street prostitutes are denied the only useful tool to screening potential violent clients by the communicating law, that will remain deeply problematic even with the other challenged provisions altered.

As a result of this split decision, both parties were allowed to appeal to the Supreme Court. The appeals from both parties were accepted by the Supreme Court for hearing.

## **5.2. The Portrayal of the Victim, Deviant, and Worker before the Supreme Court of Canada**

“Prostitution is a practice of sex inequality” (Women’s Coalition Factum, 2013, ¶ 2). This statement as it was presented before the Supreme Court of Canada expresses the essence of the victim discourse. All other arguments within this discourse supplement this core notion. Many interveners represent and advocate “for women and girls who are or have been prostituted, who are criminalized and incarcerated in relation to prostitution, who are trying to escape prostitution, who are targeted for prostitution, and who have been subject to male violence, including prostitution” (Women’s Coalition Factum, 2013, ¶ 1).

That one statement embodies a number of implications. Note, first, how women and girls are again collapsed into one social class. Females are the only victims and are relegated to a victim status. Men on the other hand cannot be victims, but are cast as violent and labelled as abusers. This notion is deeply rooted in gender inequality and traditional gender roles of females being motherly, caring, nurturing, submissive, and weaker than men; whereas men are believed to be strong, capable, figureheads, and leaders. Lastly, the use of the term 'escape' alludes to confinement and captivity; prostitutes do not leave prostitution so much as break free from it.

Risk is believed to be inherent to prostitution, and therefore no matter where prostitution takes place it can become violent (Attorney General of Canada Factum, ¶ 17). Regardless of the working environment and whether working alone or with others, harm is unavoidable because the johns who interact with prostitutes on a daily basis are the root of violence (Attorney General of Ontario Factum, 2013, ¶ 94). In other words, "attempting to direct men's demand for prostitution to particular locations does not reduce harm when it is the demand itself that causes harm" (Women's Coalition Factum, ¶ 18). The only way these risks can be properly mitigated is with the restrictions available through the laws, which act as a deterrent and discourage prostitution-related behaviour (Attorney General of Canada Factum, 2013, ¶ 69).

The Attorneys General of Canada and Ontario believe that the evidence regarding safer indoor prostitution locations is inconclusive. Although the dangers associated with prostitution may be mitigated in an indoor setting when compared to street-level prostitution, violence does occur in indoor locations. From the tone and terminology used by the Attorneys General and their supporting interveners, unless risks are eliminated, it does not meet their threshold of supporting indoor locations as a safer option (Attorney General of Canada Factum, 2013, ¶ 75). Comparable to the reasoning presented in the previous appeal case, johns can unpredictably turn violent and therefore no amount of screening or security measures can prevent an unpredictable situation (Women's Coalition Factum, 2013, ¶ 15).

Similar to the victim discourse found in the Appeal court, allowing women to work indoors only acts as a cover up for violence, confinement, and sex trafficking (Attorney

General of Canada Factum, 2013, ¶ 119; Attorney General of Ontario Factum, 2013, ¶ 92). Private locations like the home or a brothel harbour violence and other crimes difficult for the police to detect because the activities are hidden from the public. The notion that having a client come to the homes and/or working place of prostitutes gives them a “home field advantage” is a false conception because in social reality, the home is a dangerous place fostering domestic abuse (AWCEP Factum, ¶ 21). Therefore, the Attorneys Generals argue that the bawdy-house provisions are needed for the police to have a gateway into targeting the associated crimes that are hidden from police and the public (Attorney General of Canada Factum, 2013, ¶ 119; Attorney General of Ontario Factum, 2013, ¶ 92).

Screening by way of communicating with a john is not an essential tool for safety because it is not infallible. Some believe that there will be someone who cannot afford to reject a john even though they may perceive them as dangerous. The Women’s Coalition testifies that,

Even assuming that one woman could reject a john she fears will harm her, the risk of harm would simply be displaced onto another woman who cannot afford to refuse. Women with the least relative privilege in terms of age, class, disability, Aboriginality or race are more likely to endure and less able to refuse the most dangerous and brutalizing kinds of prostitution, whether indoor or outdoor (Women’s Coalition Factum, 2013, ¶ 16).

Therefore, advocates upholding the victim discourse argue that the prostitution related laws are more for protection than a factor negatively affecting their personal safety. Despite these three provisions being struck down, prostitutes would still be at risk of violence and exploitation at the hands of johns and pimps (Attorney General of Canada Factum, 2013, ¶ 100).

In contrast to the two previous levels of court, a distinctive emphasis was placed upon solutions involving diversion programs for prostitutes and johns. Division programs for johns aid in “changing the attitudes of johns by educating them about the realities of prostitution and the harms it imposes on prostitutes and communities” (Attorney General of Canada Factum, 2013, ¶ 24). These programs are offered to deter johns from engaging in the purchase of sex again. On the other hand, programs for prostitutes

assist them to exit prostitution. A way in which prostitutes can be diverted to exit programs is through their arrest by law enforcement (Attorney General of Canada Factum, 2013, ¶ 23). Both programs are claimed to be successful in (1) deterring johns and (2) helping victims of prostitution escape from prostitution and start a new life. However, neither of the programs in which the johns and prostitutes take part can be said to involve the exercise of pure free will. Specifically, for prostitutes, they may not be ready to exit but are persuaded to choose the diversion program over incarceration or other criminal penalties (Attorney General of Canada Factum, 2013, ¶ 23). The interesting part of these claims is where the prostitute is seen as a victim needing rescue from having no choice to sell their body to again not being able to choose when and how to leave the sex industry. Without the will to exit, the ultimate success of the programs is in question, and the impression of the program and associated agencies in the minds of prostitutes will likely remain negative.

The deviant discourse posits the decision to engage in prostitution as a choice. The Attorney General of Ontario argues that “personal choices to engage in particular commercial activities are not protected under section 7” (Attorney General of Ontario Factum, 2013, ¶ 22). From the view that the decision to break the law is made out of a conscious choice, criminal provisions that do not provide measures against all possible harms should not be found to be in breach of security of the person (Attorney General of Canada Factum, 2013, ¶ 15). For example, the communicating provision allows prostitutes to communicate with each other to allow the exchange of information such as licence plates and the identification of violent johns, as well as encouraging them to be cautious of one another’s safety (Attorney General of Canada Factum, 2013, ¶ 25). However, this rationalization simply ignores the victim status that the law creates.

As opposed to the previous deviant discourses presented in the lower courts, instead of direct victims caused by the law, at the Supreme Court level, sex workers have been viewed as victims of social forces. Identical to the previous claims within the victim discourse that a violent john who is feared by one prostitute may be displaced to another woman who cannot afford to reject him, the social factors that lead to these women being less privileged are not viewed as exacerbated by the law. Instead of claiming that screening clients is an ineffective self-defence method because there is a



chance that someone less fortunate will be unable to refuse a violent client, the victim status in the deviant discourse focuses on the reasons why the prostitute carries a less fortunate status in the first place. Social factors including age, disability, class, and race are the causes that resulted in these women being on the streets (Women's Coalition Factum, 2013, ¶ 16). Regardless of the severity and quantity of these social factors, the focus is on containing the problem of prostitution. By choosing to ignore these larger social pushes and pulls that caused an individual to turn to prostitution, the deviant discourse disregards the responsibility of society's influence and allows those who are members of the lowest status in society's hierarchy to be forgotten.

Alternatively, the victim status found in the deviant discourse is attributed to the community where prostitution exists. Residents of neighbourhoods where prostitution occurs experience "noise, impeding traffic, children witnessing acts of prostitution, harassment of residents, problems associated with drug use, unsanitary acts, violence, unwelcome solicitation of women and children by customers, and unwelcome solicitation of male residents by prostitutes" as harms associated with prostitution (Attorney General of Ontario Cross Factum, 2013, ¶ 34). Apart from polluting the community with prostitution-related crimes, selling and buying sex is seen as a defilement of the community. In the words of the Christian Legal Fellowship, Catholic Civil Rights League, and Real Women of Canada prostitution "degrades the community" (CLF – CCRF – RWC Factum, 2013, ¶ 3). The best method for avoiding all associated harms is for prostitutes to comply with the law and refrain from being involved in prostitution (Attorney General of Ontario Cross Factum, 2013, ¶ 15).

Within the deviant discourse, the victim status is attributed to social factors whereas the victim status in the worker discourse is attributed to the law. Laws should not force an individual to choose between obedience to the law and risk to their own lives arising from breaking the law (Bedford, Lebovitch, & Scott Factum, ¶ 13). The laws ultimately label individuals as offenders. This label denotes disobedience, deviance, and possibly a horrific deed, but ultimately the label serves as a punishment to the individual who broke the law. This process of punishment and labelling may be rightfully situated for most, if not all, criminal conduct, but in the instance of prostitution, this label extends further than being the mark of a lawbreaker. For instance, the prohibition on

communicating for the purposes of prostitution signals sex workers as a less deserving population who are “not entitled to discuss fundamental matters [like] health, safety and dignity in public before she engages in a sexual activity with a client” (British Columbia Civil Liberties Association Factum, ¶ 33). Depriving sex workers of the right to personal safety simply because of the kind of work they engage in, also denies their basic rights as humans.

As the discourses presented to the two lower courts implies, the law stigmatizes and inhibits the safety of sex workers. Even applying the adjustments made to the prostitution laws from the Ontario Court of Appeal, street level sex workers continue to be the population targeted by the laws. The Ontario Court of Appeal’s decision to uphold the communicating provision while striking down the bawdy-house laws creates a scenario where certain street level sex workers continue to be prosecuted while those who have the means to work indoors escape scrutiny (Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, & HIV&AIDS Legal Clinic Ontario Factum, ¶ 15). In fact, the kind of speech prohibited by these laws can be likened to the same type of dialogue happening between adults in bars, parks, restaurants, and streets, across Canada on a daily basis (British Columbia Civil Liberties Association Factum, ¶ 27). The bodily integrity shared between both the conversation at the bar and the discussion between a sex worker and a client includes:

. . .negotiation of condom use; assessment of a potential partner’s sexual desires and preferences; assessment of a potential sexual partner’s propensity for violence; assessment of a potential sexual partner’s level of soberness; the proposed location for a sexual encounter; and ensuring consent prior to engaging in sexual activity (British Columbia Civil Liberties Association Factum, ¶ 27).

These key components are overlooked, but remain the key factors in preventing rape, violent sexual assaults, and even murder in both the commercial and non-commercial sexual context.

Another way in which the law targets street level sex workers in a discriminating manner is related to their autonomy, health and safety of the person. The Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, & HIV&AIDS Legal Clinic Ontario argue that simple rights, including the right to access

health care services and the ability to control one's working environment, are either taken away or seen as a result of the sex worker's lack of self-sufficiency (Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, & HIV&AIDS Legal Clinic Ontario Factum, ¶ 7). The impediment to accessing health care services was mentioned in the previous worker discourse from the Ontario Court of Appeal, where sex workers feel restricted by stigma from equal treatment by health care providers. Additionally, the displacement effect of the communicating law makes it difficult for social outreach workers to find and provide health care and information to street level sex workers (Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, & HIV&AIDS Legal Clinic Ontario Factum, ¶ 7). The denial of sex workers' rights to negotiate the details to a sexual transaction, forfeits their control of the working environment, and eliminates their ability to set the terms of conditions under which they will work.

Despite the fact that sex workers' are viewed as citizens with autonomy, who are able to make choices about engaging in prostitution, the recognition that choice exists on a continuum is hardly noted. Aside from Dr. John Lowman, who described choice as existing on a spectrum, the range of choice that exists in the sex trade is rarely mentioned. Choice may be more limited among street level sex workers, as opposed to high-end escorts. For example, Aboriginal people are overrepresented within the street level sex worker population who engage in prostitution for survival purposes (Aboriginal Legal Services of Toronto Inc. (ALST) Factum, ¶ 7). Their vulnerability is in part a result of the impacts of colonialism pushing them to the margins of society (ALST Factum, ¶ 8). Colonialism has dispossessed Aboriginal people of their land, language, culture, and status (Women's Coalition Factum, 2013, ¶ 6). In this sense, survival sex workers, including Aboriginal people "do choose to prostitute, but they make that choice in a set of social conditions they did not choose" (ALST Factum, ¶ 23). It is this difference in choice and circumstances that must be recognized in order to protect those who truly need to be protected, while respecting the decisions of those who are exercising their free will.

Sex workers' voices need to be included in the conversations around improving working conditions, legislation, regulations, and services (Nagel, 1997). Only those

directly affected can fully understand the extent of the effects of discrimination, oppression, racism, sexism, and stigmatization (Secretariat of the Joint United Nations Programme on HIV/AIDS Factum, ¶ 19). Regrettably, sex workers' voices are routinely ignored. Until sex workers are treated with dignity and as an equal member of society, the harms identified in this case will persist.

### **5.2.1. The Final Determination: The Supreme Court's Interpretation**

The Attorneys General of Canada and Ontario appealed the Ontario Court of Appeal's decision on the bawdy-house provision and the living off the avails provision as unconstitutional. Meanwhile, Bedford et al., cross-appealed regarding the constitutionality of the communicating provision found in section 213(1)(c) (*Canada (Attorney General) v. Canada*, 2013, ¶ 36). The main question to be assessed in the section 7 analysis is "whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7" (*Canada (Attorney General) v. Canada*, 2013, ¶ 123). In order for a breach to be established, it must be determined that there is an absence of connection between the purpose of the law and the section 7 deprivation, and that the deprivation severely impacts an individual such that the deprivation violates fundamental norms (*Canada (Attorney General) v. Canada*, 2013, ¶ 108).

Arbitrariness, overbreadth, and gross disproportionality are the three principles of fundamental justice that were used to determine whether these laws breached the right to life, liberty, and security of the person. The first principle of fundamental justice is addressed by determining "whether there is a direct connection between the purpose of the law and the impugned effect on the individual" (*Canada (Attorney General) v. Canada*, 2013, ¶ 111). The principle of overbreadth is concerned with whether the law in question has no rational connection between the law's purposes and some of its impacts on the individual (*Canada (Attorney General) v. Canada*, 2013, ¶ 112-113). Lastly, the rule of gross disproportionality determines the balance of the seriousness of the effect(s) of the law on the individual as opposed to the purpose of the law (*Canada*

(*Attorney General*) v. *Canada*, 2013, ¶ 120-121). To further explain the analysis of these three components, the Supreme Court stated:

All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative (*Canada (Attorney General) v. Canada*, 2013, p. 1105).

Establishing a breach of section 7 to one person is sufficient for the law to be ruled unconstitutional as the question that section 7 asks is whether *anyone's* right to life, liberty, and security has been denied (*Canada (Attorney General) v. Canada*, 2013, p. 1105).

As a result of the Supreme Court's analysis being heavily founded upon the applicability of the section 7 interpretations to the challenged provisions, there was an absence of the emotional jargon used to describe discourse-related arguments as compared to the previous levels of court. Additionally, there was an absence of the victim discourse in the Supreme Court analysis. The deviant and the worker discourses were not directly mentioned, however, they, too, were referenced within the legal analysis. Similar to the reasoning presented by the Appeal Court Justices, the Supreme Court judges also found that the law exposed those selling sex to greater danger regardless of the direct effects of harm that are caused by pimps and johns (*Canada (Attorney General) v. Canada*, 2013, ¶ 89). The Supreme Court Justices reasoned

It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence (*Canada (Attorney General) v. Canada*, 2013, ¶ 89).

Opposed to this reasoning, the law denies the victim status of prostitutes as argued in the deviant discourse. The difference in this analysis as compared to the previous level of court is the recognition of these adverse effects caused by the laws and the intolerance in allowing these laws to continually victimize the population these laws intend to protect.

The notion that sex workers should be treated with dignity, equally with the rest of society is essential to the worker discourse. Although “parliament has the power to regulate against nuisances,” and other disruptive behaviour, regulation should not be “at the cost of the health, safety, and lives of prostitutes” (*Canada (Attorney General) v. Canada*, 2013, ¶ 136). The Supreme Court’s recognition of how the impugned laws adversary effect sex workers’ rights attest to the fact that this population should be viewed as worthy humans, deserving of dignity. Sex workers may be victims, but they should not be treated as less human simply because the law so labels them to be. Regardless of the legislative objectives and intentions of the law, laws that are in violation of our basic values, for example by endangering or increasing the risk of harm to individuals engaged in a lawful activity, should not be kept as valid law. As a result, all nine judges found the three provisions to be inconsistent with *Charter* rights and therefore invalid (*Canada (Attorney General) v. Canada*, 2013, ¶164).

## Chapter 6.

### Discussion and Conclusion

This chapter will begin with a discussion on Canada's legislative approach to prostitution after the *Bedford* ruling. Recommendations regarding areas that the law should address and a section raising recommendations for future studies will follow the discussion of Canada's new approach to prostitution. Lastly, a section outlining the limitations of this study will follow.

#### 6.1. The Canadian Approach to Selling and Buying Sex

The *Protection of Communities and Exploited Persons Act*, also known as Bill C-36, was introduced before parliament in early June of 2014 by Justice Minister Peter MacKay (Mas, 2014). This bill was parliament's response to the Supreme Court's ruling of the *Bedford* case. On 6, November 2014 this Bill was granted Royal Assent and came into full force thirty days later on 6, December 2014. The overall objective of this bill is to abolish prostitution by prohibiting the buying of sex and discouraging participation in the selling of sex. Bill C-36 makes it illegal to buy sex, to sell sex in or next to a daycare centre, school ground, or playground, to obtain a material gain from sexual services, and to advertise sexual services<sup>6</sup>. The intention to achieve this objective and the justification for these prohibitions arises from the goals listed in the preamble:

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

<sup>6</sup> The courts have yet to define the meaning of 'sexual services'.

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution (*Bill C-36*, 2014).

From the introduction of this bill, the objectives conform to the victim discourse where prostitutes are seen as victims in need of protection from exploitation inherent in prostitution and the focus is to punish the abusers who exploit these victims.

Additionally, this Canadian approach mimics the legal regime currently implemented in Sweden, the Swedish/Nordic model.

The new laws do not specifically target street-level sex work, and hence would also apply to those who work indoors. In fact, the term 'prostitution' and 'prostitute' are not used to describe the activity of buying and selling or those who sell sex. Instead, the phrase "anyone who offers or provides sexual services for consideration" is used to refer to those who sell sex, and "sexual services" is used to describe the activity of buying and selling sex (*Criminal Code*, 1985, ss. 213 & 286). Although the terminology has changed from the label of 'prostitute' to a phrase, the dialog is still directed at those selling sex. In the discussion below, the term 'sex worker' and 'prostitution' or 'prostitute' will be used interchangeably. The terms 'prostitute' and 'prostitution' are used to refer to the change from the previous *Criminal Code* sections that contrast with the new laws. Although the term 'sex worker' is not used within this Bill, it is used in this analysis simply to refer to someone who sells sex.

The difference between the new laws and the laws that were challenged in *Bedford* is in the wording of the law. Stopping and impeding traffic, communicating for the purposes of prostitution, keeping a common-bawdy house, and living off the avails of prostitution all remain illegal. However, the wording of each offence is adapted to the objectives mentioned in the previous paragraph. The purpose of the bawdy-house provisions were changed from pertaining to "the purpose of prostitution" to "for the practice of acts of indecency" (*Criminal Code*, 1985, s.210). Although the definition of



indecenty has yet to be determined by the courts, the elimination of the word 'prostitution' does not exclude prostitution as an act of indecenty. To stop or impede traffic in a public place or anywhere open to public view for "the purpose of offering, providing or obtaining sexual services for consideration" is the current wording for the offence in section 213(1). The wording encompasses both clients and prostitutes, because the wording criminalizes both the purchase of sex and the sale of sex. Additionally, section 213(1.1) criminalizes anyone who communicates for the offering of providing sexual services in or next to a daycare centre, playground, or school ground. Essentially, the difference between section 213(1.1) and the previous communicating provision, is in the more specific wording of where communicating for the purpose of sexual services would be illegal. Specifically, section 213(1.1) states:

Everyone is guilty of an offence punishable on summary conviction who communicates with any person – for the purpose of offering or providing sexual services for consideration – in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Although the specifics of what is included in terms of "next to" have yet to be determined by the courts, this specific section goes back to criminalizing prostitutes as offenders and contradicts the Supreme Court's ruling of how this law continually endangers the lives of those selling sex. Despite the persistence of the worker discourse in the Supreme Court's ruling, this new legislation centers upon the deviant discourse by continually labelling those who sell sex, who are therefore not conforming to the moral standards of society, as offenders.

The new section added to the *Criminal Code* related to prostitution, is section 286.1. Essentially, this section pertains to the commodification of sexual activity, and prevents the buying of sex (s. 286.1). The provisions following this prohibition detail the offences of receiving financial or other material benefit from sexual services (s. 286.2), procuring (s. 286.3), and the advertising for sexual services (s. 286.4). It is an offence to communicate with "anyone for the purpose of obtaining for consideration, the sexual services of a person" (s. 286.1(1)). These laws confine to the victim discourse, by targeting those who purchase sex because it is seen as a form of exploitation. Anyone in any place who obtains or communicates for the purpose of obtaining sexual services

for consideration is guilty of buying or attempting to buy sex, and is guilty of an offence that is punishable by a minimum of a \$500 fine, if prosecuted by summary conviction, and a maximum punishment of imprisonment for no more than five years; if the accused is charged indictably (s. 286.1 (1)). The punishment is more severe if the offence is committed in any place “where persons under the age of 18 can reasonably be expected to be present” (s. 286.1 (1)(a)(i)). Similar to the Nordic model, this new Canadian approach prohibits the purchase of sex with the goal of abolishing prostitution by targeting the demand for sex. Coincidentally, these laws suggest that everyone selling sex is a victim, presumably because no one would freely choose to sell their body. Once again, sex workers are generalized under one definition without exceptions.

The former section of living off the avails of prostitution was struck down by the Supreme Court and is no longer in the *Criminal Code*. However, section 286.2 is targeted towards those who receive a material benefit from sexual services, essentially replacing the repealed *Criminal Code* section of living off the avails. Specifically, this section states,

Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

In the absence of evidence proving the contrary, a person who “lives with or is habitually in the company of a person who offers or provides sexual services for consideration” is sufficient proof of an individual materially benefiting from another’s earnings from selling sex (s.286.2(3)). Exceptions to those who may legally benefit from the earnings of a sex worker include the sex workers themselves, anyone in a legitimate living arrangement with a sex worker, those who benefit under a legal or moral obligation, those who offer services or goods to the general public, and those who do not offer services or goods to the general public but do not encourage or instruct another to sell sexual services and the benefit derived is proportionate to the value of the good or service provided (s. 286.2 (4)).

On the one hand, this new law appears to conform to the Supreme Court’s *Bedford* ruling on the previous living off the avails of prostitution prohibition. Instead of

broadly criminalizing all relationships, this new law criminalizes exploitative relationships. In doing so, legislators have defined for sex workers what kind of relationships they are permitted to have. This control, exercised by the government, strips sex workers' autonomy and decides what relationships are permitted and what is unacceptable, ultimately controlling their lives. These restrictions not only decide for sex workers who they may associate with, but conclusively force them to work in isolation.

Section 286.3(1) prohibits procuring of any person, while subsection (2) lists the penalties for procuring an individual under the age of 18. The pre-*Bedford* section on procuring was combined with the living off the avails provision, and as an indictable offence, the maximum penalty of imprisonment was set at no more than ten years. The new procuring offence sets a maximum penalty of imprisonment for a term not exceeding 14 years, and imposes a mandatory minimum term of five years imprisonment.

Advertising to provide sexual services is made illegal under section 286.4 of the *Criminal Code*. Section 286.4 states,

Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than five years; or (b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.

The advertisement of sexual services, as outlined in section 164(8) of the *Criminal Code*, includes “photographic, film, video, audio or other recording, made by any means, a visual representation or any written material”. However, sex workers themselves are permitted to advertise “their own sexual services” (s. 286.5(1)(a)). Although this provision does not make it illegal to work indoors, it does restrict the viability of conducting business indoors and may ultimately make indoor work impossible as clients are unable to access and purchase sexual services. John Lowman stated in his cross-examination that, eliminating the opportunities to advertise sexual services online would potentially force sex workers to resort back to finding clients on the street (Trial Tr. 8 May, 2009 ¶ 558). Lowman explains that taking away the opportunity to meet clients through the internet, away from public view, resulted in an interesting effect of expanding street level prostitution, which was observed following an attempt to stop sexual

advertising on Craigs list in the United States (Trial Tr. 8 May, 2009 ¶557). Since the new laws in Canada prohibit public communication for the purpose of obtaining or selling sexual services, a reasonable inference of what could result from these new laws is the creation of an underground industry.

Apart from the shift towards seeking to abolish prostitution by focusing on diminishing the demand for sex through criminalizing the buying of sex, the government also aimed to treat sellers of sex as victims of sexual exploitation. Justice Minister Peter MacKay stated that sellers of sex would now be treated as “victims who need assistance in leaving prostitution and not punishment for the exploitation they’ve endured” (Levitz, 2014). In an effort to encourage the exit of sex workers from the sex industry, the government has announced it will allot \$20-million over a five-year period to assist sex workers in exiting the sex trade (Blanchfield, 2014). The bill also proposes a “comprehensive review of the provisions and operation” of the new laws within five years of its implementation (*Bill C-36*, 2014, s. 45.1(1)). In the name of protection, the government and the results of these laws repeatedly decide the status of those who sell sex.

Not only will the report and review of Bill C-36 be interesting, the enforcement of this new regime, and how these laws will be interpreted and withstand constitutional challenges before the courts is also intriguing. The introduction of Bill C-36 had already brought about much controversy among sex workers and their supporters who demonstrated across Canada, stating that these new laws go beyond the restrictions of the previous laws (Beaumont, 2014; Smith, 2014; Swift, 2014). On the other hand, advocates for criminalization believe these new laws are a good starting point, but they do not go far enough to protect victims of sexual exploitation (Smiley, 2015). John Ivison, a writer for the *National Post*, in expressing the differing views on these new laws, wrote,

For the prohibitionist it doesn't go far enough; for those who would prefer decriminalization it goes too far. And for anyone who is concerned about the rule of law, it simply repeats the shortcomings of the old prostitution law, struck down by the Supreme Court in the *Bedford* case (Ivison, 2014).

Despite the opposing views, an important factor to consider is how these laws affect the intended population. The pivotal focus of the *Bedford* case was on how the prostitution-related offences make the working environment for sex workers more dangerous. However, these new laws, as with the pre-*Bedford* laws, continue to endanger sex workers' lives by criminalizing their sexual behaviour, defining their identity, status, who they may associate with, and denying their rights to safer working conditions.

The current laws classify only those who claim to self-identify as a victim to be worthy of help, requiring them to first assert that they need protection. Alluding to the debate on choice, this sense of protection is exclusively reserved for victims of sexual exploitation. In addition to showing a need for protection, individuals must have the desire to leave the sex industry to receive the benefit of this legislation. From the perspective of this bill, the desire to leave is recognized as the only freely chosen decision made by sex workers. Other decisions, whether they be the decision to enter into prostitution, the choice of where to obtain clients, which clients to accept, and other day to day choices are perceived as if they are decisions made on behalf of sex workers'. It may seem as though the government is controlling and/or containing prostitution and sex trafficking, but in fact they may very well be forcing the sale of sex further underground by criminalizing the ways in which prostitution can be conducted; in turn causing prostitution to be more clandestine, and thereby increasing rather than decreasing prostitutes' vulnerability.

Despite the intention of these new provisions to protect victims, sex workers are still punishable on summary conviction under section 213 if found communicating in a public place for the purpose of offering sexual services. The revised wording of the related *Criminal Code* sections does not increase the level of safety experienced by sex workers post-*Bedford*. Sex workers are still forced to work in isolated areas and in secrecy to avoid detection by law enforcement. Section 213 continues to force sex workers to rush their negotiations on the street, and section 286.4 restrains the potential of working indoors, where it is arguably safer. In other words, the compared effects of the current laws and the pre-*Bedford* prostitution related laws are at the very least equally detrimental to sex workers, if not more destructive. Essentially, the worker discourse is non-existent and sex workers' voices continue to be silenced.

## 6.2. Disregarding the ‘Worker’ and Acknowledging the ‘Victim’ and ‘Deviant’

Throughout the material examined in this thesis, the emphasis was predominantly situated upon the victim ideology. The law attempts to protect the victims of sexual exploitation, but in fact is likely to create victims by criminalizing sex workers. Under the law, victims require protection and justice in order to redress the victimization that was experienced. Without supporting evidence of experiencing injustice inflicted by a minimum of one tangible third party, any claim of victimization is unwarranted, even possibly seen as self-inflicted. This double standard for who may be labelled and treated as a victim is permitted by ignoring the worker discourse.

Discourse analysis reveals the power to control the freedom of others and to influence the cognitive perceptions of people. Controlling freedom and influencing cognitive perceptions are clearly matters that are within the ability of parliament. The inclination of some parties to favour the victim and deviant discourse may also be a political result. Protecting the weak and being tough on crime apparently wins over voters in political elections. Most importantly, having similar political platforms enable countries to be allies. A perfect example of this is the *Trafficking Victims Protection Act* (2000) implemented by the United States of America, which rates and places countries on a tier system based on their efforts to reduce the demand for commercial sex and sex tourism (U.S. Department of State, 2014a). The rankings are important because the U.S could withhold or withdraw foreign assistance and funding to countries not ranked in Tier 1 (U.S. Department of State, 2014b).

Making informed decisions are only accepted as free choices when the decision is made to break the law or exit prostitution. Women bearing the label of a prostitute, a sex worker, or having some sort of involvement in the sex industry, are essentially treated differently from non-sex workers. For being sexually active, sex workers are treated as “other” (McLaughlin, 1991, p.250). The discriminatory treatment of sex workers by law enforcement, as explained by evidence presented in the *Bedford* case, demonstrates how sex workers are segregated. Society, in general, also treats sex workers as ‘others’ by viewing them as a source of nuisance, being problematic, and

even as garbage or a threat to morality. These views are, however, arguably influenced by the law (Baldwin, 1992). The law distinctively divides the identity of 'prostitute' from 'other women' by classifying appropriate behaviour and differentiating it from deviant behaviours associated with prostitution-related activities. The creation of this 'other' label generates stigma which "legitimize[s] the denial of rights and privileges, including the right to protection and criminal justice redress" (Bruckert & Hannem, 2013, p. 310).

Alluding to popular rape culture belief, women who make themselves sexually available are viewed as undeserving of protection because they put themselves at risk (Doe, 2013). In regard to this social and political mentality, Jiwani and Young (2006) observed that:

within this economy, racialized status, such as Aboriginality, interlocks with prostitution to position those women in the lower echelon of a moral order . . . [and] the stereotypical attributes ascribed to both of these positions feed into and reproduce common-sense notions of itinerant and irresponsible behaviour, which is then seen as naturally inviting victimization (p. 902).

Insinuating an undeserving attitude is one way of justifying the use of laws to prohibit sexual behaviours. Linking prostitution to other categories of crime, not only connects prostitution with other social ills, but reinforces the 'deviant' identity to these women.

The tendency to exclude sex workers' voices is not a new phenomenon (McGinnis, 1994; Stremler, 1994). Within the sex trade, a woman can be either a whore or a victim, nothing in between (Baldwin, 1992). Choosing to prostitute is perceived as a threat to women's liberation (Chapman, 2001). By denying the fact that sex can be a source of empowerment, the worker status is easily disregarded. As a woman, being in control and empowered do not fit into the available statuses of 'whore' or 'victim' and therefore simply cannot be accepted as reality. The emphasis placed on the victim and deviant discourses, evident through the enactment of Bill C-36, constructs the identity of the prostitute as "always and already victims" (Phoenix, 2002, p. 367). Due to the fact that sexually active women behave in ways that depart from societal expectations of the way in which women are to interact with money and sex, their opinions and experiences are invalidated (Monét, 1997). On the contrary, compared to the testimony of victims of sexual exploitation the weight placed upon the testimony of sex workers before the courts was minimal, if any, and constructing the knowledge of their lives was left to

others. All too often, portrayals of agency and choice are perceived as a delusion in light of drug addiction, alcoholism, and prior sexual abuse. The important point is not to disregard these factors, but to acknowledge that these factors are not inevitable, and their influence may only be a small portion of the greater reason(s) why these women are in their present situation. Understanding prostitution as a one-dimensional phenomenon of being a victim or a whore only permits “turning a deaf ear to those who disagree with [prominent] politics [indicating] that [we] may be lacking vital pieces of information” (Grant, 1997, p. 243).

A disturbing hypocrisy is repeated by the laws, where those who conform to the victim identity garner sympathy and are protected as victims, whereas those who reject their victim identity and continue their involvement in the activity of selling sex are punished and criminalized (Phoenix, 2002). Without fully understanding the dynamics of prostitution and addressing the many underlying social issues that cause women, men, transgender individuals, and children to be involved in the sex trade, there seems to be no capacity for recognizing the role of agency in the struggle to control prostitution. Phoenix (2002) goes on to explain that condensing prostitution to an alternative form of child abuse glosses over the political, ideological, and economic context of child and adolescent prostitution. Bittle’s (2013) point that “absent this recognition, abuse and exploitation through prostitution become something to confront and control, not an indication of larger structural problems that require transformation” (p. 287), explains the connection, or as others would argue, the lack of connection between the goals and the possible effects of the current laws.

Responding to sex workers’ needs of a safe working environment, access to non-discriminatory health care, reduction of negative social stigma, and poverty is one way of beginning to address the larger structural problems that Bittle (2013) describes as needing attention. Addressing sex trafficking apart from prostitution is a second method that should be used in conjunction with addressing the needs of sex workers’. Although there is a link between sex trafficking and prostitution, in actuality they are two different problems that require different solutions. Katrin Roots (2013) describes this vagueness between sex trafficking laws and prostitution laws as resulting from the “lack of distinguishing between pimping and trafficking” (p. 24). The continuation of repeating a



certain discourse, in this case the victim or deviant discourse, shapes a certain ideology that may or may not become reality, and therefore influence our understanding of sexual exploitation and the implementation of ineffective policies and legislation (Denton, 2009). Conflating the two issues together is similar to constructing women and children in the same category in the discussion of sex. Monet (1997) describes the hypocrisy of those who claim to be the public voices of exploited victims who have “the gall to claim respect for all women and turn around and treat sex workers like children who didn’t know any better and needed to be protected whether they wanted to be or not” (p. 221). By treating women as children, the attribution of volitional choice for women is diminished and women can thereby easily be characterized as exploited, regardless of whether this reflects reality.

Regardless of the terminology used in describing prostitution, the definitions for the relevant concepts in the realm, the type of crimes that are linked to prostitution, and the solutions that are proposed, do not derive from the experiences of all sex workers, and accordingly are only of limited value. Repeatedly shown through this thesis is the need to accept the diversity of experiences of those involved in the sex trade and the need to find a solution that can encompass and remain respectful of this assortment of experiences. Hugill (2010) described two benefits when the experiences of sex workers’ are acknowledged.

First, it recognizes that sex workers understand the conditions of their own lives in a far more developed way than any outsider observer possibly could; it avoids the condescending presumptiveness of those who imagine street-involved women as “dehumanized” and “powerless” victims incapable of comprehending what is in their own best interests. Second, it ensures that political demands are defied by the people that would be affected by their realization (p. 102).

The need for sex workers’ voices are echoed in the words of Deborah Brock, “when we treat prostitution as a social problem, relying uncritically on knowledge derived from ‘authoritative’ sources like the police, the courts, and the media, we unwittingly participate in the silencing, marginalization, and control of prostitutes” (Brock, 1998, p. 12). A solution for the problems associated with prostitution will not be reached until the variation in experiences of sex workers, including, women, children, men, transgender, and homosexuals are acknowledged and the voices of sex workers are heard.

### **6.3. Limitations**

The themes developed in the analysis section of this thesis are limited to the themes identified in the discourse of the testimony provided by the main experts in the *Bedford* case. Although, social workers, police officers, and sex workers provided testimony before the court, Justice Himel relied heavily upon the evidence of the main experts in the reasoning of her *Bedford* decision. Therefore, the analysis of this study focused on the main experts. The differences or changes in the discourse from the trial court through the appeal courts could be due to changes in the nature of the submissions. Although the issues before the courts remained relatively the same, the evidence tendered was not the same through each level of court. In the trial court, the focus was upon how the main experts described prostitution. The evidence tendered before the appeal court was from the interveners, alongside what was provided by the appellants and respondents. The diversity of the materials submitted at different court levels may account for the minimal differences in the discourse used in the two appeal courts, and the slight difference between that found in the trial court compared to the appeal courts.

There are many ways in which a discourse analysis can be conducted (Aleson & Karreman, 2000). The definition of discourse analysis also varies. Inconsistency in the process of conducting a discourse analysis can be a considerable threat to validity. For clarification on the type of discourse analysis being conducted for this study, definitional understanding of how a discourse analysis was implemented in this thesis was provided in chapter 3. The process of how themes were coded has also been provided for further clarity. Discourse can continue to change as it is examined and redefined by social structures (Fairclough, 1992). Therefore, the need for continuous interpretation and evaluation are vital in understanding the relationships between language and social practice.

### **6.4. Conclusion**

Language is a very powerful tool in constructing the knowledge of a subject. The intentional use of certain terms, the way in which something is defined and described, as

well as information not included in the discussion, all contribute to the construction of supposed version(s) of truth. The purpose of this study was to critically investigate the way in which prostitution was presented in the *Bedford* case by way of conducting a discourse analysis. Three dominant discourses were identified, namely the victim discourse, the deviant discourse, and the worker discourse, with each providing opposing views on the issue of prostitution. All three discourses approach the issue of prostitution with a different solution. Targeting the buyers of sex is arguably the best solution according to experts who support the victim discourse, which assumes that prostitution is violence against women and should be rightfully viewed as sexual exploitation. Recognizing the fluidity of the right to choice and agency, supporters of the worker discourse regard legalization as the best solution to address prostitution. Proponents concluding that prostitution is morally wrong, submit that criminalization is the only method of maintaining the moral fabric of society. However, others claim that the deviant label actually causes sex workers to become victims of negative social stigma and results in diminishing their basic human rights. Therefore, decriminalizing prostitution would allow the return of basic human rights to sex workers.

The greatest problem into this controversy rests upon the refusal to accept the various lived experiences of selling sex. Traditionally inscribed notions of gender roles and gender inequality produce a focus on the need to control prostitution. By focusing on the demand for prostitution (e.g. through the implementation of the Nordic Model in Sweden and the current Canadian Model) addressing the real issues underlying prostitution are ignored. The continual framing of this phenomenon as either black or white hardly assist in gaining a better understanding of the issues that this population faces. Silencing of sex workers' voices who do not fit into the victim or deviant discourses not only sustain and propels this controversy but also inhibit the implementation of a favorable solution.

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