

2012

Modern Courts and the Oldest Profession: The Litigious Development of Legalized Brothels in Ontario and Nevada

Margaret Davis

Follow this and additional works at: <http://lawcommons.luc.edu/pilr>



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Margaret Davis, *Modern Courts and the Oldest Profession: The Litigious Development of Legalized Brothels in Ontario and Nevada*, 18 Pub. Interest L. Rptr. 66 (2012).

Available at: <http://lawcommons.luc.edu/pilr/vol18/iss1/12>

This Feature is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Public Interest Law Reporter by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

FEATURE ARTICLE

**MODERN COURTS AND THE
OLDEST PROFESSION: THE
LITIGIOUS DEVELOPMENT OF
LEGALIZED BROTHELS IN
ONTARIO AND NEVADA**

by MARGARET DAVIS

A recent study examining global prostitution laws revealed that 61% of 100 studied countries allow some form of legal prostitution.¹ The United States and Canada both fall within this majority, but both countries place strict limits on prostitution.² In the U.S., prostitution is only legal within a



licensed brothel in one of twelve counties in Nevada.³ In Canada, prostitution laws are in a state of flux following *Bedford v. Canada*, a recent decision by the Supreme Court of Ontario. In March of 2012, an appellate court affirmed a lower court's ruling that certain parts of the Criminal Code, such as a ban on brothels, are unconstitutional.⁴ This case has the potential to reframe Canadian prostitution laws. On October 25, 2012, the Supreme Court of Canada announced that it will hear the final appeal of the case.⁵

A BRIEF HISTORY OF LEGAL PROSTITUTION IN CANADA

Even before the *Bedford* decision, the exchange of money for consensual sex was not illegal, *per se*, in Canada.⁶ However, the Canadian Criminal Code prohibits many activities that are related to prostitution, making it difficult to engage in prostitution without violating one of these provisions.⁷ For example, it is illegal to work in a "bawdy house" (brothel),⁸ to solicit for sexual services,⁹ or for an individual to profit from the prostitution of another (such as a pimp, brothel owner, or security guard).¹⁰

Three plaintiffs, Terrie Bedford, Annie Lebovitch, and Valerie Scott, filed suit against the Attorney Generals of Canada and Ontario, and the case was heard by the Superior Court of Justice in October of 2009.¹¹ The plaintiffs sought to

show that three sections of the Criminal Code are unconstitutional.¹² The “bawdy house provision” found in section 210, prohibits people from owning or entering brothels or from regularly engaging in prostitution in a certain location, such as one’s home.¹³ The “living on the avails” provision in 212(1)(j) bans profiting from the prostitution of another individual.¹⁴ Finally, section 213(1)(c) outlaws communication (solicitation) of sexual acts for money, in public.¹⁵

The plaintiffs argued that these provisions violate various sections of the Canadian Charter of Rights and Freedoms, part of the Canadian Constitution.¹⁶ Most notably, the plaintiffs argue that these provisions violate Section 7, which ensures the right to life, liberty, and security.¹⁷ The plaintiffs’ argued that the criminal code has the effect of prohibiting prostitution in its safer forms, while permitting its most dangerous manifestations.¹⁸ In other words, “the cumulative effect of the legislative scheme may actually exacerbate the social problems caused by the prostitution,” and this is a violation of an individual’s Section 7 rights.¹⁹ The judge in the Supreme Court of Justice agreed with the plaintiff’s argument, and the appellate court affirmed.²⁰

All three of the plaintiffs have worked as prostitutes in the past.²¹ Two of the three women reported experiencing more violence when working on the streets than in brothels or in their homes.²² Since the bawdy house provision prevents individuals from using these indoor locations, prostitutes are pushed into the potentially more dangerous conditions of the streets.²³

In analyzing this claim, the lower court considered a wide range of sources including expert testimony about human trafficking, studies on violence against prostitutes, The Fraser Report, which “mapped the ideological landscape, and philosophical and ethical traditions” surrounding prostitution, the Department of Justice’s synthesis report, which reviewed the effects of past legislation on street prostitution, and the plaintiff’s own stories.²⁴ The court also studied a variety of countries where legal brothels exist, including the United States.²⁵ The decision discusses the efficacy of different methods used by Nevada brothels to keep their prostitutes safe, such as having a panic button in each room and allowing management to monitor monetary negotiations between prostitutes and clients.²⁶ The breadth and depth of the court’s consideration of international sources seems to point to a desire to make a decision that benefits the well-being of prostitutes and the Canadian community as a whole.

The next issue is the “living on the avails” provision, which forbids anyone from living partially or wholly off the profits of a prostitute.²⁷ Plaintiffs argue that their safety is jeopardized by this provision, because it renders them unable to hire security guards for protection, managers to screen clients in advance, or drivers to escort them safely.²⁸ The appellate court agreed and felt that this provision should only ban people from benefiting from prostitution in an exploitive manner.²⁹

DEVELOPMENT OF LEGAL PROSTITUTION IN NEVADA

In the United States, brothels are legal in only one state: Nevada. Nevada was granted statehood in 1864, and the newly formed Nevada State Legislature passed laws that permitted cities to regulate their own brothels and prostitution laws.³⁰ In 1942, Clark County (home of Las Vegas) attempted to shut down a local brothel, deeming it a public nuisance.³¹ The resulting lawsuit went to the Nevada Supreme Court, which upheld Clark County’s right to close the brothel.³² The court’s reasoning centered on county supremacy in local governmental matters, and the state’s inability to infringe upon that authority.³³ Five years later, in *Cunningham v. Washoe County*, the Nevada Supreme court explained that state laws on prostitution are simply a foundation on which counties are permitted to build.³⁴

The Nevada State Legislature took up the issue in 1971 by enacting a ban on brothels for any county with a population in excess of 200,000.³⁵ At that time, only one county exceeded that total, but the cap has since been increased to 400,000, and two counties are currently over the limit (those encompassing Las Vegas and Reno).³⁶

The tide changed in 1978 when the Nevada Supreme Court overruled its previous decision in the *Cunningham* case.³⁷ This time, the court explained that the statute enacted in 1971 rendered counties unable to close a brothel under the guise of nuisance.³⁸ However, Counties have since been permitted to shut down brothels under alternative theories.³⁹ For example, the Nevada Supreme Court allowed Lincoln County to shut down a brothel in 1980 because regulating and overseeing the brothel was too much of a burden for the county.⁴⁰

In recent years, the number of brothels in operation in Nevada has fluctuated between 25 and 35.⁴¹ Most authority to regulate brothels is left to individual

counties.⁴² Some counties have chosen to permit them in only rural areas, and other counties simply retain the right to use their discretion in permitting individual brothels, deciding on a case by case basis.⁴³

COMPARISON: ONTARIO AND NEVADA

Except for the province of Quebec, which operates under Civil Law, Canada has a fairly similar court system to that of the U.S.⁴⁴ A Canadian Supreme Court Ruling has similar precedential value over the provinces of Canada, as a comparative United States Supreme Court decision has over the states.⁴⁵ In both Nevada and Ontario, litigation has led to legalized brothels (although the Canadian system is in flux, awaiting a Supreme Court determination). The way in which courts arrived at these decisions, and the reasoning that the court used to rationalize this legalization, has been very different.

Both courts considered the specificity of certain provisions. The Ontario court did this in regards to the “living on the avails” prohibition. The plaintiffs felt that by banning all people who live wholly or partially on the avails of prostitutes, it was eliminating not only those who exploit sex workers, but also those who could ensure the safety of sex workers—a notion that the court agreed with.⁴⁶ The Nevada Supreme Court also heard a case alleging that the ban on solicitation was overly broad. This court agreed, but based the decision on procedural grounds and not on policy ramifications.⁴⁷

The Ontario case and a few Nevada cases have discussed nuisance theories. The Nevada court did a more thorough consideration of nuisance, and historically used nuisance law as a means for counties to shut down brothels.⁴⁸ Many of these Nevada decisions were concerned with nuisance deriving from the physical building of the brothel, its location in the community, and the negative effects of its presence there.⁴⁹ In the *Bedford* decision, the Ontario court discussed nuisance, but in relation to solicitation by prostitutes, and concluded that legalizing brothels could be beneficial because solicitation would then occur within the brothel, not on the streets.⁵⁰

Regarding communication, the Nevada courts took a First Amendment standpoint, debating whether or not it should be legal to advertise brothels in the counties where they illegal.⁵¹ The Ontario court primarily discussed communication from an on-street solicitation standpoint.⁵² This court said the status

quo puts sex workers in a more dangerous position, since they had to retreat to hidden or dangerous places to do their negotiations, and because they often hurried through negotiations for fear of getting caught.⁵³ The hurried nature meant prostitutes did not have ample time to screen the client or to ensure that they felt safe in the transaction.⁵⁴ While communication and solicitation was considered by both Ontario and Nevada courts, Nevada was more concerned with the relationship between counties, whereas Ontario's court discussed the in-county effect.

Overall, the Ontario court framed its *Bedford* decision from a policy standpoint, advocating for the safety of sex workers and from an overall community health standpoint. It also considered many external and international sources, and attempted to maximize practicality and safety. In contrast, the Nevada court has focused on the legal theories by which a particular county can allow or ban a brothel, the problems that a brothel can cause to the community it surrounds, and the relationship between county and state lawmaking prerogatives. Although the Ontario Supreme Court will have the ultimate say on the legality of Ontario's brothels, the discussion that has been prompted by the *Bedford* decisions thus far provides an interesting comparison for how two different legal systems can arrive in a similar place through very different means.

NOTES

1 Ronald Weitzer, *Why Prostitution Should be Legal*, CNN (Apr. 23, 2013), <http://globalpublicsquare.blogs.cnn.com/2012/04/23/why-prostitution-should-be-legal/>.

2 *Id.*

3 ALEXA ALBERT, BROTHEL: MUSTANG RANCH AND ITS WOMEN 42 (2001).

4 *Bedford v. Canada*, 2012 ONCA 186 ¶ 374 (Can. Ont. C.A.).

5 *Canada's Top Court Lets Prostitution Challenge Proceed*, REUTERS CANADA (Oct. 25, 2012), <http://ca.reuters.com/article/domesticNews/idCABRE89O11L20121025>.

6 Heather Morton, Carolin Klein, and Boris Gorzalka, *Attitudes, Beliefs, and Knowledge of Prostitution and the Law in Canada*, 54 CANADIAN JOURNAL OF CRIMINOLOGY & CRIMINAL JUSTICE (Apr. 2012), http://muse.jhu.edu/journals/canadian_journal_of_criminology_and_criminal_justice/v054/54.2.morton.html.

7 James Robertson, *Prostitution* (Sept. 19, 2003), <http://publications.gc.ca/collections/Collection-R/LoPBdP/CIR/822-e.htm>.

8 CANADA CRIMINAL CODE, R.S.C. . ch. C-46 §§ 210-211.

9 Robertson, *supra* note 7.

10 R.S.C. . ch. C-46 § 212(1)(j).

11 *Bedford v. Canada*, 2012 ONCA 186 ¶¶ 10-12, 25 (Can. Ont. C.A.).

12 *Id.* ¶ 3.

- 13 *Id.*
- 14 *Id.*
- 15 *Id.*
- 16 *Bedford*, 2012 ONCA 186 ¶ 4.
- 17 *Bedford v. Canada*, 2012 ONCA 186 ¶ 4 (Can. Ont. C.A.).
- 18 *Id.* at 18.
- 19 *Id.* ¶ 37.
- 20 *Id.* ¶ 374.
- 21 *Id.* ¶¶ 10–12.
- 22 *Bedford v. Canada*, 2010 ONCA 4264 ¶¶ 26–43 (Can. Ont. C.A.).
- 23 LAURA BARNETT AND JULIA NICOL, PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS, FEDERAL LAW ,AND PROVINCIAL AND MUNICIPAL JURISDICTIONS, LIBRARY OF PARLIAMENT (Apr. 30, 2012), http://publications.gc.ca/collections/collection_2012/bdp-lop/bp/2011-119-eng.pdf.
- 24 *Bedford v. Canada*, 2012 ONCA 186 ¶¶ 97, 139, 150 (Can. Ont. C.A.).
- 25 *Id.* ¶¶ 178–213.
- 26 *Id.*
- 27 R.S.C. . ch. C–46, § 212(1)(j).
- 28 Max Waltman, *Ontario Disempowers Prostituted Persons: Assessing Evidence, Arguments, & Substantive Equality in Bedford v. Canada*, 2012, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091216.
- 29 *Bedford*, 2012 ONCA 186 ¶ 6.
- 30 Daria Snadowsky, *The Best Little Whorehouse is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEVADA LAW JOURNAL 217.
- 31 *Kelley v. Clark County*, 127 P.2d 221, 224 (Nev. 1942).
- 32 *Id.*
- 33 Snadowsky, *supra* note 30, at 221.
- 34 *Cunningham v. Washoe County*, 203 P.2d 611 (Nev. 1949).
- 35 Elizabeth and James Vorerberg, *The Biggest Pimp of All*, THE ATLANTIC, 2012, <http://www.theatlantic.com/magazine/print/1977/01/the-biggest-pimp-of-all/305057>.
- 36 Snadowsky *supra* note 30.
- 37 *Nye County v. Plankinton*, 587 P.2d 421 (Nev. 1978).
- 38 *Id.*
- 39 *Kuban v. McGimsey*, 605 P.2d 623, 627 (Nev. 1980).
- 40 *Id.*
- 41 Barry McKenna, *Nevada brothel’s ‘shady’ deal: Come often, get free gas*, SAN FRANCISCO CHRONICLE (July 4, 2008), <http://www.sfgate.com/news/article/Nevada-brothel-s-shady-deal-Come-often-get-3206795.php>.
- 42 Snadowsky, *supra* note 30.
- 43 *Id.*
- 44 Interview with Dr. Barry Sullivan, Loyola University of Chicago School of Law Professor, in Chi., Ill. (Oct. 2012).
- 45 *Id.*
- 46 *Bedford v. Canada*, 2012 ONCA 186 ¶ 6 (Can. Ont. C.A.).
- 47 *Ford v. State*, 262 P.3d 1123 (Nev. 2011).
- 48 *Kelley v. Clark County*, 127 P.2d 221, 224 (Nev. 1942).
- 49 *Kuban v. McGimsey*, 605 P.2d 623, 627 (Nev. 1980).
- 50 *Bedford v. Canada*, 2010 ONCA 4264 (Can. Ont. C.A.).
- 51 *Princess Sea Indus. v. State*, 102 S.Ct. 1972 (1982).

52 *Bedford*, 2012 ONCA 186 ¶ 364.

53 *Bedford v. Canada*, 2012 ONCA 186 ¶ 312(Can. Ont. C.A.)

54 *Id.* ¶ 312.