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Canada (Attorney General) v. Bedford, 2012 ONCA 186 (CanLII)

Date:	2012-03-26
Docket:	C52799; C52814
URL:	http://canlii.ca/t/fqqwq
Citation:	Canada (Attorney General) v. Bedford, 2012 ONCA 186 (CanLII), <http://canlii.ca/t/fqqwq> retrieved on 2013-10-15
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COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Attorney General) v. Bedford, 2012 ONCA 186
DATE: 20120326
DOCKET: C52799 and C52814

Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.

BETWEEN

Attorney General of Canada

Appellant

and

Attorney General of Ontario

Appellant

and

Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Respondents

Michael H. Morris, Gail Sinclair, Mathew Sullivan and Roy Lee, for the appellant Attorney General of Canada

Jamie C. Klukach, Christine E. Bartlett-Hughes and Megan Stephens, for the appellant Attorney General of Ontario

Alan N. Young, Daniel Sheppard, Sabrina Pingitore, Ron Marzel and Stacey Nichols, for the respondents Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Robert W. Staley, Derek J. Bell, Ranjan K. Agarwal and Stephen N. Libin, for the interveners, Christian Legal Fellowship, Catholic Civil Rights League, Real Women of Canada

Linda R. Rothstein, Michael Fenrick and Andrew Lokan, for the intervener Canadian Civil Liberties Association

Fay Faraday and Janine Benedet, for the interveners Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action Ontarienne Contre la Violence Faite aux Femmes, La Concertation des Luttes Contre L'Exploitation Sexuelle, Le Regroupement Québécois des Centres d'Aide et de Lutte Contre les Agressions à Caractère Sexuel, and Vancouver Rape Relief Society (the "Women's Coalition for the Abolition of Prostitution")

Joseph Arvay and Katrina Pacey, for the interveners Providing Alternatives Counselling and Education Society, Downtown Eastside Sex Workers United Against Violence Society, Pivot Legal Society

Renée Lang, for the intervener Canadian HIV/AIDS Legal Network

Jonathan Shime, for the intervener British Columbia Centre for Excellence in HIV/AIDS

Brent B. Olthuis and Megan Vis-Dunbar, for the intervener British Columbia Civil Liberties Association

Cynthia Petersen, Charlene Wiseman, Leslie Robertson and Karin Galldin, for the interveners POWER and Maggie's

Heard: June 13-17, 2011

On appeal from the judgment of Justice Susan G. Himel of the Superior Court of Justice dated September 28, 2010, with reasons reported at 2010 ONSC 4264 (CanLII), 2010 ONSC 4264, (2010), 102 O.R. (3d) 321 (S.C.).

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CONCLUSION

MacPherson J.A. (Dissenting in part):

Doherty, Rosenberg, and Feldman JJ.A.:

[1] For decades, and even for centuries, governments around the world have grappled with prostitution and its associated problems. Some have opted for an outright ban. Others have chosen to decriminalize and regulate certain aspects of prostitution. Still others have criminalized the purchase, but not the sale, of sex.

[2] In Canada, prostitution itself is legal. There is no law that prohibits a person from selling sex, and no law that prohibits another from buying it. Parliament has, however, enacted laws that indirectly restrict the practice of prostitution by criminalizing various related activities.

[3] At issue in this case is the constitutionality of three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which form the core of Parliament's response to prostitution:

1. Section 210, which prohibits the operation of common bawdy-houses. This prevents prostitutes from offering their services out of fixed indoor locations such as brothels, or even their own homes;

2. Section 212(1)(j), which prohibits living on the avails of prostitution. This prevents anyone, including but not limited to pimps, from profiting from another's prostitution; and

3. Section 213(1)(c), which prohibits communicating for the purpose of prostitution in public. This prevents prostitutes from offering their services in public, and particularly on the streets.

[4] In the court below, the application judge held that these provisions are unconstitutional and must be struck down because they do not accord with the principles of fundamental justice enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms*. She reasoned that the challenged laws exacerbate the harm that prostitutes already face by preventing them from taking steps that could enhance their safety. Those steps include: working indoors, alone or with other prostitutes (prohibited by s. 210); paying security staff (prohibited by s. 212(1)(j)); and screening customers encountered on the street to assess the risk of violence (prohibited by s. 213(1)(c)).

[5] As we will explain, we agree with the application judge that the prohibition on common bawdy-houses for the purpose of prostitution is unconstitutional and must be struck down. However, we suspend the declaration of invalidity for 12 months to give Parliament an opportunity to redraft a *Charter*-compliant provision.

[6] We also hold that the prohibition on living on the avails of prostitution infringes s. 7 of the *Charter* to the extent that it criminalizes non-exploitative commercial relationships between prostitutes and other people. However, we do not strike down that prohibition, but rather read in words of limitation so that the prohibition applies only to those who live on the avails of prostitution in circumstances of exploitation. This cures the constitutional defect and aligns the text of the provision with the vital legislative objective that animates it.

[7] We do not agree with the application judge's conclusion that the ban on communicating in public for the purpose of prostitution is unconstitutional, and we allow the appeal on that issue.

[8] The application judge's decision has been subject to a stay pending further order of this court. As we will explain, we extend the stay for 30 days from the date of the release of these reasons so that all parties can consider their positions. The practical effect is:

- The declaration of invalidity in respect of the bawdy-house provisions is suspended for one year from the date of the release of these reasons.
- The amended living on the avails provision takes effect 30 days from the date of the release of these reasons.
- The communicating provision remains in full force.

[9] One important point before we begin. Prostitution is a controversial topic, one that provokes heated and heartfelt debate about morality, equality, personal autonomy and public safety. It is not the court's role to engage in that debate. Our role is to decide whether or not the challenged laws accord with the Constitution, which is the supreme law of the land. While we have concluded that some aspects of the current legislative scheme governing prostitution are unconstitutional, it remains open to Parliament to respond with new legislation that complies with the requirements of the *Charter.*

BACKGROUND

The parties

[10] Terri Jean Bedford is a 52-year-old woman who has worked as a prostitute[1] in various Canadian cities, including Calgary, Vancouver, Windsor and Toronto. Over the years she has worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. She hopes to resume work as a dominatrix if this litigation is successful. She is not currently working as a prostitute.

[11] Amy Lebovitch is a 33-year-old woman who has worked as a prostitute in Montreal, Ottawa and Toronto. She has worked as a street prostitute, as an

escort, and in a fetish house. She currently works independently as a prostitute out of her own home. She has taken courses in criminology and psychology at the University of Ottawa and in social work at Ryerson University.

[12] Valerie Scott is a 53-year-old woman who has worked as a street prostitute and a massage parlour attendant. She has also worked independently from her home and in hotels. She is currently the executive director of Sex Professionals of Canada, a group that advocates for the decriminalization of prostitution offences. Like Ms. Bedford, she would like to resume working as a prostitute in an indoor location if this litigation is successful.

The constitutional challenge

[13] Ms. Bedford, Ms. Lebovitch and Ms. Scott (the "respondents") brought an application in the Superior Court of Justice under rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194,[2] seeking a declaration that ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code* are unconstitutional. The relevant parts of those sections provide:

> 210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
>
> (2) Every one who
>
> (a) is an inmate of a common bawdy-house,
>
> (b) is found, without lawful excuse, in a common bawdy-house, or
>
> (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,
>
> is guilty of an offence punishable on summary conviction.
>
> 212. (1) Every one who
>
> …
>
> (j) lives wholly or in part on the avails of prostitution of another person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

> 213(1) Every person who in a public place or in any place open to public view
>
> …
>
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute
>
> is guilty of an offence punishable on summary conviction.

[14] The *Criminal Code* provides definitions for some of the words in these provisions in s. 197(1):

> "common bawdy-house" means a place that is
>
> (a) kept or occupied, or
>
> (b) resorted to by one or more persons
>
> for the purpose of prostitution or the practice of acts of indecency;
>
> "prostitute" means a person of either sex who engages in prostitution;
>
> "public place" includes any place to which the public have access as of right or by invitation, express or implied.

[15] In addition to the definition provided in s. 197(1), s. 213(2) defines "public place" as including "any motor vehicle located in a public place or in any place open to public view."

[16] The practical effect of these provisions is that there is only one way to sell sex in Canada without risking criminal sanction. This is what is referred to as "out-call" work, where a prostitute meets a customer at an indoor location such as a hotel room or the customer's home.

[17] "In-call" work, where the prostitute services customers from a fixed indoor location such as her[3] home or a commercial brothel, is prohibited by the bawdy-house provisions.

[18] Although providing sexual services to customers encountered on the street is not itself illegal, communicating the willingness to provide such services is prohibited by the communicating provision. Street prostitution is therefore effectively illegal.

[19] Finally, the prohibition against living on the avails of prostitution targets anyone who provides goods or services to prostitutes, because they are prostitutes. This encompasses not only pimps who exploit prostitutes for their own purposes, but anyone who derives profit from the prostitution of others. This makes it illegal for a prostitute to pay someone to protect her, or to assist in any aspect of her work as a prostitute.

[20] The respondents argued that these provisions deprive them of the right to life, liberty and security of the person protected by s. 7 of the *Charter*, that the deprivation does not accord with the principles of fundamental justice, and that the provisions cannot be justified under s. 1. They also argued that the communicating provision violates the guarantee of freedom of expression in s. 2(b) of the *Charter* and cannot be justified under s. 1. Those sections of the *Charter* state:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of … expression
>
> ….
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The government's response

[21] The Attorney General of Canada, supported by the intervener the Attorney General of Ontario,[4] opposed the application on two principal grounds. First, the Attorney General argued that the Supreme Court's decision in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), coupled with the principle

of *stare decisis* (the doctrine of binding precedent), prevented the application judge from considering or reconsidering the constitutionality of the bawdy-house and communicating provisions (ss. 210 and 213(1)(c)). In the *Prostitution Reference*, the Supreme Court held that both of these provisions did not violate the *Charter*.

[22] Second, in the event that the application judge decided that the *Prostitution Reference* was not binding, the Attorney General submitted that the respondents failed to meet their evidentiary burden of proving a violation of their s. 7 rights. The Attorney General argued that the challenged laws do not create the risk to prostitutes; rather, the risk to prostitutes is inherent in the nature of prostitution itself.

The evidence on the application

[23] The application record in this case comprised over 25,000 pages of evidence in 88 volumes. Much of the evidence was in the form of affidavits, and cross-examination on some of those affidavits, tendered by people affected by prostitution. The witnesses included current and former prostitutes, police officers, a Crown attorney, a representative of an organization that seeks to improve the safety and work conditions of prostitutes and to assist them in leaving the occupation, a politician concerned about the victimization of street prostitutes, and a journalist who has written extensively on the sex trade.

[24] The parties also tendered extensive expert evidence on the social, political and economic dimensions of prostitution inCanada, as well as many government studies – federal, provincial and municipal – that have been produced in the last 25 years. Finally, the parties tendered evidence regarding the social and legal context of prostitution in several foreign jurisdictions, including the Netherlands, Germany, Sweden, Australia, New Zealand and the United States.

THE APPLICATION JUDGE'S DECISION

[25] The application judge heard evidence and argument over seven days in October 2009, and released her judgment the following September. Her reasons, which total 541 paragraphs, provide a full accounting of the facts and the evidence before her. Accordingly, we will not repeat the application judge's work, and will refer to the record only as needed to address the legal issues raised on the appeal.

Preliminary matters: standing and *stare decisis*

[26] The application judge dealt with two preliminary matters before turning to the merits of the constitutional challenge. First, she held that all the respondents had private interest standing to challenge the three provisions of the *Criminal Code*. In so holding, the application judge rejected the Attorney General of Canada's attempt to distinguish between Ms. Lebovitch, who currently works

as a prostitute, and Ms. Bedford and Ms. Scott, both of whom worked as prostitutes in the past and wish to return to this type of work in the future.

[27] Second, the application judge acknowledged, at para. 66, that the Supreme Court's decision in the *Prostitution Reference*was "*prima facie* binding on this court" with respect to the bawdy-house and communicating provisions. Nevertheless, she concluded, at para. 75, that she was not foreclosed from hearing the application because "the issues argued in this case are different than those argued in the *Prostitution Reference*."

Legislative objectives

[28] After summarizing the voluminous evidence tendered on the application, the application judge discussed the legislative objectives of the three challenged provisions of the *Criminal Code*.

[29] Relying principally on *R. v. Rockert*, 1978 CanLII 31 (SCC), [1978] 2 S.C.R. 704, the application judge stated, at para. 242, that the objectives of the bawdy-house provisions (i.e. the definition of "common bawdy-house" in s. 197(1) and the prohibition in s. 210) are combating neighbourhood disruption or disorder, and safeguarding public health and safety.

[30] Relying principally on *Shaw v. Director of Public Prosecutions*, (1961) [1962] A.C. 220 (H.L.), and *R. v. Downey*, 1992 CanLII 109 (SCC), [1992] 2 S.C.R. 10, the application judge held, at para. 259, that the prohibition on living on the avails of prostitution (s. 212(1)(j)) is aimed at "preventing the exploitation of prostitutes and profiting from prostitution by pimps."

[31] Relying exclusively on the *Prostitution Reference*, and in particular Dickson C.J.'s reasons, the application judge held, at para. 274, that the objective of the communicating provision (s. 213(1)(c)) is "to curtail street solicitation and the *social* nuisance which it creates" (emphasis in application judge's reasons).

Section 7 of the *Charter*: life, liberty and security of the person

[32] Citing *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, and the *Prostitution Reference,* the application judge held, at para. 281, that "[t]he availability of imprisonment [i.e. a deprivation of liberty] for all of the impugned provisions is sufficient to trigger s. 7 scrutiny". After a careful review of the competing expert evidence on this point, the application judge also held that the challenged provisions engage the respondents' security of the person. This conclusion rested on three related findings.

[33] First, prostitutes in Canada face a high risk of physical violence, though the application judge noted that most of the evidence on this point related to street prostitutes (para. 293).

[34] Second, the risk of violence can be reduced, although not necessarily eliminated, if prostitutes are able to take basic precautions such as working indoors, being in close proximity to people who can intervene if needed, taking time to screen customers, having regular customers, and planning an escape route (paras. 300-301).

[35] Third, the challenged provisions prevent prostitutes from taking precautions that can reduce the risk of violence. The application judge explained at paras. 361-362:

> With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.
>
> In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.

Section 7 of the *Charter*: principles of fundamental justice

[36] Having found that the challenged provisions contribute to a deprivation of the respondents' liberty and security of the person, the application judge considered whether the deprivation accorded with the principles of fundamental justice. In particular, she analysed whether or not the challenged provisions, separately or together, are arbitrary or overbroad, or if their effects are grossly disproportionate to their legislative objectives.

[37] The application judge held that the prohibition on bawdy-houses is not arbitrary in and of itself because it is directed toward the legislative objectives of combating neighbourhood disruption or disorder, and safeguarding public health and safety. However, she held, at para. 385, that the prohibition is arbitrary when it is considered in concert with the other challenged provisions, because the cumulative effect of the legislative scheme may actually be to exacerbate the social problems caused by prostitution.

[38] The application judge went on to hold that the bawdy-house prohibition is overbroad because it catches not just large-scale commercial establishments, but also prostitutes working discreetly and independently out of their own homes (paras. 400-401). She further held that s. 210 is grossly disproportionate because, while the evidence demonstrated that nuisance complaints arising from bawdy-houses are rare, the bawdy-house prohibition has a drastic impact on the respondents' security of the person by preventing them from working in the relative safety of a permanent indoor location (paras. 427-428).

[39] The application judge then considered the prohibition against living on the avails of prostitution under s. 212(1)(j), and concluded that it violates all three principles of fundamental justice under consideration. The reasoning underpinning her conclusions was the same in relation to each principle of fundamental justice. In essence, the application judge held that while the prohibition against living on the avails of prostitution is targeted at pimps who exploit the prostitutes under their control, the provision is so broad that it encompasses anyone who provides business services to prostitutes, because they are prostitutes. It therefore captures not just pimps, but drivers, bodyguards, and others who could protect prostitutes from harm. This forces prostitutes to choose between working alone, which increases their vulnerability, or working with people willing to risk a charge under s. 212(1)(j), which potentially puts them at the mercy of the very people the law targets in the first place: pimps (paras. 379, 402, and 432-434).

[40] Turning to the ban on communicating in public for the purpose of prostitution in s. 213(1)(c), the application judge found that the provision is sufficiently connected to the objective of combating social nuisance as to be neither arbitrary nor overbroad. However, she concluded that by forcing street prostitutes to forego screening customers, which she found to be an "essential tool" to enhance prostitutes' safety, the effect of the law is grossly disproportionate to its goal of curbing problems such as noise and congestion caused by street prostitution (paras. 432-439).

[41] Finally, the application judge determined that since the effects of all the challenged provisions are grossly disproportionate to their legislative objectives, none could be upheld as a reasonable limit under s. 1 of the *Charter*.

Section 2(b) of the *Charter*: freedom of expression

[42] Applying the *Prostitution Reference*, the application judge declared that the communicating provision constituted a *prima facie* infringement of s. 2(b) of the *Charter*.

[43] Departing from the *Prostitution Reference* because of "the changed context" in the 20 years since that case was decided, the application judge concluded that the communicating provision could not be saved by s. 1 of the *Charter*. She explained, at para. 471:

> In my view, as a result of the changed context, the impugned provision can no longer be considered to be sufficiently tailored to its objective and does not meet the minimal impairment test. The expression being curtailed is not purely for an economic purpose, but is also for the purpose of guarding personal security, an expressive purpose that lies at or near the core of the guarantee.

Remedy

[44] The application judge declared that all three of the challenged provisions are unconstitutional. Applying the principles set down in *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, she struck down the living on the avails and communicating provisions (ss. 212(1)(j) and 213(1)(c)). She struck down the prohibition on bawdy-houses for the purpose of prostitution by striking the word "prostitution" from the definition of "common bawdy-house" in s. 197(1). This remedy did not affect the prohibition on bawdy-houses for "acts of indecency", as the respondents had not challenged this aspect of the law. It also left intact other, unchallenged provisions of the *Criminal Code* that reference common bawdy-houses for purposes of prostitution, such as the procuring and concealing offences in s. 212(1)(b), (c), (e) and (f).

Stay of the application judge's decision

[45] The application judge stayed her decision for 30 days, later extended for a further 30 days. This stay was continued through orders of this court and remained in effect until further order.

THE GOVERNMENTS' APPEAL

[46] The Attorney General of Canada, joined by the Attorney General of Ontario, raise the following issues on appeal:

1. Do Ms. Bedford and Ms. Scott have standing to bring the constitutional challenge?

2. Are the respondents precluded from challenging the constitutionality of the bawdy-house and communicating provisions (ss. 210 and 213(1)(c)) by the decision of the Supreme Court in the *Prostitution Reference*, coupled with the principle of *stare decisis*?

3. Does the communicating provision (s. 213(1)(c)) infringe s. 2(b) of the *Charter*?

4. If the answer to question (3) is 'yes', is this provision saved by s. 1 of the *Charter*?

5. Do the challenged provisions deprive the respondents of the right to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*?

6. If so, does the deprivation accord with the principles of fundamental justice?

7. If the answer to question (6) is 'no', are these provisions saved by s. 1 of the *Charter*?

8. If any of the three challenged provisions is unconstitutional, what is the appropriate remedy?

[47] Twelve organizations were granted intervener status on this appeal. Five interveners or groups of interveners supported the application judge's decision. One group of interveners opposed it. One intervener representing several different women's organizations advocated for the asymmetrical criminalization of prostitution (i.e. prohibiting the purchase, but not the sale, of sex) as an alternative to these positions.

Issue 2: Are the respondents precluded from challenging the constitutionality of the bawdy-house and communicating provisions (ss. 210 and 213(1)(c)) by the decision of the Supreme Court in the *Prostitution Reference*, coupled with the principle of *stare decisis*?

[51] The Attorney General of Canada contends that the application judge was bound by the *Prostitution Reference* and erred by departing from that binding precedent to consider the constitutionality of the bawdy-house provision (s. 210) and the communicating provision (s. 213(1)(c)). The Attorney General of Canada does not dispute that it was open to the application judge to consider the constitutionality of the living on the avails provision (s. 212(1)(j)), which was not at issue in the *Prostitution Reference*.

[52] As we will explain, 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.

The 1990 Prostitution Reference

[53] In the *Prostitution Reference*, the Supreme Court was asked to consider whether s. 193 (now s. 210) and s. 195.1(1)(c) (now s. 213(1)(c)) of the *Criminal Code*, separately or together, violated s. 2(b) or s. 7 of the *Charter* and, if so, whether those violations could be justified under s. 1. The entire court found that s. 195.1(1)(c), the communicating offence, infringed s. 2(b) of the *Charter*. Chief Justice Dickson, for the majority, upheld the provision as a reasonable limit on expression under s. 1 of the *Charter,* whereas Wilson and L'Heureux-Dubé JJ. found that the provision was not sufficiently tailored to its objective to be saved under s. 1.

[54] With respect to s. 7, all six judges held that both the bawdy-house and communicating provisions infringe the right to liberty because of the potential for imprisonment. Five judges found it unnecessary to address the question whether s. 7 protects people's economic liberty to pursue their chosen professions. Justice Lamer discussed this issue in his concurring reasons.

[55] With respect to the principles of fundamental justice, all the judges considered whether the challenged provisions are void for vagueness and whether it is impermissible for Parliament to send out conflicting messages whereby the criminal law says one thing but means another (i.e. street solicitation is a crime, but prostitution itself is legal). They rejected both arguments and

found that the liberty infringement accords with the principles of fundamental justice. Accordingly, the constitutional challenge to both provisions failed.

The role of precedent

[56] A brief discussion of precedent will assist in assessing the Attorney General of Canada's submission that the constitutionality of the bawdy-house and communicating provisions is settled law. The notion of binding precedent, often used interchangeably with the principle of *stare decisis*, requires that courts render decisions that are consistent with the previous decisions of higher courts. The rationale for the rule is self-evident: it promotes consistency, certainty and predictability in the law, sound judicial administration, and enhances the legitimacy and acceptability of the common law: *David Polowin Real Estate Ltd. v. The Dominion of Canada General Insurance Co.* 2005 CanLII 21093 (ON CA), (2005), 76 O.R. (3d) 161 (C.A.), at paras. 119-120.

[57] The coverage of the principle of *stare decisis* is captured in the dichotomy between *ratio decidendi* and *obiter dicta*. As expressed in *Halsbury's Laws of Canada, Civil Procedure I*, 1st ed. (Markham: LexisNexis Canada, 2008), at p. 282:

> To employ the traditional terminology: *only the ratio decidendi of the prior court decision is binding on a subsequent court. The term ratio decidendi describes the process of judicial reasoning that was necessary in order for the court to reach a result on the issues that were presented to it for a decision.* All other comments contained within the reasons of the prior court are termed *obiter dicta*, and in essence such incidental remarks are treated as asides. They may have persuasive value, but they are not binding. [Emphasis added.]

[58] However, the traditional division between *ratio* and *obiter* has become more nuanced. It is now recognized that there is a spectrum of authoritativeness on which the statements of an appellate court may be placed. Justice Binnie, writing for a unanimous Supreme Court, stated in *R. v. Henry*, 2005 SCC 76 (CanLII), 2005 SCC 76, [2005] 3 S.C.R. 609, at para. 57:

> The issue in each case, to return to the Halsbury question, is *what did the case decide*? Beyond the *ratio decidendi* which … is generally rooted in the facts, the legal point decided by this Court may be as narrow as the jury instruction at issue in *Sellars* or as broad as the *Oakes* test. [Emphasis added.]

[59] Justice Doherty, writing for a unanimous five-judge panel of this court, discussed *Henry* in the recent decision of *R. v. Prokofiew*, 2010 ONCA 423 (CanLII), 2010 ONCA 423, (2010), 100 O.R. (3d) 401, leave to appeal to S.C.C. granted, [2010] S.C.C.A. No. 298, heard and reserved November 8, 2011, at para. 19:

> The question then becomes the following: how does one distinguish between binding *obiter* in a Supreme Court of Canada judgment and non-binding *obiter*? In *Henry*, at para. 53, Binnie J. explains that one must ask, *"What does the case actually decide?*" Some cases decide only a narrow point in a specific factual context. Other cases – including the vast majority of Supreme Court of Canada decisions – decide broader legal propositions and, in the course of doing so, *set out legal analyses that have application beyond the facts of the particular case*. [Emphasis added.]

[60] These authorities delineate the boundary between binding and non-binding statements of the Supreme Court, and they do so based on an inquiry into the Court's substantive reasoning process. Applying *Henry* and *Prokofiew*, the question becomes: what did the *Prostitution Reference* decide?

Section 7: What did the *Prostitution Reference* decide?

[61] Section 7 of the *Charter* has two components: the deprivation of a right (life, liberty and security of the person) and a subsequent inquiry into the nature of that deprivation (whether it accords with the principles of fundamental justice).

[62] In this case, it is tempting to view the questions asked in the *Prostitution Reference*, combined with the simple answers given by Dickson C.J., at p. 1143, as the *ratio* of the case:

> Question: 1. Is s. 193 of the *Criminal Code of Canada* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.
>
> Question: 2. Is s. 195.1(1)(c) of the *Criminal Code of Canada* inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms?*
>
> Answer: No.

[63] However, we do not think that this comports with the view of *stare decisis* outlined above.

[64] The case law is clear that the s. 7 interests of "life, liberty and security of the person" are to be treated as distinct, and they require separate treatment by courts: *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 52.

[65] In the *Prostitution Reference*, Dickson C.J. based the majority decision on only the physical liberty interest. He explicitly declined to address whether the s. 7 liberty interest could be implicated in an "economic" way, and stated that the *Reference* was not an appropriate forum for deciding whether liberty or security of the person could ever apply to any interest with an economic, commercial or property component (at pp. 1140-1141). The only member of the Supreme Court to touch on the s. 7 security of the person interest, albeit in the sense of an "economic" security of the person, was Lamer J., writing for himself.

[66] In this case, the parties agree that the respondents' s. 7 liberty interest is engaged by the challenged provisions. However, the respondents also argue that the provisions engage their s. 7 security of the person interest. This independent interest was not considered by the majority in the *Prostitution Reference*.

[67] In addition, the number of recognized "principles of fundamental justice" referenced in the second half of s. 7 has expanded over the last 20 years. Whereas in 1990 the Supreme Court considered only vagueness and the perceived inconsistency in Parliament's response to prostitution, in this case the application judge was asked to evaluate the infringements against the principles of arbitrariness, overbreadth, and gross disproportionality.

[68] The principles of fundamental justice at issue in this case were not considered in 1990 because they had not yet been fully articulated. Arbitrariness and overbreadth were only identified as principles of fundamental justice in 1993 and 1994, respectively:*Rodriguez v. British Columbia (A.G.)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519; *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761. Gross disproportionality emerged as a principle of fundamental justice a decade later: *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74 (CanLII), 2003 SCC 74, [2003] 3 S.C.R. 571.

[69] *Henry* and *Prokofiew* stand for the proposition that the actual words of the Supreme Court do not bind lower courts when those words are sufficiently tangential to the disposition of the case. Surely, then, the *silence* of the Supreme Court on "independent interests ... which must be given independent significance" (*Morgentaler*, at p. 52) cannot preclude future consideration of those interests by a court of first instance.

[70] It cannot be said that the *Prostitution Reference* decided the substantive s. 7 issues before the application judge in this case. Therefore, *stare*

decisis did not apply, and the application judge did not err by conducting her own analysis and coming to her own conclusions.

Section 2(b): What did the *Prostitution Reference* decide?

[71] Unlike the s. 7 arguments advanced in respect of the constitutionality of s. 213(1)(c) of the *Criminal Code*, the respondents' s. 2(b) *Charter* argument raises legal issues that were before the Supreme Court in the *Prostitution Reference*.

[72] In this proceeding, as in the *Prostitution Reference*, all parties agree that s. 213(1)(c) infringes freedom of expression as guaranteed under s. 2(b) of the *Charter*. The pivotal issue, as in the *Prostitution Reference*, is whether that infringement can be justified as a reasonable limit under s. 1 of the *Charter*.

[73] The application judge described the *Prostitution Reference* as "*prima facie* binding on this court." However, she referred to a context of violence against prostitutes that has "changed dramatically" since 1990, two decades of new research, and an evolving international legal context, and concluded that it was appropriate for her to reconsider whether s. 213(1)(c) of the *Criminal Code* continued to be a reasonable limit on the respondents' freedom of expression. She explained, at para. 83:

> In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today. Indeed, several western democracies have made legal reforms decriminalizing prostitution to varying degrees. As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me.

[74] The Attorney General of Canada argues that the application judge erred by departing from the s. 1 analysis found in the *Prostitution Reference*. We agree for the following reasons.

[75] First, the application judge misconceived the principle of *stare decisis* when she described the *Prostitution Reference* as only "*prima*

facie binding on this court." With respect, it was much more than that. The Supreme Court's decision that s. 213(1)(c) of the *Criminal Code* is a justified limit on freedom of expression was fully binding on the application judge, as there was no suggestion that it had been expressly or by implication overruled by a subsequent decision of the Supreme Court. In short, it is for the Supreme Court, and only that court, to overrule one of its own decisions.

[76] This is not to say that a court of first instance has no role to play in a case where one party seeks to argue that a prior decision of the Supreme Court should be reconsidered and overruled based on significant changes in the evidentiary landscape. The court of first instance does have a role in such a case, albeit a limited one. It may allow the parties to gather and present the appropriate evidence and, where necessary, make credibility findings and findings of fact. In doing so, the court of first instance creates the necessary record should the Supreme Court decide that it will reconsider its prior decision.

[77] The application judge relied on *Wakeford v. Attorney General of Canada* 2001 CanLII 28318 (ON SC), (2001), 81 C.R.R. (2d) 342 (Ont. S.C.), affirmed 2001 CanLII 32775 (ON CA), (2001), 156 O.A.C. 385, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 72. In that case, Swinton J. was faced with a motion to dismiss a claim on the basis that the issue had been decided by the Supreme Court in *Rodriguez*, the assisted suicide case. She recognized that the Supreme Court could reconsider its prior decisions based on new evidence. She also recognized that claims that sought to reverse prior decisions of the Supreme Court should not necessarily fail at the pleadings stage. She indicated, at para. 14, that in such a case the plaintiff must present "some indication – either in the facts pleaded or in the decisions of the Supreme Court – that the prior decision may be open to reconsideration."

[78] Justice Swinton ultimately struck the claim, holding that the plaintiff had not provided any basis upon which *Rodriguez*should be reconsidered. She made it clear, at para. 20, that had the plaintiff made out the case for reconsideration, that reconsideration would have occurred in the Supreme Court and not in the trial court.

[79] Clearly, Swinton J. did not contemplate that had she allowed the matter to proceed, she could have reconsidered, and even decided not to follow, the governing decision of the Supreme Court.

[80] The application judge also relied on *Leeson v. University of Regina* 2007 SKQB 252 (CanLII), (2007), 301 Sask. R. 316 (Q.B.). However, *Leeson* fails to support the proposition that a court of first instance can reconsider and effectively overrule a binding precedent from the Supreme Court. In *Leeson*, the court acknowledged that where a plaintiff has alleged changes in the social, political and economic assumptions underlying a prior decision of the Supreme Court and has alleged some facts that could support those changes, it was not appropriate

to prevent the plaintiff from proceeding with the claim on the basis of *stare decisis*. This observation would allow the plaintiff to build the necessary record, but says nothing about whether any court other than the Supreme Court has the power to overrule its prior decision.

[81] The second reason the application judge erred in reconsidering the s. 2(b) claim is that she incorrectly equated her position, when asked to reconsider a binding decision of the Supreme Court, with the position of a court that is asked to reconsider one of its own prior decisions, as in *Polowin Real Estate*. Reasons that justify a court departing from its own prior decision have no application to, and cannot justify, a lower court's purported exercise of a power to reconsider binding authority from a higher court.

[82] Third, the application judge erred by holding that the binding authority of the *Prostitution Reference* could be displaced by recasting the nature of the expression at issue as promoting safety, and not merely commercial expression. This change in perspective has not altered the *ratio decidendi* of that case, which was that the communicating provision is a reasonable limit on freedom of expression. In coming to this conclusion, the majority applied the *Oakes* test based on the best information available to them at the time. There may be good reasons for the Supreme Court to depart from this holding for all the reasons discussed in *Polowin Real Estate*, but that is a matter for the Supreme Court to decide for itself.

[83] In our view, the need for a robust application of *stare decisis* is particularly important in the context of *Charter* litigation. Given the nature of the s. 1 test, especially in controversial matters, the evidence and legislative facts will continue to evolve, as will values, attitudes and perspectives. But this evolution alone is not sufficient to trigger a reconsideration in the lower courts.

[84] If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally. It would be particularly problematic in the criminal law, where citizens and law enforcement have the right to expect that they may plan their conduct in accordance with the law as laid down by the Supreme Court. Such an approach to constitutional interpretation yields not a vibrant living tree but a garden of annuals to be regularly uprooted and replaced.

[85] For these reasons, it was not open to the application judge to reconsider whether s. 213(1)(c) of the *Criminal Code* remains a reasonable limit on the freedom of expression protected by s. 2(b) of the *Charter.*

Issue 5: Do the challenged provisions deprive the respondents of the right to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*?

Overview of section 7

[87] To repeat, s. 7 of the *Charter* declares:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[88] Although the language of the English version of s. 7 might suggest otherwise, the case law has established that s. 7 creates a single constitutional right: the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. There is no freestanding right to life, liberty and security of the person: *Canada (Minister of Employment and Immigration) v. Chiarelli*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711; *Cunningham v. Canada*, 1993 CanLII 139 (SCC), [1993] 2 S.C.R. 143; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4 (CanLII), 2004 SCC 4, [2004] 1 S.C.R. 76; *Malmo-Levine; Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII), 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Parker* 2000 CanLII 5762 (ON CA), (2000), 49 O.R. (3d) 481 (C.A.); and P.W. Hogg, *Constitutional Law of Canada*, 5th ed., looseleaf (Toronto: Carswell, 1996), at para. 47.20. Legislation that limits the right to life, liberty and security of the person will attract s. 7 scrutiny. It will, however, survive that scrutiny and avoid judicial nullification unless it is shown to be contrary to the principles of fundamental justice.

[89] An applicant alleging a breach of s. 7 must demonstrate on the balance of probabilities that: (1) the challenged legislation interferes with or limits the applicant's right to life, *or* the right to liberty, *or* the right to security of the person; and (2) that the interference or limitation is not in accordance with the principles of fundamental justice. While non-compliance with s. 7 can theoretically be justified under s. 1 of the *Charter*, in reality s. 1 will rarely, if ever, trump a s. 7 infringement: *R. v. D.B.*, 2008 SCC 25 (CanLII), 2008 SCC 25, [2008] 2 S.C.R. 3, at para. 89.

[90] *Criminal Code* sections which create crimes, like those challenged on this application, interfere with the liberty interest in that they are potentially punishable by imprisonment. Consequently, the outcome of a s. 7 challenge to crime-creating legislation will depend on whether the applicant can show that the legislation does not accord with the "principles of fundamental justice". That phrase is not self-defining. Its meaning has grown through judicial

interpretation: *Canadian Foundation*, at paras. 15, 83, 177;*Re B.C. Motor Vehicle Act*, at pp. 511-513; *Cunningham*, at pp. 151-152; *Rodriguez*, at p. 607, *per* Sopinka J., for the majority; and *Constitutional Law in Canada*, at para. 47.33.

[91] Perhaps no area of the law has felt the impact of the expansive interpretation of the "principles of fundamental justice" as much as the substantive criminal law. The Supreme Court has established a catalogue of principles of fundamental justice that together fix the minimum substantive standards that crime-creating provisions must meet to survive a s. 7 challenge. Those minimum standards include the concepts of arbitrariness, overbreadth and gross disproportionality. The constitutional measurements required by at least one of those concepts – gross disproportionality – inevitably draw the court into an assessment of the merits of policy choices made by Parliament as reflected in legislation.

Does the legislation interfere with the respondents' liberty interest?

[92] All parties to this appeal agree that the risk of imprisonment flowing from conviction for any of the challenged offences is sufficient to engage the respondents' s. 7 liberty interests: see *Malmo-Levine*, at para. 84.[5] Some of the interveners, however, advance a broader liberty claim. They submit that a person's decision to engage in prostitution involves personal life choices that are also protected under the right to liberty. We do not accept this submission.

[93] The case law recognizes that the right to liberty extends beyond physical liberty to the right to make individual choices that go to the core of personal autonomy. At some point, this concept of liberty must meld with the concept of security of the person, which also rests on the principle of personal autonomy.

[94] To this stage in the development of the jurisprudence, the right to liberty as manifested in the right to make personal decisions free from state interference has been limited to decisions that "go to the heart of an individual's private existence": *R. v. Clay*, 2003 SCC 75 (CanLII), 2003 SCC 75, [2003] 3 S.C.R. 735, at paras. 31-32. The decision to engage in a particular commercial activity is not akin to the kinds of decisions that have been characterized as so fundamentally and inherently personal and private as to fall under the right to liberty. To accept the interveners' submission would be to read into s. 7 a constitutional protection for what are economic or commercial decisions. That reading would be inconsistent with the deliberate decision to exclude property-related rights from the ambit of s. 7: see *Constitutional Law of Canada*, at para. 47.7(b). As stated by Major J. in *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 (CanLII), 2003 SCC 3, [2003] 1 S.C.R. 6, at para. 46: "The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*."

Does the legislation interfere with the respondents' security of the person?

(1) Should we address security of the person?

[95] Interference with any one of the rights to life, liberty or security of the person is sufficient to engage s. 7 and requires an assessment of the legislation against the applicable principles of fundamental justice. Given that all parties accept that the right to liberty is limited by the challenged provisions, it may seem unnecessary to decide whether the provisions also interfere with the respondents' security of the person.

[96] However, we are satisfied that we should address the security of the person claim for two reasons. First, the respondents placed significant, indeed paramount, emphasis on their security of the person claim. Their complaint with the legislation is not only that they risk incarceration should they fail to comply with the provisions, but that they risk serious harm, or even death, if they do comply with them. Second, the specific nature of the right or rights interfered with, and the nature of that interference, are relevant to the arbitrariness and gross disproportionality analyses. The nature and extent of the interference with the respondent's rights must be identified before the court can properly assess a claim that the legislation is inconsistent with the principles of fundamental justice.

(2) The meaning of security of the person

[97] The phrase "security of the person" defies exhaustive definition. Its meaning is best articulated in the context of the specific facts and claims advanced in a given case.

[98] The respondents' security of the person claim is as follows. They make their living through prostitution. Prostitution is a lawful commercial activity. It is also a potentially dangerous activity. Like any sensible person, the respondents want to take reasonable steps to make their working environment as safe as possible. They claim that the government is interfering with their ability to protect themselves by criminalizing what are rudimentary and obvious steps they could take to reduce the risk of physical harm to them while they are engaged in the lawful activity of prostitution. In essence, the respondents assert that the challenged provisions interfere with their security of the person by forcing them to choose between the substantial added risk to personal safety that comes with compliance with those provisions and the risk of incarceration that comes with non-compliance with those same provisions.

[99] Properly understood, the respondents' security of the person claim is about self-preservation. The preservation of one's physical safety and well-being is a fundamental component of personal autonomy. Personal autonomy lies at the heart of the right to security of the person. Thus, laws that prevented or unreasonably delayed access to necessary medical care or treatment were held to have interfered with the security of the person: *Chaoulli v. Quebec (Attorney*

General), 2005 SCC 35 (CanLII), 2005 SCC 35, [2005] 1 S.C.R. 791; *Morgentaler*; *PHS*. Similarly, a law that removed the protection of the criminal law assault provisions from children was held to have interfered with their security of the person: *Canadian Foundation*, at para. 176, *per* Arbour J., dissenting, not on this point.

(3) The application judge's findings relevant to the security of the person claim

[100] The application judge's central findings of fact concerning the security of the person claim are set out in her reasons, at para. 421. She concluded:

> 1. Prostitutes, particularly those who work on the street, are at a high risk of being the victims of physical violence.
>
> 2. The risk that a prostitute will experience violence can be reduced in the following ways:
>
> 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, [and] financial negotiations done in advance can increase safety.
>
> 3. The bawdy-house provisions can place prostitutes in danger by preventing them from working in-call in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed-circuit television and other monitoring.

> 4. The living on the avails of prostitution provision can make prostitutes more susceptible to violence by preventing them from legally hiring bodyguards or drivers while working. Without these supports, prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.
>
> 5. The communicating provision can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction.

[101] The application judge's ultimate conclusion, at para. 362, bears repeating:

> In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. *Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.* [Emphasis added.]

(4) The appellants' arguments

[102] The appellants accept that a law that creates a real risk to physical safety or well-being interferes with the right to security of the person under s. 7. The appellants maintain, however, that the application judge erred in finding any connection between the three challenged provisions and any added risk of physical harm to the respondents. Their submissions challenge both the application judge's legal analysis of what the appellants call the "causation issue" and her evidentiary findings relevant to that issue.

[103] The appellants attack the evidentiary findings on two fronts. They argue that the application judge made several errors in her approach to the evidence and that these processing errors undermine the validity of her ultimate finding that the challenged provisions place prostitutes at a greater risk of physical harm. The appellants also argue that, apart from any processing errors, the evidence considered as a whole does not support the finding of a connection between the challenged provisions and an increase in the risk posed to

prostitutes. This latter argument begins with the contention that the application judge's finding is not owed any deference, and that this court can and must make its own assessment of the evidence. We will address the causation argument first.

(a) The causation argument

[104] This is not a case like *Rodriguez, Chaoulli* or *Morgentaler* where there is a direct causal connection between the challenged legislation and the alleged interference with security of the person. In this case, the challenged *Criminal Code* provisions do not directly infringe on the respondents' security of the person. For example, the criminalization of the hiring of security does not directly compromise prostitutes' security of the person. The respondents contend, however, that the criminal prohibitions render prostitutes more vulnerable to physical harm caused by third parties. They argue that the indirect effect on their security of the person is sufficient to engage s. 7 and that legislation cannot escape constitutional scrutiny merely because non-state actors are the direct cause of the infringement of that right.

[105] The appellants accept that even where the actions of a third party are directly responsible for an interference with security of the person, state conduct can be sufficiently implicated in the actions of the third party to render the state responsible for that interference under s. 7 of the *Charter*. The appellants contend, however, that there must be a strong causative link between the state action and the action that directly interferes with the right protected under s. 7. They submit that a sufficient connection exists only where the state action is "necessary" for, or "essential" to, the interference with the s. 7 interest, or where the state can be said to be complicit in the third party's interference with the s. 7 interest. The appellants maintain that the application judge significantly and erroneously lowered the causation standard by requiring only that the state action "contribute" to the interference with the respondents' security of the person.

[106] The appellants rely to some extent on substantive criminal law causation principles, and to a greater extent on a series of decisions examining the constitutionality of actions taken by state actors, that indirectly compromised an individual's s. 7 interests: see e.g. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), 2002 SCC 1, [2002] 1 S.C.R. 3; *United States v. Burns*, 2001 SCC 7 (CanLII), 2001 SCC 7, [2001] 1 S.C.R. 283; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 (CanLII), 2010 SCC 3, [2010] 1 S.C.R. 44; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), 2000 SCC 44, [2000] 2 S.C.R. 307.

[107] We agree with counsel for the respondents that the authorities relied on by the appellants are readily distinguishable. It may be helpful to use a traditional causation analysis when deciding whether the actions of a government official

are sufficiently connected to an infringement of a s. 7 interest to render the government responsible for that infringement. However, that analysis is inappropriate where legislation is said to have caused the interference with the s. 7 interest. The language of causation does not aptly capture the effect of legislation. Legislation, including legislation that creates crimes, is not so much the physical cause of a particular consequence as it is part of the factual and social context in which events happen and consequences flow.

[108] When a court is required to decide whether there is a sufficient connection between crime-creating legislation and an alleged interference with an individual's right to security of the person, the court must examine the effect of that legislation in the world in which it actually operates. This assessment is a practical and pragmatic one.

[109] The court must first determine what it is that the legislation prohibits or requires. This is essentially an exercise in statutory interpretation. The court must next determine how the statutory prohibition or requirement impacts on those who claim to have suffered a limitation on their right to security of the person because of the legislation. Finally, the court must take the impact of the legislation as it is found to be, and determine whether that impact limits or otherwise interferes with an individual interest protected by the concept of security of the person. The second and third determinations outlined above require findings of fact. In litigation where the constitutionality of legislation is challenged, those findings will usually be based on a blending of adjudicative facts, social or legislative facts, judicial notice and common sense inferences. This record contains all those elements.

[110] We examine the relevant provisions in some detail below. For present purposes, it is sufficient to say that on our interpretation, the bawdy-house provisions criminalize the practice of prostitution at a fixed indoor location; the living on the avails provision criminalizes the use of support and security staff funded by the proceeds of the prostitution, regardless of whether the relationship is an exploitative one; and the communicating provision prohibits any attempt by street prostitutes to screen potential customers by speaking with those customers in a public place for the purpose of prostitution.

[111] On the facts as found by the application judge, each of the provisions criminalizes conduct that would mitigate, to some degree, the risk posed to prostitutes. On those findings, the relevant *Criminal Code* provisions, individually and in tandem, increase the risk of physical harm to persons engaged in prostitution, a lawful activity. They increase the harm by criminalizing obvious, and what on their face would appear to be potentially somewhat effective, safety measures. The connection between the existence of the criminal prohibitions and the added risk to those engaged in prostitution is, on the facts as found by the application judge, not obscure or tangential. An added risk of physical harm

compromises personal integrity and autonomy and strikes at the core of the right to security of the person. On the facts as found, the added risk to prostitutes takes the form of an increased risk of serious physical harm or perhaps even worse. Any real increase in that kind of risk must impair the security of the person: see *Chaoulli*, at para. 123, *per* McLachlin C.J., for the majority.

[112] The connection between the legislation and the security of the person of prostitutes is made clearer by a hypothetical that exaggerates, but does not distort, the legal reality currently faced by prostitutes on the facts as found by the application judge. Suppose Parliament enacted a provision declaring that the self-defence provisions in the *Criminal Code* were not applicable to anyone assaulted while engaged in prostitution. Prostitutes under attack or apprehending an attack from a customer would have a choice. They could defend themselves and face prosecution for assaulting their attacker or submit and risk serious personal injury. No one would suggest that a law that placed prostitutes in that position did not expose them to added risk of physical harm and thereby interfere with their security of the person. It would be no answer to assert that the assaults were perpetrated by third parties who were not state actors.

[113] On the facts as found by the application judge, the reality prostitutes face under the present *Criminal Code* regime is analogous to, albeit in some circumstances less dangerous than, the self-defence hypothetical. While the challenged *Criminal Code* provisions do not exclude prostitutes from the self-defence provisions, they do criminalize obvious and specific steps that prostitutes could take to protect themselves while engaged in prostitution.

[114] We find support for our analysis in the Supreme Court's treatment of the contention that the claimants' right to security of the person was infringed in *PHS*. In that case, the applicants brought a proceeding for a declaration that s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), prohibiting possession of narcotics, was unconstitutional as it applied to possession by the applicants at Insite, a supervised injection site located in downtown Vancouver. At Insite, addicts could inject themselves using clean equipment and under medical supervision. Insite had been established by provincial health authorities and had operated lawfully for a number of years under a federal ministerial exemption from the prohibition against possession of narcotics. That exemption was about to expire and the applicants had been advised that it would not be renewed.

[115] The applicants maintained that Insite provided a safe venue at which they could inject themselves with the narcotics they needed to feed their drug addictions. The applicants further claimed that if the prohibition against possession of narcotics applied to possession at Insite, it would close and the applicants would be forced to move from that safe venue to other venues, like alleyways and street corners, where the health and safety risks associated with

self-injection are substantially increased. The Supreme Court unanimously held that the criminal prohibition against possession at the supervised injection site interfered with the applicants' right to security of the person because that criminal prohibition had the effect in the real world in which it operated of forcing the applicants to move from a safe injection site to sites where the health risks associated with self-injection were much higher.

[116] We see a parallel between the circumstances of drug addicts who, because of a criminal prohibition, cannot access a venue where they can safely self-inject and therefore must resort to dangerous venues, and prostitutes who, because of criminal prohibitions, cannot work at venues using methods that maximize their personal safety, but must instead resort to venues and methods where the physical risks associated with prostitution are much greater. In both situations, the criminal prohibitions, as interpreted by the courts, operate on those claiming the s. 7 breach in a way that interferes with their ability to take steps to protect themselves while engaged in a dangerous activity. In one sense, the prostitutes' claim is even stronger in that prostitution, unlike the illicit possession and use of narcotics, is not an unlawful activity.

[117] The connection between the criminal prohibitions in the three challenged provisions and the increased risk of physical harm to prostitutes is not diminished by the acknowledged reality that prostitution is inherently dangerous in virtually any circumstance. Nor does it alter the connection between the prohibitions and the added risk posed to prostitutes to acknowledge that some prostitutes would not avail themselves of any of the safety measures currently criminalized even if the criminal prohibitions did not exist. On the evidence accepted by the application judge, many prostitutes would and could take advantage of those measures, but for the risk of criminal sanction. Finally, the inability to quantify the added risk to prostitutes flowing from the legislation is no bar to a finding of added risk sufficient to engage security of the person. Where the limitation on security of the person is in the nature of an increased risk of serious physical harm or worse, virtually any added risk that is beyond *de minimis* is sufficient to constitute an infringement on security of the person.

[118] The appellants contend that virtually all legislation has the potential to interfere indirectly with some manifestation of the right to life, liberty and security of the person. The appellants argue that unless the court requires a strong causal connection between the legislation and the alleged infringement, s. 7 will become dangerously overextended.

[119] We do not share the appellants' concern. A finding that legislation limits a claimant's security of the person does not determine the constitutionality of the legislation, nor affect its operation. That finding only subjects the challenged legislation to a principles of fundamental justice analysis.

[120] The appellants' concern about overreaching in s. 7 is particularly misplaced in respect of legislation that creates criminal offences. As indicated above, that legislation will inevitably be subject to a principles of fundamental justice analysis because it will always engage the liberty interest. A determination that it also engages the security of the person interest does not, therefore, subject legislation to s. 7 scrutiny where it would not otherwise have been subject to that scrutiny. It merely permits a principles of fundamental justice analysis that considers the full impact of the legislation on s. 7 rights.

[121] The analysis and outcome in *PHS* also belies the appellants' contention that the courts must impose a strong causation requirement before finding a link between interference with s. 7 interests and legislation. As outlined above, the Supreme Court held that the prohibition against possession of narcotics at Insite infringed the addicted persons' security of the person. The court went on, however, to hold that the prohibition, considered in the context of the entire *CDSA*, was consistent with the principles of fundamental justice and did not violate s. 7. In *PHS*, the constitutional failing was not with the legislation creating the criminal prohibition, but with the Minister's exercise of his discretion under another section of that legislation which effectively shut Insite down.

[122] The appellants also submit that the real cause of any infringement on the respondents' security of the person rests in their decision to engage in prostitution. That decision, according to the appellants, is a matter of personal choice that inevitably places the respondents at risk. The appellants contend that the personal decision to engage in prostitution, an inherently dangerous and anti-social activity, effectively breaks the causal chain between any added risk of harm and the criminal prohibitions that limit the venues at which, and the manner in which, the respondents can conduct the very dangerous activity they have chosen.

[123] 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. A claim that a criminal law prohibition increases the risk of physical harm to persons who engage in prostitution must, for the purpose of the security of the person analysis, be examined in the same way as any other claim that a criminal law prohibition increases the risk of physical harm to persons engaged in any other lawful commercial activity.

[124] Nor, in our view, is the appellants' position assisted by the claim that while Parliament has chosen not to criminalize prostitution, it has chosen to try to eradicate prostitution through criminalizing many related activities. We address this submission later in these reasons when considering the application of the

principles of fundamental justice. Suffice it to say here that we do not accept that one of the objectives of the challenged legislation is to eradicate prostitution through the criminalization of related activity. However, even if that were the legislative intent, the respondents' security of the person interest would nonetheless be infringed by the legislation. The legislative objectives do not play a role in determining whether legislation interferes with the right to life, liberty and security of the person. The legislative objectives become important when examining whether any infringement is inconsistent with the principles of fundamental justice.

[125] If the application judge's findings stand, her conclusion that the challenged provisions, individually and taken together, limit the respondents' security of the person is unassailable. We turn now to the challenges to those findings.

(b) Should the findings stand?

[126] We will first determine the appropriate standard of appellate review. The application judge's conclusion that the relevant*Criminal Code* provisions interfere with the respondents' security of the person was predicated on her findings that:

- prostitution is inherently dangerous for prostitutes;
- there are "safety enhancing" measures that prostitutes can take to mitigate the risk of physical harm;
- each of the challenged *Criminal Code* provisions criminalizes at least one "safety enhancing" measure that prostitutes could take to reduce the danger of physical harm; and
- the criminalization of measures that could make prostitution safer has the effect of increasing the risk of physical harm to prostitutes who engage in prostitution.

[127] The appellants contend that all the findings outlined above are properly characterized as social or legislative findings of fact and not as adjudicative findings of fact. The characterization is important because findings of social or legislative fact are not accorded the strong appellate deference given to adjudicative fact-finding: *RJR-MacDonald Inc. v. Canada (Attorney General)*,1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at pp. 285-289, *per* LaForest J., dissenting, but not on this point; *Harper v. Canada(Attorney General)*, 2004 SCC 33 (CanLII), 2004 SCC 33, [2004] 1.S.C.R. 827, at paras. 93-99.

[128] Adjudicative facts, the standard fare of litigation, speak to the who, what, where, when and why of a specific event or claim. Social facts describe conditions, causes or relationships at a societal rather than an individual level. Thus, a finding that an individual is a racist is an adjudicative fact, while a

finding that society is racist is a social fact. Unlike adjudicative facts, social facts are not readily provable through the firsthand testimony of lay witnesses. Social facts are often proven through an amalgam of testimony of the experiences of individuals, and the opinions of experts. Legislative facts, cousins of social facts, are facts that speak to the meaning or effect of legislation. These facts are often established through Parliamentary debates and government reports of various types: see *R. v. Spence*, 2005 SCC 71 (CanLII), 2005 SCC 71, [2005] 3 S.C.R. 458, at paras. 56-59.

[129] We accept the submission that the application judge's findings underlying her conclusion that the challenged provisions interfere with the security of the person are findings in the nature of social and legislative facts. This was not litigation about whether a particular person's security of the person was infringed by a specific event. This litigation approached the constitutional claims from a much broader societal perspective. The findings made by the application judge reflect that perspective, as should the review of those findings by this court. We do not defer to the application judge's findings, but rather assess the record to come to our own conclusion on the social and legislative facts underlying the application judge's finding that the respondents' security of the person is impaired by the relevant legislation.

[130] In making our own assessment, however, we are assisted by the application judge's careful review of the voluminous record and her assessment of the reliability and usefulness of some of the evidence. To the extent that the application judge found the evidence of affiants in respect of specific events and occurrences credible or incredible, we defer to those findings absent some demonstrated flaw in them. Similarly, to the extent that the application judge found some of the expert evidence to be tainted by a lack of objectivity or other similar concerns, we defer to those findings absent a demonstration of some error in the reasoning underlying the particular finding.

[131] We pause before turning to our assessment of the evidence as it relates to the respondents' security of the person claim to note that the application judge also made findings underlying her application of the concepts of arbitrariness, overbreadth, and gross disproportionality. Those findings were based on legislative facts and, to some extent, social facts. When we come to analyse the arbitrariness, overbreadth and gross disproportionality claims, we will treat her findings on those issues as we do her findings relating to the security of the person argument. We will not defer to those findings.

[132] We begin our assessment of the application judge's findings as they relate to the security of the person claim by examining the legal regime under which prostitutes operate in Canada.

[133] As we have explained, prostitution is not criminal or in any way illegal. However, many activities that would be lawful in any other context are

criminal if done in relation to prostitution. The application record is replete with testimony from individuals who have firsthand knowledge of how the present legal regime operates and the impact it has on prostitutes engaged in prostitution. In our view, that experiential evidence, buttressed by observations in several government reports, makes a very strong case for the respondents' claim that the legislation puts them at added risk of serious physical harm.

[134] We also agree with counsel for the respondents' submission that much of what the experiential witnesses said about the impact of the challenged *Criminal Code* provisions on their lives as prostitutes is self-evident and exactly what one would expect. Everyone agrees that prostitution is a dangerous activity for prostitutes. It seems obvious that it is more dangerous for a prostitute if she goes to some unknown destination controlled by the customer, rather than working at a venue under the prostitute's control at which she can take steps to enhance safety. The advantages of "home field" are well understood by everyone. The non-exploitative conduct criminalized by the living on the avails provision and the communicative conduct criminalized by the communicating provision contribute in an equally self-evident manner to potential risks to prostitutes.

[135] In holding that the negative impact of the legislation on prostitutes is obvious, we do not mean to understate the complexities and difficulties of the social problems associated with prostitution. However, those complexities and the many possible legislative responses to them are not germane to the question at hand. Like the application judge, we are satisfied that the current legal regime, and specifically the challenged *Criminal Code* provisions, interferes with prostitutes' security of the person.

[136] We turn next to the alleged processing errors. The appellants submit that the application judge made three errors in the way she approached or processed the evidence, particularly the expert evidence. First, counsel for the Attorney General ofCanada argues that the application judge did not properly exercise the role of "gatekeeper" in assessing the admissibility of some of the expert evidence offered by the respondents. We disagree. The application judge was alive to the principles governing the admissibility of expert evidence and the risks associated with that kind of evidence: paras. 104-113. With the agreement of all parties, she did not engage in a separate admissibility inquiry, but instead factored the considerations relevant to the exercise of her "gatekeeper" function into her ultimate assessment of the expert evidence: para. 352. The application judge can hardly be criticized for following the approach agreed upon by counsel. The appellants have failed to show that the approach taken by the application judge could possibly have prejudiced their case.

[137] The second processing error alleged by the appellants also relates to the application judge's treatment of the expert evidence. They contend that the

application judge failed to adequately explain why she accepted the evidence of certain experts and rejected the evidence of others. Counsel submits that because the expert evidence was crucial to the findings underlying the s. 7 analysis, the application judge's failure to adequately explain her evidentiary preferences prevents effective appellate review of her s. 7 analysis.

[138] This submission proceeds from the erroneous premise that if more could have been said to explain why a decision was made, then what was said must be inadequate. It is clear from our review of the entirety of the application judge's reasons that she understood the thrust of the expert evidence and she carefully assessed it. The application judge was aware of the general limitations on all the expert evidence, as well as certain specific problems associated with the evidence given by particular experts. As she repeatedly indicated, her findings were ultimately based on the entirety of the record. Her detailed review of that record and her explicit findings of fact provide a full explanation of how she arrived at the conclusions she did. Far from preventing appellate review, her reasons facilitate it.

[139] The third processing error is advanced by counsel for the Attorney General of Ontario. She submits that the application judge erred in making any definitive finding as to the effect of the challenged provisions on the physical safety of prostitutes. Counsel argues that the evidence demonstrated that prostitution presents intractable social problems for which there is no single, clear, and effective solution. She submits that the application judge should have declined to enter into this policy thicket and should have simply acknowledged that the conflicting evidence provided a reasonable basis for the policy choices reflected in the relevant *Criminal Code* provisions.

[140] The approach urged by counsel for the Attorney General of Ontario is appropriate in division of power cases where a government is defending its authority to enact legislation, in some aspects of a government claim that legislation is justified under s. 1 of the *Charter*, and in cases where the government is answering a claim that its legislation is inconsistent with certain principles of fundamental justice under s. 7. In those contexts, it may be enough, at least in respect of parts of the claims, that the government demonstrate a rational basis for its legislative choices: *Constitutional Law of Canada*, at para. 60.2(f); *R. v. Sharpe*, 2001 SCC 2 (CanLII), 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 84-89; *Malmo-Levine*, at paras. 78 and 134.

[141] The approach urged by the Attorney General of Ontario is, however, inappropriate at the first stage of the s. 7 inquiry. The respondents have alleged that the legislation interferes with their security of the person. They carried the burden of proving that interference on the balance of probabilities. If they met that burden, the deprivation is established and the s. 7 inquiry moves to a consideration of the applicable principles of fundamental justice. If the

respondents failed to meet their burden, their s. 7 security of the person claim would fail. The reasonableness of the policy choices animating the legislation and the reasonableness of the legislation itself are irrelevant to whether the respondents established that the legislation interfered with some component of their right to security of the person. The application judge could not decline to enter upon the factual inquiry essential to a determination whether the respondents' security of the person claim failed or succeeded.

[142] We affirm the application judge's finding that the challenged provisions, individually and in tandem, operate to limit the respondents' security of the person. We move now to whether that limit, and the limit on the liberty interest, accord with the principles of fundamental justice.

Issues 6, Does the deprivation of the respondents' liberty and security of the person accord with the principles of fundamental justice? If not, are the provisions saved by s. 1 of the *Charter*? If any of the three challenged provisions is unconstitutional, what is the appropriate remedy?

Overview of the principles of fundamental justice

[143] As we have already explained, three principles of fundamental justice are implicated in this case: arbitrariness, overbreadth and gross disproportionality. The application judge treated each of these principles as distinct concepts, as do we in the discussion that follows. However, we acknowledge that there is significant overlap among them. This has led to some confusion as to what level of deference the court should accord to legislative choice and what considerations govern at each step of the analysis.

[144] For each principle of fundamental justice, the court must examine the relationship between the challenged provision and the legislative objective that the provision reflects. It does so using a different filter for each concept.

[145] When the court considers arbitrariness, it asks whether the challenged law bears no relation to, or is inconsistent with, its legislative objective. Put another way, arbitrariness is established where a law deprives a person of his or her s. 7 rights for no valid purpose: *Rodriguez*, at pp. 594-595.

[146] As the Supreme Court noted in *PHS*, at para. 132, the jurisprudence on arbitrariness is not entirely settled. The ambiguity arises from *Chaoulli*, in which the Court split 3-3 on the question of whether a more deferential standard of inconsistency, or a more exacting standard of necessity, should drive the arbitrariness inquiry. In other words, must a law be inconsistent with, or bear no relation to, its purpose to be arbitrary, or is it sufficient to establish that the law is not necessary to achieve the purpose?

[147] In this case, we adopt the more conservative test for arbitrariness from *Rodriguez* that requires proof of inconsistency, and not merely a lack of necessity. Until a clear majority of the Supreme Court holds otherwise, we consider ourselves bound by the majority in *Rodriguez* on this point.

[148] While the role of necessity in the arbitrariness inquiry remains uncertain, it is indisputably a key component of the overbreadth analysis. When the court considers overbreadth, it asks whether the challenged law deprives a person of his or her s. 7 rights more than is necessary to achieve the legislative objective: *Heywood*, at p. 792. In analysing whether a statutory provision offends the principle against overbreadth, the court must accord the legislature a measure of deference and should not interfere with legislation simply because it might have chosen a different means of accomplishing the objective: *Heywood*, at p. 793.

[149] When a court considers gross disproportionality, it asks whether the deprivation of a person's s. 7 rights is so extreme as to be *per se* disproportionate to any legitimate government interest: *PHS*, at para. 133; *Malmo-Levine*, at para. 143.

[150] The fluidity of these concepts, particularly as they were described by the Supreme Court in *Clay*, has led some to question whether there is now only one principle of fundamental justice – gross disproportionality – or whether arbitrariness and overbreadth remain independent principles. Speaking for the court in *Clay*, at paras. 37-38, Gonthier and Binnie JJ. said:

> The analysis of overbreadth in relation to s. 7 was considered in *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761, at p. 793, where Cory J. observed that:
>
> > The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is *grossly*disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out, related to arbitrariness. [Emphasis in original.]

[151] The commingling of these principles of fundamental justice is evident in four recent decisions of this court where gross disproportionality was used as the measure of overbreadth on a s. 7 challenge: *R. v. Dyck,* 2008 ONCA 309 (CanLII),

2008 ONCA 309, 90 O.R. (3d) 409; *Cochrane v. Ontario (Attorney General)*, 2008 ONCA 781 (CanLII), 2008 ONCA 781, 92 O.R. (3d) 321, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 105; *R. v. Lindsay*, 2009 ONCA 532 (CanLII), 2009 ONCA 532, 97 O.R. (3d) 567, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 540; and *United States of America v. Nadarajah*, 2010 ONCA 858 (CanLII), 2010 ONCA 858, 266 C.C.C. (3d) 447, leave to appeal to S.C.C. granted, [2011] S.C.C.A. No. 64.

[152] The appellants seize on this ambiguity and argue that the application judge applied the wrong test for overbreadth by asking whether the challenged provisions were "necessary" to achieve the legislative objectives. Rather, they submit, the application judge should have asked whether the effects of the challenged provisions were grossly disproportionate to the legislative objectives.

[153] While we acknowledge that the jurisprudence in this area has been less than clear in the past, we are satisfied that the application judge was correct to apply the *Heywood* test for overbreadth by asking whether the challenged laws were necessary to achieve the legislative objectives. We say this for two reasons.

[154] First, as we explained above, gross disproportionality was recognized as a principle of fundamental justice a decade after *Heywood*, in the companion marijuana-related cases of *Malmo-Levine*, *Caine* and *Clay.* But in *R. v. Demers*, 2004 SCC 46 (CanLII), 2004 SCC 46, [2004] 2 S.C.R. 489, which post-dated the marijuana trilogy by a year, the Supreme Court applied the *Heywood* test with no suggestion that the overbreadth inquiry had been subsumed by gross disproportionality.

[155] Second, and more significantly, in the 2011 case of *PHS,* the Supreme Court considered the principles of arbitrariness, overbreadth and gross disproportionality separately. The Supreme Court found that the exercise of the Minister's discretion was both arbitrary and grossly disproportionate, and so concluded, at para. 134, that it is was not necessary to consider whether it was also overbroad. This is the clearest and most recent indication from the Supreme Court that these remain three distinct, if closely related, principles.

Do the challenged laws reflect an overarching legislative objective of eradicating or discouraging prostitution?

[156] Before we assess each provision separately, we begin by addressing the appellants' argument that the challenged provisions collectively reflect a broader legislative objective aimed at the problem of prostitution generally.

[157] The appellants submit that the application judge erred in her analysis of the principles of fundamental justice, both by mischaracterizing the objectives of the challenged provisions, and by failing to consider those provisions as part of

an overall legislative scheme aimed at eradicating, or at least discouraging, prostitution.[6] If this position is correct, the fact that prostitution itself is not illegal is of little constitutional significance. Indeed, it would be difficult for the respondents to establish that the provisions are arbitrary or overbroad and perhaps even disproportionate if, in some way, the laws advance the objective of reducing or abolishing prostitution.

[158] The appellants frame their argument concerning the objectives in slightly different ways. The Attorney General of Canada submits that the legislation is designed to denounce and deter the most harmful and public emanations of prostitution, to protect prostitutes, and to reduce the societal harms that accompany prostitution.

[159] The Attorney General of Ontario adopts the objectives identified by the Attorney General of Canada in part, but relying upon *R. v. Mara* 1996 CanLII 1504 (ON CA), (1996), 27 O.R. (3d) 643 (C.A.), affirmed 1997 CanLII 363 (SCC), [1997] 2 S.C.R. 630, it goes further and argues that the objective of the prostitution provisions is to eradicate prostitution. Counsel relies on the following passage from this court's decision in *Mara*, at p. 651:

> Although prostitution itself is not a crime in Canada, Parliament has chosen to attack prostitution indirectly by criminalizing prostitution-related activities. The purpose of doing so is to eliminate the harms that prostitution causes. In [the *Prostitution Reference*], Lamer J. explained that the bawdy-house provisions, procuring and pimping provisions, and disturbing the peace provisions are all aimed at the harms of prostitution. *Parliament wants to eradicate prostitution. The reason Parliament wants to eradicate prostitution is because it is harmful, a form of violence against women, related to men's historical dominance over women*. [Emphasis added.]

[160] The Attorney General of Ontario argues that the application judge erred by failing to refer to *Mara* and by failing to recognize that it was an authoritative statement from this court about the objectives of the challenged legislation. Because of the emphasis counsel places on *Mara*, we will deal with it before turning more directly to the argument that there exists a broad legislative objective of eradicating or discouraging prostitution.

[161] In our view, this court's decision in *Mara* is not determinative of the objectives of the prostitution legislation. We say this for two reasons.

[162] First, *Mara* did not deal with prostitution offences, but rather, with the indecent performance provision in s. 167 of the *Criminal Code*. Section 167 is found

in Part V, which is titled, "Sexual Offences, Public Morals and Disorderly Conduct". The prostitution provisions are found in Part VII, which is titled, "Disorderly Houses, Gaming and Betting". The court in *Mara* held that the kind of activity carried on in the tavern in that case, although falling within the terms of s. 167, was also a form of prostitution. It therefore referred to the reasons of Lamer J. in the *Prostitution Reference* as an aid to interpreting s. 167. It was not an authoritative comment on the objectives of the prostitution provisions. While there was a constitutional challenge to s. 167 in this court, the challenge was on the basis of vagueness and the part of the reasons relied upon by the Attorney General of Ontario was not part of the constitutional analysis.

[163] Second, when the *Mara* case reached the Supreme Court, the court found, at para. 37, that the harms associated with prostitution were only marginally relevant to a determination of what constituted indecency. In the Supreme Court's view, the degradation and objectification of the female performers was sufficient to establish indecency without also considering that the performances were similar to prostitution.

[164] There is nothing in Supreme Court's reasons in *Mara* to indicate that it adopted the views of this court about the purpose of the prostitution provisions. This is not surprising, given that this court relied on the reasons of Lamer J. in the *Prostitution Reference.* Justice Lamer was speaking only for himself in that case, and his opinion about the objectives of the prostitution provisions was rejected by the other members of the Supreme Court.

[165] Having concluded that this court's decision in *Mara* is not controlling, we are left to assess whether the legislative history of the challenged provisions reflects a broad, overall objective of discouraging, and even eradicating, prostitution. As we will explain, we are not persuaded that it does. On the contrary, if anything can be gleaned from the history of the treatment of prostitution in Canada, it is that acts of prostitution associated with public nuisance and the exploitation of prostitutes by pimps are to be prohibited, but prostitution itself is tolerated.

[166] The clearest expression of this approach is found in the dissenting reasons of Wilson J. (L'Heureux-Dubé J. concurring) in the *Prostitution Reference*, at pp. 1216-1217:

> While it is an undeniable fact that many people find the idea of exchanging sex for money offensive and immoral, it is also a fact that many types of conduct which are subject to widespread disapproval and allegations of immorality have not been criminalized. Indeed, one can think of a number of reasons why selling sex has not been made a criminal offence.... Whatever the reasons may be, the persistent resistance

> to outright criminalization of the act of prostitution cannot be treated as inconsequential.
>
> …
>
> *[T]he legality of prostitution must be recognized in any s. 7 analysis and must be respected regardless of one's personal views on the subject. As long as the act of selling sex is lawful it seems to me that this Court cannot impute to it the collective disapprobation reserved for criminal offences. We cannot treat as a crime that which the legislature has deliberately refrained from making a crime*. [Emphasis added.]

[167] One can see a similar, although less direct, approach in the majority reasons of Dickson C.J. (La Forest and Sopinka JJ. concurring), at pp. 1137-1138 of the *Prostitution Reference*:

> In making a choice to enact s. 195.1(1)(c) [now s. 213(1)(c)] as it now reads, *Parliament had to try to balance its decision to criminalize the nuisance aspects of street soliciting and its desire to take into account the policy arguments regarding the effects of criminalization of any aspect of prostitution.*[Emphasis added.]

[168] As we explained above, Lamer J. writing for himself in the *Prostitution Reference* stated, at p. 1191, that, although prostitution itself is not a crime in Canada, the laws that Parliament has passed to target prostitution indirectly are a clear indication that "our legislators are indeed aiming at eradicating the practice." No other member of the Supreme Court endorsed this view.

[169] To conclude on this point, we are satisfied that the challenged provisions are not aimed at eradicating prostitution, but only some of the consequences associated with it, such as disruption of neighbourhoods and the exploitation of vulnerable women by pimps.

[170] Having determined that there is no single, overarching legislative objective that animates the three provisions at issue in this case, we now turn to consider each provision individually, to assess whether it accords with the principles of fundamental justice.

[171] Our method is as follows. We open our discussion of each provision with a short preview of our ultimate conclusion on its constitutionality. The analysis that follows begins with an interpretation of the challenged provision, drawn from its legislative history and the existing jurisprudence. Next, we identify the

legislative objectives of the challenged provision. We then evaluate whether the challenged provision runs afoul of any of the three principles of fundamental justice at issue: arbitrariness, overbreadth, and gross disproportionality. If it does, we turn to its justification under s. 1, and finally, to any necessary remedies.

Do the bawdy-house provisions violate the principles of fundamental justice?

[172] As we explain below, the bawdy-house provisions aim to combat neighbourhood disruption or disorder and to safeguard public health and safety. We agree with the application judge that the prohibition is not arbitrary, because it targets many of the social harms associated with bawdy-houses. However, like the application judge, we conclude that the bawdy-house prohibition is overbroad because it captures conduct that is unlikely to lead to the problems Parliament seeks to curtail. In particular, the provisions prohibit a single prostitute operating discreetly by herself, in her own premises. We also agree with the application judge that the impact of the bawdy-house prohibition is grossly disproportionate to the legislative objective, because the record is clear that the safest way to sell sex is for a prostitute to work indoors, in a location under her control. It follows that the prohibition cannot be justified as a reasonable limit under s. 1.

[173] While we further agree with the application judge that the current bawdy-house prohibition is unconstitutional and must be struck down, we suspend the declaration of invalidity for 12 months to provide Parliament an opportunity to draft a *Charter*-compliant provision, should it elect to do so.

(1) Legislative history and judicial interpretation

[174] The legislative history of the bawdy-house provisions at issue on this appeal (i.e. the definition of "common bawdy-house" in s. 197(1) and the prohibition in s. 210) reveals a gradual broadening of the reach of the legislation: see *R. v. Corbeil,* 1991 CanLII 96 (SCC), [1991] 1 S.C.R. 830, *per* L'Heureux-Dubé J. (dissenting), at p. 846.

[175] Bawdy-houses were initially dealt with as forms of vagrancy and nuisance. With the 1953-1954 revision of the *Criminal Code*, the bawdy-house provisions were relocated to Part V (now Part VII), which deals with "Disorderly Houses, Gaming and Betting"; they are no longer associated with vagrancy. The Supreme Court subsequently held in *R. v. Patterson,* 1967 CanLII 22 (SCC), [1968] S.C.R. 157, that proof that premises were a bawdy-house required evidence that the premises were resorted to on a habitual and frequent basis.

[176] The bawdy-house provisions in the *Criminal Code* are rooted in ancient English criminal law. However, the Canadian approach differs from the English approach in at least one significant respect: in England, a place is not a

"common" bawdy-house when it is used by only one prostitute. By contrast, in Canada, by reason of a 1907 amendment to what is now s. 197(1) of the *Criminal Code*, a "common bawdy-house" is defined as a place that is kept or occupied or resorted to "*by one or more persons*" (emphasis added).

[177] The result is that a person who wishes to engage in prostitution in her own home runs afoul of s. 210: see *R. v. Worthington*(1972), 10 C.C.C. (2d) 311 (Ont. C.A.); *R. v. Cohen*, 1938 CanLII 12 (SCC), [1939] S.C.R. 212. Obviously, a group of prostitutes working together for reasons of safety, or otherwise, in a single place, would also violate the bawdy-house provisions as keepers or inmates.

[178] None of the parties, and in particular neither of the appellants, suggests that the bawdy-house provisions can be interpreted to permit prostitutes to use their own residences without attracting criminal liability. Given the legislative history, such an interpretation would be impossible.

(2) Objectives of the bawdy-house provisions

[179] As we have indicated, the application judge identified the objectives of the bawdy-house provisions as combating neighbourhood disruption or disorder, and safeguarding public health and safety. The appellants agree that these are some of the objectives, but argue that the legislation also works in conjunction with the procuring offences in s. 212 of the *Criminal Code* to control the "institutionalization and commercialization of prostitution".

[180] The only support for the broader objective of "controlling the institutionalization and commercialization of prostitution" is a single line from the *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and ServicesCanada, 1985), at p. 404 ("Fraser Report"). Drawing on this phrase, the Attorney General of Canada submits that "these offences are also aimed at discouraging and deterring prostitution generally, and thereby preventing the harm experienced by vulnerable people lured into, and involved in, prostitution that takes place hidden from the public view."

[181] The phrase relied upon by the Attorney General of Canada, so far as we can tell, is simply a description in the Fraser Report and was not intended as an explanation of the objectives of the legislation. There is nothing in the discussion of the bawdy-house provisions in the Fraser Report following this description that supports the broader objective urged by the appellants.

[182] The Attorney General of Ontario, consistent with its generally broader view of the objectives of the challenged legislation, reads the bawdy-house provisions as promoting values of dignity and equality by criminalizing a practice that reflects and reinforces anti-egalitarian attitudes.

[183] We agree that a modern, comprehensive legislative scheme dealing with prostitution could reflect the values of dignity and equality, but that is not the legislative scheme currently in place. As the respondents point out, the Fraser Report made a number of recommendations aimed at modernizing and harmonizing the existing patchwork of prostitution laws. Parliament responded soon after by introducing what is now s. 213(1)(c), the communicating provision.

[184] When the bill containing the new communicating provision was introduced in the House of Commons in late 1985, the Justice Minister explained that it was only intended to address the problem of street prostitution, and not the "whole social problem of prostitution". Rather, he declared that "the complicated, social problem of prostitution and pornography, these issues are going to be dealt with in the new year".[7]

[185] No comprehensive legislative scheme was introduced in the following year, nor has it been since.

[186] As the application judge pointed out, the Supreme Court considered the objectives of the bawdy-house provisions in the pre-*Charter* case of *Rockert*, where Estey J. wrote, at p. 712:

> The authorities leave little, if any, doubt that the mischief to which these offences were directed was not the betting, gaming and prostitution *per se*, but rather the harm to the interests of the community in which such activities were carried on in a notorious and habitual manner.

[187] In other words, the provisions are aimed at the harm to the interests of the community. There is no evidence of a broader objective of controlling the institutionalization or commercialization of prostitution, with the ultimate aim of eradicating or discouraging prostitution.

[188] In *Rockert*, Estey J. also referred with approval to the historical analysis of the provisions by Schroeder J.A., dissenting, in*R. v. Patterson*, [1967] 1 O.R. 429 (C.A.), at p. 435:[8]

> Viewed in historical perspective the keeping of a brothel or a common bawdy-house was a common nuisance and, as such, was indictable as a misdemeanour at common law. It was treated as a public nuisance "not only in respect of its endangering the public peace by drawing together dissolute and debauched persons but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness": *Russell on Crime*, 12th ed., vol. 2, p. 1440. It

> consisted of maintaining a place to the disturbance of the neighbourhood or for purposes which were injurious to the public morals, health, convenience or safety.

[189] This excerpt from *Patterson* identifies the objectives of the bawdy-house provisions as safeguarding the public peace *and* protecting against corruption of morals. As the application judge properly recognized, a legislative purpose grounded in imposing certain standards of public and sexual morality is no longer a legitimate objective for purposes of *Charter* analysis: *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452, at p. 492.

[190] Of course, Parliament could legislate, in the words of Sopinka J. in *Butler*, at p. 493, "for the purposes of safeguarding the values which are integral to a free and democratic society". But these are not the objectives of the current bawdy-house provisions, which are rooted in English common law and relate to nuisance and affront to public decency, not modern objectives of dignity and equality.

[191] In these circumstances, we agree with the application judge that to recast the objectives of these provisions as argued by the Attorneys General would violate the principle against shifting purpose: see *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731, at p. 761. Just as it is not open to the courts to invent new objectives for the purpose of s. 1, so it is the case for s. 7. The appellants' submission is not a mere shift in emphasis but a wholesale re-evaluation of ancient legislation to accord with modern values. It must, therefore, be rejected.

[192] Accordingly, we agree with the application judge that the objectives of the bawdy-house provisions are combating neighbourhood disruption or disorder and safeguarding public health and safety.

[193] We emphasize that these are not necessarily narrow objectives. The concept of public health and safety is a broad one, capable of evolving without violating the prohibition against shifting purpose: *Butler*, at p. 496. In our view, legislative concern for public health and safety is wide enough to encompass measures that target human trafficking and child exploitation, both of which may tragically arise through the operation of bawdy-houses. The fact that there are specific provisions that also deal with these alarming social problems does not mean that Parliament cannot rely on more general measures such as the bawdy-house provisions to combat them: see *Malmo-Levine,* at para. 137.

(3) Are the bawdy-house provisions arbitrary?

[194] The application judge was satisfied that there was some evidence that bawdy-houses can cause nuisance to the community and, thus, there is some

real connection to the objective of combating neighbourhood disruption or disorder. That is an accurate assessment of the evidence.

[195] In addition, there was evidence before the application judge that bawdy-houses can be used to conceal under-aged or trafficked prostitutes. Frequently, police investigating residential bawdy-houses have found vulnerable women brought in from abroad or under-aged girls working as prostitutes. The appellants' witnesses gave evidence that bawdy-houses are often an integral part of human trafficking syndicates where victims are trained and housed, and then transported elsewhere for the purpose of sexual exploitation. Massage parlours or strip clubs, which can in some circumstances constitute bawdy-houses, can also harm the community through noise and harassment. This evidence brings the bawdy-house provisions within the scope of the objectives of combating neighbourhood disruption or disorder and risks to public health and safety.

[196] We therefore agree with the application judge that the bawdy-house provisions do not infringe the arbitrariness principle of fundamental justice. We note that the fact that the bawdy-house provisions are rarely enforced is not a measure of arbitrariness. In any event, the evidence shows that lack of enforcement may be related to the difficulty of investigating these crimes.

[197] The application judge also concluded that, while the bawdy-house provisions are not arbitrary in and of themselves, they are arbitrary when considered in concert with the other challenged provisions. We find it unnecessary to address this conclusion given our disposition of the overbreadth and gross disproportionality issues, to which we now turn.

(4) Are the bawdy-house provisions overbroad?

[198] As we explained above, the application judge concluded that the bawdy-house provisions are overbroad because they catch conduct that does not contribute to the social harm sought to be curtailed.

[199] We have already rejected the appellants' submissions that the application judge mischaracterized the objectives of the legislation and adopted the wrong test for overbreadth. This leaves the difficult question of whether a blanket prohibition on all bawdy-houses is necessary to achieve Parliament's objectives.

[200] The wide definition of common bawdy-house under s. 197(1) of the *Criminal Code* includes not only large establishments, which are likely to contribute to neighbourhood disruption and disorder, but also single prostitutes working alone from their own homes. If the legislative objectives of the bawdy-house provisions included the eradication of prostitution and the deterrence of the sex industry, it may be that a blanket prohibition would not be overbroad. However, we have concluded that these are not the objectives of the bawdy-house provisions. The blanket prohibition cannot be upheld on that basis.

[201] We return to the test from *Heywood* and ask whether the blanket prohibition is necessary to achieve the state objectives we have identified. In doing so, we accept that it is open to Parliament to opt for a blanket prohibition because a narrower prohibition would not be effective in meeting the legislative objectives: see *Rodriguez*, at p. 607.

[202] Moreover, as we explained above, we also take a somewhat more expansive view of the public health and safety objectives of the legislation than did the application judge. Health and safety of the public is a broad objective, which can encompass laws that target problems such as human trafficking and child exploitation. These objectives would have been within the contemplation of Parliament as the scope of the bawdy-house provisions was gradually extended in the late 19th and early 20th centuries in response to the pressing social problem of so-called "white slavery". This history is detailed in the Fraser Report and discussed at para. 227 of the application judge's reasons.

[203] Nevertheless, even taking into account this broader understanding of public health and safety, it is our view that the application judge properly found that the provisions are overly broad. The legislation is not reasonably tailored to protect the public and in that context arbitrarily and disproportionately limits the liberty and security interests of the respondents.

[204] We find the legislation is most significantly overbroad in its extension to the prostitute's own home for her own use, a result of the 1907 amendment to the bawdy-house provisions that we described earlier. This geographic overbreadth is similar to the problem found by the Supreme Court in *Heywood*. There, the Supreme Court found the challenged loitering provisions overly broad in their geographical ambit because they applied to some public places where children were not likely to be present, even though the purpose of the provision was to protect children. Here, as the application judge found, a single person discreetly operating out of her own home by herself would be unlikely to cause most of the public health or safety problems to which the legislation is directed. Further, there was no suggestion that the broader public safety problems we identified are associated with a single person, operating by herself, in her own premises.

(5) Are the bawdy-house provisions grossly disproportionate?

[205] In light of our holding that the bawdy-house provisions offend the overbreadth principle, it is not strictly necessary to deal with gross disproportionality as it applies to those provisions. However, because the case may proceed further, we will briefly address this issue.

[206] Given the importance of the legislative objectives that animate the bawdy-house provisions, the impact on prostitutes would have to be extreme to warrant a finding of gross disproportionality. In our view, on the facts found by the

application judge, the impact on prostitutes is extreme. While empirical evidence is difficult to gather, as we have said earlier, there is a body of evidence to support the application judge's findings.

[207] In particular, the evidence in this case suggests that there is a very high homicide rate among prostitutes and the overwhelming majority of victims are street prostitutes. As well, while indoor prostitutes are subjected to violence, the rate of violence is much higher, and the nature of the violence is more extreme, against street prostitutes than those working indoors. The bawdy-house provisions prevent prostitutes from taking the basic safety precaution of moving indoors to locations under their control, which the application judge held is the safest way to sell sex. In this way, as the application judge found, the provisions dramatically impact on prostitutes' security of the person.[9]

[208] Before the application judge, two police officers testified that the bawdy-house provisions are important in human trafficking investigations. We accept that human trafficking in the bawdy-house context is a terrible scourge on society. However, the advantage of investigating these cases through the indirect method of bawdy-house investigations has to be measured against the harm faced by prostitutes because they cannot work in a safer environment.

[209] The common sense of that proposition was emphasized in the testimony of a police witness appearing before the Legislative Committee of the House of Commons in 1985 when the enactment of (now) s. 213(1)(c) was under consideration. The officer stated:[10]

> If anything causes street solicitation, at least in the short run, it is the criminalization of bawdy houses. Lacking a legal place to sell their legal services, prostitutes move out to the uncertain safety of the streets, where the problems complained of tend to gather. The decriminalization of bawdy houses is not synonymous with approving them in any moral sense: it merely is a more practical approach to the problems of pimping and street soliciting. *If women were free to operate discreetly out of their own homes, it would provide them with more safety and mutual support and allow a less public exit from the profession when the opportunity arises.* [Emphasis added.]

[210] Because empirical evidence is so difficult to come by in this area, the appellants and the respondents resorted to anecdotal evidence to support their positions. The appellants' most compelling argument is that, because of their many vulnerabilities, street prostitutes would not and could not work in bawdy-

houses run by others. Yet, the bawdy-house provisions also deny prostitutes the ability to operate from indoor locations where they live.

[211] The respondents point to evidence that shows street prostitutes will move indoors where that option is legal, as it is in England, where the prostitute works alone from her own home with only a "maid". The evidence from one of the respondents' experts, Professor John Lowman, is informative:

> But here again you see the key role of the law in facilitating the move off-street because a woman can work in a single premise in Birmingham without running afoul of the law. If we were to do a similar change of law in Canada, one would be able to predict that you would see a greater movement off-street of certain kind[s] of prostitutes, those who can afford the infrastructure, with a possibility that others would organize that infrastructure for those desperate and marginalized women on the Downtown Eastside who cannot pay for it….[11]

[212] To conclude, the impact on those put at risk by the legislation is extreme. We have no hesitation endorsing the application judge's holding that the impact of the bawdy-house prohibition on prostitutes, and particularly street prostitutes, is grossly disproportionate to its legislative objective.

(6) Are the bawdy-house provisions a reasonable limit under s. 1 of the *Charter*?

[213] The Attorney General of Canada only briefly addressed the issue of whether a violation of s. 7 could be saved by s. 1 of the *Charter*. The Attorney General of Ontario made no submissions on this issue. The Supreme Court has held that it would be a rare occasion when s. 1 could cure a breach of fundamental justice, and these rare occasions would tend to involve emergency situations: *Re B.C. Motor Vehicle Act*, at p. 518; *Malmo-Levine,* at para. 271. In this case, s. 1 cannot cure the overbreadth and gross disproportionality defects in the bawdy-house provisions since such a law could not meet the minimal impairment part of the s. 1 test: *Demers*, at para. 46.

(7) What is the appropriate remedy to address the s. 7 breach?

[214] As we have said, to cure the constitutional deficiencies in the bawdy-house provisions that she identified, the application judge struck the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210. The effect is to invalidate the prohibition on bawdy-houses for the purpose of prostitution, but not for acts of indecency. It also has no impact

on other sections of the *Criminal Code* that reference bawdy-houses, such as the procuring and concealing provisions in s. 212(1)(b),(c),(e) and (f).

[215] The application judge's discussion of remedy for the constitutional violations centred on whether there should be an immediate or a suspended declaration of invalidity of the challenged sections. To answer this question, she surveyed the other, unchallenged, *Criminal Code* provisions that offer protection to communities and to prostitutes. She concluded that there were sufficient safeguards in the other provisions to ensure that striking down the challenged provisions would not leave a dangerous vacuum. However, the application judge recognized that a consequence of her declaration would be that unlicensed brothels may be operated in a way that was not in the public interest. She therefore stayed her decision for 30 days to permit counsel to make submissions on how that problem might be addressed. As we have indicated, that stay was extended in subsequent orders.

[216] We have considered whether some lesser remedy, short of a declaration of invalidity, is appropriate to cure the s. 7 breach caused by the bawdy-house provisions. In our view, no lesser remedy than that chosen by the application judge is appropriate. A*Charter*-compliant solution requires a full reconsideration of the purpose and effect of the criminalization of bawdy-houses. This is a task for Parliament.

[217] We should not be taken as holding that any bawdy-house prohibition would be unconstitutional. It would be open to Parliament to draft a bawdy-house provision that is consistent with the modern values of human dignity and equality and is directed at specific pressing social problems, while also complying with the *Charter*. We note that striking down the current bawdy-house prohibition leaves intact other *Criminal Code* provisions that deal directly with the critical issue of human trafficking.[12]

[218] Because we believe that it is possible to draft *Charter*-compliant legislation directed at bawdy-houses, we suspend the declaration of invalidity as it relates to the definition of "common bawdy-house" for 12 months from the date of the release of these reasons.

CONCLUSION:

[325] For the reasons set out above, we declare that ss. 210 and 212(1)(j) of the *Criminal Code* are unconstitutional.

[326] To remedy the constitutional problem posed by s. 210, we strike the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210. We suspend this declaration of invalidity for 12 months to give

Parliament an opportunity to draft a *Charter*-compliant bawdy-house provision, should it elect to do so.

[327] To remedy the constitutional problem posed by s. 212(1)(j), we read in words of limitation to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation".

[328] We conclude that the communicating provision in s. 213(1)(c) does not offend the principles of fundamental justice. Accordingly, it does not infringe the respondents' s. 7 *Charter* rights. We further conclude that the application judge was bound by the *Prostitution Reference* to hold that s. 213(1)(c) is a reasonable limit on the right to freedom of expression under s. 2(b) of the *Charter.* We allow the appeal on these issues.

[329] The stay of the application judge's decision is extended for 30 days from the date of the release of these reasons so that all parties can consider their positions. The practical effect is:

- • The declaration of invalidity in respect of the bawdy-house provisions is suspended for one year from the date of the release of these reasons.

- • The amended living on the avails provision takes effect 30 days from the date of the release of these reasons.

- • The communicating provision remains in full force.

[330] We thank all counsel, including counsel for the interveners, for their thorough and thoughtful submissions. This is not a case for costs.

Signed: "Doherty J.A."

"M. Rosenberg J.A."

"K. Feldman J.A."

MacPherson J.A. (Dissenting in part):

[331] I have read the draft reasons prepared by my colleagues. I agree with their analysis and conclusions on all issues but one.

[332] My colleagues would uphold the validity of s. 213(1)(c) of the *Criminal Code* (communicating for the purpose of prostitution). They say that the provision is not arbitrary, overbroad or grossly disproportionate. They conclude that it is, therefore, in accordance with the principles of fundamental justice and s. 7 of the *Charter*.

[333] I agree that the communicating provision is neither arbitrary nor overbroad. However, in my view the application judge was correct to find that "the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance" and that the provision therefore violates s. 7 of the *Charter.*

[334] The basic test for gross disproportionality is well known and was recently restated by McLachlin C.J. in *PHS*, at para. 133,citing *Malmo-Levine*: "Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest".

[335] The application judge expressly applied this test to the communicating provision. Relying on the *Prostitution Reference*, the application judge described the legislative objective of the communication provision as "[the curtailment of] street solicitation and the *social* nuisance which it creates" (emphasis in original). There is no doubt that this is a legitimate and important objective.

[336] However, the application judge, "after weighing all of the evidence presented", found that prostitutes, particularly those who work on the street, are at high risk of being the victims of physical violence and that the communicating provision places street prostitutes "at greater risk of experiencing violence." She concluded that the danger posed to street prostitutes by the communicating provision greatly outweighed the goal of combating social nuisance.

[337] I can see no error in the application judge's determination that the communicating provision is grossly disproportionate. My colleagues would interfere with her analysis and uphold the provision. Respectfully, I disagree with their reasoning and conclusion on this issue. I do so for seven reasons.

[338] First, and most importantly, there is a striking disconnect between my colleagues' analysis and application of the principle of gross disproportionality to the bawdy-house and living on the avails provisions on the one hand, and their refusal to apply the same principle to the communicating provision on the other. With respect, my colleagues' description of the three provisions and their effects

on prostitutes does not support the conclusion that the communicating provision is not grossly disproportionate while the bawdy-house and living on the avails provisions are. To illustrate this point, I can do no better than quote some of the passages from my colleagues' reasons.

[339] In their discussion of the test for gross disproportionality in the section of their reasons relating to the communicating provision, my colleagues say this:

> The onerous standard that must be met to make out gross disproportionality is illustrated in the related context of cruel and unusual punishment under s. 12 of the *Charter*. In that context, the Supreme Court has also imposed a standard of gross disproportionality and used terms such as abhorrent or intolerable. While we do not say that the same test can be applied in the s. 7 context, these expressions assist in understanding the need for the claimants to show that the balance tips significantly in their favour. [Citations omitted.]

[340] In my view, this analogy is far removed from the way my colleagues frame the test for gross disproportionality in the bawdy-house and living on the avails sections of their reasons. In the final section of their reasons, my colleagues inject notions of "cruel and unusual punishment" and "abhorrent or intolerable" as touchstones for the analysis of gross disproportionality. This injection lays a foundation for an improper approach to gross disproportionality that is sharply at odds with the analysis in the previous sections of their reasons.

[341] In addition, referring to the effects of the three provisions, my colleagues say:

> On the facts as found by the application judge, *each of the provisions* criminalizes conduct that would mitigate, to some degree, the risk posed to prostitutes. On those findings, the relevant *Criminal Code* provisions, *individually and in tandem*, increase the risk of physical harm to persons engaged in prostitution, a lawful activity. They increase the harm by criminalizing obvious, and what on their face would appear to be potentially somewhat effective, safety measures. The connection between the existence of the criminal prohibitions and the added risk to those engaged in prostitution is, on the facts as found by the application judge, not obscure or tangential. An added risk of physical harm compromises personal integrity and autonomy and strikes at the core of the right to security

> of the person. On the facts as found, the added risk to prostitutes takes the form of an increased risk of serious physical harm or perhaps even worse. [Emphasis added.]

[342] In a similar vein, my colleagues later state that "[t]he non-exploitative conduct criminalized by the living on the avails provision and the communicative conduct criminalized by the communicating provision contribute in an *equally self-evident manner*to potential risks to prostitutes" (emphasis added).

[343] In the passages above, my colleagues equate the three impugned provisions and their effects on all prostitutes. However, in other places, my colleagues actually recognize the special vulnerability of street prostitutes. The following passage vividly illustrates this point:

> [T]he evidence in this case suggests that there is a very high homicide rate among prostitutes and the overwhelming majority of victims are street prostitutes. As well, while indoor prostitutes are subjected to violence, the rate of violence is much higher, and the nature of the violence is more extreme, against street prostitutes than those working indoors.

[344] The point I draw from these passages is a simple one. If, as my colleagues conclude, the bawdy-house and living on the avails provisions cannot survive the balancing exercise required by the gross disproportionality principle, then the communicating provision, with its equally serious – *and perhaps worse* – effects on prostitutes' rights to life and security of the person, should not survive it either.

[345] Second, I disagree with my colleagues' view that the trial judge "substantially understated the objective of the communicating provision". My colleagues imply that the application judge erred in failing to recognize that "[s]treet prostitution is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime."

[346] It is not clear to me how street prostitution's *association* with these other social ills increases the weight that ought to be assigned to the legislative objective. Indeed, in my view, the majority's focus on this factor runs contrary to the *Prostitution Reference*, where the majority of the Supreme Court of Canada did not accept Lamer J.'s position, at p. 1193, that "the curbing of related criminal activity such as the possession and trafficking of drugs, violence and pimping" was among the objectives of the communicating provision: see p. 1134, Dickson C.J.; p. 1211, Wilson J.

[347] Drug possession, drug trafficking, public intoxication and organized crime are grave social nuisances that will persist regardless of whether the communicating provision is upheld or struck down. The objective of the communicating provision, as accepted by the majority of the Supreme Court of Canada in the *Prostitution Reference*, at p. 1134, is to eradicate the social nuisance that flows directly from street prostitution, namely, "street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children". My colleagues' inclusion of this other criminal behaviour therefore seriously skews their analysis.

[348] Third, turning to the other side of the scale, I am not persuaded by my colleagues' suggestion that because screening is fallible, the security of the person infringement caused by the communicating provision should be assigned little weight. Screening may be imperfect, but the record demonstrates that it is nevertheless an essential tool for safety.

[349] In particular, all the prostitutes who testified in the 2006 parliamentary hearings on the solicitation laws agreed that working out the details of a transaction before getting into a vehicle, or going to a private location, was important for personal safety: Standing Committee on Justice and Human Rights, Subcommittee on Solicitation Laws, *The Challenge of Change: A Study ofCanada's Criminal Prostitution Laws* (Ottawa: House of Commons, December 2006) ("2006 *Subcommittee Report*"), at p. 65. Summarizing the statements of 91 street prostitutes from Vancouver, Katrina Pacey told the subcommittee that the communicating provision results in rushed negotiations, and does not allow for prostitutes to take "the time required to adequately assess a client and to follow their own instincts, or to maybe note if that client has appeared on a bad date list." The expert evidence of Dr. MacDonald, Dr. Maticka-Tyndale, Dr. Benoit and Dr. Shaver supports this position as well.

[350] In my view, the affidavit evidence in this case provides critical insight into the experience and knowledge of people who have worked on the streets, and who have been exposed to the risk of violence first-hand. This type of evidence should not be set aside lightly. The trial judge had a firm basis on which to find that the communicating provision endangers prostitutes by denying them the opportunity to screen clients.

[351] Fourth, my colleagues further underestimate the magnitude of the security of the person infringement by focusing exclusively on screening and ignoring other ways in which the communicating provision adversely affects prostitutes' safety.

[352] My colleagues overlook evidence that, instead of reducing street prostitution, the communicating provision forces prostitutes into isolated and dangerous areas. As the application judge pointed out, at para. 331 of her reasons:

The 2006 *Subcommittee Report* stated as follows at pp. 62-65:

> In many of the cities we visited, a number of witnesses indicated that the enforcement of section 213 forced street prostitution activities into isolated areas, where they asserted that the risk of abuse and violence is very high. These witnesses told us that by forcing people to work in secrecy, far from protection services, and by allowing clients complete anonymity, section 213 endangers those who are already very vulnerable selling sexual service on the street….
>
> During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.

The majority of the Subcommittee concluded at p. 89 that Canada's "quasi-legal" approach to adult prostitution "causes more harm than good" and "marginalizes prostitutes, often leaving them isolated and afraid to report abuse and violence to law enforcement authorities."

[353] By displacing prostitutes into isolated areas and discouraging them from working together, the communicating provision increases the risks faced by prostitutes. My colleagues disregard this displacement and assign no weight to its effects.

[354] Fifth, my colleagues fail to properly consider the vulnerability of the persons most affected by the communicating provision, and the ways in which their vulnerability magnifies the adverse impact of the law.

[355] The communicating provision most affects street prostitutes, a population the application judge found "are largely the most vulnerable [and] face an alarming amount of violence." Street prostitutes comprise the vast majority of survival sex workers for whom, as the Canadian Civil Liberties Association (CCLA) points out, prostitution is a means to secure basic human necessities.

[356] The equality values underlying s. 15 of the *Charter* require careful consideration of the adverse effects of the provision on disadvantaged groups. As the interveners POWER, Maggie's and the CCLA point out in compelling fashion, persons engaged in prostitution are overwhelmingly women. Many are aboriginal women. Some are members of lesbian and gay communities. Some are addicted to drugs and/or alcohol, both of which are forms of disability. Since gender, race, sexual orientation and disability are all enumerated or analogous grounds under s. 15 of the *Charter*, the s. 7 analysis must take into account that prostitutes often hail from these very groups. In *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 115, L'Heureux-Dubé J. (joined by Gonthier and McLachlin JJ.), concurring in the result, stated:

> [I]n considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

[357] Instead, my colleagues have turned the question of pre-existing disadvantage on its head. They reason that because prostitutes' marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given *less* weight.

[358] To the contrary, prostitutes' pre-existing vulnerability exacerbates the security of the person infringement caused by the communicating provision. It is precisely those street prostitutes who are unable to go inside or to work with service providers who are most harmed when screening is forbidden.

[359] The communicating provision chokes off self-protection options for prostitutes who are already at enormous risk. The evidence in the record about the violence faced by street prostitutes across Canada is, in a word, overwhelming. One does not need to conjure up the face of Robert Pickton to know that this is true.

[360] Any measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence, including assault, rape and murder, involves a grave infringement of that individual's security of the person. The infringement caused by the communicating provision is especially significant in light of the reality that many prostitutes have few alternative means of protecting themselves. Putting aside the fiction that all prostitutes can easily leave prostitution by choice or practise their occupation indoors, the communicating provision closes off valuable options that street prostitutes do have to try to protect themselves.

[361] Sixth, I do not accept my colleagues' conclusion that "the application judge also erred by equating this case with *PHS*." After a brief discussion, my colleagues state the rationale for their conclusion in this fashion: "The impact of the communicating provision on the dangers posed to street prostitutes is simply not comparable to the impact of the Minister's decision on the health and safety of the drug users in *PHS*."

[362] With respect, this conclusion and rationale are precisely the opposite of the comparison of this case and *PHS* earlier in my colleagues' reasons, where they say:

> We see a parallel between the circumstances of drug addicts who, because of a criminal prohibition, cannot access a venue where they can safely self-inject and therefore, must resort to dangerous venues, and prostitutes who, because of criminal prohibitions, cannot work at venues using methods that maximize their personal safety, but must instead resort to venues and methods where the physical risks associated with prostitution are much greater. In both situations, the criminal prohibitions, as interpreted by the courts, operate on those claiming the s. 7 breach in a way that interferes with their ability to take steps to protect themselves while engaged in a dangerous activity. In one sense, the prostitutes' claim is even stronger in that

> prostitution, unlike the illicit possession and use of narcotics, is not an unlawful activity.

[363] I prefer this analysis and reach this conclusion: the analysis of s. 7 of the *Charter* in *PHS* supports the conclusion that the communicating provision in this case, like the Ministerial decision in *PHS*, violates s. 7.

[364] Seventh, the deprivation caused by the communicating provision is particularly serious in light of the legal framework that applies to prostitutes and the circumstances in which they work. It must be recalled that, of the three challenged provisions, the communicating provision is by far the most recent in origin. The provision was enacted in 1985 at a time when both the bawdy-house and living on the avails provisions were already in force. The cumulative effect of these provisions was startling. The bawdy-house provision forbade prostitutes – practitioners of a legal occupation – from engaging in their occupation in relatively safe indoor locations, forcing them to work on the streets. Then, the communicating provision prohibited prostitutes from communicating with prospective clients, usually in idling cars, to assess clients' potential drunkenness, weirdness or violence. The 1985 addition of the communicating provision to the existing bawdy-house and living on the avails provisions created an almost perfect storm of danger for prostitutes. Prostitutes were first driven to the streets, and then denied the one defence, communication, that allowed them to evaluate prospective clients in real time.

[365] This problem is not cured by the majority's treatment of the first two impugned provisions. The communicating provision will remain deeply problematic even if the bawdy-house provision is struck down and the living on the avails provision is altered by reading in narrowing words, as proposed.

[366] The interveners PACE Society, Downtown Eastside Sex Workers United Against Violence Society, and Pivot Legal Society jointly submit that many street prostitutes will be unable to take advantage of the safety benefits offered by moving indoors or hiring bodyguards. Many prostitutes will stay on the streets because of coercion, insufficient resources, or lack of support networks. For many prostitutes, safe working spaces are hard or impossible to come by. I agree with this submission.

[367] With the prohibition on bawdy-houses still in effect, it is impossible to obtain empirical evidence as to whether street prostitutes will indeed move indoors if they are legally able to do so. This is where the international experience is instructive. Although the Netherlands has completely legalized prostitution and given prostitutes the option to move indoors, up to 10% of prostitution continues to occur on the street. Street prostitutes in the Netherlands

are often addicted to drugs or suffer from mental illness, are unwanted in brothels, and are unable to pay to rent a window.

[368] Even efforts by charities to help street prostitutes move indoors may not succeed while the communicating provision remains in force. Grandma's House, a charitable society that provided indoor space for street prostitutes in Vancouver, was established at a time when there were fears of a serial killer preying on prostitutes. (Those fears were, of course, borne out by the conviction of Robert Pickton.) The prostitutes using Grandma's House still relied on outdoor solicitation to find clients. It is not at all clear that this model could operate while public solicitation remains forbidden.

[369] My colleagues concede that there is no evidence in the record to suggest that eliminating the bawdy-house provision will shift the ground to the extent that all street prostitutes will move inside. Accordingly, as the interveners put it, street prostitution will continue to exist. In that context, the communicating provision will continue to impair street prostitutes' efforts to protect themselves. It will inhibit their efforts to work collectively. It will prevent them from communicating with their clients to assess potential danger. It will continue to drive street prostitutes to isolated, and potentially very dangerous, locations. All this implicates street prostitutes' personal safety and, in far too many cases, the fragile line between life and death.

[370] I conclude by recalling this passage from my colleagues' reasons:

> When a court is required to decide whether there is a sufficient connection between crime-creating legislation and an alleged interference with an individual's right to security of the person, *the court must examine the effect of that legislation in the world in which it actually operates*. This assessment is a practical and pragmatic one. [Emphasis added.]

[371] 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.

[372] 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.

[373] My colleagues recognize, correctly, that the effects of two *Criminal Code* provisions that prevent indoor prostitutes' safety measures are grossly disproportionate to their valid legislative objectives. I regret that they do not reach the same conclusion with respect to a third provision that has a

devastating impact on the right to life and security of the person of the most vulnerable affected group, street prostitutes.

[374] For these reasons, I conclude that the application judge was right to determine that s. 213(1)(c) of the *Criminal Code* violated s. 7 of the *Charter* and is, therefore, unconstitutional.

Signed: "J. C. MacPherson J.A."
"I agree E. A. Cronk J.A."

RELEASED: "DD" March 26, 2012

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[1] As the application judge noted at endnote 4 of her reasons, we acknowledge that some prefer the term "sex worker" to "prostitute", which they consider to be pejorative. Others take the opposite view and argue that the term "sex worker" ignores the plight of women who are forced into prostitution. In these reasons, as in the court below, we use the term "prostitute" to track the language of the *Criminal Code*, and should not be seen to be adjudicating on this issue.

[2] That rule provides: "A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is for a remedy under the *Canadian Charter of Rights and Freedoms*".

[3] Throughout these reasons, we use feminine pronouns when referring to prostitutes because the evidence establishes that the majority of prostitutes are women. However, we recognize that, as some of the interveners point out, there are also a significant number of men, and transgendered and transsexual persons working as prostitutes.

[4] The Attorney General of Ontario was an intervener in the Superior Court of Justice. It is an appellant on the appeal.

[5] The appellants conceded that the liberty interest of all three respondents is engaged in respect of all the challenged provisions. We accept that concession, although we observe that Ms. Lebovitch and Ms. Scott could not be prosecuted under the living on the avails provision based on the information in their affidavits.

[6] The intervener Women's Coalition also argues that the broad purpose of all prostitution-related offences in the *Criminal Code* is to discourage prostitution. It advocates the Swedish model of asymmetric criminalization, which prohibits the purchase, but not the sale, of sex. The interveners POWER and Maggie's dispute the wisdom of this model, arguing that it does nothing to enhance prostitutes' safety and that it undermines, rather than enhances, the *Charter* value of equality.

[7] Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49 (November 7, 1985), p. 8.10.

[8] On appeal, the Supreme Court reversed this court's decision, agreeing with the reasons of Schroeder J.A. that the premises were not shown to be a common bawdy-house: 1967 CanLII 22 (SCC), [1968] S.C.R. 157.

[9] While we do not place a great deal of weight on the international experience, we note that this evidence supports the respondents' position. This evidence shows that legalization and regulation of prostitution has increased the safety of prostitutes with minimal increase in the harm a bawdy-house prohibition is meant to address. The appellants read the evidence from other jurisdictions differently; they suggest that the evidence shows that the demand for prostitution increases with decriminalization, that organized crime continues to be involved, and that decriminalization does nothing to address the

problems of child prostitution. The evidence relied upon by the appellants is unpersuasive and does not meet the evidence relied upon by the respondents. The appellants' evidence rests upon the proposition that prostitution can and should be eliminated, an objective that is not supported by the legislative history of the challenged provisions.
[10] House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49 (October 31, 1985), p. 7:10.
[11] Some of the interveners submit that not all street prostitutes would move indoors if that option were legally available to them. We address this issue later in these reasons.

[12] Those sections include: s. 211: transporting persons to a bawdy-house; s. 212(1)(b): enticing a person who is not a prostitute to a common bawdy-house; s. 212(1)(c): concealing a person in a bawdy-house; s. 212(1)(d): procuring a person to become a prostitute; s. 212(1)(e): procuring a person to become an inmate of a bawdy-house; s. 212(1)(f): directing a person on arrival in Canada to a bawdy-house; s. 212(1)(g): procuring a person to enter or leave Canada for the purpose of prostitution; s. 279.01: trafficking in persons; s. 279.011: trafficking in persons under age of 18 years; s. 279.02: profiting from human trafficking.

[13] *Sexual Offences Act, 1956*, 4 & 5 Eliz. 2 c. 69, s. 30(1): "It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution."
[14] A majority of the Supreme Court in *Downey* upheld s. 213(3) as a reasonable limit on the presumption of innocence in s. 11(d) of the *Charter*.
[15] In *Grilo*, at p. 522, Arbour J.A. referred to s. 212(1)(h) as "the classic pimping section".
[16] The interveners POWER and Maggie's dispute the legitimacy of the government's stated objectives of the communicating law as pandering to the moral sensibilities of some members of society. We reject this submission for the reasons discussed above.

NOTE: THIS CASE HAS BEEN EDITED FROM ITS ORGINAL FORM. IT IS MEANT STRICTLY FOR THE PARALEGAL SOCIETY OF ONTARIO'S MOOT. IT IS NOT TO BE CONFUSED WITH THE ONTARIO COURT OF APPEAL'S DECISION OF BEDFORD v CANADA (ATTORNEY GENERAL)

THE ORIGINAL CAN BE FOUND HERE:

http://www.canlii.org/en/on/onca/doc/2012/2012onca186/2012onca186.html?searchUrlHash=AAAAAQAVYmVkZm9yZCB2IENhbmFkYSBPTkNBAAAAAAE