THE INITIAL TEST OF CONSTITUTIONAL VALIDITY: IDENTIFYING THE LEGISLATIVE OBJECTIVES OF CANADA'S NEW PROSTITUTION LAWS

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I. INTRODUCTION

The criminal legislative framework applicable to the purchase and sale of sexual services in Canada has shifted dramatically in the past several years resulting from a successful constitutional challenge and the subsequent enactment of new criminal sanctions. Prior to 2013, buying and selling sexual services was not illegal, but certain activities related to the conduct of prostitution were subject to criminal sanctions. In 2013, the Supreme Court of Canada ("SCC") declared three offences applicable to adult prostitution[1] inconsistent with the *Canadian Charter of Rights and Freedoms*[2] (the "*Charter*") and therefore void, providing the Parliament of Canada ("Parliament") with 12 months in which to respond before adult

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1 See *Criminal Code*, RSC 1985, c C-46, ss 210 (as it related to prostitution), 212(1)(j), 213(1)(c) [*Criminal Code*]. The SCC also struck the word "prostitution" from the definition of "common bawdy-house" in subsection 197(1) of the *Criminal Code* as it applied to section 210.

2 *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

prostitution would be effectively decriminalized in Canada.[3] In 2014, Parliament enacted the *Protection of Communities and Exploited Persons Act* (*PCEPA*).[4] It is now a criminal offence to obtain sexual services for consideration in Canada. It was critical to the decision of the SCC in *Canada (Attorney General) v Bedford* ("*Bedford*") that prostitution was a legal activity, notwithstanding that there were criminal prohibitions applicable to some activities related to prostitution. Under the new regime applicable to prostitution in Canada, a criminal offence occurs every time sex is exchanged for compensation. As such, an argument exists that prostitution is now illegal in Canada.[5]

The constitutionality of the *PCEPA* has been questioned,[6] but it has not to date been the subject of a constitutional challenge and its constitutionality has not been determined by the courts. It has been suggested that the criminal provisions enacted by the *PCEPA* may violate sections 2(b), 2(d), 7, 11, and 15 of the *Charter* by "infring[ing] sex workers' rights to freedom of expression, freedom of association, security, liberty, autonomy, and equality".[7]

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[3] See *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford* SCC].

[4] SC 2014, c 25 [*PCEPA*].

[5] See e.g. *R v Alexander et al*, 2016 ONCJ 452 at para 14, 2016 CarswellOnt 12535 (WL): "prostitution itself is now illegal" (where the Court considered whether there was sufficient evidence to commit the defendants to stand trial for charges under sections 286.1–286.5 of the *Criminal Code*). This is consistent with the intention of Parliament discussed later in this article. See also Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 CJLS 5 at 7 (where the author identifies that selling sex is no longer legal); Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69 at 79 (where the author describes it as unlawful).

[6] See Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta L Rev 101 (where the authors argue that a model premised on ending demand would not survive constitutional scrutiny in Canada).

[7] Brenda Belak & Darcie Bennett, *Evaluating Canada's Sex Work Laws: The Case for Repeal* (Vancouver: Pivot Legal Society, 2016) at 11–12, 39–63.

In a recent article, Hamish Stewart suggested a new argument: that the *PCEPA* is unconstitutional on the basis that it has incompatible purposes with the potential to create arbitrary and grossly disproportionate effects on sex workers' security of the person.[8] He identified the two incompatible purposes as: "denouncing and deterring sex work" and "improving sex workers' safety".[9]

In his article, Stewart uses the term sex work instead of the word prostitution because the term is "preferred by many persons who engage in this work and by those who advocate for their safety and for the legalization of their work."[10] Both the word prostitution and the term sex work now carry significant normative meaning and they are not interchangeable.[11] Prostitution has been defined by the SCC as "the exchange of sexual services by one person in return for payment by another",[12] and this is the word used by the SCC and Parliament in the recent legal developments discussed here. The term sex work has been used more specifically in recent decriminalization efforts to refer to "the exchange of sexual services, involving sexual acts, between consenting adults for remuneration, with

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[8] See Stewart, *supra* note 5 at 71.

[9] *Ibid.*

[10] *Ibid*, n 13.

[11] See generally Christine Overall, "What's Wrong with Prostitution? Evaluating Sex Work" (1992) 17:4 Signs 705 (for a discussion of competing discourses split between "an emphasis on sexual freedom and pleasure that views women exclusively as agents, on the one hand, and an emphasis on sexual danger and degradation that sees women exclusively as victims on the other": *ibid* at 707); Kate Sutherland, "Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade" (2004) 42:1 Osgoode Hall LJ 139 (for the ways in which feminist theory informs activist legal strategies and the role of the sex worker in these discourses); Jacqueline M Davies, "The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis" (2015) 24:2 Can J Human Sexuality 78 (where the author notes the lack of value-free terminology).

[12] *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1159, [1990] 4 WWR 481 [*Prostitution Reference*] (where the SCC identifies the word prostitution as a term of common usage).

terms agreed between buyer and seller."[13] In this way, the term sex work may be understood as referring to prostitution when engaged in by a subset of sellers bearing distinct characteristics.[14] The word prostitution is used in the remainder of this article when referring to the exchange itself. The term sex work is used when referencing sources specifically using this term. Consistent with the terminology used in the *PCEPA*, this article also refers to persons who exchange their own sexual services. The lack of precision in the use of terminology presents challenges to those tasked with identifying and responding to the problems associated with the exchange of sexual services for payment.[15] Some of those challenges are identified here.

This article contends that it is not an overall objective of the *PCEPA* or the criminal prohibitions created by it to improve sex workers' safety. It further argues that any steps taken by Parliament to remove barriers to sex workers' efforts to reduce their own risk of experiencing harm is not inconsistent with the overall objective of denouncing and deterring prostitution, and reflects an effort to balance the interests of those who continue to exchange their own sexual services for compensation with the overall objective of the legislative scheme.

The first part of this article summarizes Stewart's argument that the *PCEPA* is incoherent on the basis that it has inconsistent legislative purposes. Next, this article examines key features of the decision of the SCC

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13 Belak & Bennett, *supra* note 7 at 9, citing Amnesty International, *Amnesty International Policy on State Obligations to Respect, Protect and Fulfil the Human Rights of Sex Workers*, POL 30/4062/2016 (26 May 2016) at 3.

14 It is outside the scope and intention of this article to engage in a discussion of which term (and its embedded normative features and policy recommendations) may be more accurate or appropriate. Neither framing would sufficiently take into account the experiences of all who exchange their own sexual services for compensation. See Debra M Haak, "Re(de)fining 'Prostitution' and 'Sex Work': A Foundation for More Nuanced Research and Policy Evaluation" [forthcoming].

15 This is particularly concerning where the characteristics of sex worker subjects in empirical research do not carefully identify which prostitution participants are and are not reflected in the study. Few academic works clearly define the term sex work, although the use of the term often appears to signpost alignment with a normative understanding of the exchange.

in *Bedford*, and summarizes international approaches to legislating the commercial exchange of sex for money to locate the social and legislative context for the change of policy in Canada. Third, it outlines the role of legislative purpose in evaluating constitutionality under sections 7 and 1 of the *Charter*, and considers how the courts might approach the determination of legislative purpose. The fourth part summarizes the legislative provisions of the *PCEPA* and examines the legislative objectives as expressed in the provisions themselves, a lengthy preamble, an accompanying Department of Justice technical paper, debates in the House of Commons and the Senate, and early jurisprudence interpreting the *PCEPA*. It identifies the overall objective of the *PCEPA* as reducing the demand for prostitution with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it as much as possible.[16] The final part examines how prostitutes' safety is reflected in the legislative acts embodied in and accompanying the *PCEPA*, and argues that there is no inconsistency between the overall objective of denouncing and deterring prostitution and the steps taken by Parliament to balance the interests of those who continue to exchange their own sexual services for compensation with this objective.

Identifying the legislative objectives of the *PCEPA*, and the criminal offences created by it, and disputing the claim that one intention is to make sex work safer for those who exchange their own sexual services is important for two separate and distinct reasons. The first relates to the importance of identifying and articulating objectives in evaluating the constitutionality of the *PCEPA* and the criminal offences created by it. Once a court finds that legislative action has violated someone's right to life, liberty, or security of the person guaranteed under section 7 of the *Charter*, the principles of fundamental justice require an evaluation of the effects of the impugned legislative action compared to the legislative objective of that action. Should

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[16] See Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: Department of Justice, 1 December 2014), online: <www.justice.gc.ca/eng/rp-pr/other-autre/protect/index.html> [Department of Justice, *Technical Paper*].

the legislative action not accord with these principles, the section 1 *Charter* analysis then asks whether the negative impact of the law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The second reason why the legislative objectives are important relates to the generation of meaningful and reliable research about the effectiveness of the *PCEPA* and the criminal offences created by it. It has been suggested that the *PCEPA* and the model of criminal response embodied in it are ineffective.[17] Criticism of legislative responses to prostitution that seek to end demand is often founded wholly or in part on the claim that such responses fail to make sex work safer for sex workers or recognize their human rights.[18] If denouncing and deterring prostitution is a constitutionally permissible objective in Canada, then evaluation of the effectiveness of the *PCEPA* or the criminal sanctions created by it ought to be measured against this objective—being mindful of the limits of empirical inquiry[19]—as well as the implications of enforcement on the potential to achieve the stated objectives.[20]

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17 See Phoebe J Galbally, "Playing the Victim: A Critical Analysis of Canada's Bill C-36 from an International Human Rights Perspective" (2016) 17:1 Melbourne J Intl L 135 at 167–68 (where the author evaluates the claim that Bill C-36 will further gender equality and analyzes the productive effects of Bill C-36's construction of female sex workers as victims).

18 See e.g. Manpreet Abrol, "The Criminalization of Prostitution: Putting Women's Lives at Risk" (2014) 3:1 J Historical Studies 1 (where the author argues that the criminalization of prostitution puts the lives of sex workers in jeopardy); Jay Levy & Pye Jakobsson, "Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers" (2014) 14:5 Criminology & Criminal Justice 593 (where the authors argue that Sweden's law has increased the danger associated with some forms of sex work).

19 See *Bedford v Canada*, 2010 ONSC 4264 at paras 97–98, 102 OR (3d) 321 [*Bedford* ONSC] (where Himel J identified the hard-to-reach and fluid nature of prostitution and the importance of limiting conclusions of empirical research to sample size). See also Michelle Madden Dempsey, "How to Argue About Prostitution" (2012) 6:1 Criminal L & Philosophy 65 (for a discussion of the challenge of developing a body of empirical knowledge when researchers focus on influencing their audiences to adopt particular policies); House of Commons, Standing Committee on Justice and Human Rights & Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (December 2006) (Chairs: Art Hanger & John

II. SUGGESTION OF INCONSISTENT LEGISLATIVE OBJECTIVES

In his recent article, Stewart presented a novel argument about the constitutionality of the *PCEPA*. First, he identified that the *PCEPA* has two separate and distinct legislative purposes.[21] Next, he argued that the inconsistency between the two purposes—each of which, he suggested, was on its own constitutionally permissible[22]—created space for arguments of arbitrariness and gross disproportionality.

Stewart identified the central purpose of the *PCEPA* to be denouncing and deterring prostitution.[23] He acknowledged this objective to be fundamentally different from the purposes of the laws struck down by the SCC in *Bedford*. Stewart argued that the new offences created by the *PCEPA* were designed to implement this objective by criminalizing prostitution itself.[24] He identified that the new legislative framework not only criminalized the purchaser but also ensured that the person providing sexual services for consideration was guilty of a crime,[25] albeit one for which they could not be prosecuted.

Maloney) (for a discussion of the difficulty of knowing the extent of prostitution activity in Canada and generating a representative picture of those who sell sexual services, and for acknowledgment that social science research has been conducted in conjunction with organizations defending sex workers' rights).

[20] See Lauren Jones, "Canadian Prostitution Law: History and Market Impacts" in Scott Cunningham & Manisha Shah, eds, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016) 391 at 402–05 (where the author suggests that variations in prostitution incident rates may be caused by the degree to which police enforce the criminal law and differences in policing strategies). This is likely to be the case in Canada when evaluating the *PCEPA* due to varying enforcement strategies.

[21] See Stewart, *supra* note 5 at 71, 88.

[22] See *ibid*.

[23] See *ibid* at 71.

[24] See *ibid*.

[25] See *ibid* at 76.

Stewart then identified a second policy objective, variously referred to as "improving sex workers' safety",[26] "amelior[ating] the legal situation of sex workers",[27] "making sex work safer",[28] and "mitigating its dangers."[29] He suggested that this second objective arose as a result of the measures taken to eliminate the three constitutional defects identified by the SCC in *Bedford*.[30] He describes these measures as "immunizing sex workers and selected others from criminal prosecution for certain offences".[31]

In considering the effect of the new policy on section 7 arguments, Stewart noted two features of the *PCEPA* rendered the arguments made in *Bedford* less likely to succeed if the legislative objectives were taken at face value. Firstly, the criminalization of prostitution itself supported an argument that the effect of the law on prostitutes was caused by their choice to engage in prostitution.[32] Secondly, the new overall legislative objective is weightier than the objectives of the offences in the old regime.

Stewart noted that a moral purpose is likely to be constitutionally proper,[33] and that a court will articulate a legislative purpose in a way that is "neither too specific nor too broad."[34] He then argued that the *PCEPA*, as a whole, may be unconstitutional on the basis that it is arbitrary or grossly

26 *Ibid* at 71.

27 *Ibid*.

28 *Ibid* at 86.

29 *Ibid* at 80. Stewart's use of the term sex work here refers to prostitution as I have defined it above.

30 This argument has also taken up by Angela Campbell, who suggests that the government's mandate in responding to the decision in *Bedford* SCC was "to engage in law reform so as to ensure that Canadian criminal law no longer endangers sex workers' lives and security": Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23:1 Fem Leg Stud 27 at 29. See also Abrol, *supra* note 18 (for a discussion of how *Bedford* SCC established that criminalizing sex work increases the harm experienced by sex workers).

31 Stewart, *supra* note 5 at 72.

32 See *ibid* at 80–84.

33 See *ibid*, n 69.

34 *Ibid* at 86.

disproportionate in a way that cannot be justified by section 1 of the *Charter*, due to the lack of consistency between the two objectives he identified.[35] He suggested that the most direct way to deal with the contradictions would be to strike down the obtaining sexual services offence, following which the other offences would fall.

Stewart's argument about the constitutionality of the *PCEPA* is founded upon the claim that there are two separate, distinct, and inconsistent legislative objectives. The remainder of this article examines the legislative purposes of the *PCEPA* and the criminal offences created by it.

III. CONTEXT FOR POLICY CHANGE IN CANADA

In December of 2013, the SCC declared three *Criminal Code* offences applicable to adult prostitution unconstitutional and suspended the declaration of invalidity for a period of one year to allow Parliament to respond. Had Parliament not responded, adult prostitution would have been largely decriminalized in Canada. While many advocated for the decriminalization of adult sex work, legislative regimes enacted in the international community reflected a lack of consensus between countries with distinct and different normative approaches to the commercial exchange of sex for money. This section sets out the context in which Parliament revised Canada's legislative approach to prostitution.

A. SUPREME COURT OF CANADA DECLARED EXISTING PROSTITUTION LAWS UNCONSTITUTIONAL

In *Bedford*, three then current or former prostitutes commenced an application in the Ontario Superior Court of Justice seeking a declaration that section 210 (the "Bawdy-House Offence"),[36] paragraph 212(1)(j) (the

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[35] See *ibid* at 86–88.

[36] *Criminal Code*, *supra* note 1, s 210:

> **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.
>
> **Landlord, inmate, etc.**
>
> **(2)** Every one who

"Living on the Avails Offence"),[37] and paragraph 213(1)(c) (the "Communicating Offence")[38] of the *Criminal Code* were "unconstitutional and of no force and effect."[39] They founded this claim on the contention that the impugned criminal provisions violated section 7 of the *Charter*, that the deprivation did not accord with the principles of fundamental justice, and that the provisions could not be justified under section 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society.[40]

In 2013, the SCC declared the Bawdy-House Offence (as it related to prostitution), the Living on the Avails Offence, and the Communicating Offence inconsistent with the *Charter* and therefore void.[41] The Court struck the word "prostitution" from the definition of "common bawdy-house" in subsection 197(1) of the *Criminal Code* as it applied to

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> **(a)** is an inmate of a common bawdy-house,
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> **(b)** is found, without lawful excuse, in a common bawdy-house, or
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> **(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.

37 *Criminal Code*, *supra* note 1, s 212(1)(j), as repealed by *PCEPA*, *supra* note 4, s 13:

> **212 (1)** Every one who . . .
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> **(j)** lives wholly or in part on the avails of prostitution of another person,
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> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

38 *Criminal Code*, *supra* note 1, s 213(1)(c), as repealed by *PCEPA*, *supra* note 4, s 15:

> **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.

39 *Bedford* ONSC, *supra* note 19 at para 4.

40 See *ibid* at para 9. They also argued that the Communicating Offence violated subsection 2(b) of the *Charter* in a way that could not be justified under section 1 (see *ibid*).

41 See *Bedford* SCC, *supra* note 3 at para 164.

the Bawdy-House Offence only.[42] Writing for the Court, Chief Justice McLachlin held that "[t]hese appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not."[43]

The factual context in *Bedford* was critical to the SCC's finding that the impugned criminal provisions violated the applicants' section 7 rights. An essential aspect of the Court's evaluation of whether a section 7 rights violation had occurred was the fact that prostitution was a legal activity. The SCC held that the impugned criminal provisions precluded people engaged in a risky but legal activity from taking steps to reduce their risk of experiencing harm.[44]

Following a finding that the provisions failed to accord with the principles of fundamental justice for reasons discussed further below, the SCC suspended the declaration of invalidity of the impugned criminal provisions for a period of one year, "returning the question of how to deal with prostitution to Parliament."[45] The SCC acknowledged that dealing with prostitution is complex and sensitive, that how prostitution is regulated is a matter of great public importance, and that few countries leave prostitution unregulated.[46]

The SCC in *Bedford* clearly stated that policy was a matter for Parliament and not the courts.[47] Peter Hogg has observed that in most areas of public policy, the courts "can make only crude and simple interventions in fields that require subtle and complex regulation" because they are driven by the facts of the case before them.[48] The SCC has also confirmed that "it

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42 See *ibid*.

43 *Ibid* at para 2.

44 See *ibid* at para 60.

45 *Ibid* at para 2.

46 See *ibid* at para 167.

47 See *Ibid* at para 165.

48 Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2016) at 210.

is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable."[49]

In *Bedford*, the SCC noted that "Parliament [was] not precluded [by the decision] from imposing limits on where and how prostitution may be conducted" in Canada.[50] In considering the scope of limitations on the future regulation of prostitution following the *Bedford* decision, Lisa Dufraimont concluded that it remained open to Parliament to criminalize prostitution itself.[51] She suggested two reasons why criminalizing prostitution might be constitutionally permissible: (a) the lawfulness of prostitution was a dominant theme in the SCC's judgment and the primary objection to the existing laws was that they made it more dangerous to engage in a lawful activity; and (b) exploitation- and equality-related objectives would set a higher bar than nuisance objectives.[52]

In her reasons in *Bedford*, the Application Judge addressed the issue of whether moral disapproval of prostitution could represent a constitutionally permissible legislative objective. The applicants argued that historical moral objectives were no longer constitutionally permissible and should not be considered.[53] In rejecting this argument, the Application Judge held that "a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values."[54] This is in keeping with earlier decisions of the SCC in which it was held that a moral purpose is constitutionally proper.[55]

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49 *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 at 783, 35 DLR (4th) 1.

50 *Bedford* SCC, *supra* note 3 at para 5.

51 See Lisa Dufraimont, "*Canada (Attorney General) v Bedford* and the Limits on Substantive Criminal Law under Section 7" (2014) 67:1 SCLR 483 at 485.

52 See *ibid* at 501–02.

53 See *Bedford* ONSC, *supra* note 19 at paras 217–18.

54 *Ibid* at para 225.

55 See e.g. *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449.

The Application Judge in *Bedford* also identified that there is no consensus about prostitution in Canada.[56] This lack of consensus was reflected in the results of an online consultation undertaken by the Department of Justice on prostitution-related offences in Canada following the SCC's decision in *Bedford*. When asked whether purchasing sexual services should be a criminal offence, 56% of respondents said "yes", while 44% of respondents said "no".[57]

Had the SCC's decision in *Bedford* taken immediate effect, adult prostitution in Canada would have been largely decriminalized. In suspending the declaration of invalidity, the Court reasoned that "moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians."[58]

B. Divergent Normative Approaches to Prostitution and Sex Work

The lack of consensus identified by the courts in *Bedford* was and is reflected in the divergent approaches to legislating the commercial exchange of sex for money internationally. While early international law condemned all forms of prostitution, focus has shifted to criminalizing the exploitation of women through trafficking and so-called forced prostitution.[59] Some countries now approach prostitution itself as form of sexual exploitation

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[56] See *Bedford* ONSC, *supra* note 19 ("[t]here has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue" at para 1).

[57] See Department of Justice, "Online Public Consultation on Prostitution-Related Offences in Canada—Final Results", Catalogue No J2-394/2014E-PDF (Ottawa: Department of Justice, 2014) at 3, online: <www.justice.gc.ca/eng/rp-pr/other-autre/rr14_09/p1.html#c4>.

[58] *Bedford* SCC, *supra* note 3 at para 167.

[59] Child prostitution continues to be condemned in international conventions. See Canada, Parliamentary Information and Research Service, "Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction" by Laura Barnett, Publication No 2011-119-E (Ottawa: Library of Parliament, 17 November 2011) at 2–3.

and seek to end the practice, while others accept sex work as a form of labour and seek to implement legal responses with the goal of reducing the harm experienced by sex workers.[60] It was into this divided debate that Parliament was thrust by the decision in *Bedford*.[61]

Policy approaches to the commercial exchange of sex for money have generally been divided into four types: prohibition or complete criminalization, neo-abolition or partial decriminalization,[62] complete decriminalization, and legalization.[63] Prohibitionist approaches prohibit the activity itself and criminalize all aspects of prostitution. Neo-abolition or partial criminalization seeks to end prostitution by criminalizing buyers and third parties but not those who sell or are sold. Complete decriminalization

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60 See Vanessa E Munro & Marina Della Giusta, "The Regulation of Prostitution: Contemporary Contexts and Comparative Perspectives" in Vanessa E Munro & Marina Della Giusta, eds, *Demanding Sex: Critical Reflections on the Regulation of Prostitution* (Aldershot: Ashgate, 2008) 1 (where the authors characterize the policy challenges as "ideological disagreements over whether to respond to the individual experience of involvement in prostitution or the structural significance of men's commodification and consumption of female sexuality" at 4).

61 See Carissima Matthen, "A Recent History of Government Responses to Constitutional Litigation" (2016) 25:3 Const Forum Const 101 (where the author notes that the decision in *Bedford* SCC prompted action on the part of the government in relation to prostitution, and the government treated an unfavourable legal development as an opportunity).

62 Also referred to as abolition.

63 Scholars differ on whether there are three or four distinct approaches, including whether to separate prohibition, abolition, and neo-abolition, and whether to combine regulation and decriminalization. The lack of concise and commonly accepted definitions contributes to some confusion around this issue. For a comparison of prevalent legislative models, see generally Canada, Parliamentary Information and Research Service, "Prostitution: A Review of Legislation in Selected Countries", by Laura Barnet, Lyne Casavant & Julia Nicol, Publication No 2011-115-E (Ottawa: Library of Parliament, 3 November 2011); Saundra-Lynn Coulter & Megan Walker, *Choosing the Nordic Model: Championing Women's Equality and Human Rights; A Global Movement to Abolish Prostitution* (London, Ont: London Abused Women's Centre, 2017).

is used to refer to the repeal of all criminal sanctions specifically targeting prostitution, while legalization regulates acts associated with prostitution.[64]

There are primarily two models advocated for Canada: neo-abolition and decriminalization. Neo-abolition is founded on the understanding of prostitution as a form of violence against women and both a cause and consequence of sex inequality.[65] It is modelled after the so-called "Nordic Model" of criminalizing purchasers in an effort to end demand while decriminalizing sellers who are recognized as victims.[66] This form of legislation was enacted in Sweden, Norway, and Iceland prior to the Court's decision in *Bedford*,[67] and has been enacted in Northern Ireland, France, and the Republic of Ireland since. Decriminalization is founded upon an understanding of prostitution as labour, emphasizing "rights, the legitimacy of consent and a conception of equality based on gender neutrality."[68] In 2003, New Zealand decriminalized sex work with the objective of safeguarding the human rights of sex workers.[69] To date, decriminalization does not appear to have been implemented in other jurisdictions.

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64 See Janet Halley et al, "From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism" (2006) 29 Harv JL & Gender 335.

65 See Maddy Coy & Janine Benedet, "Prostitution on a Continuum of Violence Against Women" (Paper delivered at Simon Fraser University, 9 November 2012), online: <www.researchgate.net/publication/309823808_Prostitution_on_a_continuum_of_violence_against_women>.

66 See Chu & Glass, *supra* note 6.

67 See *ibid* at 104.

68 Lisa Carson & Kathy Edwards, "Prostitution and Sex Trafficking: What are the Problems Represented to Be? A Discursive Analysis of Law and Policy in Sweden and Victoria, Australia" (2011) 34:1 Australian Feminist LJ 63 at 65. Prostitution remains, however, a largely gendered practice where most prostitutes are female and most buyers are male. See *R v Barton*, 2017 ABCA 216 at para 122, 2017 CarswellAlta 1167 (citing Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice?" (2013) 18:2 Rev Const Stud 161 at 182–83).

69 See Carisa R Showden & Samatha Majic, "The Politics of Sex Work," in Carisa R Showden & Samatha Majic, ed, *Negotiating Sex Work: Unintended Consequences of Policy and Activism* (Minneapolis: University of Minnesota Press, 2014) xiii at xxi. While referred to as decriminalized, the regime in New Zealand includes regulation,

As the Application Judge noted in *Bedford*, the only consensus that exists about prostitution is that there is no consensus.[70] In 2014, a nonbinding resolution was adopted by the European Parliament to criminalize the purchase of sex.[71] In 2016, Amnesty International adopted a policy recommending decriminalization of consensual exchanges of sex for money between adults.[72] While neither is binding on Parliament, they reflect the degree to which views about the appropriate way to identify and respond to the harms associated with prostitution and sex work differ.

IV. LEGISLATIVE OBJECTIVES IN *CHARTER* ANALYSIS

Legislative "purpose is the initial test of constitutional validity".[73] It is used to determine whether there is sufficient justification for the legislature's infringement of a *Charter* right.[74] This analysis takes place under the principles of fundamental justice in section 7, and in section 1.[75] The SCC in *Bedford* noted that, while rooted in similar concerns, section 7 and section 1 are analytically distinct:

> Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly

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including permitting only New Zealand citizens and permanent residents to engage in sex work (see *ibid* at xxii). Any regulation in the Canadian context would involve provincial and municipal levels of government and would likely lead to different regimes in different provinces and territories, as is the case in Australia.

[70] See *supra* note 56.

[71] See Maya Oppenheim, "MEPs Vote to Criminalise Buying Sex", *The Guardian* (26 February 2014), online: <www.theguardian.com/international>.

[72] See Amnesty International, *supra* note 13 at 2.

[73] *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 334, 18 DLR (4th) 321 [*Big M*].

[74] Hogg, *supra* note 48 at 38–20.

[75] See *R v Moriarity*, 2015 SCC 55, [2015] 3 SCR 485 (where the Court considered the overbreadth analysis noting it compared the objective of the law to its effects).

> disproportionate to the law's purpose. Under s. 1, the question is different—whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.[76]

The objective that is relevant is the objective of the allegedly infringing legislative measure.[77] "The objective is identified by an analysis of the provision in its full context. . . . In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms."[78] How the objectives of legislation are construed will influence the decision of whether legislation accords with the principles of fundamental justice, and whether the limits imposed may be reasonable and demonstrably justified in a free and democratic society.[79] "[This] analysis is not concerned with the appropriateness of the legislative purpose."[80]

The objective of the allegedly infringing legislative measure is discerned with reference to the intending legislature at the time of legislative enactment: "Purpose is a function of the intent of those who drafted and enacted the legislation at the time".[81] This inquiry takes into account express statements of purpose, the contextual matrix in which the legislation was enacted, and extrinsic evidence of legislative history and evolution.[82] Courts

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76 *Bedford* SCC, *supra* note 3 at para 125. While it is theoretically possible to save section 7 violations, the SCC has not to date done so in a criminal context.

77 See *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199 at para 144, 127 DLR (4th) 1.

78 *R v Moriarity*, *supra* note 75 at para 26.

79 See Hogg, *supra* note 48 at 38-19.

80 *R v Safarzadeh-Markhali*, 2016 SCC 14 at 335, [2016] 1 SCR 180.

81 *Big M*, *supra* note 73 at para 91.

82 See *R v Moriarity*, *supra* note 75 at para 31; *R v Safarzadeh-Markhali*, *supra* note 80 at para 31; *R v Appulonappa*, 2015 SCC 59 at para 33, [2015] 3 SCR 754.

have allowed a wide range of evidence to be adduced to determine legislative facts, provided that the evidence relates to governmental intention. Courts have held that extrinsic evidence should have an institutional quality reflecting the intention of the legislature and not, for example, the intention of individual actors.[83] Legislative history and debates may be admissible to show the mischief Parliament was attempting to remedy.[84]

The determination of legislative purpose played a defining role in the SCC's evaluation of the three prostitution-related offences considered in *Bedford*.[85] Once the Court found that the three impugned provisions violated the applicants' right to security of the person by preventing people engaged in a risky but legal activity from taking steps to protect themselves from those risks, the SCC turned to the question of whether the violations failed to accord with the principles of fundamental justice, noting as follows: "All three principles—arbitrariness, overbreadth, and gross disproportionality—compare the rights infringement caused by the law with the objective of the law".[86]

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[83] See *OTF v Ontario (Attorney General)* (2000), 49 OR (3d) 257 at para 32, 188 DLR (4th) 333. In distinguishing governmental intent from the intent of individual actors in the legislative process, the Ontario Court of Appeal reasoned as follows, at para 34:

> The provision itself and its statutory context remain vital sign posts in the search for legislative purpose, because they are the actual manifestations of that purpose. Expressions of motivation by individual government actors must be scrutinized to see that they truly reflect legislative intent, rather than simply individual concerns. The former are appropriately part of the *Charter* analysis. The latter are left to be sanctioned at the ballot box.

[84] See *R v Heywood*, [1994] 3 SCR 761 at 787, 120 DLR (4th) 348. However, even where admitted they may be accorded less weight (see *ibid* at 788).

[85] See Dufraimont, *supra* note 51 at 499 [footnotes omitted]:

> The success of the challenge to the prostitution laws depended, in large measure, on the Court's interpretation of the bawdy house and communicating provisions as having relatively unimportant, nuisance-related purposes. To be fair, the Court in *Bedford* was not entirely unconstrained in its determination of legislative purpose; the SCC had previously ruled that these provisions were directed at combatting public nuisances. Still, in declining the Crown's invitation to take a broader view of the legislative purpose, the Court made a decision that greatly enhanced the strength of the constitutional challenge...

[86] *Bedford* SCC, *supra* note 3 at para 123. Determining whether a law violates norms against overbreadth, arbitrariness, and gross disproportionality does not appear to

Noting that adult prostitution had never been a crime in Canada, the Application Judge in *Bedford* found that Canadian prostitution laws to that time had "developed in a rather *ad hoc* manner, reflecting differing concerns of legislators over the years."[87] The SCC confirmed that the objectives of the three impugned criminal provisions were either nuisance or exploitation.[88] The SCC found that the object of the Bawdy-House Offence was "to prevent community harms in the nature of nuisance"[89] or to "combat neighbourhood disruption or disorder and to safeguard public health and safety."[90] The Court held that the negative impact was grossly disproportionate to its objective, reasoning that: "[t]he harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the right to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes."[91] The SCC found that the object of the Living on the Avails Offence was to "target pimps and the parasitic, exploitative conduct in which they engage"[92] and found the provision overbroad because it captured non-exploitive relationships not connected to the law's purpose.[93] With reference to the earlier SCC decision in *Reference re ss. 193 and*

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require any empirical evidence of the effectiveness of the law. See Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 593.

87 *Bedford* ONSC, *supra* note 19 at para 227 (see *ibid* for a summary of the history of prostitution-related laws in Canada from Department of Justice, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, by Paul Fraser (Ottawa: Minister of Supply and Services Canada, 1985)).

88 See *Bedford* SCC, *supra* note 3 at para 4.

89 *Ibid* SCC at para 131.

90 *Ibid* at para 132.

91 *Ibid* at para 136.

92 *Ibid* at para 137, citing *R v Downey*, [1992] 2 SCR 10 at 32, 90 DLR (4th) 449. The Application Judge had referred to the object of the offence as "preventing the exploitation of prostitutes and profiting from prostitution by pimps": *Bedford* ONSC, *supra* note 19 at para 259.

93 See *ibid* at para 142.

195.1(1)(c) of the Criminal Code (Man.)[94] ("the *Prostitution Reference*"), the Court found that the purpose of the Communicating Offence was "to take prostitution 'off the streets and out of public view' in order to prevent the nuisances that street prostitution can cause."[95] Relying on the Application Judge's finding that communication is an essential tool that can decrease risk, the SCC found that the harm imposed by the Communicating Offence was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets.[96]

In *Bedford*, the Attorneys General for Canada and Ontario argued that the overarching objective of the impugned provisions when taken together was to "prevent the harms associated with prostitution."[97] The Attorneys General argued that Parliament's intention was threefold: (a) to discourage and "deter the most harmful and public emanations of prostitution"; (b) to "protect those engaged in prostitution"; and (c) to reduce the societal harms experienced by communities when exposed to prostitution.[98] With respect to each impugned offence, they argued as follows: that the objective of the Bawdy-House Offence was to deter prostitution;[99] that the purpose of the Living on the Avails Offence was "to target the commercialization of prostitution, and to promote the values of dignity and equality";[100] and that the objective of the Communicating Offence was to deter prostitution.[101] The SCC rejected the arguments of the Attorneys General about the legislative objectives of the then existing criminal regime applicable to prostitution but the court did not comment on whether such objectives

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94 [1990] 1 SCR 1123 at 1134–35, [1990] 4 WWR 481.

95 *Ibid* at para 146–47.

96 See *ibid* at paras 158–59.

97 *Ibid* (Factum of the Appellant Attorney General of Canada at para 87 [FOA AG Canada]). See *ibid* (Factum of the Appellant Attorney General of Ontario at para 81 [FOA AG Ont]).

98 FOA AG Canada, *supra* note 97 at para 87. See FOA AG Ont, *supra* note 97 at para 56.

99 See *Bedford* SCC, *supra* note 3 at para 131.

100 *Ibid* at para 138.

101 See *ibid* at para 147.

would be constitutionally permissible. As discussed further below, some of these objectives are reflected in the *PCEPA*.

V. OBJECTIVES OF THE *PCEPA*

The Minister of Justice introduced Bill C-36 on 4 June 2014, and it received Royal Assent on 6 November 2014. The *PCEPA* came into force on 6 December 2014. The Department of Justice advised that the new legislation was informed by the evidence and decision in *Bedford*, public consultations held in February and March of 2014, jurisprudence, and domestic and international research and government reports.[102]

With the *PCEPA*, Parliament responded directly to the decision of the SCC in *Bedford* by: amending the definition of bawdy-house in section 197 of the *Criminal Code* to remove reference to prostitution,[103] repealing the Living on the Avails Offence,[104] and amending the Communicating Offence to align with a new legislative objective.[105] Parliament also added four new offences[106] and provided immunity from prosecution under the new offences for persons offering or providing their own sexual services.[107] Concurrent with the enactment of the *PCEPA*, the government dedicated $20 million in new funding to help individuals exit prostitution.[108]

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102 See Canada, Department of Justice, *Technical Paper*, *supra* note 16 at 3. See also *R v Sharpe*, 2001 SCC 2 at para 167, [2001] 1 SCR 45: "In short, the lack of scientific precision in the social science evidence relating to attitudinal harm available to Parliament is not a valid reason for calling into question Parliament's decision to act."

103 See *supra* note 4, s 12(2).

104 See *ibid*, s 13.

105 See *ibid*, s 15.

106 See *ibid*, ss 286.1–286.4

107 See *ibid*, s 286.5.

108 Department of Justice Canada and Public Safety Canada, News Release, "Government of Canada Announces $20 Million to Help Victims Leave Prostitution" (1 December 2014), online: <www.canada.ca/en/news/archive/2014/12/government-canada-announces-20-million-help-victims-leave-prostitution.html>. This amount is generally accepted to be inadequate. See also Canada, Department of Justice, "Prostitution Criminal Law Reform: Bill C-36, the *Protection of Communities and Exploited Persons*

The *PCEPA* is based upon the understanding of prostitution as inherently exploitive and itself a form of violence that disproportionately impacts women and children. The *PCEPA* was accompanied by a lengthy preamble (the "Preamble") in which Parliament expressed "grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it".[109] The Preamble identified that social harm results from "the objectification of the human body and the commodification of sexual activity" and that, to protect human dignity and equality, prostitution must be discouraged.

This section examines the legislative purpose(s) of the *PCEPA* and each of the criminal prohibitions created by it, with reference to express statements of legislative purpose and extrinsic evidence including: the legislation itself, the Preamble, a technical paper published by the Department of Justice between the date of Royal Assent and the coming into force of the *PCEPA* (the "Technical Paper"),[110] debates in the House of Commons and the Senate, and recent jurisprudence interpreting the new legislation. It also evaluates how and whether steps taken by Parliament related to safety are inconsistent with the overall legislative objective.

A. DENOUNCING AND DETERRING PROSTITUTION

Express statements of legislative purpose accompanied the *PCEPA* at the time of enactment. In the Preamble, the government identified it as

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Act", Fact Sheet (Ottawa: Department of Justice, 18 March 2015), online: <www.justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi>. The *PCEPA* also amended the trafficking offences to align with the prostitution-related offences and amended the definition of "weapon" applicable to three separate offences.

[109] *PCEPA*, *supra* note 4, Preamble, para 1.

[110] Department of Justice, *Technical Paper*, *supra* note 16. The Minister of Justice tabled the *Technical Paper* at the House of Commons Standing Committee on Justice and Human Rights and at the Senate Standing Committee on Legal and Constitutional Affairs. See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 2nd Sess, No 32 (7 July 2014) at 1035; Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 15 (9 September 2014) [Senate, *Proceedings*].

important to "denounce and prohibit the purchase of sexual services", and "denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution".[111] The government expressed a desire to "encourage those who engage in prostitution to report incidents of violence and to leave prostitution".[112]

In the Technical Paper, the Department of Justice described the purpose of the *PCEPA* as follows: "Its overall objective is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible."[113] This objective reflects a shift away from the nuisance objectives found to have informed the criminal provisions struck down by the SCC in *Bedford* towards the treatment of prostitution as a form of sexual exploitation.

The Department of Justice further explained the basis for the legislative response:

> Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice.[114]

These statements of overall objective were reiterated during debates in the House of Commons and the Senate. The Minister of Justice commenced second reading on 11 June 2014. He identified the legislation's

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111 *PCEPA*, *supra* note 4, Preamble, paras 4–5.

112 *Ibid*, Preamble, para 6.

113 Department of Justice, *Technical Paper*, *supra* note 16 at 3.

114 *Ibid* at 4.

overall objective as being the reduction of demand for sexual services and the reduction of the likelihood of third parties facilitating exploitation. Describing the *PCEPA*, he stated as follows:

> It is a new approach based upon the prevailing thinking in modern industrialized countries.
>
> Bill C-36 proposes law reform that would signal a significant shift in prostitution-related criminal law policy from treatment of prostitution as a nuisance toward treatment of prostitution for what it is: a form of exploitation. . . .
>
> For the first time in Canadian criminal law, the bill would criminalize the purchase of sexual services; in other words, it would make prostitution illegal.[115]
>
> It is about protecting vulnerable Canadians, communities that sometimes are at risk, and in particular, a specific group of Canadians to whom we do have a fiduciary duty to protect, and that is mainly our children.[116]

The *PCEPA* created four new offences in Part VIII of the *Criminal Code*—"Offences Against the Person and Reputation"—under a new heading "Commodification of Sexual Activity" (the "Commodification Offences").[117] Along with the Commodification Offences, the new legislative framework applicable to prostitution in Canada includes two offences remaining in Part VII of the *Criminal Code*—"Disorderly Houses, Gaming and Betting"[118] and, under a new heading, "Offences in Relation to Offering, Providing or Obtaining Sexual Services for Consideration".[119]

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[115] *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 101 (11 June 2014) at 1655 (Hon Peter MacKay).

[116] *House of Commons Debates*, 41st Parl, 2nd Sess, Vol 147, No 102 (12 June 2014) at 1150 (Hon Peter MacKay). See also *Debates of the Senate*, 41st Parl, 2nd Sess, Vol 149, No 86 (9 October 2014) at 1430–40.

[117] *Criminal Code*, *supra* note 1, s 286.

[118] *Ibid*, s 210.

[119] *Ibid*, s 213.

How legislative objectives are construed will influence the application of the tests under sections 7 and 1 of the *Charter*. Courts will look to the objective of the allegedly infringing measure at the time of legislative enactment. Each of the three impugned provisions in *Bedford* was considered separately. For this reason, this section will examine the way in which each of the new or amended provisions aligns with the overall legislative objective and identify express statements of legislative intention referable to the individual provisions.

Section 286.1 of the *Criminal Code* provides that "[e]veryone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person" is guilty of an indictable or summary conviction offence (the "Purchasing Offence").[120] The Department of Justice stated in the Technical Paper that the Purchasing Offence "makes prostitution itself an illegal practice; every time prostitution takes place, regardless of venue, an offence is committed."[121] The Department of Justice identified the objective of this offence as "reducing demand for sexual services."[122] At second reading, the Minister of Justice said: "[t]he purchasing offence targets the demand for prostitution, thereby making prostitution an illegal activity".[123] The Purchasing Offence is directly related to the overall objective of denouncing and deterring prostitution by prohibiting prostitution and, thereby, taking steps to reduce demand for prostitution.

Section 286.2 of the *Criminal Code* provides as follows: "Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence" under subsections 286.1(1) and (2), is guilty of an indictable offence (the

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[120] *Supra* note 1, s 286.1. This offence replaces former paragraph 213(1)(c). See *R v Al-Qaysi*, 2016 BCSC 937, 2016 CarswellBC 1395.

[121] Department of Justice, *Technical Paper*, *supra* note 16 at 5.

[122] *Ibid* at 6.

[123] *House of Commons Debates*, No 101, *supra* note 115 at 1700.

"Material Benefit Offence").[124] The Department of Justice described the Material Benefit Offence as a modernization of the Living on the Avails Offence, identifying it as consistent with the *PCEPA*'s objective of "continuing to denounce and prohibit the development of economic interests in the exploitation of the prostitution of others, as well as the institutionalization and commercialization of prostitution".[125] Exceptions to the Material Benefit Offence will be discussed further below. The Material Benefit Offence is also directly related to the overall objective of denouncing and deterring prostitution by prohibiting the exploitation of the prostitution of others. This offence aims to reduce the development of commercial activities supporting and relying on prostitution and prevent the development of vested economic interests in the prostitution of others.[126]

Subsection 286.3(1) of the *Criminal Code* provides as follows: "Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence" (the "Procuring Offence").[127] The Department of Justice identified the Procuring Offence as specifically targeting the objective of "continuing to denounce and prohibit the procurement of persons for the purpose of prostitution".[128]

Section 286.4 of the *Criminal Code* provides that "[e]veryone who knowingly advertises an offer to provide sexual services for consideration is guilty of [an offence]" (the "Advertising Offence").[129] The Technical Paper

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[124] *Supra* note 1, s 286.2. With term of imprisonment based upon whether it involves the sexual services of a person under the age of 18. Exceptions to the offence are provided (see *ibid*, s 286.2(4)).

[125] Department of Justice, *Technical Paper*, *supra* note 16 at 6.

[126] See *ibid*.

[127] *Supra* note 1, s 286.3(1).

[128] Department of Justice, *Technical Paper*, *supra* note 16 at 8.

[129] *Supra* note 1, s 286.4.

identifies that the Advertising Offence "targets the promotion of prostitution though advertisements, which contributes to the demand for prostitution."[130] This, too, appears to be directly related to the overall objective of denouncing and deterring prostitution.

Subsections 213(1.1) and 213(2) of the *Criminal Code* (the "New Communicating Offence") provide as follows:

> (1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person—for the purpose of offering or providing sexual services for consideration—in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre...
>
> (2) In this section, public place includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.[131]

The main objective of this offence as stated in the Technical Paper is: "to protect children from exposure to prostitution, which is viewed as a harm in and of itself, because such exposure risks normalizing a gendered and exploitative practice in the eyes of impressionable youth and could result in vulnerable children being drawn into a life of exploitation."[132] Discouraging the normalization of prostitution can be understood as consistent with the objective of denouncing and deterring prostitution and its underlying understanding of the activity as exploitive, particularly of women and girls.

In three recent cases, courts in Ontario and Nova Scotia have considered the *PCEPA*.[133] The Ontario Court of Justice identified the Technical Paper

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[130] *Supra* note 16 at 6.

[131] *Supra* note 1, ss 213(1.1)–(2) [emphasis omitted].

[132] Department of Justice, *Technical Paper*, *supra* note 16 at 10.

[133] See *R v Alexander et al*, *supra* note 5; *R v D'Souza*, 2016 ONSC 2749, 339 CCC (3d) 494 (where the Court considered in part whether to grant a stay of proceedings based on the section 212 analysis undertaken by the Court in *Bedford* SCC in interpreting section 286.2); *R v Mercer*, 2016 NSPC 48, 1185 APR 355 (where the Court considered whether the actions of the police service to enforce subsection 286.1(1) of the *Criminal Code* and holding a press conference identifying those charged constituted an abuse of process infringing the accused's section 7 *Charter* rights).

as useful in considering the new offences[134] and held that sections 286.1–286.5 of the *Criminal Code* created "a scheme of new prostitution-related offences" noting the first of which was that prostitution is now illegal in Canada.[135] The Nova Scotia Provincial Court was the first court to specifically consider the objectives of the *PCEPA*, noting as follows: "The centerpiece of Bill C-36 is a shift in legislative policy away from the old approach which treated prostitution as a public nuisance to a recognition that prostitution is inherently exploitive to sex trade workers with great potential for violence from johns and pimps."[136] The Provincial Court of Nova Scotia also noted that the objectives of the new legislation were clearly set out in the Technical Paper.[137]

The expressly stated objective of the *PCEPA* is to denounce and discourage prostitution on the basis that prostitution is itself a form of sexual exploitation that disproportionately and negatively impacts on women and girls.[138] This is to be accomplished by the criminalization of prostitution itself, along with activities that have the effect of creating demand for prostitution and enhancing the industry, including procuring, obtaining a material benefit from the prostitution of others, and communicating or advertising, as well as by efforts to encourage those currently exchanging their own sexual services to leave prostitution. The primary policy objective is clearly stated and consistent with the criminal prohibitions enacted by the legislature. This objective is also consistent with statements made during debates in the House of Commons and the Senate, and in recent jurisprudence. Each of the criminal prohibitions forming part of the new legislative scheme has an objective that appears to align with this overall objective.

B. Sex Worker Safety

[134] See *R v Alexander*, *supra* note 5 at para 2.

[135] *Ibid* at para 14.

[136] *R v Mercer*, *supra* note 133 at para 29.

[137] See *ibid* at para 30.

[138] See *supra* note 4, Preamble, para 3.

Stewart identified the safety of sex workers as a second objective of the *PCEPA* which, he argued, was inconsistent with the primary objective and rendered the legislative scheme incoherent.[139] Stewart suggested that this objective was found in Parliament's response to the constitutional defects identified by the SCC in *Bedford*.[140] He noted that the response sat uncomfortably with the punitive character of the legislation.[141]

In considering how to approach prostitution in Canada following the SCC's decision in *Bedford*, the government took the view that prostitution could not be made safe. The Minister of Justice stated at Second Reading: "we do not believe that other approaches, such as decriminalization or legalization, could make prostitution a safe activity."[142] Consistent with the expressed overall objective of the legislation, the Technical Paper identifies that "Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice."[143]

Parliament acknowledged specific risks associated with prostitution. In the Preamble, reference is made to grave concerns about exploitation in prostitution and risks of violence to those who engage in it, as well as to the social harm caused by objectification of the human body and commodification of sexual activity, and to protection of human dignity and equality.[144] Parliament identified that prostitution has a disproportionate effect on women and children[145] and committed $20 million to assist prostitutes to leave prostitution.[146]

Nowhere in the express statements of legislative objective is there evidence of an intention on the part of Parliament to make the safety of those who continue to exchange their own sexual services an overall

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139 See Stewart, *supra* note 5 at 71.

140 See *ibid* at 76.

141 See *ibid*.

142 *House of Commons Debates*, No 101, *supra* note 115 at 1700.

143 Department of Justice, *Technical Paper*, *supra* note 16 at 4.

144 See *supra* note 4.

145 See *ibid*.

146 See *supra* note 108 and accompanying text.

objective of the new legislative scheme or, more specifically, of the criminal prohibitions created by it. The jurisprudence considering these prohibitions, to date, makes no reference to such an objective. However, in light of Professor Stewart's claim on this point, it is important to evaluate whether such an objective may nonetheless be discerned.

The *PCEPA* directly responded to the constitutional defects identified in the three criminal provisions at issue in *Bedford* by amending or repealing each of the three provisions. The SCC held that the three impugned criminal provisions violated the applicants' right to security of the person by increasing their risk while engaging in a legal activity.[147] The Court found the harm caused by the Bawdy-House Offence grossly disproportionate to the objective of combatting nuisance.[148] The definition of bawdy-house in the *Criminal Code* was amended to remove prostitution.[149] The Court found the Living on the Avails Offence was overbroad in capturing non-exploitive relationships not connected to the law's purpose of targeting parasitic, exploitive conduct.[150] The Living on the Avails Offence was repealed.[151] The new Material Benefit Offence was enacted,[152] including exceptions for nonexploitive relationships.[153] The Court found the

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[147] See *Bedford* SCC, *supra* note 3 at paras 59–60.

[148] See *ibid* at paras 134–36.

[149] See *PCEPA*, *supra* note 4, s 12(2).

[150] See *Bedford* SCC, *supra* note 3 at paras 139–40, 142.

[151] See *PCEPA*, *supra* note 4, s 13.

[152] See *ibid*, s 19.

[153] See *Criminal Code*, *supra* note 1, ss 286.2(4)–(5):

> **(4)** Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit
>
> > **(a)** in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
> >
> > **(b)** as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
> >
> > **(c)** in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or
> >
> > **(d)** in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived,

Communicating Offence was grossly disproportionate to the object of moving the nuisance of prostitution from the streets.[154] The Communicating Offence was amended to limit the offence to communication that takes place "in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre."[155]

In *Bedford*, the SCC found that the applicants' security of the person had been denied because the impugned laws prohibited them from taking safety enhancing measures which had the potential to reduce their risk of experiencing violence. These protective measures are identified in the Technical Paper as "selling sexual services from fixed indoor locations, hiring persons who may serve to enhance safety and negotiating safer conditions for the sale of sexual services in public places."[156] Parliament sought to ensure that the new legislative framework applicable to prostitution did not prohibit prostitutes from taking these identified measures should they continue to engage in prostitution. They did this in three ways. First, Parliament immunized those engaged in exchanging their

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if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

[154] See *Bedford* SCC, *supra* note 3 at para 159.

[155] *PCEPA*, *supra* note 4, s 15.

[156] Department of Justice, *Technical Paper*, *supra* note 16 at 10–11.

own sexual services from prosecution for the Commodification Offences.[157] Second, they excluded certain nonexploitive relationships from the new Material Benefit Offence so that those who continued to exchange their own sexual services were not prevented from hiring bodyguards and others to enhance their safety.[158] Third, they limited the locations in which communicating would constitute an offence so that those offering or providing their own sexual services were not precluded from communicating in all public spaces.[159]

These three features of the legislative framework incorporated into the *PCEPA* reflect an effort to balance the interests of those who may be affected by the shift in legislation with the overall objectives of the legislation and the criminal sanctions created by it. The Technical Paper identifies it as an attempt to balance the safety concerns identified in *Bedford* "with broader safety and societal concerns posed by prostitution more generally", including: "the need to protect those subjected to prostitution from violence and exploitation; the need to protect communities from prostitution's harmful effects, including exposure of children; and, the need to protect society itself from the normalization of a gendered and exploitative practice."[160] With regard to the Communicating

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[157] Parliament did not *decriminalize* those who offer or provide their own sexual services. Rather, it *immunized* persons from prosecution in circumstances where they offer or provide their own sexual services. The *Criminal Code*, *supra* note 1, s 286.5 provides as follows:

> **286.5 (1)** No person shall be prosecuted for
>
> > **(a)** an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or
> >
> > **(b)** an offence under section 286.4 in relation to the advertisement of their own sexual services.
>
> **Immunity—aiding, abetting, etc.**
>
> **(2)** No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

[158] See *Criminal Code*, *supra* note 1 at ss 286.2(4)–(5).

[159] See *ibid*, s 213.

[160] Department of Justice, *Technical Paper*, *supra* note 16 at 11.

Offence, the Technical Paper identifies that "[t]his approach strikes a careful balance between the interests of two vulnerable groups: those who are subjected to prostitution and children who may be exposed to it."[161]

Parliament expressly acknowledged that it takes time to change social attitudes and some will remain "at risk of, or subjected to, exploitation through prostitution" during this time of transformation.[162] They identified that, for this reason, the focus of enforcement efforts should be primarily on purchasers and third parties. Parliament is entitled to and it is appropriate for them to recognize vulnerable groups, especially in the context of sexual violence.[163]

Taking steps to recognize and respond to the potential negative impact of legislation on a vulnerable group does not, of itself, make such steps legislative objectives of the overall legislative scheme or, more particularly, the criminal sanctions created by it. Parliament made it plain that the new legislative framework was "in no way" condoning prostitution.[164] The safety objectives that may be discerned in the new legislative scheme reflect an intention to increase overall safety by reducing exposure to prostitution and ensure, as much as possible, that the new legislative scheme does not preclude those who continue to exchange their own sexual services from being able to avail themselves of safety-enhancing measures identified by the SCC in *Bedford*. There is a difference between seeking to improve the overall safety of those who continue to exchange sexual services and taking steps to ensure that legislative acts do not preclude them from taking certain measures. The latter is the clearly and concisely stated objective of the immunity and exceptions in subsections 286.2(4) and (5) of the *Criminal Code*, and of the reduced scope of the New Communicating Offence.

Finally, it is relevant to consider how the constitutionality concern raised by Stewart would be tested, and what remedies might be available. Stewart's argument appears to be that the entire legislative scheme reflected

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[161] *Ibid* at 12.

[162] *Ibid* at 10.

[163] See *R v Mills*, [1999] 3 SCR 668 at para 58, 180 DLR (4th) 1.

[164] Department of Justice, *Technical Paper*, *supra* note 16 at 9.

in the *PCEPA* is unconstitutional, and that the appropriate remedy would be to strike down the Purchasing Offence, after which the rest of the legislative scheme would "fall away".[165] This argument rests on the inconsistency between legislative objectives rendering the *PCEPA* arbitrary and grossly disproportionate, thereby failing to accord with the principles of fundamental justice. He suggests that section 7 would be engaged by increasing the danger to prostitutes.[166]

The single biggest shift in policy affected by the *PCEPA* is to render prostitution in this country illegal on the basis that a criminal offence is committed whenever prostitution takes place. In *Bedford*, perhaps the most significant fact was that buying and selling sex was not illegal; the Court evaluated whether the three impugned laws made it more dangerous to engage in a risky but legal activity. Buying sex is now a criminal offence in Canada. Any evaluation of the constitutionality of the *PCEPA* and the criminal sanctions created by it will be undertaken with this new context in mind.

The focus of any eventual constitutionality argument will be on the challenged provision(s) within the context of the overall legislative scheme.[167] A future claim that the *PCEPA* or the criminal prohibitions created by it violate section 7 of the *Charter* would rest first on establishing a violation of someone's right to life, liberty, or security of the person.[168] The criminal sanctions enacted by Parliament to end the practice of prostitution most likely do make it more dangerous to continue to engage in prostitution.[169] With respect to the Purchasing Offence, which is the

165 Stewart, *supra* note 5 at 88.

166 See *ibid* at 86.

167 See *R v Moriarity*, *supra* note 75 at para 24.

168 In *Bedford* SCC, *supra* note 3 at para 123, the SCC held that a violation of the right of one person was sufficient to establish a section 7 claim.

169 See Dufraimont, *supra* note 51 at 502 (where the author draws the analogy with illicit drugs and identifies that criminalizing any activity creates black markets and makes participating in the activity more dangerous); Chu & Glass, *supra* note 6 at 106 (where the authors discuss the increased risks and violence faced by street-based prostitutes in Sweden).

centrepiece of the new legislative scheme, the section 7 argument would rest upon establishing that, in making an activity illegal, Parliament violated the *Charter* rights of those who continue to engage in that activity because doing so entails an increased risk of harm. This argument is at the very least awkward and very likely unsustainable.[170]

If a violation were established, the court would then need to evaluate whether that violation failed to accord with the principles of fundamental justice. The arbitrariness or gross disproportionality of the Purchasing Offence would be measured against its legislative objective. If the explanations provided in the Technical Paper are accepted, the objective of this offence is to reduce the demand for sexual services and to make prostitution itself illegal. It is difficult to conceive of how criminalizing the purchase is arbitrary or grossly disproportionate to these objectives.

It is possible that certain offences could be more susceptible than others to a constitutional challenge.[171] It may be that the objective of the New Communicating Offence is overbroad, if it is found to capture situations where there is no likely prospect that a child will be present, for example, at or near a school in the middle of the night. The Purchasing Offence, on the other hand, may be better able to withstand a constitutional challenge because criminalizing an activity does tend to make it a more dangerous prospect, and criminalizing prostitution itself is quite clearly connected to the goal of denouncing and deterring prostitution by focussing on

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170 See Dufraimont, *supra* note 51 at 502; *R v Alexander et al*, *supra* note 5. Note also, this argument rests on a constitutional challenge being brought by someone exchanging their own sexual services, as was the case in *Bedford* SCC. It is unclear how a person purchasing sexual services might ultimately frame a challenge to section 286.1.

171 See e.g. Coulter & Walker, *supra* note 63 at 8 (where the authors suggest section 213 is not consistent with the goal of promoting women's equality and human rights); House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 2nd Sess, No 33 (7 July 2014) at 1330 (testimony of Janine Benedet), online: <www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=2&DocId=6685376&File=0> (for a discussion of why subsection 213(1.1) may be more susceptible to challenge in light of the new overall legislative objective).

demand.[172] To date, it does not appear that anyone has evaluated the provisions independently with reference to their express policy objectives and the altered legal status of prostitution. Such analysis would be beneficial.

Nowhere in the record does it appear to have been an expressed objective of the *PCEPA* to make sex work safer for sex workers. In fact, the Technical Paper identifies that the best way to avoid the harms of prostitution would be to end the practice: "First and foremost, Bill C-36 seeks to ensure the safety of all by reducing the demand for prostitution, with a view to deterring it and ultimately abolishing it to the greatest extent possible."[173] The steps taken by Parliament to ensure that prostitutes are not precluded from taking the safety-enhancing measures identified in *Bedford* are consistent with the overall understanding that those who exchange their own sexual services are victims of exploitation who should not be punished, and reflect an awareness of the fact that some people will continue to engage in prostitution notwithstanding the change in legality.[174]

The *PCEPA* represents a response to the SCC's decision in *Bedford*; however, there is no requirement that Parliament's response have an objective of making prostitution itself a safer activity. In *Bedford*, the SCC clearly stated that their decision was not about whether prostitution itself should be legal or not.[175] If any attempt to remedy the constitutional defects identified in that case has the effect of requiring Parliament to make prostitution safer for prostitutes, and if such an objective is, as Stewart suggests, inconsistent with an overall objective of denouncing and deterring

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[172] Those who advocate for decriminalization would accomplish little by having only section 213 declared unconstitutional. It the constitutionality of section 286.1 that is critical.

[173] Department of Justice, *Technical Paper*, *supra* note 16 at 10.

[174] See also Senate, *Proceedings*, *supra* note 110 (where the answer to the direct question of how Bill C-36 addressed the concerns raised by the SCC in *Bedford* SCC about the safety of prostitutes was: (a) reducing incidence creates greater safety because fewer people are involved; and (b) those who remain in it are not precluded from taking the safety measures identified in *Bedford* SCC).

[175] See *Bedford* SCC, *supra* note 3 at para 2.

prostitution such that the *PCEPA* is unconstitutional, then Parliament would be effectively precluded from criminalizing prostitution. The SCC would, in effect, have made the normative decision that prostitution could not be made illegal in Canada. The SCC itself stated that their decision was not a pronouncement on that question.[176]

Indeed, the concern raised by the potential that the SCC was curtailing the range of possible policy options available to Parliament in this way is profound. Legislatures are increasingly called upon to balance competing interests. The steps taken by Parliament in the context of its new prostitution policy to ensure that those who continue to exchange their own sexual services are not precluded from taking the safety-enhancing measures identified in *Bedford* in the context of a new legislative scheme aimed at reducing or eliminating the incidence of prostitution reflects an example of such balancing. Suggesting that certain normative approaches embodying some but not all individual interests must always take priority in future legislative policy choices is beyond the scope of the SCC's authority.

It is also important to keep in mind that any measures taken by Parliament in the *PCEPA* to address the safety concerns of prostitutes are reflected in immunities and exemptions, not in the criminal sanctions themselves. These safety concerns do not directly inform any of the new criminal prohibitions. The SCC has noted that "if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional."[177] Thus, if it is an objective of the overall legislative scheme enacted by the *PCEPA* to both denounce and deter prostitution and to make prostitution safer for prostitutes, it is possible to reconcile these objectives by recognizing one as informing the sanctions and

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[176] See also Brian Huang, "Holding Back to Push Forward: The Role of Remedial Minimalism in Uniting the Rule of Law and Democracy in Canada" (2016) 7 McGill J Political Studies 16 (where the author argues that the remedial minimalist approach applied by the SCC in *Bedford* SCC is one that ensured the protection of constitutional rights and democracy and the separation of powers, and that by not granting remedies, Parliament was not constrained in creating new laws).

[177] *R v Mills*, *supra* note 163 at para 56.

the other exceptions to and immunity from sanction, which are not on their face inconsistent.

Stewart and others have identified that the measures employed by Parliament to allow individuals to take some steps to enhance their safety are inadequate.[178] The argument is that the legislative scheme employed in the *PCEPA* is not likely to have the effect of making sex work safer for sex workers *while engaging in prostitution*. This too is consistent with the normative approach to prostitution reflected in the *PCEPA*, the underlying understanding of prostitution as inherently dangerous and risky and an activity that cannot be made safe, and the position that the safest course is, therefore, for individuals not to engage in the exchange of sexual services for compensation.

It is not an objective of the *PCEPA* to make sex work safer for sex workers. It is an objective of the *PCEPA* to promote the safety of all by reducing the incidence of prostitution, and to ensure that the criminal prohibitions enacted with an object of reducing or ending the incidence of prostitution itself do not prohibit those who continue to exchange their own sexual services from taking specific safety measures identified by the SCC as having the potential to reduce their risk of experiencing harm. The former safety-related objective informs the criminal prohibitions created by the legislative scheme and the commitment of funds to assist prostitutes to leave prostitution. The latter safety-related objective informs the immunity from prosecution, exceptions from liability, and the reduced scope of the New Communicating Offence. These objectives are not inconsistent.

VI. CONCLUSION

There is a lack of consensus domestically and internationally about how to identify and respond to the problems associated with the commercial exchange of sex for money. The opposing policy recommendations of decriminalization and neo-abolition rest on normative claims about whether the commercial exchange should be degendered and treated as labour, or treated as a form of violence against women in an unequal society.

[178] See Stewart, *supra* note 5; Galbally, *supra* note 17.

Parliament was thrust into this contest by the decision of the SCC in *Bedford*, which would have had the effect of decriminalizing most aspects of adult prostitution in Canada. In the shadow of a lack of consensus, Parliament expressly rejected the option of decriminalization, which would have occurred had it failed to act, and enacted legislation with the intention of protecting communities and victims of exploitation from the harms associated with prostitution. In the circumstances of a lack of consensus, the *PCEPA* was based on the evidence before the courts in *Bedford*, the decision of the SCC in *Bedford*, public consultations, jurisprudence, domestic and international research, and government reports.[179]

Some people will continue to exchange their own sexual services for compensation, whether as a matter of choice or through lack of choice. Indeed, it seems reasonable to acknowledge that the *PCEPA* will never fully achieve its overall objective, in the same way as any criminal prohibition is unlikely to prevent absolutely the occurrence of crime. Based on a foundation that recognizes all who exchange their own sexual services for compensation as victims of exploitation, certain immunities, exceptions, and financial assistance were incorporated into the new policy so that prostitutes are not precluded from taking safety-enhancing measures and can leave prostitution. While many will disagree with both the approach and the characterization of victimhood,[180] there appears to be nothing inherently inconsistent about the objectives of the overall legislative scheme or the legislative means employed to pursue them.

With the *PCEPA*, Parliament made a clear choice between competing approaches to the commercial exchange of sex for money.[181] The choice they

179 See Department of Justice, *Technical Paper*, *supra* note 16 at 3, Annex A (for a bibliography listing empirical research, government documents and reports, and other reports informing the development of the *PCEPA*). Note, the SCC has afforded Parliament the scope to pursue legislative objectives based on less than conclusive social science evidence. See e.g. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

180 See e.g. House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 2nd Sess, Nos 32–44 (7–15 July 2014).

181 See Jane Scoular, "What's Law Got to do with It? How and Why Law Matters in the Regulation of Sex Work" in Jane Scoular & Teela Sanders, eds, *Regulating Sex/Work:*

made is consistent with the trend internationally, and one that they were entitled to make. As Stewart noted in his article, "a court is very likely to say that it is constitutionally permissible for Parliament to make moral choices about sex work. Legalizing and legitimating sex work would, of course, also be a legislative choice based on moral values."[182] If the decision in *Bedford* has the effect of precluding Parliament from making that choice, it raises significant concerns over the degree to which the rights protections afforded by the *Charter* may be understood as limiting the scope of Parliamentary policy-making in contests between differently situated vulnerable and marginalized groups and different or contested ideological and normative approaches to recognizing problems and generating policy responses.

From Crime Control to Neo-Liberalism? (Chichester: Wiley-Blackwell, 2010) 12 (for a critical account of the role of law in regulating sex work).

[182] Stewart, *supra* note 5, n 69.