

ARTICLE

# SOCIAL SCIENCE EVIDENCE IN POVERTY-RELATED *CHARTER* CLAIMS: AN EXAMPLE IN *BEDFORD V CANADA*

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CITED: (2020) 25 Appeal 61

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## ABSTRACT

Social science can be a useful tool for courts when deciding upon issues relating to poverty, as it can provide information about the societal realities of the matter in question. This paper explores the use of social science evidence in poverty law-related *Charter* claims, looking at the specific example of *Bedford v Canada (Attorney General)*. *Bedford* was a *Charter* application that ultimately struck down three provisions in the *Criminal Code* as unconstitutional because they interfered with sex workers' abilities to protect themselves against violence. Social science evidence played a vital role in the decision, demonstrating its effectiveness in these types of claims. The Supreme Court of Canada also made two important rulings in *Bedford* that increased the Court's recognition of the legitimacy of social science facts. This paper concludes that social science evidence is an essential aspect of many poverty-related *Charter* claims and that a solution should be found for ensuring that there is funding available for impoverished persons bringing these claims.

## INTRODUCTION

Social science evidence can be highly valuable for tracking trends, gathering information, and measuring the impacts of public policy with respect to poverty. While society views courts as conservative institutions, there can be little doubt that social science evidence is a useful tool for courts to understand the implications of their decisions, particularly in cases involving the constitutionality of legislation. As social science develops sophistication and public acceptance, it becomes increasingly important that the courts embrace this form of evidence and develop consistent processes for its evaluation. For the purpose of this paper, social science evidence refers to evidence, regarding a particular aspect of a case, that is data-driven and seeks to understand some aspect of society and social interactions.

This paper will explore the use of social science evidence in the case of *Bedford v Canada (Attorney General)*.<sup>1</sup> Part I of this paper addresses the societal context that gave rise to the *Bedford* claim, including the intersection of sex work and poverty in Canada. Part II discusses the factors that make poverty law challenges unique, and explains why *Bedford* was selected for the discussion in this paper. Part III discusses the social science admitted

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1 2010 ONSC 4264 [*Bedford SC*]; 2013 SCC 72 [*Bedford SCC*].

at trial through expert testimony, namely how the trial judge assessed the evidence. I will also address some criticisms of this analysis. Part IV notes significant changes to the way courts utilize such evidence following *Bedford*. Finally, Part V addresses ongoing problems with admitting social science evidence, particularly in poverty law cases. The purpose of this paper is to highlight the ways in which social science can be successfully used to support challenges under the *Canadian Charter of Rights and Freedoms* (“*Charter*”),<sup>2</sup> in a poverty law context. The conclusion will grapple with access to justice by examining available funding for such claims and recommends an expansion of government programs.

## I. BACKGROUND ON *BEDFORD*

*Bedford* was a case brought to the Ontario Superior Court of Justice by three applicants who were, or previously had been, sex workers in Canada.<sup>3</sup> The applicants claimed that three provisions in the *Criminal Code* concerning prostitution infringed on their section 7 rights under the *Charter* to “life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>4</sup> Although sex work in itself was not criminalized in Canada, the *Criminal Code* provisions in question criminalized keeping a common bawdy-house, living off the avails of prostitution, and communicating for the purposes of prostitution.<sup>5</sup> The applicants submitted that these provisions infringed on their section 7 rights because they effectively prevented sex workers from taking measures for their own security and therefore forced a decision between protecting themselves and risking criminal prosecution.<sup>6</sup>

The applicants in *Bedford* were Teri Jean Bedford, Amy Lebovitch, and Valarie Scott. Between them, they had sex work experience in major Canadian cities, with experience ranging from engaging in sex work on the streets to running an escort agency.<sup>7</sup> As can be gleaned from further investigation into the stories of the applicants, one must be cautious in characterizing *Bedford* as a poverty law case. Sex workers are not necessarily intrinsically impoverished or exploited. As Lebovitch wrote: “[n]o matter what those who speak for us want you to believe, there are not ‘representative’ sex workers. We are not just one type of being who share all the same experiences.”<sup>8</sup> It is critical to note, however, that the applicants in *Bedford* had privileges that many street-involved sex workers do not have. All three applicants were no longer working on the streets and, at the time of bringing the claim, were in roles where they had autonomy over their work. In contrast, many sex workers do live in poverty, particularly those who work on the streets, where many face insurmountable barriers to changing professions, which may include: drug dependency, exploitative relationships, and monetary limitations.<sup>9</sup> Many academics note

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

3 RSC 1985, c C-46 [*Criminal Code*]; Note: In this paper, when writing in my own voice I will use the term “sex work” to refer to providing sexual services in exchange for payment. However, when I am paraphrasing or quoting, particularly in relation to the *Criminal Code* I may use the word “prostitution,” as this is how sex work is characterized in the *Criminal Code*.

4 *Charter*, *supra* note 2 at s 7. Note: The applicants also made claims under section 2(b), the freedom of expression provision of the *Charter*, but this paper will focus on the section 7 claims as they are more pertinent to the discussion of poverty law, and bringing the section 2(b) analysis is beyond the scope of this paper.

5 *Bedford SC*, *supra* note 1 at para 1; *Criminal Code*, *supra* note 3, at ss 210(1), 212(1), 213(1) as appeared on June 13, 2013.

6 *Bedford SC*, *supra* note 1 at para 3.

7 *Bedford SC*, *supra* note 1.

8 Amy Lebovitch, “Foreword” in Shawna Ferris, *Street Sex Work and Canadian Cities: Resisting a Dangerous Order* (Edmonton: University of Alberta Press, 2015) at IX.

9 Lauren Sampson, “The Obscenities of This Country: *Canada v. Bedford* and the Reform of Canadian Prostitution” (2014) 22:1 *Duke J. Gender L. & Pol’y* 137 at 159 (HeinOnline) [Sampson].

that sex work is often associated with the economic conditions of “particularly young, poorly educated, young women who are unable to find employment.”<sup>10</sup> Thus, it can be inferred that even though the sex trade is not inherently associated with poverty, there are significant connections between the two.

Although not all sex workers are impoverished or victimized, it remains true that those who are in highly precarious situations have increased vulnerability. In the *Bedford* trial, police officers from across the country testified that those sex workers they encountered were “commonly poverty-stricken, abused and drug-addicted.”<sup>11</sup> In addition, vulnerable and racialized women work in street-involved sex work at higher rates.<sup>12</sup> As Sherene Raznak explains, a street sex worker is likely to be marginalized simply by virtue of their trade. However, it is often many other factors, such as race and poverty, that “over-determine” whether the person might find themselves working on the streets.<sup>13</sup> Thus, poverty and marginalization are not only factors that are experienced by women in the sex trade, but are also factors that contribute to their entrance and entrenchment in the industry.

## II. SOCIAL SCIENCE EVIDENCE AND POVERTY LAW *CHARTER* CHALLENGES

### A. Background

The use of social science evidence as a tool for disadvantaged groups in advancing *Charter* claims has had a rapid turnaround in recent Canadian jurisprudential history. As Benjamin Perryman writes: “In less than two decades, we have moved from a constitutional jurisprudence that could find serious psychological harm on the basis of a brief affidavit of the applicant, to a jurisprudence that frequently relies on, if not requires, massive records.”<sup>14</sup> Evidence heard in court can be defined as either case-specific, coined “adjudicative facts,” or it can be more generalized facts about society and the effects of legislation, which Kenneth Davis coined as “legislative” facts.<sup>15</sup> While turnaround in the treatment of social science can likely be credited to advances in the fields of social science and a modernization of courts, another strong component was the introduction of the *Charter* in 1982, and the jurisprudential treatment of *Charter* rights and freedoms since. Perryman points out that some of the earliest *Charter* claims adduced or attempted to adduce social science evidence.<sup>16</sup> Although this paper does not seek to track a case-by-case treatment of social science throughout history, prior to the *Charter* there would have been only a few cases in which legislative facts—evidence as to the effects of legislation and policy—would have been utilized.<sup>17</sup> The introduction of the *Charter* gave courts unprecedented scrutiny over legislation and legislative schemes. In order to thoroughly measure the effects of impugned legislation, such evidence has to be accepted and fairly interpreted.

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10 Canada, Department of Justice, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, Vol 2, Catalogue no. 55/2-1985E (Ottawa: Department of Justice, 1985) at 353 [Fraser Report]; See also, for example, Sampson *supra* note 9; and Sherene H Raznak, “Gendered Racial Violence and Spatialized Justice: The Murder of Pamela George” (2000) 15:2 Can LJ & Soc 91 [Raznak].

11 *Bedford SC*, *supra* note 1 at para 90.

12 Sampson, *supra* note 9 at 161.

13 Raznak, *supra* note 10 at 94.

14 Benjamin Perryman, “Adducing Social Science Evidence in Constitutional Cases” (2018) 44:1 Queens LJ 121 at 125 [Perryman].

15 *Ibid* at 125.

16 *Ibid* at 130.

17 See, for example, *Re: Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452.

## B. Review of Literature

Broadly, the literature addressing social science evidence in constitutional cases and *Charter* claims has not yet engaged in a fulsome discussion of its implications for poverty challenges. To my knowledge, David Wiseman appears to be the only commenter to have discussed social science evidence in the specific context of poverty law *Charter* claims. Wiseman has some interesting writings on the topic in which he concludes that social science has “mixed potential” in the area of anti-poverty claims.<sup>18</sup> In a more tangential composition that goes beyond the scope of this paper, he also engages in a wider discussion of the justiciability of poverty-related *Charter* claims.<sup>19</sup> Prior to the release of the Supreme Court of Canada (“SCC”) decision on *Bedford*, Julia Hughes and Vanessa MacDonnell contrasted the assessment of social science by the Canadian judiciary with that of German courts, concluding that there were many problems in the Canadian use of social science evidence that needed to be clearly addressed by an appellate authority.<sup>20</sup> While some issues Hughes and MacDonnell address are beyond the scope of this paper, they also express concerns regarding inconsistency in the evaluation of social science evidence and the following of *stare decisis*—the principle that the courts look to prior decisions to guide their judgement—in light of new academic findings.<sup>21</sup> Given that these issues are addressed in *Bedford SCC*, we can consider Hughes and MacDonnell’s criticism in the context of these changes. More recently, Jodi Lazare has written two papers assessing the use of social science in two important constitutional cases, *Carter v Canada (AG)* and *Reference re: Section 293 of the Criminal Code of Canada* (commonly referred to as *the Polygamy Reference*).<sup>22</sup> Lazare’s article on the *Polygamy Reference* is highly critical, stating that the law has a “long way to go before it can make proper use of the social sciences,”<sup>23</sup> In contrast, her later article on *Carter* primarily praises Justice Smith’s measured weighing of social science evidence in that particular case.<sup>24</sup> Although she still identifies significant procedural problems in the overall processing of social science generally, the tone in her *Carter* article provides a more optimistic understanding of the ways this evidence may be used in the future.<sup>25</sup> Michelle Bloodworth writes that courts are “uncomfortable” applying social science, but also asserts that, with proper guidance, there is no reason why trial judges cannot make determinations using social science evidence.<sup>26</sup> Perryman’s writings in the area are particularly useful, as he seeks to fill a gap in the literature by discussing best practice in the actual adducing of social science, taking a more technical approach

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18 David Wiseman, “Managing the Burden of Doubt: Social Science Evidence, The Institutional Competence of Courts and the Prospects of Anti-Poverty Charter Claims Burden” (2014) 33:1 *Nat’l J Const L* 1 at 2 [Wiseman]; see also, the earlier version of this paper, “Competence Concerns in Charter Adjudication: Countering the Anti-Poverty Incompetence Argument” (2006) 51:3 *McGill LJ* 503.

19 David Wiseman, “The Charter and Poverty: Beyond Injusticiability,” (2001) 51:4 *U Toronto LJ* 425.

20 Julia Hughes & Vanessa MacDonnell, “Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations” (2013) 32:1 *Nat’l J Const L* 23 [Hughes & MacDonnell].

21 *Ibid* at 25. Note: Hughes and MacDonnell also discuss admissibility of expert evidence and court deference to legislative review of social science evidence (at 25).

22 Jodi Lazare, “Judging the Social Science in *Carter v Canada (AG)*” (2016) 10:1 *McGill JL & Health* 535 [Lazare on *Carter*]; Jodi Lazare “When Disciplines Collide: Polygamy and the Social Sciences on Trial” (2015) 32:1 *Windsor YB Access to Just* 103 [Lazare on *Polygamy Reference*]. See also, *Carter v Canada (Attorney General)* 2012 BCSC 886 [Carter]; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 [Polygamy Reference].

23 Lazare on *Polygamy Reference*, *supra* note 22 at 106.

24 Lazare on *Carter*, *supra* note 22.

25 *Ibid*.

26 Michelle Bloodworth, “A Fact Is a Fact Is a Fact: Stare Decisis and the Distinction between Adjudicative and Social Facts in *Bedford* and *Carter*” (2014) 32:2 *Nat’l J Const L* 193 at pp 198, 209 [Bloodworth].

and describing best practices for counsel who wish to “harness” social science evidence.<sup>27</sup> Overall, the literature appears to be accepting of the use of social science evidence in theory, but critical of its application. The way the judiciary navigates social science evidence thus remains unstable, and circumstances in which such evidence is utilized appropriately tend to be treated by commenters as lucky exceptions rather than the rule.

### C. Poverty-Related *Charter* Claims

What makes *Charter* claims involving poverty distinct from other *Charter* claims is not immediately clear. Wiseman asserts that anti-poverty *Charter* claims must “explicitly seek *Charter* protection against inadequate income or lack of basic socio-economic necessities.”<sup>28</sup> However, this definition is extremely narrow and excludes cases that have a significant impact on the lives of the impoverished. Anti-poverty *Charter* litigation challenges legislative and executive action that disproportionately affects impoverished people by creating additional social barriers for those living in, or at risk of, poverty. From Wiseman’s conception, the claim in *Bedford* was not an anti-poverty *Charter* claim because the applicants were not making a claim based on either lack of income or a right to necessities, but, rather, against government intervention in measures to protect themselves. By defining anti-poverty claims in this manner, Wiseman seems to advocate specifically for positive rights, i.e. “rights to” certain necessities, while *Charter* rights have been traditionally interpreted as negative rights, or “rights from” government intervention. For example, in *Gosselin* the Supreme Court of Canada held that it would not yet recognize positive rights under section 7, but that “one day” they might do so.<sup>29</sup> This does suggest some openness to readdressing the matter in the future. However, claims that find ways to argue within the existing jurisprudence may be more successful (and viewed by courts as less radical) than repeatedly requesting judgement on the viability of section 7 positive rights claims. An example of these creative workaround tactics is the British Columbia Court of Appeal case, *Victoria (City) v Adams*.<sup>30</sup> In *Adams*, the applicants successfully argued that the City of Victoria bylaws, which prohibited erecting overnight shelters in city parks, violated the section 7 rights of homeless people in Victoria who were sleeping in tents at night to reduce their exposure to harm from elements.<sup>31</sup> *Bedford* represents a similar creative workaround of this issue by utilizing the existing recognized principles of fundamental justice in an attempt to implicitly improve working conditions for sex workers. This successful strategy should be emulated in poverty law cases in the future where possible.

## III. EXPERT TESTIMONY AT TRIAL

At the trial level in *Bedford*, the parties included the three applicants and the Attorney General of Canada, the respondent. Joining the case against the applicants were the following intervenors: the Attorney General of Ontario, the Christian Legal Fellowship (“CLF”), REAL Women of Canada, and the Catholic Civil Rights League.<sup>32</sup> Social science evidence was submitted in the form of expert testimony, which is required when “[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a

27 Perryman, *supra* note 14 at 125.

28 Wiseman, *supra* note 18 at 2.

29 *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 82 [*Gosselin*].

30 2006 BCCA 563 [*Adams*]; Interestingly, although Wiseman does not classify *Bedford* as an anti-poverty *Charter* claim, he does consider *Adams* to be one. However, he classifies it as a “narrow negative liberty claim arising only as a last resort and only of temporary individual benefit” (Wiseman, *supra* note 18 at 33).

31 *Adams*, *supra* note 30.

32 *Bedford SC*, *supra* note 1 at para 5.

correct judgment about it, if unassisted by persons with special knowledge.”<sup>33</sup> As John Lowman explains through a reflection on his testimony in the *Bedford* trial, the main purpose of expert testimony is to provide an opinion which courts expect will “reflect the expert’s personal knowledge in the realm of their expertise.”<sup>34</sup> In *Bedford* and many other *Charter* challenge-related cases, the expert testimony as to the legislative facts puts courts in a position to make judgements on the effects of the impugned provisions, as well as the implications of its enactment on the lives of Canadian sex workers.<sup>35</sup>

In order to be in accordance with the principles of fundamental justice under section 7 of the *Charter*, a law must not be arbitrary, overbroad, or grossly disproportionate, if it affects a claimant’s life, liberty or security of the person.<sup>36</sup> In *Bedford*, the legislative evidence brought by the applicants sought to demonstrate that the laws in question were not in accordance with these principles. The respondent argued that sex work is an inherently risky activity, and therefore involves risk no matter how it is practiced. The Attorney General of Ontario argued that the exploitative nature of the relationship between a sex worker and a customer contribute to the risk involved in the sex trade and that these laws exist to “limit the negative effects of prostitution on both the prostitute and the public, as they curtail commercialized institutional prostitution and prohibit public prostitution.”<sup>37</sup> The claimants argued that these provisions reflect the values of society and should therefore be upheld.<sup>38</sup>

At trial, a vast array of evidence was considered by the court. Lowman, a professor at Simon Fraser University who studied prostitution in Vancouver for 30 years, provided key expert testimony for the applicants.<sup>39</sup> The respondent’s key expert witness was from Dr. Melissa Farley, who is the founder of the Prostitute Research and Education non-profit and has 40 years of experience in psychology research and 15 years’ experience conducting research specific to prostitution and human trafficking.<sup>40</sup> “The Fraser Report” was also discussed at great length as a contribution to the evidentiary record. The Fraser Report was generated in 1985 by the Special Committee on Pornography and Prostitution and entailed “a great deal” of empirical research.<sup>41</sup> The Committee made four recommendations that, generally, suggested either that sex work be wholly criminalized and legislation should be strengthened to keep sex workers off the streets, or that it should be decriminalized and exploitative relationships between sex workers and pimps or customers be targeted instead.<sup>42</sup> Interestingly, the Fraser Report’s recommendations were largely ignored by Parliament and, in 1985, Parliament introduced the “communication provision,” one of the provisions at issue in *Bedford*.<sup>43</sup> It is important to recognize that it is unlikely that the evidence from the Fraser Report would have been enough on its own for the provisions to be ruled unconstitutional, and that social science has developed substantially since

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33 *Kelliher (Village of) v Smith*, [1931] SCR 672, 1931 CanLII 1 (SCC) at para 684.

34 John Lowman, “The Role of Expert Testimony in *Bedford v. Canada* and *R v. McPherson*”, excerpt from “In the Eye of the Storm: The (Ab)Use of Research in the Canadian Prostitution Law Reform Debate” (Paper delivered at Durham Law School, Durham University, 18–19 September, 2014) [Unpublished] at 3.

35 *Ibid* at 3.

36 *Bedford SC*, *supra* note 1 at para 12.

37 *Ibid* at para 40.

38 *Ibid* at para 23.

39 *Ibid* at para 129.

40 *Ibid* at para 132.

41 *Bedford SC*, *supra* note 1 at para 138; Fraser Report, *supra* note 10.

42 Fraser Report, *supra* note 10 at 357.

43 *Bedford SC*, *supra* note 1 at para 149.

1985. It is also difficult to condemn the legislature in this case, because it might not be known if a law's effects are arbitrary, overbroad, or grossly disproportionate until the law has been enacted and its effects measured.

Although Justice Himel's treatment of the social science evidence brought before her has been subject to criticism, her analysis of the evidence was exactly what adjudicators in these types of cases should be expected to do. Both sides made arguments to discredit the other side's expert witness evidence, which Justice Himel accounted for when making her findings of fact. Justice Himel's weighing of the evidence submitted by expert testimony is fair and reasoned.<sup>44</sup> She considered the totality of the expert evidence from a legal perspective and concluded:

The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.<sup>45</sup>

Based on these findings, Justice Himel proceeds in her analysis of the principles of fundamental justice from section 7 of the *Charter*. She concludes that the provisions are not in accordance with the principles of fundamental justice and should be struck down.<sup>46</sup>

Max Waltman criticizes Justice Himel's findings of fact, claiming that Justice Himel missed several key methodological concerns in the social science evidence presented that resulted in the case being wrongly decided.<sup>47</sup> I take issue with Waltman's argument for two reasons. First, the case did not turn on many of the issues Waltman points out.<sup>48</sup> Second, Waltman seems to have misinterpreted the implications of the *Bedford* decision, the legal burden of proof required in this case, and what actions were left open to Parliament following the ruling. Waltman's criticisms seem to confuse his own views on the legalization of prostitution with whether Justice Himel successfully balanced the evidence in front of her.<sup>49</sup> Waltman further discusses alleged problems within the methodology of key studies cited in the decision. Although an in-depth evaluation of these criticisms is beyond the scope of this paper, Waltman's analysis seems to require specific proof to a scientific degree that there is a causal connection between indoor sex work and lower instances of violence.<sup>50</sup> Waltman can perhaps be forgiven for asserting this standard because, in academic discussions of social science evidence, methodological arguments are important for the improvement of research and the discourse of ideas. However, the burden of proof for the applicants in this case was on a balance of probabilities, or whether it is more probable than not

44 *Ibid* at paras 300–359.

45 *Bedford SC*, *supra* note 1 at para 300.

46 *Ibid* at paras 300–538.

47 Max Waltman, "Assessing Evidence Arguments, and Inequality in *Bedford v. Canada*" (2014) 37:2 *Harv JL & Gender* 459–463 [Waltman].

48 See, for example, his lengthy discussion on whether or not sex work causes PTSD, or the fact that he engages in a lengthy methodological discussion, seeming to conclude the cases cited in *Bedford* lack credibility, but cites cases to prove his own points without subjecting them to the same intense scrutiny (*ibid* at 471–473, 491–510).

49 Waltman on various occasions insists that prostitution is "intrinsically exploitative" (Waltman, *supra* note 47).

50 *Ibid* at 495.

that the totality of the evidence points to a certain conclusion. When using social science evidence in *Charter* claims such as this one, it is important to consider that courts are making decisions that affect the lives of real people. Therefore, if it is more probable than not that a law is infringing on *Charter*-protected rights (and is not saved under section 1 of the *Charter*), then there is a societal net value in striking down that law. The likelihood that the legislation violates a *Charter* right must be balanced in proportion to the harm that it perpetuates. Particularly in the context of poverty law, these provisions could mean the difference between life and death, or incarceration and liberty. Justice Binnie explains in *R v Marshall* that “litigating parties cannot await the possibility of a stable academic consensus.”<sup>51</sup> That is not to say that social scientists should not continue to seek a higher degree of certainty while conducting research. However, courts do not have the luxury of waiting for a certainty that will be nearly impossible to prove definitively.

#### IV. SUPREME COURT DECISION

In a unanimous decision written by Chief Justice McLachlin, the Supreme Court of Canada agreed with Justice Himel’s ruling that all three provisions were unconstitutional. The Court struck down the impugned provisions. The decision also made interesting changes to the law in relation to the handling of social science evidence, and in particular evidence as to the effects of legislation, or legislative evidence.

As Perryman notes, the *Bedford* decision makes two key holdings regarding the treatment of social science evidence.<sup>52</sup> First, lower courts are now permitted to reconsider issues without strict adherence to *stare decisis* should there be “a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.”<sup>53</sup> Second, the Supreme Court affirmed that legislative facts be treated as other findings of fact upon review. The Court of Appeal in *Bedford* based their decision on an interpretation of the existing law, which suggested the standard for reviewing legislative facts was different than for adjudicative facts and could be accorded less deference.<sup>54</sup> To this, the Supreme Court responded that the standard of review for findings of “social facts” by the trial chambers should be whether there is a “palpable...and overriding error,” the same standard used for adjudicative findings of fact at the trial level.<sup>55</sup> The implications of these holdings suggest not only an openness to the admittance of social science evidence, but a recognition of its legitimacy in Canadian society.

We can see an example of the evolution of circumstances in *Bedford* itself. The applicants argued similar issues to the 1990 Supreme Court decision, the *Prostitution Reference*, which upheld the bawdy-house and communication provisions as constitutional under the *Charter*.<sup>56</sup> At the trial level, Justice Himel ruled that she was not bound by this decision because the interpretation of section 7 of the *Charter* had evolved considerably since the decision.<sup>57</sup> The Supreme Court majority ruled even further, stating that a matter can be revisited if there are significant changes in the law *or* if there is a significant change in circumstances or in evidence.<sup>58</sup> This is hugely significant with respect to social science evidence and the *Charter* because it means that *Charter* matters relating to the

51 [1999] 3 SCR 456, 177 DLR (4th) 513 para 3, cited in Lazare on *Polygamy Reference*, *supra* note 18 at 113.

52 Perryman, *supra* note 14 at 131.

53 *Bedford SCC supra* note 1 at 42.

54 As discussed in *Bedford SCC, supra* note 1 at para 48.

55 *Ibid* at para 56.

56 *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, 68 Man R (2d) 1 [*Prostitution Reference*].

57 *Bedford SCC, supra* note 1 at para 17.

58 *Ibid* at 42.

constitutionality of legislation can never be truly settled law. Perryman suggests that a societal change in circumstances may include the evolution of the socially accepted meaning of marriage, while a change in evidence might be new research that was not available when a matter was previously ruled upon.<sup>59</sup> Although this approach, in opening the possibility of revisiting matters, might seem to be radical on its face, the idea is actually consistent with the purpose of using a case-based common law system, which allows the law to evolve with societal norms. As Hughes and MacDonnell assert, courts should be encouraged to engage with social science in a meaningful way, while being open to the possibility that this might mean revisiting and reviewing constitutional issues as further evidence becomes available.<sup>60</sup>

Chief Justice McLachlin gives two reasons for the decision to change the standard of review of legislative facts: (1) efficiency of the system (an appellate level review of legislative findings of fact would essentially result in a new trial at every level); and (2) legislative facts might be “intertwined” with case-specific adjudicative facts, which means that it would be impractical to apply different standards of review to different types of facts.<sup>61</sup> The decision to change the standard of review for findings of fact with respect to legislative evidence seems to have mixed reception. For example, Bloodworth asserts there is nothing inherent about social science facts that might make them any more “suspicious” than adjudicative facts.<sup>62</sup> Bloodworth also contends that the previous interpretation that legislative facts were not due the same deference as adjudicative facts was a misinterpretation of *RJR-MacDonald Inc. v Canada (Attorney General)* and never should have been law.<sup>63</sup> The change to the law gives trial judges a lot of responsibility when it comes to the weighing of evidence, evaluating of methodology, and determining credibility of expert witnesses. Although many commentators seem ready to embrace the new standard, there are consequences. As Lazare points out:

[A]s a case makes its way up the appeals process, the evidentiary record is scrutinized by increased numbers of judges at each level of court, creating a sense of safety in numbers and consensus. As the number of judges increases, so do the chances that the evidence will be examined by a judge with the requisite awareness of the risks and challenges associated with expert evidence from the social sciences. Thus, the risk of uncritical reliance on unsound evidence, or of misapprehension of complex scientific evidence, is minimized.<sup>64</sup>

However, although the new standard may seem to set an insurmountable task before a trial judge, the requisite reasoning is actually quite similar to the way that trial judges are already required to make findings of fact. It should also be noted that in an instance of palpable and overriding error in the interpretation of a trial judge, the appellate courts retain the right to step in. In addition, if there appear to be missing elements to the evidentiary records, appellate courts might look to intervenors or *amici curiae*—“friend(s) of the court” asked to provide external counsel to stakeholders and adjudicators—to fill in the gaps. The fact remains, however, that many trial judges might find they are actually up to the task. As we can see from Justice Himel’s use of logic and her assessment of applicability to the facts before her, this responsibility might be considered simply an application of the skills that judges already utilize when analyzing different areas of evidence. In the same way

59 Perryman, *supra* note 14 at 125.

60 Hughes & MacDonnell, *supra* note 20 at 57.

61 Bedford SCC, *supra* note 1 at paras 51 and 52.

62 Bloodworth, *supra* note 26 at 208.

63 *Ibid* at 208–209, see also *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199, 127 DLR (4th) 1 at para 79.

64 Lazare on Carter, *supra* note 22 at 45.

that a judge is not expected to be a forensic scientist, a judge does not have to be a social scientist to carefully evaluate evidence that is before them.<sup>65</sup> Pointing out methodological problems with opposing evidence is the responsibility of the parties involved in the case and their counsel in cross-examination. This, as is the case for any other matter within the adversarial system, means that the parties must bring their strongest case forward.

## V. CONTINUING PROBLEMS IN POVERTY LAW CHARTER CLAIMS

A clear access to justice problem arises in the context of the resources required to bring forward poverty-related claims. Many cases involving poverty law may benefit from social science evidence, but few impoverished people have the resources to retain counsel necessary to make radical *Charter* claims or to hire experts to testify on their behalf. Professor Allan Young writes that “most people cannot afford to mount constitutional challenges in order to vindicate their rights.”<sup>66</sup> Legislative fact evidence drives the already exorbitant costs of *Charter* litigation even higher, with the cost to bring a claim possibly even exceeding a million dollars.<sup>67</sup> Young explains that even when a lawyer agrees to argue the claim *pro bono*, the other costs, particularly that of expert witnesses, still make *Charter* claims a costly undertaking.<sup>68</sup>

In *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, the Supreme Court suggests that an access to justice remedy could include allowing public interest groups to bring forward claims.<sup>69</sup> I take issue with this being the sole remedy because the judiciary is assigning responsibility to non-profit groups to solve problems that the government themselves created by passing unconstitutional legislation. Some funding may be available for *Charter* claims under the federal “Court Challenges Program,” which was initially introduced in 1978 but was cut by the previous government in 2006.<sup>70</sup> The current government has committed themselves to reinstating the program, but has not provided substantive information about the timeline, stating that it is “gradually” transiting the program to its new independent organization.<sup>71</sup> Applicants in Ontario can also apply for funding under test case public interest funding through Legal Aid Ontario, but the funding is limited and, even when granted, does not come near to Young’s estimate of the cost of bringing these claims.<sup>72</sup> Another potential solution for funding these claims would be a practice of judges awarding costs to applicants. However, applicants would still need to acquire funding up-front, and unsuccessful applicants would be responsible for their own costs.<sup>73</sup>

The use of social science evidence via expert witness testimony may also pose problems given the adversarial nature of Canada’s court system. In fact, the adversarial system is mentioned

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65 Perryman, *supra* note 14 at 149.

66 Alan Young, Department of Justice Canada, “The Costs of Charter Litigation” (2016) at 2, online (pdf) <<https://www.justice.gc.ca/eng/rp-pr/jr/ccl-clc/ccl-clc.pdf>> archived at [<https://perma.cc/A96D-93VL>] [Young].

67 *Ibid* at 3.

68 *Ibid*.

69 2012 SCC 45 at para 51.

70 Canada, “Objective and History of Court Challenges Program” (5 February 2019), online <<https://www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program/backgroundunder.html>> archived at [<https://perma.cc/CDW7-B72R>].

71 *Ibid*.

72 Young, *supra* note 66 at 3.

73 *Ibid* at 7.

explicitly as a problem by many commentators.<sup>74</sup> As was the case in *Bedford*, there can be much disagreement even amongst experts. A court may miss important evidence if both sides have incentives to not bring the best witnesses or hide related findings from the court. In these cases, it might be prudent for judges to have discretion to call important experts on the matter that neither side has presented in a witness. One possible solution to this is to adopt a quasi-inquisitorial method for seeking truth in legislative evidence. Inquisitorial systems allow for the presiding judge to direct the process rather than the adversarial parties, as is commonplace in the adjudicative process.<sup>75</sup> Lazare discusses the possible benefits of adopting methods from inquisitorial systems by pointing out that the adversarial system can be “potentially hindering” to the search for truth.<sup>76</sup> This could potentially curtail a large portion of the costs of bringing *Charter* claims as it would greatly reduce the parties’ costs in acquiring their own expert witnesses.

## CONCLUSION

Social science evidence brings clear public benefits to *Charter* claims in a poverty context and allows courts to rule on the constitutionality of legislation using social evidence to contextualize the real effects of the impugned legislation. *Bedford* is a significant case in the realm of the adjudication of social science evidence in law and poverty cases for various significant reasons. The case demonstrates a robust example of how a trial judge might weigh expert testimony to make legislative findings of fact. The applicants in *Bedford* were ultimately successful in their claim, demonstrating the possible success of utilizing social science evidence strategically. The changes in the law that stem from the Supreme Court decision suggest courts’ increasing openness to hearing expert testimony and accepting social science evidence as legitimate. Poverty law-related *Charter* claims are particularly challenging because of the continued refusal of the courts to recognize any positive rights to the basic necessities of life. Cases such as *Bedford* are examples of creative legal workarounds using officially recognized *Charter* rights to make claims in areas of law that disproportionately affect the impoverished. The use of social science to form legislative evidence in such cases is still developing, and some clear issues in relation to access to justice and available funding for these cases will need to be addressed as the jurisprudence matures. This paper recommends an embracing of social science evidence and further discussion on how courts can be most successful in admitting the best evidence, improving efficiency, and helping impoverished persons bring claims in order to advance the aims of anti-poverty advocacy.

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74 See, for example, Hughes & MacDonnell, *supra* note 20; Lazare on *Carter*, *supra* note 22; Lazare on *Polygamy Reference*, *supra* note 22.

75 Jodi Marissa Lazare, *The Use of Social Science Evidence in Constitutional Adjudication Overcoming the Challenges of the Adversarial System* (LLM Thesis, McGill University, 2012) [unpublished] at 107.

76 *Ibid* at 107.

