Criminal Law

Sex trade decision removes 'Parliamentary supremacy'

By Jacob Stilman

It is unlikely that a decision of the Supreme Court of Canada will attract as much public discourse as today's monumental judgment in *Canada v. Bedford et al* any time soon. It seems that every decade or so a decision comes down from our highest court which captures the attention of legal scholars, politicians, social scientists, and the public at large in equal measure.

Such was the case, for example, in *R. v. Morgentaler*, a decision on abortion made at the dawn of the Charter era. Or more recently in the assisted suicide debate (*B.C v. Sue Rodriguez*). Or, the mercy killing case of *R. v. Robert Latimer*. All of these decisions transcend the public imagination and elicit the strongest opinions from all quarters. Everyone has already formed an indelible opinion on the subject, and no one is likely to change their mind where the debate is so polarizing. *Canada v. Bedford, et al*, the "prostitution case," now enters this pantheon.

In a nutshell, the unanimous and single-voiced judgment – authored by the chief justice herself – strikes down three elements of our current prostitution laws. These are the provisions which up to now have prohibited: Communication for the purpose of prostitution; keeping a common bawdy house (ie a brothel) and living off the avails of prostitution (pimping, but not exactly).

A discussion of the reasons and logic of the decision are beyond the scope of this piece, but it is anchored to the inter-related constitutional principles of "arbitrariness," "over breadth," and "disproportionality." What it all comes down to though is a paradigm shift in the manner in which our laws are analyzed when subjected to judicial scrutiny. This focus has changed from assessing the purpose of the legislation, in which the court looks at what the law does and whether that is in keeping with constitutional limitations, to the effect or impact of the legislation – ie: regardless of the law's objectives, does its enforcement bring about an unconstitutional result.

What is unique about this decision is just how purposeful and "effect driven" the analysis is. Gone is any deference to parliamentary supremacy, or hand-wringing about the deleterious effects of prostitution on the moral fabric of society. Nor does the court pronounce much upon the morality of prostitution, the potential for the exploitation of vulnerable women, or the linkages between prostitution and other forms of criminality. The opening stanza of the judgment pretty well says it all:

[1] *"It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.*

[2] *"These 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. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament."*

Is the Supreme Court derogating its responsibility by taking an "if you can't beat 'em, join 'em" approach? Some critics will undoubtedly argue that is exactly what is going on; that prostitution is a blight on society, and that anything which can be done to discourage its practice is a legitimate and necessary legislative measure. It will also likely be heard from some quarters that the court has come to the defence of one narrow class of citizens (ie. sex trade workers) at the expense of a much broader spectrum of the public: the law-abiding, taxpaying public that does not seek out the services of prostitutes, but that is more concerned with public order and morality in their neighbourhoods. These are legitimate arguments, and this piece does not pretend to supply the answers.

What is so apparent in this decision is that the well-publicized horrors of the Picton case in Vancouver precipitated a re-think among jurists on this issue, first from the trial judge at first instance, then at the Court of Appeal, and now by the Supreme Court. The decision's laser-like focus on the rights of sex trade workers, their vulnerability to severe violence and murder, and the current law's role in perpetuating these risks is clearly an outgrowth of the public and judicial awareness which derived from that notorious case. What has been recognized at all three levels of court is that these laws are costing the lives of vulnerable people, and that the courts will not abide this any longer.

This is what also makes this decision so interesting: that its genesis is so clearly rooted in real-world events. But what will be the long-term impact of a "real world" approach to resolving difficult constitutional questions? Is there a risk that over-reliance by the judiciary on front-page news events could undermine or de-value traditional constitutional legal analysis? Will our laws become subject to re-interpretation each time a notorious event captures the public's imagination? On the other hand, is a less ivory-tower approach to constitutional interpretation and analysis not perhaps a good thing? Oughtn't the courts look to the real events that impact the lives of the people who are most impacted by the law?

These are interesting times, not just for Supreme Court watchers and legal wonks, but for the entire Canadian public. As we conclude this chapter of our legal storybook we will have to turn again to Parliament to produce an effective solution. Let us hope that the current government, which has generally demonstrated a contemptuous and politically-laden approach to all issues related to our criminal laws, adopts a balanced solution which withstands constitutional scrutiny when they tackle this issue.