THE *BRIEF*

by the CANADIAN LAW REVIEW

inaugural issue

ISSUE I

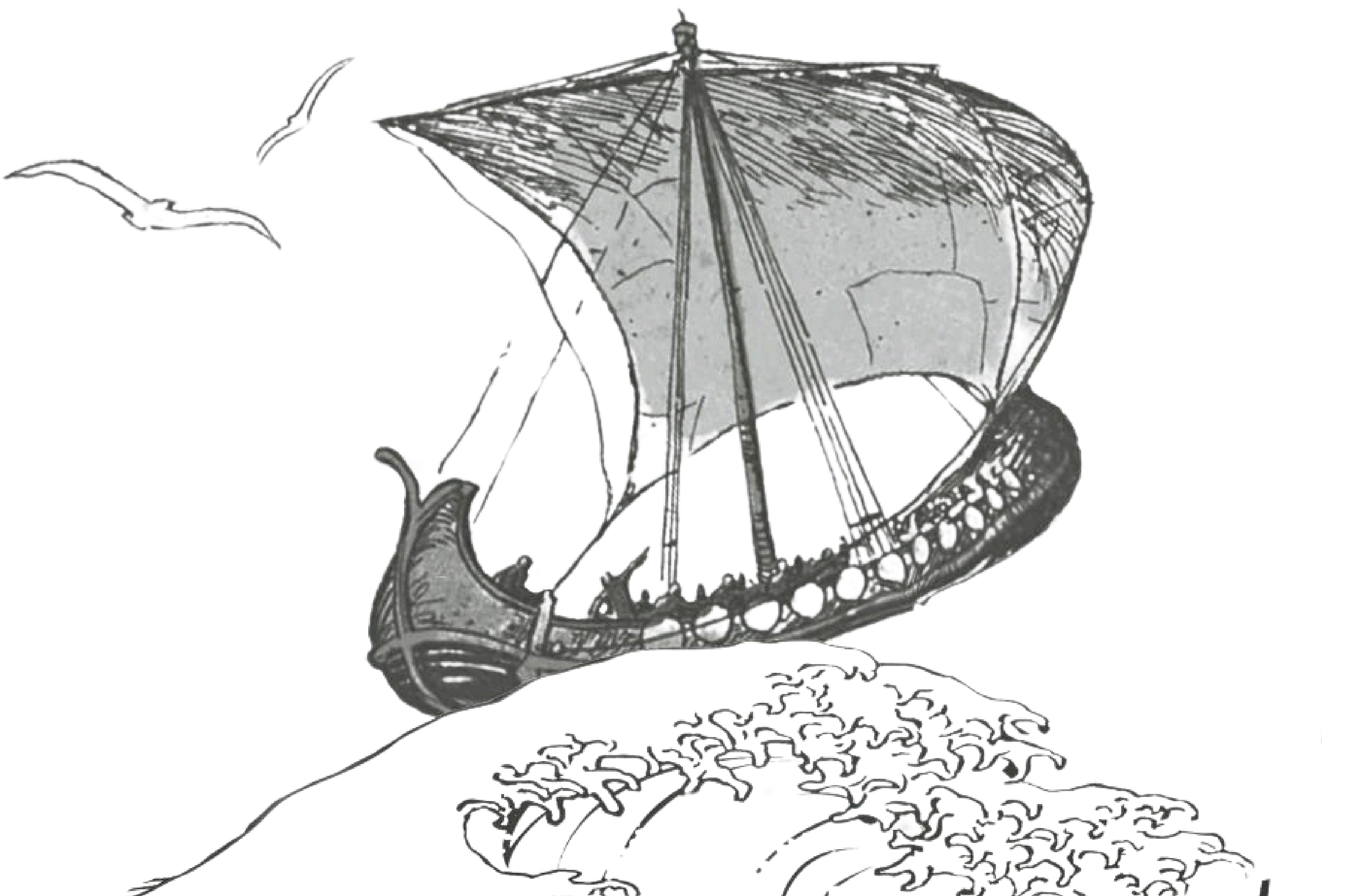
The Legal Odyssey: Exploring the Law

THE *BRIEF*

ISSUE I

The LEGAL ODYSSEY

Editor-in-Chief: Nikhil Trehan
Copyeditors: Damai Siallagan and Rachel Brouwer



THE LEGAL ODYSSEY

A SPECIAL THANK YOU

To the incredible editors on our team: this publication would not have been possible without your tireless dedication and support.

The Brief would like to specifically thank Damai Siallagan, Rachel Brouwer, Nikhil Trehan, Emelia Shull, Reagan Lindsay-Kereluik, Caliyah Simon, Anjalique Raghunauth, and Kyra Vellinga for their contributions to this issue of The Brief.

EDITOR'S NOTE

exclusive

What is 'The Brief'? The Brief is a quarterly journal for legal advocacy and discussion. As part of 'The Canadian Law Review', the Brief is committed to *bridging the legal gap,* creating opportunities for everyone to be involved with and get experience in the legal editorial process.

Every season, The Brief will publish a series of articles related to a central topic of law. The summer publications will release every August 1st, and focus on topics related to Law & Philosophy.

The Fall publications will center on issues of Public Law, and release every November 1st. The Winter publications will center on issues of Private Law, and release every February 1st. The Spring publications will center on issues of Law & History, and release every May 1st.

The Brief's inaugural issue; The Legal Odyssey: Exploring the Law, is the first of our summer Law & Philosophy publication series and will explore a vast sea of legal areas and focus on the legal philosophies present across these bounds of the law. This Legal Odyssey will voyage across the areas of criminal law, the law of contracts, criminal procedure, human rights law, and Indigenous law. We welcome you to The Odyssey and wish you a safe journey.

A Call to Advance Indigenous Justice: Addressing Indigenous Incarceration Beyond *Gladue*

Elizabeth McGraw

The Brief

August 2024

Abstract

The overrepresentation of Indigenous persons within the Canadian criminal justice system is an increasingly pressing concern, prompting an impetus for substantive legal reform. This paper explores the complex factors contributing to the disproportionately high rates of Indigenous incarceration in the justice system. Through analysis of proposals, this paper highlights the urgent need for comprehensive legal reform to ensure equitable treatment of Indigenous people regarding criminal justice. This paper examines R v Gladue's attempt to address Indigenous overrepresentation crises. Finally, this paper discusses the potential of abolitionist-minded frameworks for justice system reform, indicating that these frameworks are vital to meaningfully addressing deep-rooted systemic inequalities. This discussion will promote the implementation of juridical self-determination and transformative justice strategies as a promising avenue toward equitable criminal justice.

The overrepresentation of Indigenous persons in the Canadian criminal justice system is a crisis.[1] Many investigations have drawn critical attention to this issue, such as the Royal Commission on Aboriginal Peoples, Commissions of Inquiry (including the 1991 Aboriginal Justice Inquiry of Manitoba and the Truth and Reconciliation Commission), and Supreme Court of Canada rulings.[2] Despite concerted efforts aimed at rectifying this injustice—notably the addition of section 718.2(e) to the *Criminal Code* and the *R v Gladue* decision—the persistence of disproportionately high Indigenous incarceration rates remains a testament to the exigency for justice system improvement. Systemic racism—stemming from centuries of dispossession, cultural suppression, and institutional violence—continues to perpetuate cycles of injustice, rendering Indigenous communities more vulnerable to victimization and exhibiting higher rates of recidivism.[3] Additionally, socioeconomic disparities, inadequate access to essential services, and intergenerational trauma compound vulnerabilities faced by Indigenous individuals, amplifying their likelihood of involvement with the criminal justice system.[4] Furthermore, Indigenous persons are twice as likely to experience victimization than their White counterparts.[5] Indigenous incarceration remains a crisis deeply rooted in historical injustice and systemic inequalities. It is essential to address these enduring inequalities.

---

[1] This analysis will define the term crisis as an ongoing and intense problem that must be rectified. "Crisis" is defined by Merriam-Webster as "an unstable or crucial time or state of affairs in which a decisive change is impending," "crisis," *Merriam-Webster.com*, 2024, (28 May 2024). The discussion in *R v Gladue* states that the figures of Indigenous incarceration represent a situation that can be fairly termed as a crisis in the Canadian criminal justice system. *R v Gladue*, [1999] 1 SCR 688 at para 64.

[2] Statistics Canada, *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021*, by Paul Robinson et al, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2023) at 4, online: <www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm>.

[3] *Ibid* at 18; Nicole M Muir & Jodi L Viljoen, "Adverse Childhood Experiences and Recidivism in Indigenous and White Female and Male Adolescents on Probation" (2022) 126 Child Abuse & Neglect 105512, DOI: <10.1016/j.chiabu.2022.105512>.

[4] Statistics Canada, *supra* note 2 at 2.

[5] *Ibid.*

There is a stark contrast between Indigenous incarceration and non-Indigenous incarceration rates. Between 2020 and 2021, there were 42.6 Indigenous persons in provincial custody per every 10 000 people, compared to 4.0 non-Indigenous persons.[6] Furthermore, a study from 2023 completed by Public Safety Canada shows that "[d]espite accounting for approximately 5% of the adult population, Indigenous Peoples continue to be overrepresented in the federal correctional system, accounting for 28% of all federally sentenced individuals and 32% of all individuals in custody; and Indigenous women account for 50% of all federally incarcerated women."[7] These figures highlight the significance of disproportionate Indigenous incarceration rates, indicating the imperative for reform. As Erfat Arbel states, "There is nothing extraordinary about the steadily rising rates of Indigenous incarceration; they are as predictable and fixed as the colonial structures that produce them."[8] Recidivism also disproportionately impacts Indigenous populations. A 2022 study indicates that inequitably high rates of Indigenous recidivism are tied to "the presence of higher rates of adverse childhood experiences (ACEs) arising from past and ongoing colonialism."[9]

The Supreme Court case *R v Gladue*, represents a significant juridical attempt to address the issue of Indigenous mass incarceration. The Supreme Court of Canada remarked that the incarceration of Indigenous people represents a crisis.[10] In both *Gladue* and *R v Ipeelee*, the

---

[6] Statistics Canada, *supra* note 2 at 3.

[7] Public Safety Canada, *Parliamentary Committee Notes: Overrepresentation (Indigenous Offenders)*, by Jenna Smith (Ottawa: PSC, 2023), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20230720/12-en.aspx>.

[8] Efrat Arbel, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 Can JL & Society 437 at 439, DOI: <10.1017/cls.2019.37>.

[9] Muir & Viljoen, *supra* note 3 at 2.

[10] *R v Gladue*, [1999] 1 SCR 688 at para 64; see also Arbel, *supra* note 8.

courts attempted to address how section 718.2(e) of the *Criminal Code* should be applied.[11] Section 718.2(e) directs a court, when imposing a sentence, to "consider all available sanctions other than imprisonment that are reasonable in the circumstances for all offenders, with particular attention to the circumstances of aboriginal [*sic*] offenders."[12] This section thereby requires the sentencing judge to consider both alternatives to incarceration, as well as recognition of the unique circumstances of Indigenous offenders.[13] The ultimate goal of *Gladue* and *Ipeelee* was to reduce Indigenous incarceration rates, remedy injustices, and address systemic disparities.

The *Gladue* decision set an important precedent for Canadian courts. It interpreted section 718.2(e) of the *Criminal Code* to require sentencing judges to more holistically consider an Indigenous offender's circumstances in determining a fit sentence.[14] *Gladue* states that:

> In sentencing an aboriginal [*sic*] offender, the judge must consider:
>
> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.[15]

This section of the *Criminal Code* highlights the deep-rooted circumstances affecting Indigenous peoples. One way this issue was addressed was through the utilization of *Gladue* reports. A *Gladue* report helps a judge tailor a sentence for an Indigenous offender with considerations of the unique circumstances of the offender and the context in which the crime was committed. As Alexandra Herbert notes, "*Gladue* reports address both the Indigenous offender's

---

[11] See also *R v Ipeelee*, 2012 SCC 13.

[12] *Criminal Code*, RSC 1985, c C-46, s 718.2(e).

[13] *R v Gladue*, *supra* note 10 at para 38.

[14] *Ibid* at para 93(6).

[15] *Ibid* at para 93(6).

macro-circumstances, such as colonial history and enduring discrimination, as well as the offender's micro-circumstances, such as community, family, and addiction."[16]

Despite these developments, the discrepancy between Indigenous and non-Indigenous incarceration has intensified since the *Gladue* decision. *Gladue* did not have the significant positive impacts that its decision intended. Scott Clark, from the Canadian Department of Justice, states that the incarceration rates for Indigenous persons have only risen post-*Gladue*.[17] Statistics Canada provides data on the growing numbers of Indigenous incarceration that continue to adversely affect Indigenous populations (see Table 1). These statistics present an increase in Indigenous incarceration rates. The persistent significance of disproportionate Indigenous incarceration rates indicates the imperative need for reform. The *Gladue* decision shed light on the crisis Canada is facing, pointing toward solutions for change. However, due to its failure to reduce Indigenous incarceration rates, a solution is still needed.

Instead of continuing to focus on *Gladue* reform, one way to alleviate ongoing systematic discrimination in the justice system is to honour Indigenous self-determination and support Indigenous-led justice.[18] Focusing on these methods would allow us to move away from the reformist mindset that underpins *Gladue*. Clark contends that Indigenous-led justice processes may offer a juridical model more responsive to Indigenous persons' needs and circumstances.[19]

---

[16] Alexandra Hebert, "Change in Paradigm or Change in Paradox? Gladue Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149 at 157.

[17] Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*, by Scott Clark, (Ottawa: Department of Justice, 2019) at 4, online: <justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>.

[18] *Ibid*; Judah Oudshoorn, "Theorizing a Way out of Reformist Reforms: Gladue Reports and Penal Abolition" (2023) 26:2 Punishment & Society 243, DOI: <10.1177/14624745231208177>.

[19] Department of Justice, *supra* note 17.

Table 1. Changing Rates of Indigenous Incarceration, 2013–2014 and 2016–2017.

Category	2013–2014 (%)	2016–2017 (%)	Change[a]
Admission to custody	25	30	+20%
Sentenced admission	26	30	+15%
Remands	23	29	+26%
Other custodial statuses	32	33	+3%

Source: Department of Justice, *supra* note 17 at 10.

[a] Change represents the proportional change, not the change magnitude.

The Government of Canada has committed to reconciliation with Indigenous Peoples through the creation of the Truth and Reconciliation Commission (TRC). The TRC call to action number forty-two states:

> We call upon the federal, provincial, and territorial governments to commit to the recognition and implementation of Aboriginal justice systems in a manner consistent with the Treaty and Aboriginal rights of Aboriginal peoples, the *Constitution Act, 1982*, and the *United Nations Declaration on the Rights of Indigenous Peoples*, endorsed by Canada in November 2012.[20]

In this sense, the Canadian government has recognized the importance of implementing Indigenous-led justice systems. While the complete abolition of the Canadian criminal justice system would be a lengthy and resource-demanding process, Canada can advance abolitionist reform by supporting Indigenous-led justice initiatives.[21].

[20] Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015) at para 42.

[21] Indigenous-led justice initiatives include supporting culturally appropriate, Indigenous-led and community based services for justice as well as ensuring policies are informed by Indigenous peoples and their lived experiences. Further, initiatives should focus on community based programs aimed at addressing the systemic issues Indigenous communities face. Department of Justice, *Supporting Indigenous-Led Justice and Victims Services in Six Nations* (Ohsweken: Department of Justice, 2023), online: <canada.ca/en/department-justice/news/2023/12/supporting-indigenous-led-justice-and-victims-services-in-six-nations.html>.

Previous investments in Indigenous-led justice services indicate that such support is possible. In December 2023, the Minister of Justice and the Attorney General of Canada announced over $560 000 in funding to support two Indigenous-led projects of the Six Nations Justice Department to aid in addressing the overrepresentation of Indigenous people in the criminal justice system.[22] The first project assists Six Nations members who experienced a Gladue report process and connects them with support services such as healing circles, spiritual care, mental health support, and addiction services.[23] This project emphasizes the ability for the government to support various Indigenous strategies for rehabilitation. Tim Bucci, Director of Six Nations Justice Department commented on this funding stating, "The Six Nations Justice Department welcomes this funding and sees it as an opportunity to continue providing support to victims and those accused of a crime in Brantford, Cayuga, Hamilton, and Six Nations Reserve."[24] Furthermore, he emphasises the Six Nations Justice Department's commitment to providing services free of charge which remains their policy to this day. The Six Nations Justice Department offers numerous programs to accused Indigenous peoples such as the bail Program, community standards program, family and criminal law resources, Indigenous victim services, and a restorative justice program.[25] The Six Nations Department of Justice and the funding being provided to the organisation provide a clear example of how Indigenous-led initiatives can be utilised as a solution.

---

[22] Department of Justice, *Supporting Indigenous-Led Justice and Victims Services in Six Nations* (Ohsweken: Department of Justice, 2023), online: <canada.ca/en/department-justice/news/2023/12/supporting-indigenous-led-justice-and-victims-services-in-six-nations.html>.

[23] *Ibid*.

[24] *Ibid*.

[25] Six Nations Justice Department, *Programs,* (Ohsweken: Six Nations Department of Justice, 2024), online: <Six Nations Justice>

Implementing Indigenous-led justice narratives would both acknowledge the systemic racism intrinsic to the Canadian penal system, as well as allow Indigenous communities greater jurisdiction over matters of Indigenous justice. In the interests of Canada's commitment to reconciliation, it is Canada's responsibility to support alternatives to the colonial justice system wherever possible. Transformative strategies could be implemented as an alternative to incarceration. Transformative justice can be defined as a change which emphasizes local agency and resources, prioritizing processes that challenge unequal power relationships.[26] Empowering Indigenous communities and services to manage alternatives to incarceration –such as rehabilitative programs and community-based sanctions– would provide Indigenous populations with a greater degree of legal self-determination. In order to enable the justice system to accurately implement section 718.2(e) of the *Criminal Code*, alternatives to incarceration are vital.

Justice system alternatives must be informed by the recognition that the Indigenous incarceration crisis is a systemic issue. The historical and ongoing impacts of colonialism can be understood as a contributing factor to individuals' criminal behaviour.[27] Indigenous communities continue to experience the effects of colonialism, including poor living conditions, unemployment, substance abuse, family violence, and lack of access to essential services.[28] Therefore, in addition to honouring section 718.2(e) of the *Criminal Code*, Canada must also commit to providing rehabilitative measures and more comprehensive social support that address

---

[26] Rosemary Nagy, "Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada" (2022) 26:2 Intl J Human Rights 191 at 192, DOI: <10.1080/13642987.2021.1910809>.

[27] Statistics Canada, *supra* note 4 at 4.

[28] *Ibid*.

these systemic issues. Providing more care and support at the community level will help work towards solving the Indigenous incarceration crisis.

While prioritizing Indigenous-led justice and self-determination is essential, initial steps may necessitate a hybrid model due to resource and policy limitations. From a hybrid model as the starting point, the government would be able to work through understanding how a full implementation of a separate system can come into place in the future. Additionally, the Canadian Government would be able to gather statistics on any changes in incarceration rates of Indigenous peoples resulting from the changes. An instant implementation of a wholly autonomous Indigenous justice system may not be feasible. Therefore the cooperation of the Canadian Government through providing funds and resources, which has been demonstrated possible through the Six Nations funding, would benefit a collaboration with Indigenous-led Initiatives. Undoubtedly, implementation of this would need to be spearheaded by Indigenous communities, themselves, with minimal interference. Self-determination of the implementation of justice is vital for success.

The issue of overrepresentation of Indigenous peoples in the Canadian criminal justice system is a national crisis that must be rectified. This paper proposes to commit to investing in the expansion of Indigenous-led justice processes. Furthermore, there must be community-based solutions to address the lasting effects of colonialism, which are responsible for the high levels of Indigenous incarceration. It is vital that Indigenous communities and practices are consulted to find a solution that will benefit their communities. The *Gladue* decision drew attention to this issue and pointed toward more holistic considerations of Indigenous offenders' circumstances as a potential solution. However, additional work is necessary to address the ongoing crisis of overrepresentation of Indigenous peoples within the Canadian criminal justice system. Implementing Indigenous-led justice initiatives will not provide an immediate resolution. However, continued, planned, and directed investment into Indigenous-led solutions may help alleviate this crisis.

BIBLIOGRAPHY

LEGISLATION

Criminal Code, RSC 1985, c C-46.

JURISPRUDENCE

R v Gladue, [1999] 1 SCR 688.

R v Ipeelee, 2012 SCC 13.

GOVERNMENT DOCUMENTS

Department of Justice, *Supporting Indigenous-Led Justice and Victims Services in Six Nations* (Ohsweken: Department of Justice, 2023), online: <canada.ca/en/department-justice/news/2023/12/supporting-indigenous-led-justice-and-victims-services-in-six-nations.html>.

Department of Justice, *Overrepresentation of Indigenous People in the Canadian Criminal Justice System: Causes and Responses*, by Scott Clark (Ottawa: Department of Justice, 2019), online: <justice.gc.ca/eng/rp-pr/jr/oip-cjs/oip-cjs-en.pdf>.

Public Safety Canada, *Parliamentary Committee Notes: Overrepresentation (Indigenous Offenders)*, by Jenna Smith (Ottawa: PSC, 2023), online: <publicsafety.gc.ca/cnt/trnsprnc/brfng-mtrls/prlmntry-bndrs/20230720/12-en.aspx>.

Statistics Canada, *Over-Representation of Indigenous Persons in Adult Provincial Custody, 2019/2020 and 2020/2021*, by Paul Robinson et al, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2023), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2023001/article/00004-eng.htm>.

Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: TRC, 2015).

SECONDARY MATERIAL: ARTICLES

Arbel, Efrat, "Rethinking the 'Crisis' of Indigenous Mass Imprisonment" (2019) 34:3 Can JL & Society 437, DOI: <10.1017/cls.2019.37>.

Hebert, Alexandra, "Change in Paradigm or Change in Paradox? *Gladue* Report Practices and Access to Justice" (2017) 43:1 Queen's LJ 149.

Muir, Nicole M & Jodi L Viljoen, "Adverse Childhood Experiences and Recidivism in Indigenous and White Female and Male Adolescents on Probation" (2022) 126 Child Abuse & Neglect 105512, DOI: <10.1016/j.chiabu.2022.105512>.

Nagy, Rosemary, “Transformative Justice in a Settler Colonial Transition: Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada” (2022) 26:2 Intl J Human Rights 191, DOI: <10.1080/13642987.2021.1910809>.

Oudshoorn, Judah, “Theorizing a Way out of Reformist Reforms: *Gladue* Reports and Penal Abolition” (2023) 26:2 Punishment & Society 243, DOI: <10.1177/14624745231208177>.

The Uncertainty of the Criterion of Enforceability in Contracts

Nikhil Trehan

The Brief

August 2024

Abstract

This paper examines the evolution of the enforceability of contracts across common law jurisdictions. It traces the shift from an objective approach, which focuses on the outward expressions of agreement between parties, prevalent in the early to mid-20th century, to a more subjective and equitable approach employed in the late 20th century, which considers the fairness and intentions behind the agreements. In the last few decades, the approach has once again shifted, becoming more conservative and less settled. The paper delves into key judicial decisions related to two major concepts: consideration (the value exchanged in a contract) and consensus ad idem (mutual agreement). These concepts will be applied to recent and highly tendentious matters of forum exclusion clauses in adhesion contracts. By analyzing case law and judicial decisions, the paper highlights the ongoing debate between different legal philosophies and the challenge of balancing stability in the law with achieving justice in individual cases.

Introduction

The law of contracts is said to concern itself with the expectations of parties, induced by the conduct of other parties, through promises and agreements.[1] Stephen Waddams, in the *Introduction to the Study of Law,* writes:

> Every system of contract law must develop a criterion of enforceability. In Anglo-Canadian law, the chief criterion of enforceability has been the bargain, an agreed exchange, and every contracts course will devote attention to the constituent parts of a bargain, [namely; offer, acceptance, consideration, *consensus ad idem*,[2] capacity, and legality].[3]

Besides the existence of the bargain, however, there are further reasons for enforcement, partial enforcement, or nullification of a contract. Waddams writes, "The law of contracts involves a continuous tension between stability, certainty and predictability, on the one hand, and fairness, equity and justice in the individual case on the other."[4] Historically, some courts have grasped beyond their authority in decisions that have since been referred to as judicial activism[5], whereas other courts have exercised judicial restraint, viewing contracts more objectively, as merely the terms agreed to. The vacillation between various competing legal philosophies, in particular; legal formalism, positivism, realism, and naturalism, is often attributed to causing the uncertainty in determining the criterion of enforceability in contracts. Through an analysis of notable

---

[1] Charles Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed (Oxford: Oxford University Press, 2015) at 17–19.

[2] *Consensus ad idem* (or "meeting of the minds") refers to the intentions of parties forming a contract. Per Black's Law Dictionary, under the early 19th century subjective theory of the contract, meeting of the minds referred to the requirement of manifestation for mutual accord between the parties to a contract. Under the late 19th century objective theory of the contract, meeting of the minds is defined as evidence of expressed or implied consent. However, under will theory, a party is not bound by a contractual duty, unless they willed it so, thereby requiring a finding of subjective and mutual intent as opposed to the objective manifestation of intent.

[3] Stephen Waddams, *Introduction to the Study of Law*, 5th ed (Scarborough: Carswell, 1997) at 63–64.

[4] *Ibid* at 2.

[5] Judicial activism is defined as the practice of judges making decisions on the basis of social policy considerations, as opposed to interpretation based on existing law. It is generally considered to exceed the proper exercise of judicial authority.

objective and subjective approaches to contract enforcement, this analysis will seek to evaluate the general criterion of enforceability in contracts.

***Consensus ad Idem* and the Objective Theory of the Contract**

It is a founding principle of contract law that courts must only determine what the contract says or does, not what it is intended to say or do.[6] This objective approach to the understanding of the contract is reflected in the parol evidence rule, which bars extrinsic evidence, including prior or contemporaneous oral or written agreements, that contradict or create a variation of a term in writing that the parties intended to be completely integrated.[7] Courts have historically been reluctant to interpret intent beyond the writing of the contracts.[8] However, in practice, there are often instances where this approach comes at odds with the requirement of *consensus ad idem*.[9] It is up to debate whether, at times, to determine the true intent of the parties, the courts ought to look beyond the writing of the contract. American jurist and former Associate Justice of the U.S. Supreme Court Oliver Wendell Holmes wrote that the law has "nothing to do with the actual state of the parties' minds," but rather must "go by externals, and judge parties by their conduct."[10] The use of moral phraseology in the law of contracts results in an inference that there is no contract because the minds have not met (i.e. they have intended different things). However, in Holmes' view, nothing is more certain than the fact that parties may be bound by a contract of things which neither of them intended, and when

---

[6] RA Samek, "The Objective Theory of Contract and the Rule in *L'Estrange v. Graucob*" (1974) 52:3 Can Bar Rev 351 at 354–355.

[7] *Ibid* at 355.

[8] *Ibid* at 363.

[9] *Ibid* at 367.

[10] Oliver Wendell Holmes, *The Common Law* (Cambridge, MA: Harvard University Press, 1963) at 279.

one does not know of the other's assent[11]. The formation of a contract is not dependent on the agreement of two minds in one single and unified intention, but rather, on the agreement of two sets of external intentions – coming together to say the same thing[12].

J. R. Spencer, Professor Emeritus of Law in the Law Faculty at the University of Cambridge, in referencing the ruling of Blackburn J. in *Smith v Hughes (1870)*, wrote “[w]ords are to be interpreted as they were reasonably understood by the *man to whom they were spoken*, not as they were understood by the *man who spoke them* [emphasis in original].”[13] In *Smith v Hughes,* the plaintiff, Smith, delivered some oats he claimed to have sold to the defendant, Hughes, who refused to pay for them because he said that he had not agreed to buy the kind of oats that the plaintiff had sent him.[14] The defendant, Hughes had misidentified the kind of oats, and the oats agreed to in the contract could not be eaten by the defendant’s horse. The plaintiff brought an action against the defendant to complete the sale as agreed. This case was heard in the county court before a jury, which found for the defendant. In reaching this conclusion, the county court rendered the contract void *ab initio*[15] as there was no *consensus ad idem* between the contracting parties. The plaintiff appealed the decision to the Court of the Queen’s Bench on the grounds that the county court’s direction to the jury, on the question of agreement, had been defective.[16] The Court of the Queen's Bench found that the judge had misdirected the jury, ordered a new trial, and laid down what the trial judge’s direction ought to have been. The court

[11] *Holmes*, supra at 279.

[12] *Ibid* at 280.

[13] JR Spencer, “Signature, Consent, and the Rule in *L’Estrange v. Graucob*” (1973) 32:1 Cambridge LJ 104 at 106.

[14] *Smith v Hughes* (1871) LR 6 QB 597 [*Smith*].

[15] Void *ab initio* (or void from the beginning) means a contract is deemed as invalid from the time it was written.

[16] *Smith*, *supra* note 14 at 150.

ruled that the mistake was made solely by fault of the defendant – thereby finding the sale contract to be valid.[17] This case exemplified the principle of *caveat emptor* (buyer beware), where it is the responsibility of the buyer alone to check the suitability of the goods prior to entering into a contract. Blackburn writes:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.[18]

Spencer writes that if one party makes an offer to purchase an item they have confused to be another, there would still be a valid offer. If the selling party chooses to agree, the contract relating to the purchase and sale of the item would exist, even if the two minds of the parties did not meet. The purchasing party has misled the selling party into thinking the offer is genuine, and it would be impermissible for the purchasing party to be allowed to go back on the impression that they created. However, this apparent consent, in Spencer's view, can be rightfully denied in two circumstances; (i) if one party knew, or ought to have known, that the other party was mistaken in their understanding of the terms of the contract; and (ii) if it was one party's fault or due to that party's misleading, that the other party appeared to agree to something that they did not.[19]

A more stringent form of objective theory, commonly known as detached objectivity (or fly on the wall) theory, holds that a contract is formed when to all outward appearances the parties have agreed to the same terms and on the same subject matter, regardless of the actual intention and state of knowledge of either party. The terms of a contract are merely that which a

---

[17] *Smith*, *supra* note 14 at 152.

[18] *Ibid* at 607.

[19] Spencer, *supra* note 13 at 106–107.

third party (or a fly on the wall) would have heard had he listened to the offer and acceptance of the terms of the contract. Lord Denning MR was the leading advocate in England of the detached objectivity theory of contract formation, having stated in *Solle v Butcher*:

> Once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject matter, then the contract is good until it is set aside ... Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake."[20]

However, this theory has been critiqued as contrary to authority and often difficult to apply. Spencer writes that we run into difficulties if we frame the agreement around how a third party overhearing the negotiation of two contracting parties would have interpreted them. The more sensible question, rather, would be; how should one party have interpreted what the other party said?[21] The fly-on-the-wall theory has also been objected to on the grounds that it leads to untenable results. What happens if the parties are inwardly agreed, but externally, they seem to have agreed on something else? In a critical example illustrated by Spencer, two immigrants with little knowledge of the English language, agree on the purchase and sale of a bull.[22] While both of them intend to deal with a cow, both parties believe that the word "bull" refers to a female cow[23]. Per Denning L.J's "fly on the wall" theory of agreement, they would have made a contract to buy and sell a bull, although Party A does not want one and Party B does not have one to sell.[24] For this reason, many oppose a completely objective interpretation of the formation of a contract. A mutual understanding of all terms and clauses is essential for the existence of true

[20] *Solle v Butcher*, [1950] 1 KB 671 at 691.

[21] Spencer, *supra* note 13 at 112.

[22] *Ibid* at 108.

[23] *Ibid*.

[24] *Ibid* at 113.

obligations or benefits under a contract. Gross misunderstandings of contractual obligations, whether intentional or unintentional, undermine this mutual understanding and the integrity of the contract, as a whole. Intentional misunderstandings and exploitations constitute fraud, unconscionability, or misrepresentation, whereas unintentional ones amount to mistake or *non est factum*[25]. In either case, mutual assent is compromised, rendering a clause or, at times, the entire contract *ab initio*. With this broad range of approaches by various judiciaries, case law reflects ambivalence and uncertainty as to whether knowledge of all contractual terms is required to constitute sufficient *consensus ad idem*.

In *Tilden Rent-A-Car Co v Clendenning (1978),* the defendant, Mr. Clendenning, visited Vancouver and rented a car from the plaintiff, Tilden Rent-a-Car, a rental car agency.[26] Tilden prided itself on how quickly it is to rent a car from them. They extended, *inter alia*, an all-coverage insurance policy. Clendenning signed the car rental agreement, received the coverage, drove the rented vehicle, and was subsequently involved in a car accident. He pled guilty to driving under the influence of alcohol in his criminal suit. However, he later claimed that he did so on the advice of counsel, and at the time of the impact, he was, in fact, capable of proper control of the motor vehicle.[27] Tilden brought a motion against Clendenning for damages, citing a clause on the back of the contract exempting coverage in the case of alcohol consumption. The court noted that the clause was written in a small font on a gray background, and included many exceptions to the coverage – including, *inter alia*, consumption of any drugs or alcohol of any amount as well as driving on any road or highway not governed by the

[25] *Non est factum* (or not my deed), is a plea that an agreement was not the act of one party or significantly different from what one party believed the agreement to be. It often applies where a person signing a document had no real understanding of the character or effect of that document.

[26] *Tilden Rent-A-Car Co v Clendenning,* 1978 CanLII 1446 (ONCA), online: <canlii.ca/t/g1bxl> [*Tilden*].

[27] *Ibid* at 407.

municipality. The defendant argued that he was unaware of the contract term as he never read the back of the contract, alleging staff misrepresentation and intentional concealment by agents of the plaintiff. The court considered the principles established in *L'Estrange v F Graucob (1934),* a leading English contract law case on the incorporation of terms in a contract by signature.[28] In applying *L'Estrange*, the judge held that, where a contract is in writing and both parties sign it, both parties are bound to its terms regardless of whether they agree. However, there are notable exceptions to these objective approaches to contract interpretation, including fraud, misrepresentation, and *non est factum*. The trial judge found that in the case at bar, there was intent to withhold information relating to the terms of the contract from the defendant, constituting misrepresentation[29]. At trial, the court ruled to dismiss the motion brought against the defendant, and the plaintiff appealed to the Ontario Court of Appeal. At Appeal, the court looked beyond what the parties said and agreed to, looking closely at the dynamic of the adhesion contract.[30] The appellate court dismissed all charges, ruling that it was not open to the plaintiff to rely on its exemption clauses. In reaching this conclusion, the court found that it was *unconscionable* to compel a party to be bound by a term in the contract that the author of the contract would know that signatories would have no reasonable way of reading or understanding. In *Tilden*, the Court of Appeal ruled that where the terms of adhesion contracts are onerous, the author of the contract must take steps to ensure that the other party understands and is aware of

---

[28] *L'Estrange v F Graucob Ltd*, [1934] 2 KB 394.

[29] *Tilden, supra* note 26 at 408–409.

[30] Adhesion contracts ("standard form" or "boilerplate" contracts) are defined as any agreement offered on the take it or leave it basis. The Legal Information Institute at Cornell Law School writes "an adhesion contract exists if the parties are of such disproportionate bargaining power that the party of weaker bargaining strength could not have negotiated for variations in the terms of the adhesion contract. Adhesion contracts are generally in the form of a standardized contract form that is entirely prepared and offered by the party of superior bargaining strength to consumers of goods and services. Adhesion contracts are commonly used for matters involving insurance, leases, deeds, mortgages, automobile purchases, and other forms of consumer credit."

it. The clerk could not help but have known that Mr. Clendenning had not, in fact, read the contract before signing it. Indeed, the form of the contract itself, with the important provisions on the reverse side and in very small font, would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was thus unaware of the exempting provisions.

The Court of Appeal's decision in *Tilden* exemplifies the more progressive stance on contract interpretation of the late 20th century, emphasizing the responsibility of contract authors to ensure transparency, particularly in adhesion contracts. *Tilden* also expanded the criterion of enforceability, suggesting that future courts ought to consider the reasonable expectations and intentions of the parties when determining the validity of the contract, opposing the tradition of *detached objectivity* in contract interpretation.

Consideration and Inequality of Bargaining Power

On the matter of consideration, it is trite law that even a peppercorn will do.[31] In legal parlance, the peppercorn represents a nominal payment or consideration by one party in a legal contract. The peppercorn principle holds that courts are not to concern themselves with the adequacy of consideration, but merely with its existence. In *Chappell & Co Ltd v Nestle Co Ltd*, [1959], the court writes “a peppercorn does not cease to be good consideration if it is established that the promisee does not like pepper and will throw away the corn”[32].

Established in *Allegheny College v National Chautauqua County Bank of Jamestown (1927)*, consideration must be mutually related to the promise given by the other party; it must be requested by the promisor and constitute the reason for the promise[33]. Consideration must confer

[31] *Chappell & Co Ltd v Nestle Co Ltd*, [1959] UKHL 1.

[32] *Ibid* at 114.

[33] *Allegheny College v National Chautauqua County Bank of Jamestown*, 246 NY 369 (1927) at 376.

a legal benefit on the promisor or a legal detriment to the promisee, and it ought not to be illusory. A mere gratuitous promise is *nudum pactum*,[34] and thus lacks enforceability. However, with a rise in consumer protection legislation passed by common law legislatures in the late 20th century, there has been a correlating trend in equitable interpretations by common law courts. Contractual relationships deemed as unfair would often merit the intervention by the court. However, the question is often raised of which situations the adequacy of consideration be contemplated by the court.

Prior to the introduction of comprehensive consumer protection legislation, many legal scholars argued that the *peppercorn* principle ought to have been abandoned due to a rise in cases of gross inequality of bargaining power between contracting parties. In doing so, the court could intervene and assess the adequacy of consideration, particularly to protect vulnerable parties and prevent unjust enrichment. However, this view was met with criticism, as many suggested that the judiciary was overstepping its bounds and acting as a super-legislature.[35] Critics contended that if such business practices ought to be prohibited, it should be addressed by the legislature.[36] Years ago, with the advent of the doctrine of Fundamental Breach, courts sought to counteract exclusion clauses that deprived innocent parties of the benefits of the contract in cases where breaches were so fundamental. The superimposition of this judicially imposed rule was heavily

---

[34] Latin for a "naked promise," *nudum pactum* is defined as an agreement made without any consideration for it.

[35] A super-legislature refers to a judiciary that is able to create new legislation without being held accountable through the means of election. While typical legislatures create laws through a structured process involving debate, amendments, and votes designed to reflect the will of the electorate, decisions by judges are made without the same level of public debate or accountability. Because of this, if judges create and strike down laws without limitations, they become a "super-legislature" with all the powers of legislative bodies but with none of the accountability or fear of losing future elections. However, cases of judicial activism by super-legislative courts have not necessarily led to poor outcomes.

[36] Freidrich Kessler, "The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions" (1943) 43 Colum L Rev 629 at 629.

opposed, leading to a revision that ambiguous clauses should be read *contra proferentem*.[37] Much like cases such as *Tilden*, courts have occasionally extended their traditional roles to protect the little man. In these real-life David and Goliath scenarios, courts have intervened to prevent the powerful from exploiting the vulnerable, striving to balance the scales of justice and uphold fairness where there is a significant disparity in bargaining power. However, at the opposing end, there exists a concern that business transactions are being undermined by the overly paternalistic reach of an *ultra vires* court.[38]

Prior to the enactment of the Consumer Credit Act, 1974 – which, *inter alia*, defined unfair creditor-debtor relationships and defined the powers of the court in relation to unfair creditor-debtor relationships – there was a lack of statutory protections for debtor or creditor parties with an inequality of bargaining power.[39] In *Lloyds Bank Ltd v Bundy (1974)*, the defendant, Old Herbert Bundy, was a farmer at Yew Tree Farm.[40] His family resided on this farm for 300 years and passed the estate down several generations. It was the defendant's only asset, and he decided to mortgage the land to the bank for the sake of his son, who was experiencing business troubles. The defendant was unable to fulfil his mortgage obligations, and the bank brought an action against him for possession. The defendant's lawyers argued that when he executed the charge to the bank, he did not know what he was doing; or at any rate, the circumstances were such that he ought not to be bound by it. At the trial, his plight was plain. The defendant was so clearly incapacitated that he had a heart attack in the witness box. The

---

[37] *Contra proferentem* (also known as "against the offeror"), is a doctrine of contract interpretation, where any ambiguous contract term is construed against the drafter of the contract. The doctrine exists to place the burden of ambiguity on the party most capable of mitigating that ambiguity, i.e., the person who wrote it.

[38] Kessler, *supra* note 36 at 630.

[39] *Consumer Credit Act 1974 (UK)*, c 39.

[40] *Lloyds Bank Ltd v Bundy*, [1975] QB 326 [*Lloyds*].

judge felt deep remorse, yet felt the court could do nothing for him, stating, that there was nothing which differentiates the facts of this case from the vast range of commercial transactions.[41] The court ordered the defendant to give up possession of Yew Tree Farm to the bank. He appealed to the Court of England on the ground that the circumstances were so exceptional that he ought not to be held bound. In *Lloyds*, Lord Denning wrote that while in the vast majority of cases, customers who sign a bank guarantee are bound by then, there exist exceptions to this general rule[42]. There are cases in the books in which the courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms, when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.[43] Such exceptional cases have been treated as a separate category in itself. Lord Denning proposed to find a principle to unite them. On one side there are contracts or transactions which are voidable for fraud, misrepresentation, or mistake – which had all been governed by settled principles. However, there are other cases where there has been inequality of bargaining power, such as to merit the intervention of the court. The following categories were classified by Denning as exceptions to the enforcement of contracts: duress of goods, unconscionable transactions, undue influence, undue pressure, and salvage agreements.[44] Gathering all together, he suggested that through all these instances there runs a single thread: inequality of bargaining power.[45] By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms

---

[41] *Lloyds, supra* at 770.

[42] *Ibid* at 763.

[43] Philip Slayton, "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v. Bundy*" (1976) 22:1 McGill LJ 94 at 100.

[44] *Lloyds*, *supra* note 40 at 837.

[45] *Ibid* at 765.

which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.[46] The particular case facts of *Lloyds* made it evident that the defendant, Bundy, was particularly vulnerable to the bank's advantage. In such a case, the England Court of Appeal deemed it necessary to intervene to right this wrong, dismissing the action for possession brought against the defendant. This decision created a precedent in which the court ought to assess the adequacy of consideration to distinguish cases of fair business practices to those of gross inequality. While this decision was novel in its creation of the doctrine "inequality of bargaining power," as early as the mid-17th Century, the common law recognized the power of courts to refuse to enforce contracts that overstep accepted bounds of fairness, typically categorized as unconscionability.[47] However, this ruling pushed inequality of bargaining power as a *de facto* necessary precondition for a finding of unconscionability. To many, this was viewed as a rejection of the *peppercorn* principle, as the adequacy of consideration would be relevant to courts where there exists great inequality between the contracting parties. As consumer protection legislation has increased substantially in the last few decades, often cases of unconscionability have merited the assessment of consideration by the court. However, courts continue to wrestle with how to deal with bargaining power disparities.[48] Some jurisdictions have ruled that a finding of inequality of bargaining power is, on its own, sufficient for a determination of procedural unconscionability, whereas others have ruled that inequality of

---

[46] *Lloyds, supra* at 765.

[47] Daniel D Barnhizer, "Inequality of Bargaining Power" (2005) 76:1 U Colorado L Rev 139 at 195.

[48] *Ibid* at 195–196.

bargaining power is one of several elements of procedural unconscionability.[49] In the case of *Williams v. Walker-Thomas Furniture Co.*, the court defined unconscionability as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favourable to the other party."[50] In contrast, in *Wille v. Southwestern Bell Telephone Co.*, unequal bargaining power was listed as one of ten factors that courts should consider in assessing unconscionability, in general.[51] The ambiguity in the application of inequality of bargaining power has created wide discretion for individual courts when determining whether the adequacy of consideration ought to be assessed in such situations.

Interpretations of *Consensus ad Idem* and Consideration in Adhesion Contracts Containing Forum Selection Clauses

The obscurity of what constitutes sufficient *consensus ad idem* and consideration – and whether either of these elements ought to be assessed for their adequacy, altogether, has prompted an incertitude in the rights and obligations of contracting parties. The turn of the 21st century was marked by technological advancements, and in particular relation to the law of contracts; a rise in digital transactions and agreements. Common law courts who were embracing a more equitable approach to common law interpretation began to revert to a more conservative approach, in fear of discouraging the new digital business wave. However, as businesses began conducting automated and digital transactions, critics believed that the bargaining power of consumers was further diminishing. One such mechanism that was heavily criticized was forum selection clauses, which by their nature, aimed to limit the means by which parties can bargain or litigate. The question of whether forum selection clauses that greatly narrowed the rights of

[49] Barnhizer, *supra* at 196.

[50] *Williams v Walker-Thomas Furniture Co*, 350 F (3d) 445 at 449 (DC Cir 1965).

[51] *Wille v Southwestern Bell Tel Co*, 549 P (2d) 903 (Kan Sup Ct 1976).

consumers ought to be enforced by the courts became a central focus of adhesion contract cases. In *Douez v Facebook, Inc.*, the majority at the Supreme Court of Canada (SCC) wrote “[b]ecause forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause”.[52]

In the 1999 case of *Rudder v Microsoft*, the plaintiffs, Rudder and La Rochelle, purchased and used the network of the defendant, Microsoft.[53] A few months later, the plaintiffs discovered that the defendant had doubled their subscription charges as a result of a negative option billing in the contract. The plaintiffs joined a class action suit against the defendant. The defendant pleaded a forum exclusion clause that the plaintiffs signed, stipulating that they were not allowed to join a class action lawsuit against the defendant. In addition to preventing the joining of a class action suit, the forum exclusion clause also stipulated that any actions brought against the defendant by the plaintiffs be done in King’s County Washington, where the defendant, Microsoft, was headquartered. The Superior Court determined that the clause was clear and the plaintiffs had the necessary time to review, finding no case of gross inequality of bargaining power or unconscionability. The court honoured the forum selection clause and dismissed the plaintiff’s motion.

In 2002, the Ontario Superior Court of Justice was determining whether, in the case of *Kanitz v Rogers Cable Inc.*, adequate notice of an amendment to the contract was given to the plaintiff by the defendant, as contemplated by the terms of the contract.[54] The plaintiff, Kanitz, was a subscriber of the cable company of the defendant, Rogers. The user agreement signed by the plaintiff included a term that specified the occasion in which Rogers could make an

---

[52] *Douez v Facebook, Inc*, 2017 SCC 33.

[53] *Rudder v Microsoft Corp*, 1999 CanLII 14923 (ONSC), online: <canlii.ca/t/1w8rg>.

[54] *Kanitz v Rogers Cable Inc*, 2002 CanLII 49415 (ONSC), online: <canlii.ca/t/1w1c2>.

amendment to the contract. The ways in which Rogers agreed to notify its subscribers of amendments to the contracts were by way of mail, email, or a posting on the defendant's website. The contract specified that when Rogers changed the terms of their contract, a customer's use of the service over 30 days was taken as agreement to the new terms. Kanitz participated in a class action suit against Rogers, but Rogers alleged that the mandatory arbitration clause required that any claim or dispute would be referred to arbitration, to the exclusion of the courts, and that the subscriber waived any right to participate in any class action against the defendant. Rogers brought a motion to stay the proposed class action under s. 7(1) of the *Arbitration Act*, 1991.[55] In Justice Nordheimer's ruling, he held that the case did not fall within any exceptions to the mandatory stay set out in the *Arbitration Act*, 1991. He found that the arbitration agreement was not *unconscionable* nor was there evidence to support a finding that the defendant used its *greater bargaining power* to take advantage of the plaintiff. The plaintiff alleged that the amendment was not sufficiently brought to his attention and he had no knowledge of it or intent to be bound by it. However, in ruling that the defendant's motion should be granted, Justice Nordheimer held that the plaintiff had adequate time to assess the amendment. Similar to *Clendenning, Kanitz*, involves an adhesion contract with onerous terms, necessitating the author of the contract, Rogers, to take reasonable steps to ensure that the signee understands and is aware of the contract's terms.[56] However, the facts failed to establish that Rogers' technicians were instructed to do so. This failure suggests that under the subjective contractual regime applied in *Clendenning,* there was no *consensus ad idem* between the parties in the signing of the contract in *Kanitz*. In *Gilbert Steel Ltd. v. University Construction Ltd (1976)*, the Ontario Court

---

[55] *Arbitration Act*, RSC 1991, c C-46.

[56] The precedent set in *Tilden Rent-A-Car v Clendenning* is binding on *Kanitz v Rogers* as the past decisions of the Ontario Court of Appeal are binding on the Ontario Superior Court of Justice.

of Appeal held that for amendments to existing contracts to be enforceable, they require fresh consideration.[57] In *Gilbert*, the Ontario Court of Appeal found that performance by one party of their existing contractual duties to another party is not sufficient consideration for a new promise by the other party. When one party agrees to do more than what was previously agreed to, the other party must normally provide consideration for that promise to be enforceable. If a promise is made in return for an act that has already been performed, or for a benefit that has already been received, then the promise is not motive for the act or benefit and there is no consideration. With no consideration, there is no contract. A party ratifies a contract when they accept a benefit, thereby rendering the contract legally enforceable. The plaintiff in *Kanitz* did not ratify the new contract by his continued use of the service and benefit under the contract past the stipulated 30-day period, as he did not receive any new benefit, but rather continued to receive a benefit under his original contract. The question of whether the plaintiff ratified the new amendment goes to the heart of the prior discussion: if there is no new consideration, there can be no new contract. Contrary to Justice Nordheimer's ruling, per the prior rulings on consideration and *consensus ad idem* at the Ontario Court of Appeal, it ought not to have been open to Rogers to rely on the arbitration clause.

From the *Kanitz* and the *Rudder* rulings, it could be viewed that the Court of Appeal in Ontario, and potentially more courts in Canada and other commonwealth nations, were regressing to the stringent fly-on-the-wall objective approach to the contract and the *peppercorn* principle. However, over the next few years, as digital transactions became more frequent, the courts became less stringent in their objective approaches. In *Z.I. Pompey Industrie v ECU-Line N.V.*, the issue raised to the court was whether a forum selection clause in the agreed contract was

[57] *Gilbert Steel Ltd v University Construction Ltd*, 1976 CanLII 672 (ONCA), online: <canlii.ca/t/g1d1h>.

valid.[58] The respondents, Z.I. Pompey Industrie, filed an action for damages against the appellant, ECU-Line N.V., in the Federal Court, alleging that cargo was damaged while in transit by rail.[59] The cargo was transported from Antwerp to Montreal, where it was unloaded and carried by train to Seattle. The bill of lading[60] contained a forum selection clause stating that the contract is "governed by the law of Belgium, and any claim or dispute arising hereunder or in connection herewith shall be determined by the courts in Antwerp and no other Courts."[61] The appellant brought a motion seeking a stay of proceedings on the basis that the bill of lading required disputes to be determined exclusively by the courts of Antwerp. This motion was denied by a prothonotary.[62] The Trial Division at the Federal Court dismissed the appellant's motion to set aside the prothonotary's order. This was further appealed to the Federal Court of Appeal, which upheld the decision. At a final appeal to the SCC, the court ruled that the appeal should be allowed and a stay of proceedings issued in favour of the appellant. In the absence of applicable legislation, the SCC applied a test for stay of proceedings to enforce a forum selection clause.[63] The *Pompey* test for determining whether to enforce a forum selection clause engages two parts: (1) whether the clause is enforceable under contractual doctrines like public policy, duress, fraud, unconscionability or grossly uneven bargaining positions; and (2) if the clause is enforceable, the onus shifts to the consumer to show "strong cause" why the clause should not be enforced because of factors typically considered under the *forum non conveniens* doctrine (*inter alia*, that

[58] *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [*Pompey*].

[59] *Ibid* at 5.

[60] A bill of lading is a document issued by a transportation company to a shipper detailing the shipping details.

[61] *Pompey*, *supra* note 58 at 32.

[62] Prothonotaries are judicial officers of the Federal Court.

[63] Pursuant to *Federal Courts Act*, RSC 1985, c F-7, s 50.

it would not be reasonable or just to require the plaintiff to adhere to the terms of the clause).[64] The “strong cause” test clarified in which cases it would be *unconscionable* to enforce a forum selection clause. However, as a result of varied definitions from statutes and prior jurisprudence, there remained a persisting ambiguity as to which situations met the definitions of unconscionability. In the case of *Cain v Clarica Life Insurance Company*, a constructively dismissed employee negotiated a lump sum severance package equal to nine months' pay in exchange for his resignation.[65] The employee deposited the sum, did not repudiate the severance package, and did not offer to return the pay. Following this, the employee brought an action for additional damages for wrongful dismissal and the employer pleaded for the severance package. The Alberta Court of Queen's Bench allowed the action and awarded the employee $98,000 in addition to the $88,000 provided for by the severance package. The employer appealed, and the employee cross-appealed. The Alberta Court of Appeal allowed the employer’s appeal and dismissed the employee's action and cross-appeal. In doing so, the Court of Appeal ruled that there were no grounds to set aside the severance package and the employee’s voluntary resignation was equivalent to a release. In the *Cain* test, the court wrote that for the transaction to be *unconscionable*, it required, *inter alia,* (1) a “grossly” unfair or improvident transaction; and (2) the victim’s lack of independent legal advice or other suitable advice; and (3) an overwhelming imbalance in bargaining power caused by victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and (4) the other party knowingly taking advantage of this vulnerability.[66] The

[64] *Forum non conveniens* refers to a court's discretionary power to decline to exercise its jurisdiction where another court, or forum, may more conveniently hear a case.

[65] *Cain v Clarica Life Insurance Company*, 2005 ABCA 437.

[66] *Ibid* at para 32.

Cain test indicated that the courts would apply a finding of unconscionability scarcely and conservatively, with a high threshold.

In the 2017 case of *Douez v. Facebook, Inc.*, the claimant, a resident of British Columbia, was a member of Facebook, since 2007.[67] In 2011, Facebook created a new advertising product called "Sponsored Stories," which used the names and pictures of Facebook members to advertise companies and products to other members. The claimant brought an action against Facebook alleging the use of her name and likeness without consent for the purposes of advertising, in contravention to s. 3(2) of British Columbia's Privacy Act. The contract provided by Facebook to which the claimant agreed, included a forum selection and choice of law clause, requiring disputes to be resolved in California according to California law. Facebook brought a preliminary motion to stay the action on the basis of this forum selection clause. The preliminary judge dismissed Facebook's motion to stay, ruling that the clause would not be enforced. At the B.C. Court of Appeal, the appellate judge reversed the decision of the preliminary judge, finding that the forum selection clause was enforceable and that the claimant failed to show *strong cause* not to enforce it. At the SCC, the court found that the *forum non conveniens test* enacted in the Court Jurisdiction and Proceedings Transfer Act (CJPTA)[68] did not replace the common law test for forum selection clauses, and thus applied the *Pompey* test. With respect to the first step of the *Pompey test*, the majority (Karakatsanis, Wagner, and Gascon JJ) ruled that the clause was enforceable and did not meet any *prima facie* contractual doctrines such as public policy, duress, fraud, unconscionability or grossly uneven bargaining positions. At the second step of the test, the majority ruled that the claimant met the onus to establish *strong cause* not to enforce the

[67] *Douez*, *supra* note 52.

[68] *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s 11.

forum selection clause. Of the cumulative factors that supported a finding of strong cause, the court noted the: adhesion nature of the contract; the statutory cause of action implicating the quasi-constitutional privacy rights of British Columbians; the greater interest of Canadian courts in adjudicating cases impinging on constitutional and quasi-constitutional rights; the expense and inconvenience of requiring British Columbian individuals to litigate in California, compared to the comparative expense and inconvenience to Facebook; and the need for a local court's interpretation of a statutory privacy tort under the Privacy Act. At the second stage, the court found that the evidence supported a finding of *gross inequality of bargaining power* between the parties and the policy considerations supported a finding of *strong cause*. Per Abella J., while in agreement that the forum selection clause should not be enforced, The Honourable Madame Justice wrote that the clause failed at the first step of the *Pompey* test. In reaching this decision, she referenced the burden of forum selection clauses on consumers, the nature of online adhesion contracts, the outweighing of public policy concerns to protect individuals' quasi-constitutional or constitutional rights, and a case of such *gross uneven bargaining power* that the claimant is given "in reality, no meaningful choice".[69] In this case, she found that the doctrine of unconscionability applied, which met both the requirements of inequality of bargaining power and unfairness.[70] Abella J. additionally noted that Section 4 of British Columbia's Privacy Act states that the particular protections in the Act "must be heard and determined by the Supreme Court".[71] For this reason, among the others listed, it would be contrary to public policy to enforce a forum selection clause in a consumer contract that would deprive a party of access to a

[69] *Douez*, *supra* note 111.

[70] The court did not apply the more comprehensive *Cain* test, in determining whether the facts of the case met the definition of unconscionability.

[71] *Personal Information Protection Act,* SBC 2003, c 63, s 4.

statutorily mandated court. Dissenting in the case at bar were McLachlin C.J. and Moldaver and Côté JJ., who found that the claimant failed to establish strong cause for not enforcing the forum selection clause to which she agreed. With respect to the first step of the *Pompey test*, the dissent wrote that at *prima facie* the agreement was clear and there was no inconsistency between a commitment to strive to apply local laws and an agreement that disputes will be tried in California. While s. 4 of the Privacy Act grants the Supreme Court of British Columbia subject matter jurisdiction over Privacy Act claims to the exclusion of other British Columbia courts, nothing in the language of s. 4 suggests that it can render an otherwise valid contractual term unenforceable. With respect to the second step, the dissent found no *strong cause* by the claimant or public policy considerations that would render the clause unenforceable. They wrote that the British Columbia tort created by the Privacy Act need not require the expertise and interpretation of local B.C. courts, and the courts of California have not been shown to be disadvantaged in interpreting the Privacy Act as compared with the Supreme Court of British Columbia[72].

The split decision in *Douez*, accompanied by the strong dissent and concurring judgements, illustrated the ambiguity regarding the applicability of forum selection clauses, along with uncertainty as to how the *Pompey* test is to be interpreted. The fluid standard of the *unconscionable transaction* and the *grossly unequal bargain* contributed to this, particularly because *Cain* was not binding on all Canadian courts and was thus often neglected. In 2020, the case of *Uber Technologies Inc. v Heller* was brought to the court to determine whether the inequality of bargaining power between the contracting parties and the improvident cost of arbitration as stipulated by the contract's mandatory arbitration clause was sufficient in finding the arbitration clause to be *unconscionable.*[73] Prior to the *Uber* decision, the commonly used

[72] *Douez, supra* note 52 at 165.

[73] *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*].

Cain test required *unconscionable* transactions to be *grossly* unfair, have an *overwhelming* inequality of bargaining power, and have one party *knowingly* take advantage of the other party. If the doctrine of unconscionability or other contractual doctrines were not met, under the Pompey test, the onus would rest on the consumer to show the "strong cause" for disregarding the forum exclusion clause. In *Uber*, the plaintiff, David Heller, provided food delivery services in Toronto using the software applications of the defendant, Uber. As a condition of his agreement to drive with Uber, the plaintiff had to accept the terms of Uber's standard form services agreement. The agreement contained a mandatory arbitration clause, requiring the resolution of any dispute with Uber through mediation and arbitration in the Netherlands. The mediation and arbitration process required up-front administrative and filing fees of US$14,500, in addition to any other legal fees and costs of participation. The court noted that these fees represented most of the plaintiff's annual income. In 2017, the plaintiff brought a class proceeding against Uber in Ontario, alleging that they violated the Employment Standards Act (ESA).[74] Uber brought a motion to stay the proceeding as a result of the mandatory arbitration clause. The plaintiff argued that the arbitration clause was *unconscionable* and therefore invalid. At summary judgment, the judge stayed the proceeding, finding that the validity of the arbitration agreement had to be referred to arbitration in the Netherlands. On appeal, the Court of Appeal in Ontario allowed the plaintiff's appeal and set aside the motion judge's order, finding that the plaintiff's objections to the arbitration agreement could be dealt with by a court in Ontario. Additionally, it found the arbitration clause to be *unconscionable*, based on the inequality of bargaining power between the parties and the unreasonable cost of arbitration. The case was further appealed to the SCC. At the SCC, the majority wrote that if the matter is sent to

---

[74] *Employment Standards Act,* SO 2000, c 41.

be heard by an arbitrator, as a result of the extensive fees for initiating arbitration, the plaintiff's challenge to the validity of the arbitration agreement may never be resolved. For this reason, the validity of the arbitration agreement must be resolved by the court. In determining whether the arbitration clause is *unconscionable*, the court considered two elements: (1) whether there is an inequality of bargaining power; and (2) whether there is a resulting improvident bargain. The inequality of bargaining power requirement was sufficed by the inclusion of the arbitration clause as part of an unnegotiated adhesion contract. The court wrote "there was a significant gulf in sophistication between the parties, and a person in [the plaintiff's] position could not be expected to appreciate the financial and legal implications of the arbitration clause."[75] On the finding of whether there was a resulting improvident bargain, the court found that the upfront administration fees of US$14,500 met this requirement, thereby finding the arbitration clause to be *unconscionable* and therefore invalid.[76] In referencing *Dell Computer Corp. v Union des consommateurs,*[77] and *Seidel v TELUS Communications Inc.*[78] the SCC wrote that a court may depart from the general rule of arbitral referral if an issue of accessibility arises, which could be by way of costs or as a result of physical location. The majority in *Uber* rejected the *Cain* test, maintaining that it "raises the traditional threshold for unconscionability and unduly narrows the doctrine, making it more formalistic and less equity-focused".[79] The landmark decision in *Uber* signifies a potential new era for contract interpretation; one more centred on equity, where the

[75] *Uber*, *supra* note 73 at 93.

[76] *Ibid* at 82.

[77] *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34.

[78] *Seidel v TELUS Communications Inc*, 2011 SCC 15.

[79] *Uber*, *supra* note 73 at 82.

adequacy of consideration can, in fact, be assessed more frequently, and the interpretation of *consensus ad idem* would require a more subjective approach.

Concluding Remarks

The evolving rulings on forum selection clauses underscore a critical and pervasive challenge within the realm of contract law: the enduring ambiguity surrounding approaches to contract interpretation. This ambiguity leaves contracting parties in a state of uncertainty, unsure when judicial intervention is warranted and when an objective interpretation of the contract terms must prevail. Such uncertainty can undermine the very foundation of trust and predictability that contract law seeks to provide. As the legal system strives to balance considerations of fairness, equity, and justice with the need for stability, certainty, and predictability, two critical questions stand at the forefront of contract enforceability. First, to what extent do the methods by which contract terms are communicated and the mutual understanding of those terms impact their enforceability? This question is particularly pertinent in an era where digital communication and electronic contracts are prevalent, and where the clarity and accessibility of contract terms can vary widely. Second, how do the nature of the bargain and the parties' subjective intentions influence enforceability beyond what is explicitly written in the contract? This question delves into the heart of contractual relationships, recognizing that the written words may not always capture the full intent and expectations of the parties involved.

Addressing these questions is essential for establishing a clearer and more consistent framework for contract enforcement. It requires a nuanced approach that acknowledges the complexities of modern contracting, where parties have different levels of bargaining power and varying degrees of understanding. Future legal analyses and judicial rulings must strive to delineate the criteria for enforceability more precisely, providing guidance on how subjective intentions and the nature of communication influence contractual obligations. This clarity is not only beneficial for legal practitioners and the judiciary but also for the contracting parties, themselves. A more predictable and transparent legal framework can strengthen certainty in contractual agreements, fostering an environment where parties can enter into contracts with greater confidence in their enforceability. This, in turn, encourages the growth of commercial relationships, as parties are assured that their agreements will be upheld in a manner that is both fair and predictable.

In summation, the future of contract law hinges on the ability to reconcile the tension between objective and subjective approaches to contract enforcement. By providing more definitive answers to the critical questions of the intentions of parties and the nature of bargains, the legal system can offer greater predictability and fairness in contract law. This will not only ensure the protection of parties involved in legal disputes but will also contribute to the overall reliability and trustworthiness of contractual agreements in an increasingly complex and globalized society.

BIBLIOGRAPHY

LEGISLATION: CANADA

Arbitration Act, RSC 1991, c C-46.

Court Jurisdiction and Proceedings Transfer Act, SBC 2003, c 28.

Employment Standards Act, SO 2000, c 41.

Federal Courts Act, RSC 1985, c F-7.

Personal Information Protection Act, SBC 2003, c 63.

LEGISLATION: UNITED KINGDOM

Consumer Credit Act 1974 (UK), c 39.

JURISPRUDENCE: CANADA

Cain v Clarica Life Insurance Company, 2005 ABCA 437.

Dell Computer Corp v Union des consommateurs, 2007 SCC 34.

Douez v Facebook, Inc, 2017 SCC 33.

Gilbert Steel Ltd v University Construction Ltd, 1976 CanLII 672 (ONCA), online: <canlii.ca/t/g1d1h>.

Kanitz v Rogers Cable Inc, 2002 CanLII 49415 (ONSC), online: <canlii.ca/t/1w1c2>.

Rudder v Microsoft Corp, 1999 CanLII 14923 (ONSC), online: <canlii.ca/t/1w8rg>.

Seidel v TELUS Communications Inc, 2011 SCC 15.

Tilden Rent-A-Car Co v Clendenning, 1978 CanLII 1446 (ONCA), online: <canlii.ca/t/g1bxl>.

Uber Technologies Inc v Heller, 2020 SCC 16.

ZI Pompey Industrie v ECU-Line NV, 2003 SCC 27.

JURISPRUDENCE: UNITED KINGDOM

Chappell & Co Ltd v Nestle Co Ltd, [1959] UKHL 1.

L'Estrange v F Graucob Ltd, [1934] 2 KB 394.

Lloyds Bank Ltd v Bundy, [1975] QB 326.

Smith v Hughes, (1871) LR 6 QB 597.

Solle v Butcher, [1950] 1 KB 671.

JURISPRUDENCE: UNITED STATES

Allegheny College v National Chautauqua County Bank of Jamestown, 246 NY 369 (1927).

Williams v Walker-Thomas Furniture Co, 350 F (3d) 445 (DC Cir 1965).

Wille v Southwestern Bell Tel Co, 549 P (2d) 903 (Kan Sup Ct 1976).

SECONDARY MATERIAL: MONOGRAPHS

Fried, Charles, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed (Oxford: Oxford University Press, 2015).

Holmes, Oliver Wendell, *The Common Law* (Cambridge, MA: Harvard University Press, 1963).

Waddams, Stephen, *Introduction to the Study of Law*, 8th ed (Scarborough: Carswell, 1997).

SECONDARY MATERIAL: ARTICLES

Barnhizer, Daniel D, "Inequality of Bargaining Power" (2005) 76:1 U Colorado L Rev 139.

Kessler, Freidrich, "The Contracts of Adhesion—Some Thoughts about Freedom of Contract Role of Compulsion in Economic Transactions" (1943) 43 Colum L Rev 629.

McLauchlan, DW, "Objectivity in Contract" (2005) 24:2 U Queensland LJ 479.

Samek, RA, "The Objective Theory of Contract and the Rule in *L'Estrange v. Graucob*" (1974) 52:3 Can Bar Rev 351.

Slayton, Philip, "The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v. Bundy*" (1976) 22:1 McGill LJ 94.

Spencer, JR, "Signature, Consent, and the Rule in L'Estrange v. Graucob" (1973) 32:1 Cambridge LJ 104.

Beyond the Individual: The Broader Societal Benefits of Using Social Testimony over Psychological Testimony in Cases of Battered Woman Syndrome

Casey Zhang

The Brief

August 2024

Abstract

In legal defences of women suffering from intimate partner abuse, courts have conventionally leveraged the psychologically rooted notion of Battered Woman Syndrome (BWS) to mitigate sentences. This paper challenges this traditional approach and posits reformation towards a sociological approach. Rather than the psychological approach's emphasis on determinism, the sociological approach illuminates intentionalism, thereby reinforcing the foundational philosophy driving the legal system's social control mechanism and society's propensity for self-inhibition. Moreover, the sociological approach overcomes the psychological approach's adversarial focus by spotlighting the women's lived experiences, thus granting them dignity and morally righteous representations. Finally, although both approaches risk stereotypical group-based adjudication, the sociological approach unearths sociological patterns of intimate partner abuse for future prevention and reform. Considering the perspectives of social control, moral entrepreneurship, and evidence-based social reform, it is evident that the sociological approach offers greater benefits to both the defendants and the broader society.

Introduction

In cases where battered women[1] have been accused of murdering their abusive partners, the defence has traditionally raised the justification of Battered Woman Syndrome (BWS), portraying the defendant as suffering from a psychological disorder.[2] BWS was first successfully applied in Canada in *R v Lavallee*, which set a precedent for using BWS as mitigating evidence.[3] The concept initially originated as a response by feminist legal theorists to the traditional male-centred notion of self-defence. To constitute self-defence, section 34 of the *Criminal Code* required an element of immanence.[4] In other words, the act of retaliation must have been committed in response to an imminent threat of violence. In contrast, battered women typically murder their abusers when they are in a vulnerable state rather than displaying active violence. The unique circumstances of battered women caused them to fall short of this imminence requirement, preventing them from successfully raising self-defence.[5] For example, in *Lavallee*, an Indigenous woman named Angelique Lavallee and her abusive common-law partner got into an argument during a party they were hosting at their house.[6] During the argument, the partner physically assaulted Lavallee, handed her a gun, and threatened to kill her after the guests left, saying "either you kill me, or I'll kill you."[7] As he turned to leave the room—which put him in a

---

[1] Cases of BWS are heavily skewed towards men being the abuser and women being the victim, though the condition is not strictly binary—there are instances where women are abusers and men are victims. However, this paper will focus on the former due its prevalence and profound impact on legal precedence.

[2] Sheila Noonan, "Strategies of Survival: Moving Beyond the Battered Woman Syndrome" in Ellen Adelberg & Claudia Currie, eds, *In Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang Publishers, 1993) at 247.

[3] *R v Lavallee*, 1990 CanLII 95 (SCC), [1990] 1 SCR 852, online: <canlii.ca/t/1fsx3> [*Lavallee*]. Mitigating evidence is evidence that increases the likelihood of a lesser sentence.

[4] *Criminal Code*, RSC 1985, c C-46.

[5] Patricia Kazan, "Reasonableness, Gender Difference, and Self-Defense Law" (1997) 24:3 Man LJ 549.

[6] *Lavallee*, *supra* note 3.

[7] *Ibid*.

particularly vulnerable state as his back was turned—Lavallee shot him in the head. The discrepancy between the doctrine and reality prevented victims of intimate partner abuse from successfully asserting claims of self-defence. In the late 1970s and early 1980s, feminist psychologist Lenore Walker drew upon behavioural psychologists Seligman and Maier's works on learned helplessness to formulate a coherent explanation for this discrepancy.[8] Walker's theory of the Cycle of Violence suggests that battered women are trapped in cycles of violence, which precisely attunes their bodies to react when they know violence to be imminent, thereby fulfilling the imminence requirement in the traditional self-defence doctrine.[9] *R v Lavallee* is the landmark case that challenges the traditional self-defence doctrine using expert psychological evidence in the form of BWS testimony.[10] Lavallee's plea for self-defence was initially accepted by the jury, overturned on appeal by the Court of Appeal for Manitoba, and ultimately upheld by the Supreme Court of Canada (SCC). The SCC judge, Bertha Wilson, deemed the psychological evidence as permissible, reasoning that it would help the jury appreciate Lavallee's unique ability to predict a violent outburst from her partner as imminent in an objective test of reasonableness, given her unique physiological synchronization to the cycle of violence.[11]

The BWS framework is arguably effective as a mitigating factor in sentencing and increasing exoneration rates.[12] It functions by informing the jury about how the defendant's

---

[8] Martin E P Seligman & Steven F Maier, "Failure to Escape Traumatic Shock" (1967) 74:1 J Experimental Psychology 1, DOI: <10.1037/h0024514>.

[9] Noonan, *supra* note 2.

[10] *Lavallee*, *supra* note 3.

[11] *Ibid*.

[12] M Julianne Leary, "A Woman, a Horse, and a Hickory Tree: The Development of Expert Testimony on the Battered Woman Syndrome in Homicide Cases" (1985) 53:3 UMKC L Rev 386 at 410, online: <heinonline.org/HOL/P?h=hein.journals/umkc53&i=396>.

psychology has been transformed through repeated intimate partner abuse.[13] However, the use of acquittal rates as the sole metric of success fails to consider the approach's long-term attitudinal effect on the broader society. Alternatively, the sociological approach uses social testimony to inform the jury about the social constraints facing battered women.[14] This paper argues that in cases concerning battered women, the law should replace psychological testimony with sociological testimony because it: emphasizes intentionalism, a foundational premise of Canadian law that suggests behaviour is a product of individual agency and free will; treats women as intrinsically valuable which provides better moral outcomes;[15] and upstages the psychological approach by spotlighting social patterns in intimate partner violence and providing actionable avenues of social reform.

Intentionalism & Self-Inhibition

The psychological approach emphasizes determinism, whereas the sociological approach illuminates intentionalism. Lenore Walker's theory of the Cycle of Violence frames battered women as passive to external factors in two ways.[16] First, these women have become psychologically trapped through learned helplessness, a mindset produced by repeated failed attempts to escape abuse.[17] Thus, they were incapable of perceiving an alternative escape from the violence beyond killing. Second, the repeated cycles have attuned these women's bodies to predict when violence was likely, thus making killing the automatic response in self-defence

---

[13] M Julianne Leary, *supra* at 410.

[14] Noonan, *supra* note 2.

[15] According to Kantian ethics, a moral act must treat individuals as beings of intrinsic value—ends in and of themselves—rather than using them to achieve certain outcomes—means to ends. See Melvyn Bragg, "Kant's Categorical Imperative" (21 September 2017), online (podcast): <bbc.co.uk/programmes/b0952zl3>.

[16] Noonan, *supra* note 2.

[17] *Ibid*.

situations.[18] The SCC judge in *R v Malott*, Antonio Lamer, suggested that the BWS framework depicts women as helpless, victimized, and dependent.[19] This passive construction of their actions aligns with prescriptive determinism, articulated by the philosopher, David Hume, who suggested that an uncontrollable matrix of causal factors compels behaviour.[20] Under this school of thought, the actions of individuals are predominantly caused by elements of the external environment and past experiences rather than the individual's own will.

The sociological approach, on the contrary, takes a rational actor approach and frames women as agents of free will,[21] whose actions are merely understood in the context of external economic, patriarchal, and sociopolitical forces.[22] In *Lavallee*, Wilson suggested that factors such as employable skills, protection of children, and weakness of social support could be used to contextualize the beliefs of battered women.[23] This alternate construction distinctly separates the individual from the social context in which they are situated, maintaining perceptions of women's agency and the basis of intentionalism.[24]

It is crucial that the law upholds intentionalism as it increases society's ability to regulate its criminal impulses in line with the law, which is critical to maintaining social order. Beyond individual cases, the legal system is a powerful mechanism of subjectification, the socio-legal mechanism by which legal processes send messages to the public about acceptable behaviour

---

[18] Noonan, *supra* note 2.

[19] *R v Malott*, 1998 CanLII 845 (SCC), [1998] 1 SCR 123, online: <canlii.ca/t/1fqv6> [*Malott*].

[20] Richard C Boldt, "The Construction of Responsibility in the Criminal Law" (1992) 140:6 U Pennsylvania L Rev 2245 at 2255, DOI: <10.2307/3312415>.

[21] From a legal standpoint, an agent of free will has the capacity to choose their behavior independently of circumstantial forces within the environment, and thus takes more ownership of their actions. See *ibid*.

[22] Noonan, *supra* note 2.

[23] *Lavallee*, *supra* note 3.

[24] Boldt, *supra* note 20 at 2246.

and worldviews.[25] Specifically, court decisions that are highly publicized send implicit attitudinal information to the broader society about human nature, subsequently structuring the minds of the public.[26] Statistics suggest that cases of BWS typically receive exceptionally high media attention, rendering them particularly prone to eliciting subjectification effects.[27] Furthermore, such high-profile cases of intimate partner abuse were found to directly impact the public's perception.[28] Since intentionalism portrays humans to be agents of free will, it socializes the broader public to believe that they have the agency to choose their actions independently of universal causation.[29] The self-fulfilling prophecy in psychology suggests that higher expectations about one's own performance lead to better actual performance.[30] Therefore, an increase in the public's perceived self-agency, as a result of the sociological approach, will increase their self-inhibition[31] to act according to the law and consequently increase social order in general.

Deontology & Moral Righteousness

Deontology, a widely-held philosophical perspective, posits that a morally righteous act must follow certain natural and universal principles, notably the duty to treat all humans as inherently valuable.[32] Immanuel Kant argues that morally righteous actions treat all humans as

[25] Boldt, *supra* note 20 at 2246.

[26] *Ibid*.

[27] Melanie Frager Griffith, "Battered Woman Syndrome: A Tool for Batterers?" (1995) 64:1 Fordham L Rev 141.

[28] *Ibid*.

[29] Universal causation is the philosophical concept that a matrix of uncontrollable causal factors govern every human action. See Boldt, *supra* note 20.

[30] R Rosenthal, "Self-Fulfilling Prophecy" in VS Ramachandran, ed, *Encyclopedia of Human Behavior*, 2nd ed (Cambridge, Mass: Academic Press, 2012), DOI: <10.1016/B978-0-12-375000-6.00314-1>.

[31] Society's propensity for self-inhibition denotes civilians' capacity to inhibit themselves from committing law-violating actions according to their own will. See Boldt, *supra* note 20.

[32] Bragg, *supra* note 12.

valuable ends within themselves rather than as means to ends.[33] According to this view, the sociological approach is preferable to the psychological approach, as the sociological approach treats women as agents of inherent value, while the psychological approach hinges their value upon their role in the adversarial battle. Walker's BWS framework requires battered women to conform to strict diagnostic criteria, diminishing their multifaceted experiences of abuse and confining them within a predetermined mould.[34] This procedure favours achieving a successful common law defence over dignifying the women as human beings, which evidently treats them as means to an end. In *Malott*, which created the precedent for using sociological evidence in such cases, Lamer claimed that emphasizing the woman's low self-esteem, male dependence, and mental weakness to meet the BWS criteria should be avoided as it comes at the expense of spotlighting women's personal inadequacies.[35]

Contrastingly, the sociological approach uses social testimony as a means to achieve the end of humanizing battered women. It details women's social constraints and lived experiences for the purpose of illuminating their rationality and the defensibility of their crime amidst extreme social forces. In *Malott*, Lamer explained that these individualized environmental factors help the jury accurately comprehend the woman's reasonableness in believing she was in danger, providing a holistic approach that centres and empowers women within a legal system that has traditionally silenced them.[36] Therefore, the psychological approach instrumentalizes the women's experiences for a legal battle, while the sociological approach leverages social testimony to allow the women to be holistically understood.

---

[33] Bragg, *supra* note 12.

[34] Leary, *supra* note 12 at 408.

[35] *Malott*, *supra* note 19.

[36] *Ibid*.

The legal system holds a monopoly of power over serving justice to the public and upholding society's moral values. This authority entails a responsibility to ensure its decisions reflect society's moral understanding. The sociological approach constructs a morally righteous adjudication process that dignifies human beings and empowers them as inherently valuable ends. Only through representing the people in its moral decisions can the legal system maintain its status as the epitome of justice and morality.

Group-Based Adjudications

A central criticism of the sociological approach is that the use of structural disadvantages as the basis of the defence excludes women with more social power.[37] Sociological testimony makes societal status salient, increasing the likelihood of group-based adjudications where courts adjudicate based on aggregate patterns of those from similar socioeconomic groups rather than the individual at hand.[38] Minimizing the spectrum of factors influencing each distinct case of intimate partner violence leads to a reductionist mindset associated with stereotyping, where people draw upon common characteristics of social categories to speed up cognitive processing and judgement.[39] In *Malott*, Lamer observed that since rectifying the category of BWS, myths and stereotypes have arisen about the archetypical battered women, such as not being professionally employed.[40] Consequently, Lamer cautioned against making group-based judgements based on these stereotypes.[41] However, this criticism does not favour the

---

[37] Noonan, *supra* note 2.

[38] Boldt, *supra* note 20 at 2251.

[39] Nicholas Bradley, "Essentialism in the Concept of Culture: Gauging Belief" (2018) 21 J for Intercultural Communication 1.

[40] *Malott*, *supra* note 19.

[41] *Ibid*.

psychological approach either, as it is equally at risk for group-based adjudications.[42] Testimony about BWS depicts women as irrational, emotional, and erratic, making salient entrenched patriarchal stereotypes and increasing the likelihood of group-based adjudication according to gendered patriarchal stereotypes.[43]

Critically, the two forms of potential group-based adjudications differ in that the sociological approach offers a reconciliation benefit of illuminating facets of systemic inequality, while the psychological approach inappropriately targets the pathology. Psychological testimony's construction of BWS as a pathology elicits the forward action of medicalization, targeting deficient women rather than the external circumstances that catalyzed the syndrome. In contrast, social testimony about shared patterns among battered women reveals hidden risk factors for intimate partner abuse. This information is valuable to policy-makers as it provides actionable targets for social reform that shift with social change. In essence, both psychological and sociological approaches risk group-based adjudications; however, the sociological approach offers the unique conciliatory power of highlighting temporally changing patterns of social inequality for policy-makers to address.

Conclusion

In cases where battered women murder their abusers, the psychological BWS framework has increased the gender equity outcomes. However, it is nevertheless deficient in its long-term attitudinal effects on the broader society. In contrast, adopting a sociological approach addresses these deficiencies by reinforcing intentionalism – the legal system's philosophical scaffold – and framing the accused as inherently valuable beings – a moral approach on the basis of deontology.

[42] *Leary*, *supra* note 12.

[43] *Ibid*.

Moreover, the emphasis on circumstantial factors spotlights social ills for sociological research and social reform.

Nevertheless, the sociological approach has been criticized for perpetuating group-based adjudication based on socioeconomic status, leading to prejudices against women of higher social class. A strategy to overcome this obstacle is to introduce expert psychological testimony prior to presenting the sociological testimony to eliminate potential jury biases. It is essential that the expert witness make salient the unconscious stereotypes that lay people commonly hold about different social categories in relation to intimate partner violence. This improves the likelihood that the jury will actively identify and remove such cognitive biases when they arise during sentencing, supplementing the sociological approach.

By leveraging sociological testimony as the dominant approach while retaining aspects of psychological testimony to address group-based adjudication concerns, this hybrid model promotes desirable long-term effects on society. Working in conjunction, the synergy of these two approaches guides the population towards higher self-inhibition, sets the legal system's procedures as the moral standard, highlights dysfunctional social patterns, and shifts the legal trajectory towards unbiased, individualized sentencing.

BIBLIOGRAPHY

LEGISLATION

Criminal Code, RSC 1985, c C-46.

JURISPRUDENCE

R v Lavallee, 1990 CanLII 95 (SCC), [1990] 1 SCR 852, online: <canlii.ca/t/1fsx3>.

R v Malott, 1998 CanLII 845 (SCC), [1998] 1 SCR 123, online: <canlii.ca/t/1fqv6>.

SECONDARY MATERIAL: ARTICLES

Boldt, Richard C, "The Construction of Responsibility in the Criminal Law" (1992) 140:6 U Pennsylvania L Rev 2245, DOI: <10.2307/3312415>.

Bradley, Nicholas, "Essentialism in the Concept of Culture: Gauging Belief" (2018) 21 J for Intercultural Communication 1.

Griffith, Melanie Frager, "Battered Woman Syndrome: A Tool for Batterers?" (1995) 64:1 Fordham L Rev 141.

Kazan, Patricia, "Reasonableness, Gender Difference, and Self-Defense Law" (1997) 24:3 Man LJ 549.

Leary, M Julianne, "A Woman, a Horse, and a Hickory Tree: The Development of Expert Testimony on the Battered Woman Syndrome in Homicide Cases" (1985) 53:3 UMKC L Rev 386, online: <heinonline.org/HOL/P?h=hein.journals/umkc53&i=396>.

Noonan, Sheila, "Strategies of Survival: Moving Beyond the Battered Woman Syndrome" in Ellen Adelberg & Claudia Currie, eds, *In Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang Publishers, 1993) 247.

Rosenthal, R, "Self-Fulfilling Prophecy" in VS Ramachandran, ed, *Encyclopedia of Human Behavior*, 2nd ed (Cambridge, Mass: Academic Press, 2012), DOI: <10.1016/B978-0-12-375000-6.00314-1>.

Seligman, Martin E P & Steven F Maier, "Failure to Escape Traumatic Shock" (1967) 74:1 J Experimental Psychology 1, DOI: <10.1037/h0024514>.

SECONDARY MATERIAL: ELECTRONIC SOURCES

Bragg, Melvyn, "Kant's Categorical Imperative" (21 September 2017), online (podcast): <bbc.co.uk/programmes/b0952zl3>.

Beyond Beauty Standards: A Need for Legal Reform for Hair-Based Discrimination Against Black Women

Ashley Cole

The Brief

August 2024

Abstract

Despite the Canadian Human Rights Act's prohibition of racial discrimination, current Canadian legislation does not outline specific protections against racial discrimination on the basis of an individual's hair texture or hairstyle. Such gaps have historically left racialized persons—especially Black women, vulnerable to hair-based discrimination. Through a comparative approach of the Ontario legislature's Bill 147 and the United States Congress' 'Creating a Respectful and Open World for Natural Hair Act of 2022' (CROWN Act), *this paper advocates for the passing of a comprehensive policy at the federal level in Canada that protects Black women from hairstyle-based discrimination across various industries. This paper underscores the inadequacies of current Canadian legislation and proposes legal reforms to promote equity and inclusivity in the workplace.*

In recent years, the discourse surrounding both the discrimination against Black women based on hair and biases in the workforce has been brought before the Legislative Assembly of Ontario. This discourse highlights a subset of racially discriminatory practices; one that attacks women whose natural hair texture and presentation diverges from the Eurocentric ideals of straight hair, which is considered socially acceptable and "proper" in the workplace.[1] In contrast, Black hair is generally characterized as kinky, coily, curly, and gravity-defying in its nature. A subset of Black hair are hairstyles such as locs, twists, braids, curls and afros, which are cultural staples in the Black community and serve as a protective means from the elements of nature. Such hairstyles also reflect deep cultural symbolism that predates the modern workplace atmosphere.

However, hairstyles such as the ones listed are often deemed unprofessional in the workplace, and have, in many cases, forced Black women to forgo them to adhere to Eurocentric workplace ideals. For example, the utilization of products such as chemical relaxers aids in the conformity to Eurocentric hair standards by chemically straightening Black hair. However, chemical relaxers and other products marketed toward Black women contain harmful chemicals and put Black women at an increased risk of diseases such as uterine cancer.[2] In a 2015 study conducted by Shaunsea Brown, which explored the experiences of self-identified black women within the broader Canadian context, several participants felt that they "would not feel comfortable showing up to a job interview with their hair styled in an Afro."[3] The findings in the study demonstrate the internalization of Eurocentric hair standards in Black women and their

---

[1] ME Montle, "Debunking Eurocentric Ideals of Beauty and Stereotypes against African Natural Hair(styles): An Afrocentric Perspective" (2020) 7:1 J African Foreign Affairs 111, DOI: <10.31920/2056-5658/2020/7n1a5>.

[2] National Institutes of Health, News Release, "Hair Straightening Chemicals Associated with Higher Uterine Cancer Risk" (17 October 2022), online: <nih.gov/news-events/news-releases/hair-straightening-chemicals-associated-higher-uterine-cancer-risk>.

[3] Shaunasea Brown, "'Don't Touch My Hair': Problematizing Representations of Black Women in Canada" (2018) 12:8 J Pan African Studies 64 at 71.

"need to seek legitimized authorization from dominant societal ideals regarding their appearance."[4] Another participant from the study who works in the legal field expressed feeling excluded based on her race, particularly regarding how she wears her hair. This experience has heightened her awareness of the importance of styling her hair in a manner that helps her feel more accepted.[5] Such sentiments further reflect how professionalism is often equated with having straight hair—implying that Black women's choice of hairstyle reflects their intelligence.[6] As the recollection of experiences has indicated, societal pressures leave Black women feeling the need to assimilate to the underlying workplace ideals in order to access the same spaces and opportunities as their White counterparts. Similarly, it has indicated that while conformity to Eurocentric standards may grant preferential favour in the workplace, such actions starkly embody anti-Blackness.

There are, to an extent, some protections against similar actions in legislation as outlined in Section 15 of the *Canadian Charter of Rights and Freedoms*, the *Employment Equity Act* and the *Canadian Human Rights Act,* which prohibit discrimination based on race.[7] However, human rights legislation consistently fails to safeguard features that are associated with race such as hair texture and hairstyles, focusing solely on skin colour as the defining characteristic of race. Given the prevalence of hair-based discrimination against Black women in the Canadian workplace, it is vital to rectify such omissions. The prevalence of such issues may be attributable to the ambiguity of whether hairstyles, due to their association as a cultural and racial element, can be

[4] Shaunasea Brown, *supra* at 72.

[5] *Ibid*.

[6] *Ibid*.

[7] *Canadian Charter of Rights and Freedoms,* s 15, Part I of the *Constitution Act*, *1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Employment Equity Act*, SC 1995, c 44, s 2; *Canadian Human Rights Act*, RSC 1985, c H-6, s 2.

offered protection under the *Canadian Charter of Rights and Freedoms* and other Canadian human rights legislation. Although hair texture is immutable,[8] American courts have ruled that hairstyles can not be protected, as "Courts have overwhelmingly favoured employers, denoting the wearing of natural hairstyles like braids and locs as trendy, or mutable and easily changeable."[9] Hence, the lack of adequate laws that protect individuals from both texture and hair-style-based discrimination.[10] Comparatively, as Annaëlle Barreau describes, "the current state of Canadian law does not adequately protect Black people from being discriminated against on the basis of their hair texture or choice for protective styling."[11] The recent proposal of Bill 147, *Protecting our Crowns (Training Requirements with respect to Black, Indigenous, Racialized, Natural and Textured Hair Types) Act*, though advances a solution, is considerably limited in its scope of protection against hair-based discrimination in the Canadian workforce.[12]

In 2023, Bill 147 was proposed in the Legislative Assembly of Ontario, to promote adequate hairstyling techniques in the entertainment industry, advocating for the inclusion of Black persons in varying workspaces.[13] Additionally, Bill 147 would codify educational reforms for hairstylists into law, requiring them to adhere to updated training guidelines that are designed to equip them with techniques better suited for Black hair. Though progressive, Bill 147's limited

---

[8] Annaëlle Barreau, "Afro-Hair and the Law: The State of American and Canadian Law on Race-Based Hair Discrimination" (8 September 2022), online: <mjlh.mcgill.ca/2022/09/08/afro-hair-and-the-law-the-state-of-american-and-canadian-law-on-race-based-hair-discrimination>.

[9] Ra'Mon Jones, "What the Hair: Employment Discrimination against Black People Based on Hairstyles" (2020) 36 Harv BlackLetter LJ 27 at 44–45.

[10] Barreau, *supra* note 8.

[11] *Ibid*.

[12] Bill 147, *Protecting our Crowns (Training Requirements with respect to Black, Indigenous, Racialized, Natural and Textured Hair Types) Act, 2023*, 1st Sess, 43rd Parl, 2023.

[13] *Ibid* at 1.

scope renders it an imperfect solution, failing to advocate for Black women in other industries who face hair-based discrimination at the hands of their current or prospective employers. Furthermore, it does not resolve the ambiguity surrounding the legal protection of Afro-centric hairstyles. Hair-based discrimination disproportionately affects Black women and their hair is 2.5 times more likely to be seen as unprofessional compared to White and Hispanic women.[14] 66% of Black women feel the need to modify their hair for job interviews, and 41% specifically straighten their naturally curly hair.[15] Black women also feel a 54% higher pressure to straighten their hair for job interviews in order to achieve success.[16] As the statistics exemplify, many employers demonstrate racial bias toward their employees, indirectly and directly forcing many Black women to alter their hair.

The penalization of Black women in Canada for wearing their natural hairstyles to work has been demonstrated in the Canadian workforce. This issue is exemplified in numerous cases. For example, Letitia McNickle, a Montreal woman, was sent home from her job as a waitress because she was wearing cornrows. McNickle's employer justified her dismissal by expressing that she did not want a hairstyle such as cornrows in her establishment.[17] In a similar instance, Akua Agyemfra from Toronto was sent home from her waitressing job for failing to wear her hair down, even though it would require a substantial amount of hair alteration to achieve that

---

[14] Janice Gassam Asare, "How Hair Discrimination Affects Black Women at Work," *Harvard Business Review* (10 May 2023), online: <hbr.org/2023/05/how-hair-discrimination-affects-black-women-at-work>.

[15] Jim Wilson, "Hair Discrimination Rampant for Black Women: Survey," *Canadian HR Reporter* (17 February 2023), online: <hrreporter.com/focus-areas/diversity/hair-discrimination-rampant-for-black-women-survey/373791>.

[16] *Ibid*.

[17] "Madisons Grill & Bar Punishing Me over Braids, Worker Alleges," *CBC News* (19 March 2015), online: <cbc.ca/news/canada/montreal/madisons-grill-bar-punishing-me-over-braids-worker-alleges-1.3001363>.

result. [18] Bianca Bujan, an administrative employee at an international college, was asked to wear her curly hair "pulled back or straight" by her supervisor to prepare for an upcoming staff photo.[19] Sahar Saidi, also an employee in the corporate sector, stated that her manager pulled her aside to inform her that, while her curly hair was "nice," it was "obviously unprofessional." Out of fear of losing her job, she purchased a straight-haired wig to comply with her manager's request.[20] Such examples demonstrate the need for comprehensive protection that extends to multiple industries—protection that Bill 147 fails to provide.

These experiences are indicative of an outcome that emphasizes the need for explicit legal safeguards without which individuals with these hairstyles remain vulnerable to discriminatory workplace practices that favour Eurocentric beauty standards. Furthermore, the lack of clarity and protection perpetuates systemic biases and undermines the goal of achieving true workplace equality for Black women.

Due to the absence of specific laws prohibiting hair-based discrimination and the gaps in Bill 147, seeking justice through the legal system can be an arduous task for claimants. In the case of Letitia McNickle, a four-year legal battle resulted in a win through the Centre for Research Action on Race Relations (CRARR), which filed a complaint with Quebec's Human Rights Commission on behalf of McNickle.[21] However, though Quebec's Human Rights Commission ruled that McNickle was a victim of racial and gender discrimination, the decision was not binding and McNickle's manager refused to pay the damages awarded to the claimant.

---

[18] Barreau, *supra* note 8.

[19] Bianca Bujan, "Women Working from Home Are Embracing Natural Hair. Will Corporate Canada Catch Up?" *Montecristo Magazine* (22 December 2020), online: <montecristomagazine.com/business/women-working-home-wearing-natural-hair-will-corporate-canada-catch>.

[20] *Ibid*.

[21] *Ibid*.

McNnickle's case eventually proceeded to the human rights tribunal as she did not receive the awarded damages as of 2018.[22] Additionally, there have been no further updates on whether or not the case ended in victory on McNickle's behalf. Both cases sparked a large amount of media outrage, and complaints against the former respective establishments of McNickle and Agyemfra, and have further fueled the need for organizations such as the CRARR to intervene. Other claimants who have experienced similar racial discrimination may choose not to take legal action due to the inaccessibility of legal support or the lack of legal grounds to do so. The ambiguity and limited scope of protection in the current legal framework further exacerbate systemic biases against Black women, leaving them vulnerable to ongoing discrimination in the workforce. Such inadequacies demonstrate the need for reform within the Canadian workforce by first and foremost challenging the idea that Eurocentric hair standards are universally applicable. By eradicating biases and enacting laws that specifically prohibit hair-based discrimination, such a reform can help uphold the principles against discrimination outlined in the *Canadian Charter of Rights and Freedoms*, the *Human Rights Act*, and the *Employment Equity Act*.[23]

Practices of hair discrimination impede upon the dignity and rights of Black Women and impact their access to equal opportunity in the workplace however, there is still the question of the feasibility of adopting such legislation. An analogous piece of United States legislation may provide a model for Canadian legislation on the issue: the *Creating a Respectful and Open World*

[22] Anne Leclair, "Montreal Woman Wins Case after Losing Job at Madisons Because of Her Hair," *Global News* (5 December 2018), online: <globalnews.ca/news/4732671/montreal-woman-wins-case-after-losing-job-at-madisons-because-of-her-hair>.

[23] *Canadian Charter of Rights and Freedoms*, *supra* note 4, s 15; *Employment Equity Act*, *supra* note 4, s 2; *Canadian Human Rights Act*, *supra* note 4, s 2.

for Natural Hair Act of 2022 (*CROWN Act*).[24] The *Act* was promulgated as an initiative to protect Women of Colour from texture- and hairstyle-based discrimination in the workplace. In comparison to Bill 147*,* the *CROWN Act* offers a more comprehensive framework of protections which includes protection against "[racial] discrimination based upon hair texture and hairstyle."[25] Protections are to be extended to discrimination experiences in "schools, workplaces, housing, federally funded institutions, and other contexts."[26] The *CROWN Act*'s proactive approach provides a wider coverage of settings of protection against hair-based discrimination in contrast to Bill 147. This more generalized approach may furnish a needed comprehensiveness to future Canadian legislation that would clarify the protected status of Black hairstyles. Passing a bill similar to the *CROWN Act* in Canada that prohibits hair-based discrimination would further promote equality and reinforce the *Charter of Rights and Freedoms*, the *Canadian Human Rights Act*, and the *Employment Equity Act*. Mandating a bill that addresses hair texture and specific cultural hairstyles would augment the protections provided by the Ontario Human Rights Commission by securing rights for Black women within a protected ground and social context. Furthermore, such legislation could be seamlessly integrated into contemporary Canadian workplaces as part of diversity and inclusion training programs, and enforced by human resources departments to ensure adherence to these standards. Additionally, outlining specific cultural hairstyles in this bill (such as bantu knots, afros Braids, twists, cornrows, dreadlocks etc) would provide legal clarity and protection, which would further ensure that these styles are explicitly recognized and respected. Due to the insufficiency of

---

[24] US, Bill HR 2116, *Creating a Respectful and Open World for Natural Hair Act of 2022*, 117th Cong, 2022 [*Crown Act*].

[25] *Ibid* at s 2b(6).

[26] *Ibid* at s 2b(3).

current and proposed legislation regarding hair-based discrimination, the passing of a bill that addresses and provides a plausible solution to the ongoing discrimination against Black women in the workplace is needed. Such a bill would mark a significant step forward in the eradication of hair-based discrimination. This policy reform would protect the integrity of women of colour by enabling them to achieve their full potential in the workplace.

BIBLIOGRAPHY

LEGISLATION

Canadian Charter of Rights and Freedoms, *s 15, Part I of the Constitution Act, 1982*, *being Schedule B to the Canada Act 1982 (UK), 1982, c 11.*

Employment Equity Act, *SC 1995, c 44.*

Canadian Human Rights Act, *RSC 1985, c H-6.*

BILLS

Bill 147, *Protecting our Crowns (Training Requirements with respect to Black, Indigenous, Racialized, Natural and Textured Hair Types) Act, 2023*, 1st Sess, 43rd Parl, 2023.

US, Bill HR 2116, *Creating a Respectful and Open World for Natural Hair Act of 2022*, 117th Cong, 2022.

GOVERNMENT DOCUMENTS

Department of National Defence, *Canadian Armed Forces ‘Changing for the Better,’* by Steve Fouchard (Oromocto: Department of National Defence, 2023), online: <canada.ca/en/army/news-publications/2022/03/caf-changing-for-the-better.html>.

SECONDARY MATERIAL: ARTICLES

Asare, Janice Gassam, “How Hair Discrimination Affects Black Women at Work,” *Harvard Business Review* (10 May 2023), online: <hbr.org/2023/05/how-hair-discrimination-affects-black-women-at-work>.

Barreau, Annaëlle,“Afro-Hair and the Law: The State of American and Canadian Law on Race-Based Hair Discrimination” (8 September 2022), online: <mjlh.mcgill.ca/2022/09/08/afro-hair-and-the-law-the-state-of-american-and-canadian-law-on-race-based-hair-discrimination>.

Brown, Shaunasea, “‘Don’t Touch My Hair’: Problematizing Representations of Black Women in Canada” (2018) 12:8 J Pan African Studies 64.

Bujan, Bianca, “Women Working from Home Are Embracing Natural Hair. Will Corporate Canada Catch Up?” *Montecristo Magazine* (22 December 2020), online: <montecristomagazine.com/business/women-working-home-wearing-natural-hair-will-corporate-canada-catch>.

Jones, Ra’Mon, “What the Hair: Employment Discrimination against Black People Based on Hairstyles” (2020) 36 Harv BlackLetter LJ 27.

Leclair, Anne, “Montreal Woman Wins Case after Losing Job at Madisons Because of Her Hair,” *Global News* (5 December 2018), online: <globalnews.ca/news/4732671/montreal-woman-wins-case-after-losing-job-at-madisons-because-of-her-hair>.

“Madisons Grill & Bar Punishing Me over Braids, Worker Alleges,” *CBC News* (19 March 2015), online: <cbc.ca/news/canada/montreal/madisons-grill-bar-punishing-me-over-braids-worker-alleges-1.3001363>.

Montle, ME, “Debunking Eurocentric Ideals of Beauty and Stereotypes against African Natural Hair(styles): An Afrocentric Perspective” (2020) 7:1 J African Foreign Affairs 111, DOI: <10.31920/2056-5658/2020/7n1a5>.

National Institutes of Health, News Release, “Hair Straightening Chemicals Associated with Higher Uterine Cancer Risk” (17 October 2022), online: <nih.gov/news-events/news-releases/hair-straightening-chemicals-associated-higher-uterine-cancer-risk>.

SpearChief-Morris, Joy, “Opinion: Indigenous and Black Communities Have a Shared Past of Injustice. They Deserve a Shared Future of Justice,” Opinion, *The Globe and Mail* (29 May 2021), online: <theglobeandmail.com/opinion/article-indigenous-and-black-communities-have-a-shared-past-of-injustice-they>.

Wilson, Jim, “Hair Discrimination Rampant for Black Women: Survey,” *Canadian HR Reporter* (17 February 2023), online: <hrreporter.com/focus-areas/diversity/hair-discrimination-rampant-for-black-women-survey/373791>.

Shifting Focus of Prostitution Laws in Canada

Miguelle Descary

The Brief

August 2024

Abstract

This paper examines the evolution of prostitution laws in Canada, tracing the legal changes from the 1970s through the landmark Supreme Court of Canada decision in Canada v Bedford. It explores the societal and legal challenges associated with prostitution, highlighting the shift from treating it as a public nuisance issue to recognizing the importance of the safety and rights of sex workers. The paper demonstrates how legislative and judicial actions have impacted the safety of sex workers and shifted the legal perspective toward their protection since the early 2000s.

Introduction

Often referred to as one of the world's oldest professions, prostitution has long been a subject of contentious legal and social debate. The solicitation of sexual services has frequently been stigmatized as morally objectionable, whereas others perceive it as a legitimate occupation, deserving of respect and legal protection.[1] Legislative and judicial efforts concerning prostitution laws have continually sought to address societal concerns, however, each reform has produced unintended consequences affecting the safety and security of sex workers. In 2013, the Supreme Court of Canada (SCC) significantly altered prior legislation with its decision in *Canada v Bedford*, initiating new discourse on the legal treatment of prostitution.[2] This landmark decision eventually led to the enactment of the Protection of Communities and Exploited Persons Act (PCEPA).[3] This paper examines the evolution of Canadian legislation and jurisprudence relating to prostitution, from the 1970s to the present. This analysis will illustrate how the evolving legal landscape, aimed at addressing public concerns, has affected the safety and rights of sex workers.

Historical Context of Prostitution Laws in Canada

Canadian prostitution legislation can be first traced back to 1839 with the introduction of the early Vagrancy Law in Lower Canada.[4] This law authorized police to arrest "all common prostitutes or night walkers wandering in the fields, public streets or highways, not giving a

---

[1] Susan Dewey, "Sex Work" in John DeLamater & Rebecca F Plante, eds, *Handbook of the Sociology of Sexualities* (Springer, 2015) 389 at 389–90, DOI: <10.1007/978-3-319-17341-2>.

[2] Sampson, Lauren, "'The Obscenities of This Country': Canada v. Bedford and the Reform of Canadian Prostitution Laws" (2014) 22:1 Duke J Gender L & Pol'y 137 at 171.

[3] Parliamentary Information and Research Service, *Bill C-36: An Act to Amend the* Criminal Code *in Response to the Supreme Court of Canada Decision in* Attorney General of Canada v. Bedford *and to Make Consequential Amendments to Other Acts*, by Lyne Casavant & Dominique Valiquet, No 41-2-C36-E (Ottawa: Library of Parliament, 2014), online: <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-e.pdf>.

[4] *Revised Acts and Ordinances of Lower-Canada*, 1845 at 166, online: <canadiana.ca/view/oocihm.9_00928/3>; Constance Backhouse, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18:36 Soc History 387 at 389, online: <ssrn.com/abstract=2263368>.

satisfactory account of themselves."[5] This legislation, however, was often broadly enforced by police officers in ways that unfairly impacted women.[6] As a result, women were subjected to overnight detentions and medical examinations.[7] Despite its overly broad enforcement, the Vagrancy Law remained largely unchanged until the 1970s.[8] This was largely due to its appeal in prohibiting acts perceived as violations of the sexual norms of the era.[9]

The 1839 Vagrancy Law was eventually repealed in the 1970s, influenced by the implementation of the 1960 *Canadian Bill of Rights* and the 1967 Royal Commission on the Status of Women (RCSW), both of which aimed to establish greater protections for gender equality.[10] The *Bill of Rights* sought to recognize and protect individual freedom and dignity, as well as certain human rights and fundamental freedoms, including "the right of the individual to equality before the law and the protection of the law" without discrimination based on sex, among other factors.[11] Emphasis on gender equality contributed to the repeal of the Vagrancy Law as it infringed the Bill of Rights by exclusively applying to women.[12] The RCSW was established in response to increasing pressure from second-wave feminists to abrogate

---

[5] Constance Backhouse, *supra* note 4 at 389.

[6] Emily van der Meulen, Elya M Durisin & Victoria Love, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) at 7.

[7] *Ibid*.

[8] *Ibid*.

[9] Backhouse, *supra* note 5 at 393.

[10] *Canadian Bill of Rights*, SC 1960, c 44, s 2; Canada, "Royal Commission on the Status of Women in Canada" (14 April 2021), online: <canada.ca/en/women-gender-equality/commemorations-celebrations/royal-commission-status-women-canada.html#>.

[11] *Canadian Bill of Rights*, *supra* note 10, s 1–2.

[12] John Lowman, "Deadly Inertia: A History of Constitutional Challenges to Canada's *Criminal Code* Sections on Prostitution" (2011) 2:2 Beijing L Rev 33 at 36, DOI: <10.4236/blr.2011.22005>.

discriminatory legislation, such as the 1839 Vagrancy Law.[13] The RCSW was mandated to investigate the impact of federal legislation on the livelihoods of women, ultimately determining the Vagrancy Law to be discriminatory due to its focus on women.[14] Although the repeal of the Vagrancy Law marked a significant shift in the legal and societal treatment of women, it did not comprehensively address broader systemic issues, including the vulnerability of women in the sex industry to exploitation and violence.

Legislative Reforms in the 1970s

The 1839 Vagrancy Law was repealed in 1972 and replaced with the Soliciting Law.[15] The 1972 Soliciting Law altered s. 195.1 of the *Criminal Code,* prohibiting solicitation for the purpose of prostitution in public.[16] Unlike the 1839 legislation, this law specifically targeted the activities associated with prostitution, focusing on the activities associated with the public offer and acceptance of sexual services. While it sought to address concerns over the gender-biased language of previous laws by saying "every person" instead of "any woman" and the increased visibility of street prostitution and its associated disturbances, such as public disorder and crime, it inadvertently resulted in the harassment of female sex workers by "residents" and law enforcement.[17] This harassment was ostensibly justified as a means to maintain public safety and

---

[13] Deborah R Brock, *Making Work, Making Trouble: Prostitution as a Social Problem*, 2nd ed (Toronto: University of Toronto Press, 2009) at 26, 29–30.

[14] Beer, Sarah, *The Sex Worker Rights Movement in Canada: Challenging the 'Prostitution Laws'* (PhD Dissertation, University of Windsor, 2011) at 22 [unpublished].

[15] Lauren Jones, "Canadian Prostitution Laws: History and Market Impacts" in Scott Cunningham & Manisha Shah, eds, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016).

[16] Jones, *supra* note 17; see also *Reference re ss 193 and 195.1(1)(C) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [*Reference*].

[17] *Ibid*; Department of Justice, *Youth Involvement in Prostitution: A Focus on Intrafamilial Violence—A Literature Review*, by Steven Bittle, No TR1999-3E (Ottawa: Department of Justice, 1999) at 4, online: <justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/tr99_3-rt99_3/tr99_3.pdf>.

morality.[18] One perception of prostitution was that it posed a nuisance by *unscrupulous* men and women seeking to purchase or sell sexual services.[19] Consequently, the discourse surrounding prostitution and its associated nuisances emphasized the protection of women from being mistakenly identified as sex workers, leading to a disproportionate focus on stopping, questioning, and monitoring women suspected of involvement in prostitution.[20] Despite these issues, Pierre Trudeau's Liberal government was reluctant to intervene, viewing the matter as a moral issue.[21] The law was accused of having ambiguous definitions of the terms "public space" and "solicitation" resulting in uncertainty in its application by judges and law enforcement.[22] This ambiguity eventually reached the SCC, compelling the Court to intervene and provide judicial clarification.[23]

In *R. v Hutt* (1978), the SCC provided a pivotal clarification of the solicitation law. The appellant, *Hutt*, was charged under section 195.1 of the *Criminal Code* for allegedly soliciting a "casually dressed" police officer in an unmarked vehicle.[24] *Hutt* contested the charge, arguing that the Court of Appeal of British Columbia erred in its legal interpretation of the term "soliciting" under s. 195.1 of the *Criminal Code*.[25] The majority at the SCC concluded that while the charge pertained to soliciting "in a public place," the officer's unmarked car, where the

---

[18] Department of Justice, *supra* note 20 at 4; Leslie Ann Jeffrey, "Prostitution as Public Nuisance: Prostitution Policy in Canada" in Joyce Outshoorn, ed, The Politics of Prostitution Women's Movements, Democratic States and the Globalisation of Sex Commerce (Cambridge: Cambridge University Press, 2004) 83 at 86.

[19] Jeffrey, *supra* note 18 at 86.

[20] *Ibid*.

[21] *Ibid*. Pierre Trudeau's Liberal government refrained from passing legislation on sexuality.

[22] Van der Meulen, Durisin & Love *supra* note 6 at 8.

[23] Department of Justice, *supra* note 18 at 5; see also *Hutt v The Queen*, [1978] 2 SCR 476 [*Hutt*].

[24] *Hutt*, *supra* note 23 at 476.

[25] *Ibid*.

solicitation purportedly occurred, was classified as a private place rather than a public one.[26] The Court further noted that this finding alone would have sufficed to dispose of the appeal.[27] Nevertheless, even under the broadest interpretation of soliciting, the Court found no evidence indicating that the defendant intended to make herself available for prostitution prior to the closure of the car door.[28] The SCC ruled in favour of the appellant, establishing that solicitation must be "pressing and persistent," a criterion that was not met in the case at bar.[29]

The decision elicited extensive criticism from law enforcement and community members.[30] They contended that the newly established threshold would exacerbate street prostitution and diminish the capacity of law enforcement officers to apprehend individuals engaged in prostitution.[31] Former Vancouver Police Chief, Don Winterton specifically attributed the clarification of the term "soliciting" to transforming the streets into "sexual supermarkets."[32] Although the visibility of street prostitution did increase, subsequent research revealed that the SCC's decision was not the cause.[33] Instead, law enforcement practices that compelled sex workers onto the streets by shutting down many venues where they previously met clients were

---

[26] *Hutt*, *supra* note 23 at 476; The officer's car was considered "private" according to section 179 of the *Criminal Code*. See *Criminal Code*, RSC 1985, c C-46, s 179.

[27] *Ibid* note 23 at 477.

[28] *Ibid*.

[29] *Ibid*.

[30] Van der Meulen, Durisin & Love, *supra* note 6 at 8.

[31] *Ibid*.

[32] Lowman, *supra* note 12 at 36. "Sexual supermarkets" refer to areas where sex work is highly visible and prevalent. This term is used to describe a situation where the streets are filled with sex workers seeking clients, creating an environment where the exchange of sexual services for money is as commonplace and accessible as goods in a supermarket.

[33] Department of Justice, *supra* note 18 at 6.

partially responsible.[34] Despite judicial clarifications and legislative changes, such as the introduction of the Soliciting Law and the SCC's ruling in *R. v Hutt,* sex workers remained inadequately protected. The law enforcement practices that pushed prostitution into less safe public spaces illustrate the persistent challenges in ensuring their safety and rights, as well as law enforcement hypocrisy.

The 1980s: Legislative and Social Shifts

In light of evidence indicating that existing prostitution laws were ineffective in addressing the street prostitution problem, the Standing Committee on Justice and Legal Affairs was tasked by the House of Commons to address the measures used to combat this issue.[35] The Committee heard testimonies from various interest groups, revealing the inadequacies of current laws.[36] In 1983 the Committee produced its final report, giving five key recommendations: (1) amendments to s. 195.1 of the *Criminal Code* should eliminate the uncertainty that clients will be prosecuted; (2) it should establish a criminal offence for "offering" or "accepting an offer to engage in prostitution" in public, with penalties up to $500 or 15 days in jail; (3) the definition of public places should include vehicles and private spaces visible to public view; (4) it should be a criminal offence to engage in an exchange of sexual services with individuals under 18 years of age, punishable on "summary conviction" or "indictment"; (5) the proposed amendments should be reviewed within three years of implementation.[37] These recommendations reflected a legislative effort to address the complexities of street prostitution while underscoring the ongoing challenges in balancing public order with the rights and safety of sex workers. Despite the

[34] Department of Justice, *supra* note 18 at 5–6; Lowman, *supra* note 14 at 37.

[35] Brock, *supra* note 15 at 46.

[36] Lowman, *supra* note 14 at 36–37.

[37] *Ibid*.

Committee's steps to improve prostitution laws, other organizations also emerged to focus on prostitution, marking a collective effort to address the issue.

Amid legislative reviews, public debates surrounding prostitution laws and sex workers organizations intensified. In 1977, the first sex workers' organization in Canada, the Better End All Vicious Erotic Regulations (BEAVER), was established to "legitimize the female sex [and] decriminalize prostitution."[38] Concurrently, the second wave of the women's movement was gaining momentum, increasing public debates on gender and sexuality.[39] Rather than acting on the recommendations of the Standing Committee and other interest groups, the Pierre Trudeau Liberal government responded to growing pressure from municipal and provincial governments across Canada to revisit the Criminal Code by establishing the Special Committee on Pornography and Prostitution in 1983.[40] This body was tasked with analyzing Canada's "sex trade"[41] and recommending policy reform.[42]

The Fraser Committee's[43] 1985 report revealed inadequacies in Canadian prostitution laws in addressing street prostitution and protecting the rights and safety of sex workers.[44] The report recommended that the government strengthen its commitment to eliminating "economic and social inequalities between men and women [and] discrimination on the basis of sex."[45] It

38 Brock, *supra* note 15 at 41.

39 Van der Meulen, Durisin & Love, *supra* note 7 at 8.

40 Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol 1–2 (Ottawa: 1985) at 7, online: <publications.gc.ca/collections/collection_2017/jus/J2-55-1-1985-A-eng.pdf>; Lowman, *supra* note 14 at 37.

41 This paper defines sex trade as activities wherein sexual services are exchanged for money.

42 Jones, *supra* note 17; see also Canada, *supra* note 44 at 5.

43 The Special Committee on Pornography and Prostitution is also known as the Fraser Committee, named after the Chairman of the Committee Paul Fraser.

44 Lowman, *supra* note 14 at 37.

45 Canada, *supra* note 44 at 527.

also suggested permitting a limited number of sex workers to conduct their activities within a "residence."[46] The Committee's findings indicated that street prostitution had already been on the rise before the 1978 SCC ruling in *Hutt*, absolving the Court's clarification of the term "soliciting" from being held accountable for the increase.[47] The Committee determined that the Soliciting Law had not effectively reduced prostitution and had inadvertently marginalized and stigmatized sex workers.[48] The law framed prostitution as a moral issue, attributing it to women's "loose" morals and suggesting that women needed protection from immoral men, thereby increasing male scrutiny of women's worth.[49] This comprehensive report, informed by various perspectives, demonstrated a nuanced understanding of the challenges faced by sex workers and underscored the need for a more effective legal framework.

The inclusion of feminist perspectives in the Fraser Committee's report represented a significant shift in the understanding of women in sex work, recognizing their agency and the need to address their rights more thoughtfully. The Canadian Advisory Council on the Status of Women (CACSW) was established as an additional and independent body to conduct gender-based research and provide policy recommendations, particularly focusing on addressing gender discrimination within the prostitution debate.[50] Despite consulting with the CACSW and feminists, the Fraser Committee's report attributed the complexities of the prostitution problem to societal issues rather than systemic gender inequality as recommended by CACSW.[51]

---

[46] Canada, *supra* note 44 at 538.

[47] Lowman, *supra* note 14 at 37.

[48] Department of Justice, *supra* note 20 at 6; Canada, *supra* note 44 at 533.

[49] Canada, *supra* note 44 at 531.

[50] Jeffrey, *supra* note 21 at 89.

[51] Brock, *supra* note 15 at 73.

Regardless of the report's recommendations and shortcomings, the attempt to address the prostitution problem was ignored.[52]

In 1985, the newly elected Conservative Party introduced Bill C-49, which did not fully take into account the security concerns of sex workers or the Fraser Committee's findings.[53] Less than a week after the release of the Fraser Report, which demonstrated a thorough understanding of the issue, Bill C-49 was initiated in response to continued public pressure to address street prostitution.[54] The bill criminalized public communication for the purpose of prostitution and designated parked cars as public spaces, making it illegal to engage in prostitution in one's car.[55] Women's groups and the Canadian Organization for the Rights of Prostitutes had previously expressed concerns that this shift would disproportionately affect women by forcing sex workers to meet clients in hidden and secluded areas, which it did.[56] After the enactment of the legislation, police officers charged 80 to 100 times more than under the previous Soliciting Law, which had limited their ability to make arrests.[57] Additionally, violence against sex workers also increased dramatically, with a notable rise in discovered bodies in British Columbia from 1985 to 1998.[58] Three years after the implementation of Bill C-49, Justice Canada evaluated the Communication laws and concluded that instead of reducing prostitution, the laws displaced sex

---

[52] Jones, *supra* note 17.

[53] *Ibid.*

[54] Jeffrey, *supra* note 21 at 90; see also van der Meulen, Durisin & Love, *supra* note 7 at 8.

[55] Van der Meulen, Durisin & Love, *supra* note 7 at 9.

[56] Department of Justice, *supra* note 20 at 9; Jeffrey, *supra* note 21 at 91.

[57] Lowman, *supra* note 14 at 38.

[58] Lowman, John, "Violence and the Outlaw Status of (Street) Prostitution in Canada" (2000) 6:9 Violence against Women 987 at 990, DOI: <10.1177/10778010022182>.

workers to other areas.[59] The Communication law did not achieve its intended objectives and appeared to exacerbate the security challenges faced by sex workers. This underlines the critical need for legislation to consider sex worker's safety over punitive measures aimed at maintaining public order.

The 1990s: Continued Legislative Efforts and Emerging Challenges

In response to growing concerns about youth prostitution and its associated harms, the Federal/Provincial/Territorial Working Group on Prostitution was established in 1992 to analyze and review prostitution legislation and practices.[60] The Working Group consulted with youth engaged in prostitution who advocated for the decriminalization of prostitution. The youth population argued that decriminalization was essential for their protection against escalating violence, as it would reduce their reliance on pimps and prevent them from working in secluded and dangerous areas.[61] However, the Working Group on Prostitution refrained from recommending decriminalization of prostitution.[62] Instead, the Working Group suggested that legislation surrounding youth prostitution should be more easily enforceable.[63] This led to the introduction of Bill C-115, which eventually became a subsection of Bill C-27.[64] The new focus on youth prostitution and the implementation of Bill C-27 demonstrated a shift in public concern

---

[59] Lowman, *supra* note 14 at 38.

[60] Library of Parliament, *Bill C-36: An Act to Amend the* Criminal Code *in Response to the Supreme Court of Canada Decision in* Attorney General of Canada v. Bedford *and to Make Consequential Amendments to Other Acts*, by Lyne Casavant & Dominique Valiquet, No 41-2-C36-E (Ottawa: Library of Parliament, 2014) at 7, online: <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-e.pdf>.

[61] Jeffrey, *supra* note 21 at 96.

[62] Department of Justice, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, Catalogue No J2-175/1998E (Ottawa: Department of Justice 1998) at 11, online: <publications.gc.ca/pub?id=9.647969&sl=0>.

[63] *Ibid*.

[64] Jeffrey, *supra* note 21 at 97.

from issues of public disturbance to the protection of youth. The youth advocated for decriminalization as a means to protect themselves from violence and exploitation, highlighting their firsthand understanding of the dangers they face. By overlooking these insights, the Working Group missed an opportunity to incorporate the lived experiences of those most affected by these laws into the legislative process. This omission underscores the ongoing challenge of crafting legal measures that not only protect at-risk populations but also genuinely reflect and address their needs and perspectives.

The 2000s: Recognizing Sex Work Security Concerns

In the 2000s sex work security concerns began to gain significant legal traction, marking a shift towards greater recognition of the rights and safety of sex workers in Canada. A pivotal moment occurred in 2007 when the Downtown Eastside Sex Workers United Against Violence Society from Vancouver challenged the constitutionality of several prostitution laws under the *Canadian Charter of Rights and Freedoms*.[65] This legal challenge aimed to address the injustices and dangers faced by sex workers, arguing that existing laws infringed upon their rights to security, freedom of expression, and association.[66] This decision marked a pivotal moment, setting the stage for subsequent legal battles and policy debates aimed at improving the conditions and protections for sex workers. However, the delay in addressing sex work security concerns reflects the historical focus on prostitution's nuisances to others rather than the safety and rights of sex workers. This pivotal moment signifies a turning point while also highlighting the extended period during which sex workers' safety was compromised by legislation that was focused on promoting public order, over individual rights and liberties.

***Canada v Bedford*: A Landmark Decision**

[65] *Canada (Attorney General) v Downtown Eastside Sex Workers United against Violence Society*, 2012 SCC 45.

[66] *Ibid* at para 8.

In one of the most significant cases impacting Canadian prostitution laws, *Canada (Attorney General) v Bedford* (2013), the Supreme Court of Canada (SCC) revisited the contentious legal issues surrounding the legal implications of sex work. The case arose from the challenges brought by three current and former sex workers—Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott— to the Ontario Superior Court of Justice against three specific provisions of the *Criminal Code*: s. 210, s. 212(1)(j), and s. 213(1)(c).[67] The three defendants argued that these provisions infringed their rights under section 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to life, liberty, and security of the person.[68] They contended, that the impugned provisions prevented them from lawfully implementing safety measures to protect themselves from the dangers inherent in sex work, such as hiring bodyguards, thereby increasing their vulnerability to violence.[69] They also alleged that section 213(1)(c), which prohibits communication in public for the purpose of prostitution, violated their freedom of expression as protected by section 2(b) of the *Charter*.[70]

The SCC's unanimous decision in *Bedford* was a pivotal moment in Canadian legal history. The Court affirmed the appeal in favour of the defendants, finding that the challenged provisions indeed violated their Section 7 rights, as the provisions prevented those "engaged in a

[67] *Canada (Attorney General) v Bedford*, 2013 SCR 72 at para 4 [*Bedford*]. Section 210 of the *Criminal Code* prohibits the keeping of a common bawdy-house; section 212(1)(j) prohibits living on the avails of prostitution; section 213(1)(c) prohibits public communication for the purpose of prostitution. See *Criminal Code*, *supra* note 30, ss 210, 212(1)(*j*), 213(1)(*c*).

[68] *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; *Bedford*, *supra* note 72 at para 6. This section required a two step analysis where the applicant had to show that the legislation affected their life, liberty, or security and then had to demonstrate how the legislation violated fundamental principles of justice. See Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 578–579, DOI: <10.7202/1032679>.

[69] *Bedford, supra* note 72.

[70] *Ibid*.

risky—but legal—activity from taking steps to protect themselves from the risks."[71] The court considered whether, in achieving its intended goal, the law was arbitrary, overbroad, and grossly disproportionate.[72] The Court held that the bawdy-house prohibition (s. 210) violated section 7 of the *Charter* since its negative impacts on the security of the person were grossly disproportionate to its objective of "preventing public nuisance," as it prohibited sex workers from working in a fixed location where they could employ safety measures. The prohibition on living off the avails of prostitution (s. 212(1)(j)) was deemed unconstitutional since "the law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes."[73] The law covers conduct that may not relate to its purpose of preventing exploitation, making it overly broad. The communication law (s. 213(1)(c)) was also found to violate section 7 of the *Charter*, as it sought to remove street prostitution from public view to prevent nuisances. However, this provision's impact on street sex workers' safety, by preventing them from screening clients and implementing safety measures, was grossly disproportionate to the goal of nuisance prevention. The Court did not find it necessary to consider whether s. 213(1)(c) violated s. 2(b) of the *Charter*, as it had already determined that the impugned provisions violated s. 7.[74]

---

[71] *Bedford, supra* at para 60.

[72] *Ibid* at para 133, 139, and 148. This analysis defines the term arbitrariness as defined in *Bedford* as "where there is *no connection* between the effect and the object of the law" at para 98; This analysis will define the term overbroad as defined in *Bedford* as where "the law goes too far and interferes with *some* conduct that bears no connection to its objective" at para 101; This analysis will define the term gross disproportionality as defined in *Bedford* as where the "effect of the law is grossly disproportionate to the state's objective" at para 103.

[73] Examples used in *Bedford* of those who exploit prostitutes include controlling and abusive "pimps." Examples of those who could increase the safety and security of prostitutes include legitimate drivers, managers, and/or bodyguards. See *ibid* at para 142.

[74] *Ibid* at para 160.

Since all three provisions were found to violate s. 7 of the *Charter* the Court determined whether these violations could be justified under section 1 of the *Charter*. The Court found that the three provisions could not be justified, as the Attorney General of Canada had not "seriously argued" that the laws could be saved under s. 1 of the *Charter*.[75] The Attorney General attempted to justify the broad scope of the "living on the avails" provision as necessary to capture all exploitative relationships.[76] The SCC found that the law also ensnared non-exploitative relationships, such as those with receptionists or accountants, demonstrating that the provision's overbreadth was not minimally impairing.[77] Additionally, the detrimental effect of preventing sex workers from employing safety measures outweighed any positive impact of protecting them from exploitation, failing the final stage of the section 1 analysis.[78] The SCC ultimately dismissed the appeal and declared that the three provisions at bar were unconstitutional as they were inconsistent with the *Charter*.[79]

The SCC's decision in *Canada (Attorney General) v Bedford* marked a pivotal moment in the legal landscape surrounding prostitution laws in Canada. By affirming that the challenged provisions violated sex workers' *Charter* rights, the Court underscored the imperative to prioritize the safety and security of individuals engaged in sex work. This landmark ruling not only highlighted and acknowledged the arbitrariness and overbreadth of existing laws but also emphasized the gross disproportionality of the real impact on sex workers. The SCC's unanimous decision to strike down these provisions reflected a profound shift towards

---

[75] *Bedford, supra* at para 161.

[76] *Ibid* at para 162.

[77] *Ibid*.

[78] *Ibid*.

[79] *Ibid* at para 164.

recognizing and protecting the rights and dignity of sex workers, challenging the long-standing societal and legal perceptions of prostitution.

The *Protection of Communities and Exploited Persons Act* (PCEPA)

The aftermath of the *Bedford* decision elicited varied perspectives on the ruling. Supporters celebrated it as a "breakthrough" for sex workers' rights, while critics argued that the decision continued to marginalize sex workers, who remained hesitant to engage law enforcement when in distress.[80] Although the ruling marked a substantial step towards recognizing sex workers' rights, the persistent reluctance of sex workers to seek help from law enforcement suggests that deeper systemic issues remain unaddressed. In response to the SCC ruling in *Bedford*, the Canadian government enacted Bill C-36, the *Protection of Communities and Exploited Persons Act* (PCEPA), in 2014.[81] This Act aimed to safeguard sex workers, identified as "victims of sexual exploitation," while simultaneously "protecting communities from the harms caused by prostitution," and "reducing the demand for sexual services."[82] Notably, Bill C-36 shifted the criminal burden from those who solicit sexual services (sex workers) to those who purchase sexual services (clients), under section 286.1 of the *Criminal Code*.[83] This legislative change stipulates that any prostitution transaction constitutes a criminal offence committed by the purchaser, while those who sell their own sexual services are afforded protection.[84] This shift in legal focus aims to reduce the demand for sexual services while

---

[80] Graham Hudson & Emily van der Meulen, "Sex Work, Law, and Violence: *Bedford v. Canada* and the Human Rights of Sex Workers" (2013) 31:1 Windsor YB Access to Justice 115 at 135–137.

[81] *Protection of Communities and Exploited Persons Act*, SC 2014, c 25; Casavant, and Dominique Valiquet, *supra* at 1.

[82] Library of Parliament, *supra* note 65 at 2.

[83] Library of Parliament, *supra* note 65 at 2; see also Department of Justice, *Prostitution Criminal Law Reform: Bill C-36, the* Protection of Communities and Exploited Persons Act (Ottawa: Department of Justice, 2014) at 1–2, online: <justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi/c36fs_fi_eng.pdf>.

[84] Department of Justice Canada, *supra* note 88 at 1–2.

providing protection to sex workers.[85] However, this has raised questions about its effectiveness in truly safeguarding sex workers and whether it addresses the root causes of their vulnerability. Under the PCEPA, s. 210 of the *Criminal Code*, which pertains to keeping a common bawdy-house, was not entirely repealed but was amended to revise the definition of "common bawdy-house."[86] The term now encompasses "a place that is kept or occupied or resorted to by one or more persons" with the explicit reference to prostitution removed.[87] S. 212 (living on the avails of prostitution) was repealed and reformulated into a new section, ss. 286.1 to 286.3 of the *Criminal Code*.[88] These sections now prohibit receiving material or financial benefit from sexual services of others, with exceptions for non-exploitative relationships such as family relationships and general public businesses.[89] This amendment allows sex workers to seek protection without criminalizing those who assist them in non-exploitive ways. S. 213(1)(c) was repealed and replaced by s. 213(1.1) which prohibits prostitutes from communicating in public places for the purpose of offering their sexual services near locations "designed for use by children," such as playgrounds.[90] This change represents a significant evolution in legislative approach and understanding, addressing not just concerns over nuisances associated with sex work but focusing on harm prevention. The previous statute broadly targeted communicating for the purpose of prostitution, without much regard for context or security considerations, leading the SCC to criticize that the law's impact was grossly disproportionate to its intended goal. The shift

[85] Library of Parliament, *supra* note 65 at 2.

[86] *Ibid* at 11–12.

[87] *Ibid*.

[88] *Ibid* at 13.

[89] Department of Justice Canada, *supra* note 88 at 2–3.

[90] Library of Parliament, *supra* note 65 at 13; Department of Justice Canada, *supra* note 88 at 4.

in focus to protect children from potential harm demonstrates a targeted, context-specific approach. This amendment responds directly to the concerns identified in the *Bedford* case, where the SCC found certain provisions to be overbroad, arbitrary, disproportionate, and not minimally impairing. By adjusting the law to prohibit sex work communications near areas frequented by children, the legislation aims to be more precise and narrowly tailored, addressing the proportionality issue raised by the *Oakes* test. These changes illustrate a nuanced approach to the complexities surrounding sex work. By moving from a broad approach to a more focused, harm-preventive strategy, the legislation attempts to balance the protection of vulnerable populations with the rights of sex workers, reflecting an effort to address security and systemic issues highlighted in the *Bedford* decision.

The effectiveness of the PCEPA has been a contentious issue, with considerable debate surrounding its impact on sex workers and the broader community. Studies examining the aftermath of the PCEPA's implementation indicate mixed results regarding its efficacy. Statistics Canada's study on the effects of Bill C-36 indicated a 55% decrease in "sex-trade-related" crime between 2010 and 2019.[91] However, this decline is largely attributed to a 95% decrease in offences for communicating for the purpose of prostitution in public which occurred prior to Bill C-36.[92] Post-PCEPA data reveals a significant shift in the focus of criminalization, with a notable decline in the number of female accusations and an increase in male accusations, reflecting the legislation's intent to target purchasers rather than sellers of sexual services, given that the "vast majority" of those purchasing sexual services are men.[93] Following the implementation of the

[91] Statistics Canada, *Crimes Related to the Sex Trade: Before and After Legislative Changes in Canada*, by Mary Allen & Christine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021) at 5, online: <www150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00010-eng.htm>.

[92] *Ibid*.

[93] *Ibid*.

new laws, 93% of individuals accused in sex-trade-related incidents were men.[94] While the PCEPA appears to be achieving its goal of shifting the criminal burden to purchasers, its effectiveness in protecting vulnerable individuals remains uncertain. The data on the PCEPA's impact reveals a significant shift in the criminal burden from sex workers to clients, which aligns with the law's objectives to reduce legal pressures on sex workers, who have historically borne the brunt of criminalization, by targeting those who create the demand for sex work. By doing so, the law seems to incorporate *Bedford*'s wishes to create a safer environment for sex workers by reducing sex workers' interactions with law enforcement and minimizing the risk of arrest and prosecution. The policy change reflects a shift in seeing sex workers as something other than perpetrators of crime, and in some cases, even victims of crime.

Research on the PCEPA's effects reveals significant challenges regarding access to health and support services, trust in law enforcement, safety strategies, and criminalization. The practical application of the PCEPA has not significantly improved access to health or support services for sex workers. A Vancouver-based study shows no substantial increase in access to health or support services post-Bill C-36, rather a decrease in such services has been observed.[95] In addition, a 2018 study revealed that a majority of sex workers continue to experience harassment and a lack of safety, with 87.5% reporting an inability to contact police in the event of violence due to fear of "police detection."[96] Negative past experiences with police, including physical and sexual assaults, misconduct, and stigma, have significantly eroded trust in law

---

[94] Statistics Canada, *supra* at 11.

[95] Elena Argento et al, "The Impact of End-Demand Legislation on Sex Workers' Access to Health and Sex Worker-Led Services: A Community-Based Prospective Cohort Study in Canada" (2020) 15:4 PLoS ONE e0225783 at 4–5, DOI: <10.1371/journal.pone.0225783>.

[96] Anna-Louise Crago et al, "Sex Workers' Access to Police Assistance in Safety Emergencies and Means of Escape from Situations of Violence and Confinement under an 'End Demand' Criminalization Model: A Five City Study in Canada" (2021) 10:1 Soc Sciences Article 13 at 4, DOI: <10.3390/socsci10010013>.

enforcement leading to sex workers to not report violence to law enforcement.[97] The language of the PCEPA, referring to sex workers as "exploited persons" and "victims," perpetuates stigma and discrimination, further isolating sex workers from support and protection.[98] Inadequate protective and health care services have led sex workers to develop independent safety strategies, including using cell phones, screening clients, and avoiding intoxication while working.[99] However, the criminalized context under PCEPA complicates these efforts, as clients are less willing to share personal information, hindering effective screening and precautionary measures.[100] The conflicting evidence surrounding Bill C-36 underscores the complexities in balancing legislative intentions with the lived realities of sex workers, ultimately raising questions about the law's true impact on sex workers' safety and well-being.

The Supreme Court of Canada's decision in *Bedford* was a significant step in addressing the criminalization of sex work and highlighting the need for legal reforms to protect the rights and safety of sex workers. However, the *Bedford* decision did not address the underlying systemic issues that contribute to the dangers sex workers face. The implementation of Bill C-36 (PCEPA) following *Bedford* sought to shift the legal burden from sex workers to their clients, aiming to protect those engaged in sex work from further criminalization. Yet, despite these legislative changes, sex workers remain generally unsafe and continue to face significant harm. The persistent reluctance of sex workers to engage with law enforcement, due to fear of detection, harassment, and past negative experiences, underscores the limited impact of these

---

[97] Cecilia Benoit & Andrea Mellor, *A Brief to the Standing Committee on Justice and Human Rights House of Commons: Review of the* Protection of Communities and Exploited Persons Act (Victoria: Canadian Institute for Substance Use Research, 2022) at 3–4, online: <ourcommons.ca/Content/Committee/441/JUST/Brief/BR11602468/br-external/Jointly6-e.pdf>.

[98] *Ibid* at 6.

[99] *Ibid* at 4.

[100] *Ibid*.

legal reforms on their real-world safety and well-being. The focus on criminal law reform alone is insufficient to create a safe and supportive environment for sex workers. Comprehensive solutions require addressing the root causes of their marginalization, improving access to health and support services, fostering trust in law enforcement, and ensuring that sex workers can implement effective safety measures without fear of legal repercussions. While *Bedford* marked a pivotal moment in the legal recognition of sex workers' rights, the journey toward genuine safety and equity for sex workers in Canada remains ongoing.

Recent Developments and Ongoing Legal Challenges

In 2023, the Canadian Alliance for Sex Work Law Reform (the Alliance) brought a significant challenge against various *Criminal Code* provisions related to sex work before the Ontario Superior Court of Justice.[101] The six individual applicants—Monica Forrester, Valerie Scott, Lanna Moon Perrin, Jane X, Alessa Mason, and Tiffany Anwar—joined forces with The Canadian Alliance for Sex Work Law Reform.[102] They contested provisions prohibiting activities such as stopping traffic, communicating in public places near schools, purchasing sexual services, receiving material benefits from sex work, procuring, and advertising sexual services.[103] The Alliance argued these prohibitions violated the *Canadian Charter of Rights and Freedoms*, specifically sections 2(b), 2(d), 7, and 15.[104]

The applicants presented substantial evidence demonstrating how the impugned laws exacerbated the harms faced by sex workers. The laws facilitated constant police surveillance,

---

[101] *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197 at para 6 [*CASWLR*].

[102] *Ibid* at para 5. The Canadian Alliance for Sex Work Law Reform is a sex worker rights group in Canada that seeks to "create a unified and cohesive response to law reform, and to strengthening the capacity of our communities to engage with legislative processes that impact on our lives." See Canadian Alliance for Sex Work Law Reform, "About Us" (last visited 31 July 2024), online: <sexworklawreform.com>.

[103] *Ibid* at para 6.

[104] *Ibid* at para 4; see also *Canadian Charter of Rights and Freedoms*, *supra* note 68 ss 2(b), 2(d), 7, 15.

drove sex workers to operate in more isolated and dangerous conditions, and made it difficult to maintain stable housing as landlords often refused to rent to individuals engaged in sex work.[105] Additionally, the criminalization of various aspects of sex work limited sex workers' access to essential services, including health care and government support.[106] These arguments echoed the 2022 recommendations of the Standing Committee on Justice and Human Rights, which called for amendments to the Protection of Communities and Exploited Persons Act (PCEPA) to "prevent harm in the Canadian sex industry."[107] Recognizing that the PCEPA framework hindered the ability to safeguard sex workers' health and safety, the Committee recommended that Parliament repeal sections 213 (the communication law) and 286.4 (criminalizing the advertisement of sexual services) and promote better practices for building trust between police and sex workers.[108]

The applicants contended that all challenged offences under the PCEPA violated section 2(b) of the *Charter* by preventing crucial communications between sex workers, customers, and third parties.[109] Justice Goldstein acknowledged the Attorney General's concession that the stopping traffic, communications, and advertising offences violated section 2(b), but found these infringements justified under section 1.[110] He determined that the PCEPA's objectives were pressing and substantial, the measures were rationally connected to these objectives, and the

[105] *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197 (Factum of the Intervener, Women's Legal Education and Action Fund at para 4 [FOI]); see also *CASWLR*, *supra* note 106 at para 257, 282, and 290.

[106] FOI, *supra* note 110 at para 4; see also *CASWLR*, *supra* note 106 at para 316.

[107] House of Commons, *Preventing Harm in the Canadian Sex Industry: A Review of the* Protection of Communities and Exploited Persons Act (June 2022) (Chair: Randeep Sarai) at 5, online: <ourcommons.ca/Content/Committee/441/JUST/Reports/RP11891316/justrp04/justrp04-e.pdf>.

[108] *Ibid* at 1–2.

[109] *CASWLR, supra* note 106 at para 429–430.

[110] *Ibid* at 431–433.

offences minimally impaired the right to freedom of expression.[111] He concluded that the salutary effects outweighed the deleterious effects.[112] The applicants further argued that the PCEPA interfered with their freedom of association under section 2(d) by making it impossible for sex workers to work in association, preventing them from communicating with customers, and infringing on their rights to associate in pursuit of other freedoms.[113] Justice Goldstein rejected these arguments, stating that PCEPA does not interfere with non-exploitative associations and targets associations formed for committing prohibited activities.[114] He upheld the provisions, emphasizing that section 2(d) aims to reduce social imbalances and protect against exploitation, not to expand the rights of exploiters.[115] In contending that the *Criminal Code* provisions violated their section 7 rights, the applicants argued that they increased the risks to their life, safety, and liberty by hindering access to safety measures and criminalizing sex work.[116] While Justice Goldstein agreed that the security of outdoor sex workers was compromised regarding client screening and purchasing offences due to interference with bodily and sexual autonomy, he found these arguments consistent with principles of fundamental justice.[117] Thus no section 7 violation was found. The applicants also argued that the PCEPA violated section 15 of the Charter by discriminating against sex workers, a group facing intersecting forms of

---

[111] *CASWLR, supra* at paras 478–490.

[112] *Ibid* at paras 495–501. Examples of the salutary effects include charges against women and fewer homicides of sex workers. Examples of the deleterious effects include the claimed limitations on sex worker's ability to communicate and ensure safety.

[113] *Ibid* at paras 405, 419.

[114] *Ibid* at paras 411–412, 420, 426.

[115] *Ibid* at para 427.

[116] *Ibid* at para 249.

[117] *Ibid* at paras 251, 404.

marginalization, based on gender, race, and occupational status.[118] Justice Goldstein disagreed, concluding that sex work is not an analogous ground for discrimination under section 15 because it does not constitute an immutable characteristic.[119] He found that PCEPA aimed to reduce exploitation and provide protections rather than creating or perpetuating harms and disadvantages.[120]

The contested provisions within the *Criminal Code* and the *Protection of Communities and Exploited Persons Act* (PCEPA) present challenges to the intrinsic rights and dignity of sex workers. The evidence presented highlights that the current legal provisions may inadvertently increase the risks and vulnerabilities faced by sex workers, affecting their ability to maintain safety, health, and autonomy. The recommendations by the Standing Committee on Justice and Human Rights suggest a shift towards a more balanced approach, advocating for the repeal of certain prohibitive measures and the promotion of trust-building practices between police and sex workers. By considering reforms that are in harmony with natural law principles, the legal system can better support the fundamental rights and well-being of all individuals, including those involved in sex work.

Conclusion

The evolution of prostitution laws in Canada underscores the complex struggle between societal norms and individual rights. From the 1970s to the landmark decision in *Canada v Bedford*, Canada's shifting legislative landscape has mirrored the ongoing tension between moralistic perspectives and the imperative to safeguard the rights and safety of sex workers. This analysis reveals how legislative and judicial actions have progressively pivoted from a focus on

[118] *CASWLR, supra* at para 443.

[119] *Ibid* at paras 447, 451.

[120] *Ibid* at paras 463–464.

public nuisance to an emphasis on the security and rights of sex workers, marking significant legal and social transformations.

The landmark ruling in *Canada v Bedford* was a pivotal moment that highlighted the inadequacies and harms of existing laws, affirming the need to prioritize the safety and security of sex workers. The subsequent enactment of the PCEPA sought to address these concerns but has faced criticism for its limited effectiveness in truly safeguarding sex workers and for perpetuating stigma and discrimination. The recent challenge by the Canadian Alliance for Sex Work Law Reform underscores the ongoing legal and social challenges faced by sex workers under the current legal regime. This case, which questioned the constitutionality of several provisions of the *Criminal Code*, highlights the persistent issues within the PCEPA framework and the need for further legislative reform to genuinely protect sex workers' rights and safety.

This paper has examined the historical and contemporary changes in Canada's prostitution laws. The study aims to add to the academic dialogue on sex workers' legal rights and the broader context of morality, legality, and individual rights. While this analysis hopes to better inform academic discussions in Canada specifically, it also serves to bring awareness to the disregard and treatment of sex workers and their rights, hoping to illuminate individuals on their reality. By shedding light on these issues, this study aspires to pave the way for comparative analyses or global discussions on sex work to enhance the understanding of these issues in modern legal contexts. It also seeks to challenge preconceptions and promote a more nuanced understanding of the complexities surrounding sex work and legislation.

BIBLIOGRAPHY

LEGISLATION: CANADA

Canadian Bill of Rights, SC 1960, c 44.

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.

Criminal Law Amendment Act, SC 1972, c 13.

Criminal Code, RSC 1985, c C-46.

Protection of Communities and Exploited Persons Act, SC 2014, c 25.

Revised Acts and Ordinances of Lower-Canada, 1845, online: <canadiana.ca/view/oocihm.9_00928/3>.

JURISPRUDENCE: CANADA

Canada (Attorney General) v Bedford, 2013 SCR 72.

Canadian Alliance for Sex Work Law Reform v Attorney General, 2023 ONSC 5197.

Reference re ss 193 and 195.1(1)(C) of the Criminal Code (Man), [1990] 1 SCR 1123.

Hutt v The Queen, [1978] 2 SCR 476.

Canada (Attorney General) v Downtown Eastside Sex Workers United against Violence Society, 2012 SCC 45.

GOVERNMENT DOCUMENTS

Canada, *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, vol 1–2 (Ottawa: 1985), online: <publications.gc.ca/collections/collection_2017/jus/J2-55-1-1985-A-eng.pdf>.

Canada, "Royal Commission on the Status of Women in Canada" (14 April 2021), online: <canada.ca/en/women-gender-equality/commemorations-celebrations/royal-commission-status-women-canada.html#>.

Department of Justice, *Prostitution Criminal Law Reform: Bill C-36, the* Protection of Communities and Exploited Persons Act (Ottawa: Department of Justice, 2014), online: <justice.gc.ca/eng/rp-pr/other-autre/c36fs_fi/c36fs_fi_eng.pdf>.

Department of Justice, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, Catalogue No J2-175/1998E (Ottawa: Department of Justice 1998), online: <publications.gc.ca/pub?id=9.647969&sl=0>.

Department of Justice, *Youth Involvement in Prostitution: A Focus on Intrafamilial Violence—A Literature Review*, by Steven Bittle, No TR1999-3E (Ottawa: Department of Justice, 1999), online: <justice.gc.ca/eng/rp-pr/cj-jp/yj-jj/tr99_3-rt99_3/tr99_3.pdf>.

Library of Parliament, *Bill C-36: An Act to Amend the* Criminal Code *in Response to the Supreme Court of Canada Decision in* Attorney General of Canada v. Bedford *and to Make Consequential Amendments to Other Acts,* by Lyne Casavant & Dominique Valiquet, No 41-2-C36-E (Ottawa: Library of Parliament, 2014), online: <lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/41-2/c36-e.pdf>.

House of Commons, *Preventing Harm in the Canadian Sex Industry: A Review of the* Protection of Communities and Exploited Persons Act (June 2022) (Chair: Randeep Sarai), online: <ourcommons.ca/Content/Committee/441/JUST/Reports/RP11891316/justrp04/justrp04-e.pdf>.

Statistics Canada, *Crimes Related to the Sex Trade: Before and After Legislative Changes in Canada*, by Mary Allen & Christine Rotenberg, Catalogue No 85-002-X (Ottawa: Statistics Canada, 2021), online: <150.statcan.gc.ca/n1/pub/85-002-x/2021001/article/00010-eng.htm>.

SECONDARY MATERIALS: ARTICLES

Argento, Elena et al, "The Impact of End-Demand Legislation on Sex Workers' Access to Health and Sex Worker-Led Services: A Community-Based Prospective Cohort Study in Canada" (2020) 15:4 PLoS ONE e0225783, DOI: <10.1371/journal.pone.0225783>.

Backhouse, Constance, "Nineteenth-Century Canadian Prostitution Law: Reflection of a Discriminatory Society" (1985) 18:36 Soc History 387, online: <ssrn.com/abstract=2263368>.

Beer, Sarah, *The Sex Worker Rights Movement in Canada: Challenging the 'Prostitution Laws'* (PhD Dissertation, University of Windsor, 2011) [unpublished].

Crago, Anna-Louise et al, "Sex Workers' Access to Police Assistance in Safety Emergencies and Means of Escape from Situations of Violence and Confinement under an 'End Demand' Criminalization Model: A Five City Study in Canada" (2021) 10:1 Soc Sciences 13, DOI: <10.3390/socsci10010013>.

Dewey, Susan, "Sex Work" in John DeLamater & Rebecca F Plante, eds, Handbook of the Sociology of Sexualities (Springer, 2015) 389 at 389–90, DOI: <10.1007/978-3-319-17341-2>.

Hudson, Graham & Emily van der Meulen, "Sex Work, Law, and Violence: *Bedford v. Canada* and the Human Rights of Sex Workers" (2013) 31:1 Windsor YB Access to Justice 115.

Lowman, John, "Deadly Inertia: A History of Constitutional Challenges to Canada's *Criminal Code* Sections on Prostitution" (2011) 2:2 Beijing L Rev 33, DOI: <10.4236/blr.2011.22005>.

Lowman, John, "Violence and the Outlaw Status of (Street) Prostitution in Canada" (2000) 6:9 Violence against Women 987, DOI: <10.1177/10778010022182>.

Sampson, Lauren, "'The Obscenities of This Country': *Canada v. Bedford* and the Reform of Canadian Prostitution Laws" (2014) 22:1 Duke J Gender L & Pol'y 137.

Stewart, Hamish, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575, DOI: <10.7202/1032679>.

SECONDARY MATERIALS: BOOKS

Brock, Deborah R, *Making Work, Making Trouble: Prostitution as a Social Problem,* 2nd ed (Toronto: University of Toronto Press, 2009).

Jeffrey, Leslie Ann, "Prostitution as Public Nuisance: Prostitution Policy in Canada" in Joyce Outshoorn, ed, *The Politics of Prostitution Women's Movements, Democratic States and the Globalisation of Sex Commerce* (Cambridge: Cambridge University Press, 2004) 83.

Jones, Lauren, "Canadian Prostitution Laws: History and Market Impacts" in Scott Cunningham & Manisha Shah, eds, *The Oxford Handbook of the Economics of Prostitution* (New York: Oxford University Press, 2016).

Van der Meulen, Emily, Elya M Durisin & Victoria Love, *Selling Sex: Experience, Advocacy, and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013).

SECONDARY MATERIAL: ELECTRONIC SOURCES

Benoit, Cecilia & Andrea Mellor, *A Brief to the Standing Committee on Justice and Human Rights House of Commons: Review of the* Protection of Communities and Exploited Persons Act (Victoria: Canadian Institute for Substance Use Research, 2022), online: <ourcommons.ca/Content/Committee/441/JUST/Brief/BR11602468/br-external/Jointly6-e.pdf>.

Canadian Alliance for Sex Work Law Reform, "About Us" (last visited 31 July 2024), online: <sexworklawreform.com>.

THE *BRIEF*

ISSUE I

The LEGAL ODYSSEY