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# MEMO

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**To:** You (counsel for the Respondents)

**From:** Senior Partner

**Date:** September 30, 2011

**Re:** *Canada v Bedford*

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We have been retained by Terri Jean Bedford, Amy Lebovitch and Valerie Scott to respond to the Crown's appeal of *Canada v Bedford* to the Supreme Moot Court of Dalhousie. I need you to write the factum and argue the appeal for me.

The appellant's factum is due on October 21, 2011. Counsel for the Crown will provide you with a copy of their factum, so that we'll have an opportunity to respond to it in our factum. I recommend that you begin researching and writing our factum before you receive the appellant's factum – you can always revise your draft to address any additional issues the appellant raises that you didn't anticipate.

Our factum is due on Friday, October 28, 2011 between 9:00 a.m. – 11:00 a.m. in Room 407. We must file three copies with the Court.

The appeal will be heard during the week of February 6-9, 2012. I am scheduled to be out of town for discoveries that week. You will need to check the Court's docket to determine the exact date and time of the appeal.

I've summarized the facts of the case below as found by the trial judge and set out the grounds of appeal to which we have to respond. Feel free to use any other facts mentioned in the lower courts' decisions, if you think they might be useful.

Good luck!

## Facts

Our clients are sex workers who brought a constitutional challenge to three of Canada's prostitution laws: sections 210, 212(1)(f) and 213(1)(c) of the *Criminal Code*. Section 210 criminalizes the keeping of a common bawdy house. Section 212(1)(f) addresses living on the avails of prostitution, while section 213(1)(c) criminalizes public communication for the purpose of prostitution.

Our clients argue that these laws prevent them from conducting their lawful business in a safe environment. They state that the bawdy house provision prevents them from operating indoors in an established location, which is significantly safer. They state that the living on the avails provision prevents them from hiring drivers, bodyguards, and managers who could help reduce the risk of violence to them. Finally, they state that the communication provision compels hasty decisions and prevents them from properly screening clients for violent propensities.

The Government of Canada argues that prostitution is an inherently high risk activity and that there is no reason to revisit the Supreme Court of Canada's decision in *Reference re ss.193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123 in which the Court dismissed constitutional challenges to the predecessor sections that have since become sections 210 and 213(1)(c) of the *Criminal Code*.

Our view is that developments over the past two decades (in particular, the Pickton case) have changed the landscape of prostitution in Canada, and that it is time to revisit the constitutionality of these provisions.

The trial judge's key factual findings can be found at paragraph 421 in her judgment:

1. Prostitutes, particularly those who work on the street, are at a high risk of being the victims of physical violence.
2. The risk that a prostitute will experience violence can be reduced in the following ways:
  - a. Working indoors is generally safer than working on the streets;
  - b. Working in close proximity to others, including paid security staff, can increase safety;
  - c. Taking the time to screen clients for intoxication or propensity to violence can increase safety;
  - d. Having a regular clientele can increase safety;
  - e. When a prostitute's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;
  - f. The use of drivers, receptionists and bodyguards can increase safety; and
  - g. Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring; financial negotiations done in advance can increase safety.
3. The bawdy-house provisions can place prostitutes in danger by preventing them from working in-call in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed circuit television and other monitoring.
4. The living on the avails of prostitution provision can make prostitutes more susceptible to violence by preventing them from legally hiring bodyguards or drivers while working. Without these supports, prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no

one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.

5. The communicating provision can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction.

The trial judge concluded that the effect of the impugned provisions was to require prostitutes to choose between their liberty interest and their own personal security. She found that the provisions violate section 7 of the *Charter* and cannot be saved by section 1. She further concluded that section 213(1)(c) (the communication provision) violates the freedom of expression guarantee in section 2(b) of the *Charter* and cannot be saved by section 1. As a result, she struck the word “prostitution” from the common bawdy house provision and struck down the other two provisions in their entirety.

The Ontario Court of Appeal dismissed the Crown’s appeal. The Crown appealed further to the Supreme Court of Canada. The Supreme Court of Canada also dismissed the Crown’s appeal, essentially on the same grounds as set out in the decision of the trial judge.

The Crown has now appealed to the Supreme Moot Court of Dalhousie. While the constitutionality of all three provisions remains at issue, we have divided the workload among several counsel. Your role will be to challenge only section 213(1)(c) of the *Criminal Code* (the communication provision). This section is challenged on both section 2(b) (freedom of expression) and section 7 (liberty and security of the person) grounds.

You should be aware that the Crown has conceded two points that will affect your argument of this case. First, the Crown conceded that section 213(1)(c) violates section 2(b) of the *Charter*, as found in the Supreme Court of Canada’s *Prostitution Reference* case. Second, the Crown conceded that if section 213(1)(c) violates section 7 of the *Charter*, it cannot be saved by section 1. As such, your argument on the first issue will relate only to section 7 of the *Charter* and your argument on the second issue will relate only to section 2(b) of the *Charter*.

### **First Issue:**

1. Does section 213(1)(c) of the *Criminal Code* violate section 7 of the *Charter*?

### **Second Issue:**

2. Given that section 213(1)(c) of the *Criminal Code* violates section 2(b) of the *Charter*, can it be saved by section 1?

### **Sources**

You will want to start by looking at the trial judge’s decision at 2010 ONSC 4264. There are a number of other related decisions, mostly relating to the Crown’s request for a stay pending the outcome of the appeal (which was granted). These will not be

particularly useful to you. The key point is that we were successful in obtaining a stay pending the outcome of the case at the Supreme Moot Court of Dalhousie.

(Note: We have assumed judgments at the Ontario Court of Appeal and Supreme Court of Canada for the purposes of this exercise. You will not be able to locate these judgments on the merits. This case was argued at the Ontario Court of Appeal in June 2011 and is currently pending decision there.)

The Supreme Moot Court of Dalhousie prefers that counsel cite only the most relevant cases and authorities. You may cite up to five cases on each issue, any relevant legislation you feel should be brought to the Court's attention, and up to two secondary sources (such as journal articles). Lower court decisions in this matter do not count towards the five-case limit.