Contrasting Legal Reforms Relating to Sex Work and Medical Assistance In Dying: Post Bedford and Carter

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Introduction

Two of the most anticipated and hotly debated Supreme Court decisions in the last few years are the cases of *Bedford v Canada* (released in December 2013), finding unconstitutional sections of the *Criminal Code* concerning activities relating to prostitution, or sex work[1] and *Carter v Canada* (released in February 2015), finding unconstitutional provisions of the *Criminal Code* prohibiting assisted suicide[2]. Both cases were unanimous rulings[3] of the Supreme Court of Canada that attracted substantial amounts of media coverage, in part because of the public perception that the cases represented a significant overturning of past precedents. The issues at stake in those cases are so vexed and complex, that further legal challenges have been initiated (against the post reform assisted dying legal regime)[4] or being considered (against the post reform legal regime covering prostitution).[5]

This paper undertakes to contrast the two cases, with a focus on two critical junctures, first the litigation process and outcome, and then the ensuing legal reforms. It would be easy to dismiss the project by insisting that the two social practices at the heart of the cases are simply too different, one dealing with sex work, and the other with what might be characterized as "assisted death work". Yet, there were overlapping themes between the cases, notably the issues of consent and concern for protection of vulnerable persons. Each case presented a fertile opportunity for jurisprudential reform, and both prompted legal reform on the part of the federal government. The evidence presented in both cases highlighted the impoverishment of criminal prohibitions at achieving harm reduction, yet the situation concerning sex work after legal reform post Bedford remained confined under the criminal law umbrella, while significant aspects of the social practice of medical assistance in dying after legal reform post Carter have migrated to intersect with a health law framework. My aim in this paper is to make the case that contrast can be especially fruitful, that there are intriguing commonalities, as well as highly instructive and revealing disparities.

In Part One, the focus is on a number of commonalities and quasi-similarities between the context and process for the Bedford and Carter litigation. These include: (1) persons litigating and their motivations; (2) role of lived experience testimony and social science data; (3) personalities of the judges hearing the cases and precedent; (4) developments in Charter jurisprudence concerning Section 7 of the Charter. In Part Two, the focus is on

the disparities between the types of legal reforms which were undertaken by government in the wake of the Supreme Court rulings in each case. To situate those reforms, there is discussion of contending narratives presented by the parties to litigation and the interveners for each case, and consideration of the policy options.

I. Commonalities and Quasi-Similarities Between the Litigation Contexts for Bedford and Carter

A number of intriguing commonalities can be revealed through examination of the contexts for litigation in the Bedford and Carter cases. A crucial dimension of the context for the litigation for both includes a previous ruling from the Supreme Court, upholding some of the challenged sections of the *Criminal Code*: the Prostitution Reference case from 1990[6], and the *Rodriguez v. Attorney-General of BC* case from 1993.[7] It is to be expected that although one was a reference case and one was an appeal judgment, Justice Susan Himel, of the Ontario Superior Court of Justice, and Justice Lynn Smith, of the British Columbia Supreme Court would have experienced the weight of precedent in a comparable way.[8]

That context provides a frame for the selection of the commonalities and quasi-similarities, the factors that present explanatory variables for the revision of the jurisprudence and reinterpretation of rights. Selected commonalities that will be explored here are: (1) persons litigating and their motivations; (2) role of lived experience testimony and social science data; (3) personalities of the judges hearing the cases and the role of precedent; and (4) developments in Charter jurisprudence concerning Section 7 of the Charter. These factors can help to explain how first the trial judges, and then the Supreme Court judges, in Bedford and Carter, came to the conclusion that the impugned sections of the *Criminal Code* were unconstitutional.

Persons Litigating: It is notable that women were central to the litigation dealing with assisted suicide/ medical assistance in dying (first, Sue Rodriguez, then Kay Carter and Gloria Taylor)[9], as well as the litigation dealing with prostitution (Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott). It is also striking that all of the litigants were motivated by their lived experiences. Gloria Taylor suffered from the same condition as did Sue Rodriguez, ALS.[10] Kathleen (Kay) Carter (in whose name the litigation proceeded), experienced a condition which caused her grievous and irremediable suffering.[11] Bedford's experience as a former professional dominatrix, and those of Scott and Lebovitch as sex workers, had significant impact on the development and articulation of the legal arguments they presented.

Lived Experience Testimony and Social Science Data: Lawyer Joseph Cheng has remarked that *Charter* cases challenge "our conventional notions of what should and should not be tried in a court of law … [as well as] our traditional conception of what kinds of evidence are put before the court" (Cheng, 2013: 2). It has become distinctive of Charter cases to incorporate social science evidence, and the two cases in focus here are exemplars of that development. What is considered to be social science evidence includes academic and scholarly articles, expert reports, government-commissioned studies, survey evidence, and more (Cheng, 2013: 3). Supreme Court judges have commented on the usefulness of such evidence about social, economic and political aspects of the issues at stake, particularly in constitutional cases.[12] As emphasized by Cheng (2013: 6), reliance upon and incorporation of social science evidence can help to enhance the legitimacy of the courts in their role as adjudicators, rather than crafters and creators of public policy.[13]

The Bedford trial, which took place over 7 days in Toronto, Ontario, during October 2009, generated a substantial evidentiary record.[14] The witnesses providing testimony included former prostitutes/ sex workers, police officers and numerous social science experts. The trial in the Carter case began in December 2011, and lasted for 21 days. The evidentiary record it generated was likewise impressively sizable.[15] The fields of expertise of the experts included gerontology, neurology, psychiatry, palliative care, and cardiology, as well as sociology, psychology, human rights, law, bioethics, and public health (BCSC, *Carter*, para. 160). Both judges needed to exercise considerable discernment in the face of substantial portions of the evidence provided by experts who had "entered the realm of advocacy" (ONSCJ, *Bedford*, para. 182).[16] The differences made by the content of the evidentiary record will be discussed below (in Part Two) in the context of exploring contending narratives, and the application of Section 7 jurisprudence.

Personalities and Precedent: The composition of the bench at the time of a court decision can be a highly significant catalyst for changes in jurisprudence.[17] Although an extensive examination is beyond the scope of the present work, it is worth making a few observations about the judges who were responsible for the ground breaking cases, at the trial and appeal levels. Along with the matter of who decided the cases, of great import is the existence of two prior Supreme Court cases serving as precedent. To begin with who decided, there was no overlap between the SCC judges who decided the Prostitution Reference case, and the SCC judges who decided Bedford.[18] The Supreme Court judges who heard the Carter case included only one judge, Chief Justice Beverly McLachlin, who had previously decided the Rodriguez case (as one of the dissenting judges).[19] Bedford was unanimous and authored by the Chief Justice, while Carter was unanimous and anonymous. The two trial judges for Bedford and Carter were both women: Justice

Susan Himel of the Ontario Superior Court of Justice, and Justice Lynn Smith of the British Columbia Supreme Court. [20]

Media coverage of, and scholarly commentary on, the Bedford and Carter cases have made much of the ostensible "overturning" of, or at least significant departure from, the precedent cases. The Supreme Court has itself recognized and articulated the need to balance certainty and correctness when it comes to approaching its own precedents. Justice Marshall Rothstein, in the case of *Ontario (Attorney General) v. Fraser* (2011) affirmed that in circumstances when adhering to a prior case would lead to unfairness, or when new reasons not previously considered have been advanced, there is justification for overruling a precedent. There were important and influential novel arguments developed in both the Bedford and Carter cases (discussed below in Part Two), and new evidence, that prompted the Supreme Court judges to reach a different result than in the Prostitution Reference[21] and Rodriguez cases.[22]

It is especially innovative for the trial judges to have been prepared to reach decisions that represented such significant revisiting of the prior cases, given the expectation on lower courts to follow the precedents of higher courts, and particularly, those coming from the pinnacle of the legal pyramid, the Supreme Court of Canada.[23] In the Ontario Court of Appeal, the judges upheld the reasoning of Justice Himel with respect to declaring unconstitutional two of the three challenged provisions, with a twist.[24] Three of the five judges insisted that the trial court was bound by the Prostitution Reference precedent (to the extent that it applied), and reversed the trial judge's finding on the third provision.[25] The British Columbia Court of Appeal, in a divided decision, reversed the findings of the triad judge in the Carter case, with the majority drawing upon the OCA decision in Bedford for the understanding of the impact of a Supreme Court precedent case for a trial judge.[26] Ultimately, the Supreme Court, in its final determination of the Bedford case, supported the capacity of a trial judge to reconsider settled rulings of higher courts, when and where: "(1) a new legal issue is raised [or] (2) … there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate"." (SCC, Bedford, para. 44)

Both trial judges, resourced with a comprehensive, extensive and fertile evidentiary record, were able to support their reinterpretations of rights in the context of the developments in Section 7 jurisprudence (discussed just below).[27] The Bedford and Carter trial decisions were framed by the trial judges as eminently reasonable and justifiable responses to the availability of social scientific evidence that had not been previously available, to novel testimony, and to innovative legal arguments presented by the litigants. The judicial innovation of the two trial judges connects the previous factor

discussed above - the incorporation of social science evidence - with the next factor, which focuses on developments in Section 7 jurisprudence.

Developments in Section 7 Jurisprudence: Having canvassed some of the central extra-jurisprudential factors at play in the cases, it is now opportune to shift to the jurisprudential underpinning for both cases.

Context of Charter jurisprudence: The first stage, or phase of a Charter case is the judicial determination of whether the impugned legal provisions do infringe upon a Charter protected right. In both Bedford and Carter, the challenged sections of the *Criminal Code* were charged with infringing Section 7, which protects the right to life, liberty and the security of the person.[28] Those rights can only be infringed if doing so is in accordance with the principles of fundamental justice, and if the infringement is a reasonable limit, under Section 1 of the Charter.

Judicial analysis under Section 7 consists of a two stage process.[29] The challenger of a law must first convince the court that the impugned law infringes, restricts, or imposes limits on the individual's life, liberty or security of the person. Then, after finding there is a rights infringement under Section 7, the judges must find that the infringement is contrary to the principles of fundamental justice, in order for the challenged law to be held to be an infringement of Section 7. The jurisprudence concerning the second stage of Section 7, relating to principles of fundamental justice, can be complex.

In the trial decision for Bedford, Justice Himel provided an encapsulation of the principles of fundamental justice:

- Laws must not arbitrarily deprive individuals of their protected rights.
- Laws must not be broader than necessary to accomplish their purposes.
- The harmful effects of a law must not be grossly disproportionate to the benefits to be gained.
- The state must legislate in accordance with the rule of law.

The principles of fundamental justice, wrote Chief Justice McLachlin, are "concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values" (SCC, *Bedford*, para. 96).

The Supreme Court judgment in *Bedford* was welcomed by legal scholars for its discussion of how to distinguish between norms relating to arbitrariness, overbreadth and gross disproportionality (as components of the fundamental principles of justice), even if that discussion was perhaps not as fulsome as it might have been (SCC, *Bedford*, paras.

95-123).[30] The decision was also appreciated for attempts to differentiate between Section 7 analysis and Section 1 analysis, a complicated matter in *Charter* jurisprudence (SCC, *Bedford*, paras. 124-129).

Charter rights and freedoms, including Section 7, can be infringed through "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (the wording of Section 1, known as the "reasonable limits" clause). Once there has been a finding that the targeted law does infringe a *Charter* protected right, then the analysis moves on to the next stage, or phase, of Charter jurisprudence which contains several steps or elements (known as the Oakes test). The goal is to determine whether the infringement is or is not a reasonable limit, i.e., whether the law that infringes can be justified and held to be constitutionally sound, or whether it is unconstitutional.

The elements of the Oakes test include: (i) a pressing and substantial objective; (ii) rational connection between the means chosen to achieve the objective (i.e.,) the right-infringement and the legislative goal(s) or purpose(s); (iii) minimal impairment of the right; and (iv) proportionality between the salutary effects of achieving the objective and the deleterious effects of the right-infringement. Another way of characterizing the fourth aspect is that the means chosen to realize the legislative objective must be proportionate to the end that is sought. It is the responsibility of government to establish the objective of the law, providing evidence to that purpose. Once the objective has been identified and elaborated, judicial interpretation ensues to determine whether the infringement of the Charter right(s) can pass the test, in order to be deemed a reasonable limit.

The specific applications of the Section 7 jurisprudence are the focus of Part Two, along with the consideration of policy options for sex work and for medical assistance in dying.

II. Contending Narratives and Policy Options for Legal Reform Post Litigation:

Throughout Part One, at each point of contrast, I have led with the Bedford case, and then followed with the Carter case. That sequencing had the attraction of reflecting the chronology (the Prostitution Reference came before the Rodriguez case, and the Bedford case came before the Carter case). It also made good sense for specifically focusing on the litigation process, given the way that the trial judge's decision in the Bedford case provided a model for the trial judge in Carter, and the way that the Ontario Court of Appeal decision (in Bedford) influenced the reasoning of the British Columbia Court of Appeal (in Carter), particularly with respect to the issue of precedent.

Here, in Part Two, the focus will shift to analyze the contending narratives presented in each case, followed by a brief survey of the policy options for legal reform, finishing

with the striking contrast between the legal developments post SCC decisions. In this part of the paper, it will be more apropos to reverse the sequence, to examine the Carter case first this time, followed by the Bedford case. One rationale for doing so is that the Supreme Court's decision in the Carter case represents an even more decisive, definitive, and determinative reinterpretation of the relevant law than the Bedford decision. Another rationale is that the legal reforms that came into effect after the Carter case (though Bill C-14) came closer to reflecting the demands, and fulfilling the expectations of the litigants than after Bedford (through Bill C-36). Although there was still a gap after Carter, it was not such a significant gap as after Bedford. In this respect, at least, the Carter litigation and its aftermath provide a sort of model for what was missing after the Bedford litigation.

Litigation relating to contested social practices (such as medical assistance in dying and sex work) can be characterized as a contest of contending narratives. I begin with the contending narratives in Rodriguez and Carter, which offer competing accounts of consent and capacity, and competing remedies for the problem of protecting vulnerable persons from harm.

Contending Narratives in Rodriguez and Carter:
Rationales articulated by the federal government in support of the blanket ban on assisted suicide relied heavily upon the perspective of paternalism. The purpose of the law was to prevent "vulnerable persons from being induced to commit suicide at a moment of weakness" or to "take their own lives in times of weakness" (SCC, Carter, para. 78; para. 99). The acts comprising medical assistance in dying (MAID), or physician-assisted dying/ death (PAD) were characterized as acts of suicide, and requests for those services as a form of suicidal ideation. The larger story that the government tried to tell with its experts raised questions about the legitimacy of consent to physician-assisted dying (PAD) or medical assistance in dying (MAID). Experts testified to the need to protect persons who were motivated by depression or other psychiatric conditions from precipitous, and less-than-autonomous demands for assistance in suicide. It was argued that patients asking for PAD or MAID merited "mental health intervention rather than hastened death" (Karsoho et. al., 2016: 6).

The rights-claimants and their preferred experts told a very different story. The gist of Sue Rodriguez's quest for justice is captured in these poignant questions: "Whose body is this? Who owns my life?"[31] She expressed genuine puzzlement at the paradox that it was illegal for someone to help her do what it was legal for her to do on her own, although she was not physically capable of doing so, i.e., ending her own life.[32] She insisted that the denial of assistance in dying forced persons *in extremis* to endure prolonged and protracted physical and psychological suffering.

The litigants sought to counter the government's narrative with assertion of the rationality of requests for MAID/ PAD, and the capability of health care professionals to properly distinguish when patients' requests were motivated by proper reasoning. Patient testimony reinforced a narrative that has become ubiquitous in the digital age online and in social media: the representation of requests for MAID/ PAD as voluntary, rational, and in keeping with a person's life-long values and goals. In Canada, as elsewhere, there has been a flow of testimonials from individuals with "strong and vivid personalities characterized by determination", persons with "unusually fervent desire[s] to control the timing and manner of death to avoid dependence on others" (Karsoho et. al. 2016: 6, citing an affidavit).[33] Their experts could rely upon experience in assessing cognitive capacity in the context of ascertaining medical decision-making capacity, rather than simply experience with suicide prevention. [34]

One particular argument presented by the litigants, and supported by testimonials, was entirely novel for Carter; it had not been considered in the Rodriguez case. The argument related to the impact of the law in generating a risk of motivation for premature suicide. The concern was that individuals would be motivated to engage in suicide while they had the capacity to end their lives without assistance. It proved to be highly persuasive for the trial judge and the Supreme Court judges in the Carter case. Gloria Taylor described a "cruel choice" that she faced. Lacking financial resources to travel to Switzerland (where assisted suicide is legal and available to non-residents), she faced the choice between "killing herself while she was still physically capable of doing so, or giving up the ability to exercise any control over the manner and timing of her death" (SCC, *Carter*, para. 13). Witness testimony/ affidavit evidence supported Gloria Taylor's claims about the risk of premature suicide and the jeopardy faced by families, spouses and loved ones if they helped them – the risk of prosecution (SCC, *Carter*, paras. 15, 16, and 57-58). In one Statement submitted during the original trial, a couple recounted that: "[w]e both face this reality, that we have only two terrible and imperfect options, with a sense of horror and loathing…" (SCC, *Carter*, para. 16)

Section 7 Analysis

The significant shift between the Rodriguez and Carter cases is reflected in the Supreme Court's finding that all three portions of Section 7 – life, liberty, and security of the person – were infringed by the *Criminal Code* provisions prohibited assisted suicide.

Life: The SCC judges affirmed the trial judge's reasoning that the right to life is engaged when there is a threat, or increased risk of death, that is a result of government actions or laws, or where the law or state action "imposes death, or an increased risk of death on a

person, either directly or indirectly" (SCC, Carter, para. 62). The right to life was understood to encompass the right not to die (BCSC, *Carter*, para. 1332; SCC *Carter,* paras. 61 and 62). Yet, the right to life does not entail that an individual cannot waive their right to life; it must be understood to include an individual's power, capacity and authority to waive the right. If that was the case, then the law would be creating a "duty to live". Such a duty, emphasized the SCC judges, would call into question the legality of consent to withdrawal of treatment, or refusal of lifesaving or life-sustaining treatment, which is well recognized and well established in Canadian law (SCC, *Carter,* para. 63).

The Trial Court Judge, Justice Smith, rejected a quality of life perspective in the characterization of the right to life. Justice Smith argued that the Right to Life does not include the right to die with dignity. The Supreme Court judges followed that interpretation, and observed that "concerns about autonomy and quality of life have traditionally been treated as liberty and security rights" (SCC, *Carter,* para. 62). The Supreme Court, in Carter, recognized that sanctity of life is one of our society's most fundamental values. Section 7, the judges stated, is rooted in profound respect for the value of human life**.** But, Section 7 also encompasses liberty and security of the person during the passage to death. Echoing the dissent in Rodriguez, the judges held that Sanctity of life is "no longer seen to require that all human life be preserved at all costs" (SCC, *Carter*, para. 63; SCC, *Rodriguez*, page 595).

Liberty and **Security of the Person**[35]: The Supreme Court judges, in Carter, affirmed the portions of the Trial Court Ruling concerning liberty and security of the person. The judges found that the criminal prohibition of physician-assisted dying infringes on liberty**.** The right to liberty, wrote the judges, means the "right to non-interference by the state with fundamentally important and personal medical decision-making (BCSC, *Carter*, para. 1302; SCC, *Carter*, para. 30). By interfering with the ability of grievously ill individuals to "make decisions concerning their bodily integrity and medical care", the law infringes on liberty (SCC, *Carter*, para. 66).

Security of the person comprises "a notion of personal autonomy involving … control over one's bodily integrity free from state interference … and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering" (SCC, *Carter*, para. 64). "An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy" (SCC, *Carter*, para. 66). Crucial choices about the end of life, the trial judge had stated, concern one's "life long values" and reflect one's life experiences (BCSC, *Carter*, para. 1326). The law impinged on the individual's security of the person by interfering with their ability to live, and die in accordance with their values, purposes, and goals.

Principles of Fundamental Justice: The trial judge had invoked the specific principles of overbreadth and gross proportionality as dimensions of fundamental justice that had not been considered in the Rodriguez case. According to the trial judge, the challenged *Criminal Code* provisions did not comport with either of those. The Supreme Court narrowed its focus to only the first of those, finding that the blanket prohibition of assisted suicide was overbroad.[36] The SCC judges held that the law went too far in its goal of protecting vulnerable persons from committing suicide. In preventing persons who are "competent, fully informed, and free from coercion and duress" in accessing assistance with the end of life, it suffered from overreach (SCC, *Carter*, para. 86).

A further issue which was the subject of expert witness testimony, and which has generated considerable debate in the scholarly literature is the potential for abuse in permissive regimes.[37] In particular, some researchers have reported that they have uncovered instances of Life-Ending Acts Without Explicit Request of Patients (LAWERs) (see Karsoho et. al., 2016). Defenders of continuation of the blanket ban insist that decriminalization would exacerbate the risk of abuse, by providing, in effect a "legal fig leaf" for getting away with murder (Karsoho et. al, 2016: 10). By contrast, the advocates for decriminalization insist that careful design and robust enforcement of safeguards, in the context of a permissive regime, could and would be sufficient to protect vulnerable persons from the risk of abuse.

Reasonable Limit: The blanket prohibition of access to physician assisted death (PAD) was found not to be a reasonable limit, due to failing to be "minimally impairing". In Rodriguez, the majority judges had been convinced that there was a "substantial consensus in Western countries that a blanket prohibition [against assisted suicide] is necessary" to protect vulnerable persons (SCC, *Carter*, para. 47). The evidence that had been provided to the trial court about the safeguards in place in "permissive regimes" demonstrated that the state could protect vulnerable persons from abuse and error, without unjustifiably infringing on the rights of the nonvulnerable who do not need such protection (SCC, *Carter*, para. 105).

The key passage from the ruling, with respect to direction for legal reform is this one:

> "[Sections 241 (b) and 14 of the *Criminal Code*] are void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition" (SCC, *Carter*, para. 127).[38]

There are a few highlights of key differences between the ruling of the Supreme Court in the Rodriguez case and the Carter case, with respect to Section 7.[39] The majority judges in Rodriguez found that the blanket prohibition of assisted suicide was an infringement of Section 7, with a predominant focus on the right to security of the person, and some focus on liberty (the right to life was not considered in the context). Yet the majority judges held that the infringement was in accordance with the principles of fundamental justice. The majority in Rodriguez thus did not need to undertake a Section 1 analysis, because the infringement of rights was justified within the parameters of Section 7 itself. By contrast, the trial court judge and the Supreme Court judges echoed and expanded upon the reasoning of one of the dissenting opinions in Rodriguez, that of Justices McLachlin and L'Heureux-Dube. The trial judge and Supreme Court judges, in Carter, found that the *Criminal Code* provisions being challenged infringed every portion of the right to life, liberty, and that the infringement did not comply with the principles of fundamental justice, specifically for the Supreme Court, the norm against overbreadth. [For the trial judge, there was also a failure to comply with the norm against gross proportionality.]

The infringement of Section 7 was irredeemable for the judges in Carter; it failed to be a minimal impairment. In the Carter case, the evidentiary record contained sufficient empirical support for the assurance that a permissive regime could be implemented and operationalized to avoid excessive impairment.

Policy Options for Medical Assistance in Dying

(1) Blanket Prohibition, Criminal Prohibition of Assisted Suicide, with no exceptions
The federal government's stance throughout the Carter litigation was as it had been throughout the Rodriguez litigation: a defence of the status quo.

(2) Decriminalization and Regulation of Medical Assistance in Dying
The rights-claimants pursuit of litigation, throughout Rodriguez and Carter, was in pursuit of this policy option.

There are then several more finely-grained policy options that arise when decriminalization is the pathway for legal reform.

(2A) Decriminalization and Regulation of Medical Assistance in Dying for adults (18 years of age and older) who fulfill specified critieria: (i) they have a grievous and irremediable medical condition*; (ii) they have made a voluntary request for medical assistance (a decision that was not made as a result of external pressure); (iii) they have given their informed consent**.

*A grievous and irremediable medical condition is defined as a serious incurable illness, disease or disability, and specifically a condition for which natural death has become reasonably forseeable, and that causes the person physical and psychological suffering that is intolerable, and that cannot be relieved in any way that would be acceptable to that person.
Principle of Informed Consent: Every mentally competent patient has the right to determine what shall be done with their body, and to give or refuse consent to medical treatment. Informed consent consists of knowledge, appreciation and understanding of: (i) expected **benefits of medical treatment; (ii) anticipated **risks** of medical treatment; (iii) alternatives; and (iv) **likely outcome or consequences** of non-treatment. This knowledge is in addition to information about the diagnosis and prognosis relating to a patient's condition.

(2B) Further Expansions of Medical Assistance in Dying, to Mature Minors, and/ or
(2C) Further Expansions of Medical Assistance in Dying to persons who are suffering from mental illnesses, or severe mental health conditions.

Legal Developments Post Carter

With the passage of Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), policy option 2A became the law in Canada.[40] A fundamental assumption underpinning legislative reform is that at least some persons who request medical assistance in dying will be found to be eligible (and thus Section 14 will not apply to them). The law now reflects an acceptance of the notion that authentic, nonambiguous, voluntary, informed consent to MAID is possible. The government's choice of policy options is in keeping with the core themes of the Carter litigation concerning the possibility of consent to MAID, and the prospect of being able to protect vulnerable persons from the risk of harm.

Continuing debate surrounds the specifics of the criteria for eligibility. Sue Rodriguez and Gloria Taylor would both have satisfied the existing criteria for eligibility for MAID. Yet, Kay Carter would not have.[41] Advocates for more expansive access to MAID have already launched litigation (*Lamb v. Canada*). The litigants insist that outstanding "Charter" infringements necessitate further litigation, because of the gap between their interpretation of the Supreme Court ruling and the law after amendment. Their claims of infringement, intersecting with assertions of discrimination, can be expected to be based on factors of age, ability and capacity.

In the meanwhile, there is the potential for there to be further legislative reform in the future. A parliamentary report titled "Medical Assistance in Dying: A Patient-Centred

Approach" recommended a two-phased approach to implementation of MAID (see Special Joint Committee, 2016). The first phase should be restricted to adults 18 years and over, with the potential for there to be an expansion to mature minors after three years of study and consideration (for a selective sample of views on that prospect, see Davies, 2018; IRIS, 2017; Vogel, 2017).

While some litigants and their allies insist that eligibility criteria for access to MAID need to be expanded even further, it is beyond doubt that the legal reforms went, from their perspective, in the right direction: decriminalization and regulation. For the litigants in Bedford and their allies, the legal reforms that ensued after the SCC ruling went in completely the wrong direction: alternative criminalization. To appreciate how and why there is such a profound gap between expectations and achievement, it is crucial to examine the contending narratives in the Bedford litigation, followed by overview of the policy options.

Contending Narratives Prostitution Reference and Bedford:
Several themes of the contending narratives in Bedford resonant with those in Carter, but there is an additional goal for the law that is distinctive for the litigation relating to prostitution.[42] The government focused on consent in the context of the choice to participate in the social practice of prostitution, and the need to protect vulnerable persons. But it also placed much emphasis on the need to protect the public from the "nuisance factor" of prostitution.

The Attorneys General for Canada and for Ontario claimed that "it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face" (SCC, *Bedford*, para. 73).[43] The government insisted that prostitution is inherently violent, regardless of the legal regime in place or where it is practiced (ONSC, *Bedford*, para. 344).[44] Construing prostitution as a "lifestyle choice", lawyers for the government relied upon the case of *R. v. Malmo-Levine* to argue that lifestyle choices are not constitutionally protected (SCC, *Bedford*, para. 82). The government is entitled to legislate "as it sees fit", and to target the significant risks for individuals and harms to society.

In addition to denying that there was sufficient causal connection between the law and harms suffered by persons working in prostitution, the government called for deference to government policy decision-making authority. Drawing upon the association of prostitution with drug addiction, organized crime, and human trafficking in the context of the globalization of the sex industry, the government lawyers argued that Parliament has made difficult choices and decided to criminalize the most *harmful* and the most *public* aspects of prostitution.

The rights-claimants in the Bedford case would echo Sue Rodriguez's pointed question: "Whose body is it?" In public presentations of the motivation for challenging the criminal prohibitions relating to prostitution, Valerie Scott has spoken about sex workers being "regular human beings who do ordinary, everyday things", and find themselves forced to fight to "have our voices heard, … to choose our careers and carry out our jobs".[45] There is a sense that the litigants, and their lawyers, assumed the backdrop of liberal individualism, in which consenting individuals choose to engage in market transactions, and are able to negotiate and reach (with their clients) mutually agreeable exchanges of sexual services for financial remuneration.[46] While recognizing that there are considerable risks involved with sex work (particularly from sexual predators), the rights-claimants aspired to present sex workers as akin to independent contractors, who have a customer base, who give consideration to meeting the needs of their customers, and endeavour to cultivate loyalty on the part of good customers, and who desire to facilitate a fair exchange of services for monetary compensation (Scott, 2015).

A considerable portion of the evidence, and the legal analysis, was devoted to delineating the conditions of work for sex workers, differentiating between (i) working "in call", where clients attend at a fixed indoor location, such as a prostitute's own home, or a massage parlour; (ii) working "out call", where prostitutes meet clients at different locations such as hotel rooms or clients' homes; and (iii) street work.[47] The rights-claimants stressed the many ways that the criminal prohibitions increase the risk factors for participating in sex work, particularly for those involved in street prostitution. The Supreme Court judges summarized the gist of the overall argument in this passage:

> "[The *Criminal Code* prohibitions] do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks."[48] (SCC, *Bedford*, para. 60)

Ultimately, the rights-claimants expressed the belief that if the targeted criminal prohibitions were removed, that sex workers could get on with doing their jobs, less precipitously and more safely.

In a parallel to the Carter litigation, the rights-claimants in Bedford have pointed to jurisdictions in which more "permissive regimes" have been implemented, and held those up as models for Canada to consider emulating.[49]

Section 7 Analysis

All the judges at every stage of the litigation found Section 7 interests were engaged by the criminal prohibitions of bawdy houses, living on the avails and communicating in public for the purposes of prostitution. The Supreme Court judges drew upon existing jurisprudence to dismiss the claim of government that there was insufficient causal connection between the law and harms experienced by sex workers.[50]

The Supreme Court judges distinguished between three distinct meanings of the concept of "causal connection": (i) sufficient causal connection (the approach favoured by the trial court judge in the Ontario Superior Court of Justice); (ii) a general impact approach (adopted by the Ontario Court of Appeal); and (iii) causal connection as "active, foreseeable and direct" (the approach promoted by the Attorney General of Canada) (SCC, *Bedford*, para. 74). The government had linked their approach to causation to claims about the responsibility of prostitutes for their choice to engage in the sex trade, and the role of third parties as agents of harm, i.e., the johns who abuse prostitutes and pimps who exploit them (SCC, *Bedford*, para. 84). Ultimately, the Supreme Court judges rejected the government's proposal for a more stringent conceptualization of causation, and instead affirmed the approach adopted by the trial judge: the sufficient causal connection standard. The Supreme Court judges insisted that case law supported their choice, and that it represents a fair and workable threshold (SCC, *Bedford*, para. 78). The litigants needed to establish that there is a sufficient causal connection between the law and the deprivation of their security of the person, and then to show that the deprivation was not in accordance with the principles of fundamental justice.

Liberty and Security of the Person: The trial judge held that the *Criminal Code* provisions being challenged infringed both the liberty and security of the person dimensions of Section 7. The infringement of liberty arose from the potential for imprisonment, whereas the increased risk of harm due to the intersection of the three sections working in tandem jeopardized security of the person. The three *Criminal Code* provisions working together, Justice Himel stressed, compelled prostitutes to choose between their liberty interest and their own personal security.

In the Supreme Court's reasoning, by contrast, the focus was narrowed to the security of the person issue. The rationales for that narrowing were articulated by Chief Justice McLachlin as follows:

> "First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that

> any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person." (SCC, *Bedford*, footnote)

With the understanding of sufficient causal connection in mind, the SCC judges readily found that the interaction and intersection of the three challenged *Criminal Code* provisions infringed security of the person for sex workers.[51]

One of the most intriguing and stimulating passages in the Supreme Court's Bedford decision, conceptually, is that dealing with the "constrained context of choice" to engage in sex work. The distinction is drawn between those who freely choose to engage in prostitution and those whose participation is less than fully voluntary. Selections from that passage are worth quoting:

> "… while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so…. As the [trial] judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice …. these are not people who can be said to be truly "choosing" a risky line of business (SCC, *Bedford*, para. 86).

With the specter of functionally nonconsenting participants is raised a serious concern about the need for protection of vulnerable persons from the risks of harm from engaging in such potentially "risky work". This concern is one that will play a prominent role in the discussion of policy options below.

Principles of Fundamental Justice: Justice Himel reasoned that the prohibition of bawdy houses (Section 210) 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" (ONSC, *Bedford*, para. 421). The bawdy house provision was overbroad; it restricted liberty and security more than necessary to achieve the legislative goal (ONSC, *Bedford*, para. 401). The bawdy house provision was also grossly disproportionate to the legislative objective (ONSC, *Bedford*, para. 428).

The living on the avails provision (Section 212) could increase susceptibility to violence by prohibiting the hiring of bodyguards or drivers. It was, Justice Himel found, arbitrary, overbroad and grossly disproportionate (summarized in SCC, *Bedford*, para. 21). Its target was abusive and exploitative, or parasitic relationships with pimps, and yet the provision captured non-exploitative arrangements and prohibited those as well, making it overbroad (ONSC, *Bedford*, para. 402). Contrary to its supposed purposes, the provision increased the risks of severe violence from pimps and exploiters, making it grossly disproportionate to its legislative objective (ONSC, *Bedford*, para. 431).

Justice Himel devoted considerable attention to the issues concerning Section 213, or the communicating in public for the purposes of prostitution (ONSC, *Bedford*, paras. 403-410, and 449 - 472). This is a striking contrast to the judges of the Supreme Court. Justice Himel rationalized that the reason for departing from the precedent case on the specific issues concerning freedom of expression was that the type of expression at issue differed. Justice Himel offered a different characterization of the speech at issue. Rather than the speech being just for a commercial purpose (as the majority of the SCC in the *Prostitution Reference* case determined), the speech involved in prostitution also concerned liberty and security of the person. The speech being constrained by the *Criminal Code* provision was speech that was directed at *safely* exchanging sexual services for payment, and that contributed substantially to reducing the risk of harm to prostitutes.

Ultimately, Justice Himel, drawing upon the dissenting judges' reasoning in the *Prostitution Reference* case, found that the prohibition on communicating in public for the purposes of prostitution was, in a sense, overbroad and definitively grossly disproportionate (ONSC, *Bedford*, paras. 410, 434). It went further than needed in order to achieve the legislative objective of eliminating social nuisance.

It is interesting to note that the Supreme Court declined to address the question of whether the communication provision is or is not a justified limit on freedom of expression (Section 2(b) of the *Charter*). The Supreme Court judges did not endorse the trial judge's analysis of the freedom of expression issues, stating that the attempt at re-characterization did not convert the argument into a new legal issue. According to the Supreme Court judges, the evidentiary record that the trial judge had placed such emphasis on did not alter the parameters of the debate concerning freedom of expression (SCC, *Bedford*, para. 46). The Supreme Court judges elected to bypass the issue of revisiting the precedent, by simply asserting that "it is not necessary to determine whether this Court can depart from its s. 2(b) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds" (SCC, *Bedford*, para. 47, 160).

Justice Himel found that the three impugned provisions "acting in concert" infringed Section 7 rights arbitrarily, that there was no rational connection between the legislative goals and the provisions, and that the provisions were inconsistent with the objectives of the law (ONSC, *Bedford*, para. 388). The Supreme Court judges held that the harmful effects of the bawdy house provision on the safety of sex workers were grossly disproportionate to the purpose of preventing public nuisance (SCC, *Bedford,* paras. 131, 134-146). The bawdy house provision put legal barriers in the way of sex workers setting up safe houses.[52] The communicating in public for the purposes of prostitution was likewise found to be a grossly disproportionate response to the potential for public nuisance posed by street prostitution. (SCC, *Bedford,* para. 159). Communication is an essential means for sex workers to reduce the risks of their work.[53] The living on the avails provision suffered from overbreadth, since it did not distinguish between those who did actually exploit sex workers and those who would instead be able to contribute to their safety and security (SCC, *Bedford*, para. 142).

Reasonable Limit: The discussion of Section 1 by the Supreme Court judges was remarkably condensed. They observed that only the lawyers for the Attorney General of Canada even addressed the potential for Section 1 to justify infringement of Section 7, and then very briefly. The federal government had argued that it could be difficult to specifically and effectively identify exploitative relationships, and thus the law, specifically the "living on the avails" provision, needed to be drafted broadly to be sure to capture those that are exploitative. [54] The broad ambit of the provision, however, also caught non-exploitative relationships in its net. Ultimately, the broad scope of the law prevented prostitutes from taking measures to reduce the risks and increase their safety. The Supreme Court judges held, succinctly and pointedly, that the law was not minimally impairing, and that the deleterious effects of the law outweighed its positive effects.

Policy Options for Sex Work

(IA) **Selective Criminal Prohibition of Activities Relating to Adult Prostitution**. On this approach, the criminal law is used to prohibit a selection of activities by adults relating to prostitution. In Canada, under the former legal regime, there were criminal prohibitions relating to bawdy houses, communicating in public (for the purposes of exchanging sex for money), and living on the avails of prostitution (also known as procuring or pimping). Some jurisdictions have chosen to criminalize the selling of sex, while others criminalize both selling and purchasing.

(IB) **Alternative Criminalization Approach, or the Nordic Model**. Within the broad umbrella of criminalization options is the specific option known as the Nordic model, and

sometimes simply the Swedish Model. It is so called due to its origins in Scandanavian countries, beginning in Sweden, and then followed by Norway and Iceland. The Nordic Model consists of advocacy of a set of laws and policies that penalize demand for commercial sex, while decriminalizing the activities of individuals involved in meeting that demand. In its more robust versions, the model has a strong focus on providing persons working in sex trade with support of social services, including help for exit from prostitution. Supporters have characterized it as a Victim-Centred, Human Rights approach.

(2) **Controlled Legalization, with Licensing and Regulation**. This option provides for regulated legalization of the adult sex trade, with restrictions on where and when, and who takes part. Regulation can be combined with licensing of sex trade workers, providing for potential for oversight by public health authorities and testing or screening (i.e., health tests and drug tests) for public health purposes. In some such schemes, the fees for licensing could cover the costs of the application and oversight processes, making for "cost recovery". Legalization presents opportunities for governments to garner tax revenue from the sex trade.

(3) **Outright Legalization of Sex Trade**, for adults. This approach is sometimes viewed as a "libertarian" type of view, although there is considerable diversity and range of perspectives that can support this policy option. Generally, it would involve minimal regulation by government for activities involving adults, and potential for maximal market freedom. This position is sometimes referred to as "normalization" of sex work as just another ordinary job. It could be expected, then, to be accompanied by the application of the usual laws and regulations that deal with workplace health and safety and employment standards for any other type of legal employment.

The rights-claimants in Rodriguez and Carter were seeking decriminalization and regulation, the hallmarks of a permissive regime for access to medical assistance in dying. That is the core of the legal reforms that are in place post Carter, with the potential for there to be further expansions of access in the future. The rights-claimants in Bedford were also seeking decriminalization, in the first instance, within an indeterminate or unregulated (other than age parameters) market for sexual services. What ensued was far from what they envisaged when they launched their litigation.

Legal Developments Post Bedford

The federal government developed and pursued legal reform through the vehicle of Bill C-36, titled An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General v. Bedford and to make consequential amendments

to other Acts. The alternative title was "Protection of Communities and Exploited Persons Act". In it, the focus was shifted from "living on the avails of prostitution" (former Section 212 (1) (j)) to "receiving a material benefit from the sexual services of an adult".[55] The procuring section (former Section 212 (1)) was reframed as its own offence distinct from "receiving a material benefit", with an increased maximal penalty.[56]

The characterization of the offence of keeping a bawdy house no longer contains the phrase "for the purpose of prostitution" (or a definition of prostitution in that context), and is now focused on places in which "acts of indecency" occur.[57] The new replacement for the communicating in public provision (former Section 213 (1) (c) is now more carefully circumscribed to specify where is off limits.[58] It is notable that the new provision targets only the activities of persons selling sex in those off limits spaces (next to school grounds, playgrounds or daycare centres).[59]

Reflecting legislative innovation were two additional sections with no counterpart in the criminal law previously. One dealt with advertising of sexual services.[60] The other is the most dramatic departure from the previous legal regime, under which neither the selling nor the purchasing of sexual services had been illegal, is the provision that turns buy sexual services into a criminal office.[61] Another provision ensures immunity for prosecution for engaging in otherwise prohibited activities in relation to "one's own sexual services".[62]

Conclusion

Both Bedford and Carter cases highlight the impoverishment of criminal prohibitions at achieving harm reduction, but the situation post Bedford remained confined under the criminal law umbrella, while that post Carter migrated to intersect with a health law framework. Crucial questions arise from a contrast between the legal reforms precipitated by the Supreme Court decisions. Why would one set of litigants, and those who are similarly situated to them, have good reason to think that litigation was a success (for the Carter case), while the other perceives there is cause for serious disappointment? How is it that, despite substantial commonalities between the role of lived experience, the evolving jurisprudence, and the shared narrative of constitutional protections for individual rights to autonomy and self-determination, the outcomes differed significantly?

Further exploration of the contrasting contexts for legal reform is warranted. For reasons of space and scope, I can only briefly mention some lines of inquiry that could be fruitful in future investigations and analyses. One striking dissimilarity is the trajectory of legal reform relating to assisted suicide. There was a decided momentum towards reform,

which can be illustrated by the findings of the Senate Special Committee on Euthanasia and Assisted Suicide (1985), the Provincial-Territorial Expert Advisory Group on Physician-Assisted Dying (2015), the Quebec National Assembly's Select Committee on Dying With Dignity, as well as the number of private member's bills introduced by MPs and Senators that related to end-of-life issues and assisted death between 1991 and 2014 (see Butler and Tiedemann, 2015: 15, note 32 for a list).

By contrast, the pathway for legal reforms concerning the social practice of prostitution has not evidenced a linear, progression towards decriminalization (see the Chronology in Robertson, 2003, for elaboration). It would be easy, but perhaps too simple, to point to the difference of which political party was in power during the respective time frames for legal reform.[63] It is unclear at the present time whether, and if so when, the government currently in power, will commit to pursuing decriminalization for sex work.[64]

It is also worth keeping in mind the differences in social location and group identities of the rights-claimants and their relations with others. In Carter, the rights-claimants would themselves be the intended recipients of the health care services they wanted to access. They were seeking the right to access those services from willing health care providers in the context of a pre-existing framework of doctor-patients. That framework includes a regulatory infrastructure that relies upon norms of professional practice health care providers are expected to adhere to, uphold and fulfil. Those norms arise from the nature of the physician-patient relationship and include requirements that physicians: respect patient dignity, ensure access to care, and protect patient safety (see, for example, CPSO, 2008/ 2015). There is a presumption that doctors asked to provide MAID will do so in keeping with the best interests of the patients.[65]

By contrast, the rights-claimants in Bedford were service providers (either in the past or still); their pursuit of justice was in the name of liberty. Their clientele are diffuse and disparate, ranging from persons with disabilities (see Fritsch et. al., 2016; Thomsen, 2015) to sexual predators. Commentators on the Bedford case have expressed disappointment that the legal analysis did not incorporate express and explicit consideration of the "gendered and racialized nature" of the harms (Koshan, 2013: 4). In effect, the call is to view the liberty interests at stake through the lens of equality. Doing so can be expected to significantly complicate the policy debates. Even the most cursory exploration of the vast literature debating the social practice of prostitution/ sex work reveals protracted and persistent disagreement between and among liberal theorists, feminists, and others about the fundamentals.[66] The most basic of claims are deeply contested: that women can freely, voluntarily, nonambivalently consent to the exchange of sexual services for financial compensation in the context of capitalism and patriarchy;

that legalized prostitution can be prevented from sheltering human trafficking; that decriminalization is preferable to the Nordic model.

The notion of dialogue has been proposed and developed as a frame for the interactions between the judiciary - specifically in their Charter rulings - and the legislatures, as they respond to those rulings (see Hogg and Bushell, 1997; Hogg, Bushell Thornton and Wright, 2007a, 2007b; Knopf et. al., 2017; Macfarlane, 2012; Mathen, 2007). The contrast between Bedford and Carter suggests there may be impetus for, and value in, expanding the frame of dialogue to include several other dimensions. Another version of dialogue is the conversation between the members of the judiciary amongst themselves, as they revisit and revise the jurisprudence in light of precedent cases. And yet still another dimension the continuing conversation between governments and the litigants and interveners who undertake constitutional challenges to laws.

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[1] The relevant sections of the *Criminal Code* challenged in Bedford were the following:
Criminal Code, Section 197 (1), Definitions
"common bawdy-house" means a place that is
(*a*) kept or occupied, or
(*b*) resorted to by one or more persons
for the purpose of prostitution or the practice of acts of indecency; …
Criminal Code Section 210: Bawdy Houses
Section 210 (1): Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
Section 210 (2): Every one who
(a) in an imate of a common bawdy-house,
(b) is found, without lawful excuse, in a common bawdy-house, or
(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a bawdy house,
Is guilty of an offence punishable on summary conviction.
Criminal Code Section 212: Offence of Procurement/ Living On the Avails
Section 212 (1): Everyone who (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada…
(*j*) lives wholly or in part on the avails of prostitution of another person…
is guilty of an offence.
Section 212 (3): Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of (1) (j).
Criminal Code Section 213: Communicating in Public for the Purposes of Prostitution
Section 213 (1): Every person who in a public place or in any place open to public view

(*a*) stops or attempts to stop any motor vehicle,
(*b*) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
(*c*) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person … for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
Section 213 (2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

[2] The relevant sections of the *Criminal Code* challenged in Carter were the following:
Criminal Code, Section 14: No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given.
Criminal Code, Section 241: Every one who
(b) aids or abets a person to commit suicide,
whether suicide ensues or not, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[3] A significant distinction between the two judgments are that the unanimous ruling in the Bedford case is attributed to then Chief Justice Beverley McLachlin, whereas the judgment in the Carter case is unanimous and unattributed, or anonymous. The latter is an instance of the phenomenon of the "By the Court" nomenclature, which is the focus of an article by Peter McCormick, titled "'By the Court': The Untold Story of a Canadian Judicial Innovation".

[4] See the website for *Lamb v. Canada*, the ongoing litigation being shepherded by the British Columbia Civil Liberties Association (BCCLA), launched June 27, 2016: https://bccla.org/our-work/blog/lamb/

[5] According to media reports, the advocacy group, Pivot, is considering pursuing a Charter challenge. See Lum (2018).

[6] The case titled *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)* is known as the Prostitution Reference case. It was decided by Chief Justice Brian Dickson, and Justice Gerard LaForest, John Sopinka, who together formed the majority (authored by CJ Dickson), with Justice Antonio Lamer providing concurring reasons, and Justices Claire L'Heureux-Dube and Bertha Wilson, dissenting. A seventh judge, Justice William McIntyre, took no part in the judgment. The two *Criminal Code* sections that were challenged had different numbers by the time of the Bedford litigation: Section 193 had become Section 210, and Section 195.1 (1) (c) became Section 213.

[7] The Supreme Court judges who formed the majority in the Rodriguez case were: Justices Frank Iacobucci, Gerard LaForest, John Major, and John Sopinka (who authored the decision). Chief Justice Antonio Lamer authored one of the three dissents, Justice Peter Cory authored another one, with Justices Claire L'Heureux-Dube and Beverley McLachlin (who authored the combined dissent) providing a third dissent. More recently, John Major has given interviews (after his retirement from the bench), giving the impression that his comfort at being part of the majority was premised upon the assumption that Parliament was bound to act, given the strength and weight of public

opinion seeking decriminalization (see McCue, 2013). It is interesting to note that the British Columbia Court of Appeal decision was also a divided decision. In the BCCA, the majority found the provisions of the *Criminal Code* to be constitutional, with the Chief Justice Allan McEachern dissenting.

[8] Peter McCormick (2016: 20, note 60) has observed that the Court's self-description of reference cases is as opinions which would not serve as precedent the way that regular judgments in appeal cases would, and yet in practice, the Court tends to cite its own reference decisions in the same way as other decisions.

[9] The individual plaintiffs for the Carter litigation included three others besides Gloria Taylor and Kay Carter: Kay's daughter, Lee Carter, and Lee's husband, Hollis Johnson, as well as Dr William Shoichet. Dr Shoichet presented himself as a physician who would be willing to perform assisted suicide in the appropriate circumstances, were the law to be reformed. The litigants may have thought it beneficial to have a doctor that supported medical assistance in dying, given the continuing reports that a high proportion of physicians were unwilling to perform such procedures. In one study, 63 percent of physicians, and 75 percent of palliative care physicians specifically were unwilling (Hune-Brown, 2017).

[10] ALS stands for amyothrophic lateral sclerosis, a "fatal disease that causes progressive paralysis and pain while leaving cognitive functions intact" (Butler and Tiedemann, 2015: 1). There is typically a short life expectancy by the time of diagnosis. Although Gloria Taylor had been granted a personal exemption by the trial judge of the BCSC, she died as a result of an infection on October 4, 2012. Thus, she did not end up needing to access medical assistance in dying. Interestingly, although Sue Rodriguez was denied what she sought, which was legal permission for a physician-assisted death, it was reported in the media that she was able to receive that service from a health care provider who remained anonymous.

[11] Kay Carter's condition was called spinal stenosis. She travelled to Switzerland with her family to avail herself of the end of life services from the Dignitas clinic, on January 15, 2010. At that time, it was reported that 9 other Canadians had been previous clients of the Dignitas clinic, although Kay Carter's visit was the first revealed to the public (Todd, 2010/ 2015). As a rationale for their involvement in the litigation, Kay's daughter, Lee, and son-in-law, Hollis, expressed the concern that they were at risk of legal prosecution under the law for having accompanied Kay Carter to receive medical assistance in dying out of country.

[12] For discussion of the distinction between "adjudicative facts" and "legislative facts", and the changing jurisprudence on judicial review in relation to those materials, pre-Bedford and post-Bedford, see Cheng (2013) and Lazare (2016).

[13] The issue of legitimacy of judicial decisions, amidst concerns about the potential usurpation of the role of federal and provincial legislatures is a familiar trope in the literature focusing on Charter dialogue: see, for instance, Dixon, 2009; Hogg et. al., 1997; Hogg et. al., 2007a, 2007b; Knopf et. al., 2017; Macfarlane, 2012; Mathen, 2007; Petter, 2007.

[14] As Justice Himel recounted, the evidence for the case amounted to over 25,000 pages in 88 volumes (OSCJ, *Bedford*, para. 84). Amongst the evidence was material from 18 witnesses. The trial decision consisted of 541 paragraphs. There were four interveners at

the trial stage: Attorney General of Ontario, Catholic Civil Rights League, Christian Legal Fellowship, and REAL Women of Canada. When the case was heard by the Supreme Court, there were two dozen interveners.

[15] The evidential record in Carter included 36 binders with 116 affidavits, material from 57 expert witnesses (of whom 18 were cross-examined on their affidavits) (BCSC, *Carter*, paras. 114, 160). The trial decision consisted of 1421 paragraphs (including 5 corrigendum paragraphs). The number of interveners in the case swelled from 5 at the trial stage to over two dozen by the time the case was before the Supreme Court. The original 5 were: Ad Hoc Coalition of People with Disabilities Who are Supportive of Physician-Assisted Dying; Canadian Unitarian Council; The Christian Legal Fellowship; Euthanasia Prevention Coalition and EPC – BC; Farewell Foundation for the Right to Die.

[16] See Jodi Lazare (2016), for discussion of the challenges facing judges in dealing with social science evidence, challenges which in Lazare's view, were particularly well managed by Justice Lynn Smith in the Carter case.

[17] For example, in an article tracing the history of Canadian litigation concerning Sunday observance laws, Bruce Elman (1990) focuses on Principle and Personalities as catalysts for change, as well as the crucial shift from a pre-Charter to a post-Charter landscape. See also Heard (1991).

[18] The SCC judges who decided Bedford, in addition to Chief Justice McLachlin who authored the unanimous decision were: Justices Rosalie Abella, Thomas Cromwell, Morris Fish, Andromache Karakatsanis, Louis LeBel, Michael Moldaver, Marshall Rothstein, and Richard Wagner. See note X above for the complement of judges that decided the Prostitution Reference case for the Supreme Court.

[19] Most of the judges who were part of the unanimous anonymous decision in Carter, along with Chief Justice McLachlin had decided Bedford, with one exception (Gascon instead of Fish): Justices Rosalie Abella, Thomas Cromwell, Clement Gascon, Andromache Karakatsanis, Louis LeBel, Michael Moldaver, Marshall Rothstein, and Richard Wagner. See note Y above for the complement of judges who decided the Rodriguez case for the Supreme Court.

[20] Justice Himel had formerly been Assistant Deputy Attorney General for Ontario. Justice Smith had experience both in legal practice and in academia prior to joining the bench. If one places emphasis on the social fact that both trial judges, authoring these precedent-revising, if not precedent-overturning, landmark decisions, were women, there could be support for the hypothesis that having a more diverse judiciary, in terms of gender and other features can make a difference. Rosemary Hunter (2015), relaying findings from The Feminist Judgments Project, recognizes that, in general, evidence is inconclusive as to whether having more female judges will generate substantively different legal decision making. Hunter (2015: 141) emphasizes that there are "many other good reasons for having a more diverse judiciary – in terms of what the presence of non-traditional judges represents symbolically, how they manage their courtrooms, and the contributions they make behind the scenes and extrajudicially".

[21] As will be discussed below, in Part Two, the Prostitution Reference case concerned only two of the three *Criminal Code* provisions that were challenged in Bedford, the ones concerning bawdy houses and communicating in public for the purposes of prostitution.

The analysis in the Prostitution Reference case was focused on the liberty dimension of Section 7, and did not encompass the focus on security of the person that was novel in the Bedford case.

[22] *U.S. v. Burns* (2001) is another case in which the Supreme Court's decision reflected a different interpretation of the relevant law, a different appreciation of the balancing, and a different understanding based on the import of the available social scientific evidence. It was a unanimous, anonymous decision, in which the reasoning of the Supreme Court judges departed significantly from the majority's ruling in "precedent" companion cases decided by the Supreme Court: *Kindler v. Canada* (1991), and *Reference Re Ng Extradition* (1991). Burns is one of the cases discussed in McCormick (2016), along with Carter.

[23] Latin legal term meaning "to stand by things decided". The full phrase is "*stare decisis et non quieta movere*", which means to "stand by decisions and do not move that which is quiet". Another way of putting it is to stand by previous/ past decisions and not disturb what is settled. *Stare decisis* encapsulates the doctrine of precedent, which establishes authority and obligation for judges to follow past court decisions, particularly of higher courts in the same jurisdiction, in deciding similar issues in subsequent cases with identical or relevantly similar facts. Precedent is considered a "cornerstone" of the common law system, which provides for consistency, predictability, reliability and stability (Butler and Tiedemann, 2015: 4).

[24] The judges who decided the Bedford appeal for the Ontario Court of Appeal were: Justices Eleanore Cronk, David Doherty, Kathryn Feldman, James MacPherson, and Marc Rosenberg. The judges found that Section 210, the bawdy house provision, was irredeemably flawed, being grossly disproportionate, and not a reasonable limit under Section 1. The judges held that Section 212, focused on procurement and living on the avails, could not pass constitutional muster as it was written, but with the modification that it would be tailored to targets pimps or others who exploit prostitutes, it could.

[25] The majority found Section 213 to be

[26] The judges who decided the Carter appeal for the British Columbia Court of Appeal were: Justice Lance Finch, Mary Newbury, and Mary Saunders. Justice Finch dissented from the decision of Justices Newbury and Saunders. It is interesting to note the timeline: the Ontario Court of Appeal decision in the Bedford case was available when the BC Court of Appeal was deciding the Carter case, and the majority judges relied upon the reasoning of the OCA on the issue of stare decisis for trial judges faced with a Supreme Court precedent. The Supreme Court's ruling in the Bedford case, which addressed the issue, was not released until two months after the BCCA released its decision.

[27] Lazare (2016: S47) makes the point that due to her academic background, Justice Smith was especially well equipped and well situated to deal with the considerable challenges of the size, scale and scope of the evidentiary materials in the Carter case. During her time in academia, Lynn Smith taught courses on evidence, civil litigation and the Charter.

[28] Previously, in the Rodriguez case, the claim was made that the law infringed Section 12 and Section 15 of the *Charter*. Section 12 guarantees that everyone has the right not be subjected to cruel and unusual treatment or punishment. Section 15 (1) of the *Charter* reads as follows: "Every individual is equal before and under the law and has the rights to

equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Note: In the case of *Egan v. Canada*, [1995] 2 S.C.R. 513, 1995 SCC 49, the Supreme Court of Canada held that sexual orientation, although not specifically included in Section 15 of the *Charter*, is an analogous ground, and is thus a prohibited ground of discrimination as well. Section 15 (2) of the *Charter* ensures that: "Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

[29] It is not possible, for reasons of scope and scale, to do justice to the richness and complexity of Charter jurisprudence. I offer a brief overview in the hopes that it could facilitate appreciation of the discussion to come in Part Two.

[30] Representative passages include these: "Arbitrariness [describes] the situation where there is no connection between the effect and the object of the law." (SCC, *Bedford,* para. 98) A law that suffers from overbreadth is one that "goes too far and interferes with some conduct that bears no connection to its objective." (SCC, *Bedford*, para.101) A law that is so "broad in scope that it includes *some* conduct that bears no relation to its purpose", and is arbitrary in part, will be found to be overbroad (SCC, *Bedford*, para. 112). Additional passages further differentiate them: "arbitrariness and overbreadth are aimed at avoiding the evil of "the absence of a connection between the infringement of rights and what the law seeks to achieve" (SCC, *Bedford*, para. 108). Gross disproportionality is viewed in relation to the legislative goal. Gross disproportionality arises when "depriving a person of life, liberty, or security of the person" occurs in a manner that is connected to the legislative goal or purpose, but "the impact is so severe that it violates our fundamental norms" (SCC, *Bedford*, para. 109).

[31] Video clips of Sue Rodriguez explaining her quest for justice, in her own words, and on her own terms, are widely available online. See, for instance, McCue (2013).

[32] Canadian criminal law had formerly prohibited (attempted) suicide, but that behaviour was decriminalized in 1972. The criminal offence of suicide could actually only be pursued against those who attempted suicide, but did not succeed, since anyone who succeeded would be well beyond the reach of the law. Ultimately, the focus on helping those who are suicidal shifted to be covered by provincial mental health laws across the country.

[33] Gloria Taylor provides an exemplary articulation of that perspective in the following quote:

"What I want is to be able to die in a manner that is consistent with the way that I lived my life. I want to be able to exercise control and die with dignity and with my sense of self and personal integrity intact. I want to be able to experience my death as part of my life and part of my expression of that life. I do not want the manner of my death to undermine the values that I lived my life in accordance with…" (Taylor, quoted in Schafer, 2013).

[34] See Karsoho et. al. (2016: 7-9) for discussion of the differences between the rights-claimants and the government over the relevant capacities of health care professionals.

[35] The SCC treats liberty and security of the person as a combined interest for the purposes of this case (SCC, *Carter*, para. 64), while in other cases, those are differentiated.

[36] The SCC judges stated that it was unnecessary for them to decide whether the principle against gross disproportionality was also infringed.

[37] Permissive jurisdictions are those countries and states that have decriminalized physician-assisted suicide (PAS), physician-assisted dying (PAD), or medical assistance in dying (MAID). See Karsoho et al. (2016) for further discussion of the evidence in Carter about practices in permissive jurisdictions.

[38] The gist of that passages echoes one in the trial court decision that is much longer: "[The assisted suicide prohibition is] of no force and effect to the extent that [it prohibits] physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult patient how: (a) is free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) is materially physically disabled or is soon to become so, has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capabilities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person." (BCSC, *Carter*, para. 1393)

[39] The portions of the cases concerning Section 15, while fascinating and important, are nonetheless beyond the scope of the present work.

[40] The amendments to the *Criminal Code* implemented through Bill C-14, An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying) include the following:

Criminal Code, Section 226 and 227

Acceleration of death

226 Where a person causes to a human being a bodily injury that results in death, he causes the death of that human being notwithstanding that the effect of the bodily injury is only to accelerate his death from a disease or disorder arising from some other cause.

Exemption for medical assistance in dying

227 (1) No medical practitioner or nurse practitioner commits culpable homicide if they provide a person with medical assistance in dying in accordance with section 241.2.

Exemption for person aiding practitioner

(2) No person is a party to culpable homicide if they do anything for the purpose of aiding a medical practitioner or nurse practitioner to provide a person with medical assistance in dying in accordance with section 241.2.

Reasonable but mistaken belief

(3) For greater certainty, the exemption set out in subsection (1) or (2) applies even if the person invoking it has a reasonable but mistaken belief about any fact that is an element of the exemption.

Non-application of section 14

(4) Section 14 does not apply with respect to a person who consents to have death inflicted on them by means of medical assistance in dying provided in accordance with section 241.2.

Definitions

(5) In this section, medical assistance in dying, medical practitioner and nurse practitioner have the same meanings as in section 241.1.

Criminal Code, Section 241

241 (1) Everyone is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years who, whether suicide ensues or not,

(a) counsels a person to die by suicide or abets a person in dying by suicide; or

(b) aids a person to die by suicide.

Exemption for medical assistance in dying

(2) No medical practitioner or nurse practitioner commits an offence under paragraph (1)(b) if they provide a person with medical assistance in dying in accordance with section 241.2.

241.1 The following definitions apply in this section and in sections 241.2 to 241.4.

medical assistance in dying means

(a) the administering by a medical practitioner or nurse practitioner of a substance to a person, at their request, that causes their death; or

(b) the prescribing or providing by a medical practitioner or nurse practitioner of a substance to a person, at their request, so that they may self-administer the substance and in doing so cause their own death.

Eligibility for medical assistance in dying

241.2 (1) A person may receive medical assistance in dying only if they meet all of the following criteria:

(a) they are eligible — or, but for any applicable minimum period of residence or waiting period, would be eligible — for health services funded by a government in Canada;

(b) they are at least 18 years of age and capable of making decisions with respect to their health;

(c) they have a grievous and irremediable medical condition;

(d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

(e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.

Grievous and irremediable medical condition

241.2 (2) A person has a grievous and irremediable medical condition only if they meet all of the following criteria:

(a) they have a serious and incurable illness, disease or disability;

(b) they are in an advanced state of irreversible decline in capability;

(c) that illness, disease or disability or that state of decline causes them enduring physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions that they consider acceptable; and

(d) their natural death has become reasonably foreseeable, taking into account all of their medical circumstances, without a prognosis necessarily having been made as to the specific length of time that they have remaining.

Safeguards

241.2 (3) Before a medical practitioner or nurse practitioner provides a person with medical assistance in dying, the medical practitioner or nurse practitioner must

(a) be of the opinion that the person meets all of the criteria set out in subsection (1);

(b) ensure that the person's request for medical assistance in dying was

(i) made in writing and signed and dated by the person or by another person under subsection (4), and

(ii) signed and dated after the person was informed by a medical practitioner or nurse practitioner that the person has a grievous and irremediable medical condition;

(c) be satisfied that the request was signed and dated by the person — or by another person under subsection (4) — before two independent witnesses who then also signed and dated the request;

(d) ensure that the person has been informed that they may, at any time and in any manner, withdraw their request;

(e) ensure that another medical practitioner or nurse practitioner has provided a written opinion confirming that the person meets all of the criteria set out in subsection (1);

(f) be satisfied that they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are independent;

(g) ensure that there are at least 10 clear days between the day on which the request was signed by or on behalf of the person and the day on which the medical assistance in dying is provided or — if they and the other medical practitioner or nurse practitioner referred to in paragraph (e) are both of the opinion that the person's death, or the loss of their capacity to provide informed consent, is imminent — any shorter period that the first medical practitioner or nurse practitioner considers appropriate in the circumstances;

(h) immediately before providing the medical assistance in dying, give the person an opportunity to withdraw their request and ensure that the person gives express consent to receive medical assistance in dying; and

(i) if the person has difficulty communicating, take all necessary measures to provide a reliable means by which the person may understand the information that is provided to them and communicate their decision.

Note: *Criminal Code*, Section 14 received a touch up in terms of wording; it now reads: Section **14** No person is entitled to consent to have death inflicted upon them, and such consent does not affect the criminal responsibility of any person who inflicts death on the person who gave consent.

[41] The fact that her mother could not have satisfied the eligibility criteria was a significant cause of disappointment to her daughter, Lee Carter, who expressed that disappointment in media reports (Canadian Press, 2016).

[42] As in so many areas of public policy debate, the terminology used for the social practice at issue is itself contested. The government, and interveners opposed to decriminalization and normalization tend to rely upon the older term of "prostitution" and "prostitute". Those terms can be perceived to be morally loaded, in some versions of

dictionary definitions and popular discourse. By contrast, the rights-claimants prefer to terms "sex work" and "sex worker".

[43] Legal commentators have emphasized the similarity to arguments presented by the Attorney General of Canada on these points in the case of *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134. That case concerned the legal status of a supervised safe injection for drugs, and raised jurisprudential issues at the intersection of criminal law and provincial jurisdiction over health.

[44] The government called on experts of their own, including Dr Melissa Farley, a clinical psychologist by training, and founder and director of Prostitution Research and Education (PRE), a feminist anti-prostitution advocacy organization. Another expert for the government was Dr Janice Raymond, whose background is in Theology, Ethics and Society, and who lectures internationally as part of the Coalition Against Trafficking in Women. Janice Raymond's (2003) article, available online, titled "Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution" has been widely cited and much discussed.

[45] See, for instance, the TEDx Toronto talk given by litigant Valerie Scott (2015), provocatively titled "Someone You Love Could Be A Sex Worker". Also during 2015, all three litigants discussed their case when they participated in a public event in Toronto that is available online. See Bedford, Terri-Jean, Amy Lebovitch and Valerie Scott (2015).

[46] That sense comes from the abovementioned public articulation by Valerie Scott, as well as the content of a book published by lawyer Alan Young (who represented Terri-Jean Bedford) titled *Justice Defiled: Perverts, Potheads, Serial Killers and Lawyers* (2003). In his book, Alan Young draws heavily upon John Stuart Mill's notion of the harm principle, from *On Liberty*.

[47] The litigants relied upon the work of Canadian researcher Dr John Lowman, from the School of Criminology at Simon Fraser University, who has carried out research on the sex trade since 1977. That research indicated that two factors that impact on the level and extent of violence experienced by prostitutes are location and working conditions. The research indicates that street prostitutes are the most vulnerable, facing an alarming amount of violence. Indications are that street prostitutes are disproportionately survival sex workers, whose engagement in prostitution is driven by drug addiction and by experience of abusive relationships (child abuse and domestic violence).

[48] Justice Himel, in her decision, set out a series of what she considered to be facts established by the evidence before the court, consisting of ways that the risks of sex work could be reduced:

"(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 can increase safety;
(d) Having a regular clientele can increase safety;
(e) When a prostitute's client is aware that 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." (ONSC, *Bedford*, para. 421)

[49] Valerie Scott (2015) places particular emphasis on the decriminalization initiatives in New Zealand.

[50] In *Bedford* (paras. 75 to 78), the Supreme Court clarified that the appropriate standard of causation in this context was that of "sufficient causal connection" between a state-caused effect, and prejudicial impact on claimants, making a reasonable inference drawn on a balance of probabilities. The law need not be the only or even the dominant cause of negative impact on claimants.

[51] As Chief Justice McLachlin articulated:

> "It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence." (SCC, *Bedford*, para. 89)

[52] In the Bedford case (para. 64), Chief Justice McLachlin elaborates on the pernicious and perverse effects of the bawdy house provision: "Grandma's House", a Vancouver establishment intended to support street workers in the Downtown Eastside "was operating at about the same time as fears were growing that a serial killer was prowling the streets — fears which materialized in the notorious Robert Pickton. Street prostitutes — who the [trial] judge found are largely the most vulnerable class of prostitutes, and who face an alarming amount of violence … were able to bring clients to Grandma's House. However, charges were laid [the bawdy house provision] and although the charges were eventually stayed — four years after they were laid — Grandma's House was shut down (supplementary affidavit of Dr. John Lowman, May 6, 2009, J.A.R., vol. 20, at p. 5744). For some prostitutes, particularly those who are destitute, safe houses such as Grandma's House may be critical."

[53] The Supreme Court judges explained that the assessment, under Section 7 is "qualitative, not quantitative". The passage then states that: "If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established" (SCC, *Bedford*, para. 158). Another reference to the

[54] The complexities of disentangling Section 7 arguments from those belonging to Section 1 are evident in passages concerning the living on the avails provision (for example, SCC, *Bedford*, para. 162).

[55] Section 286.2 (1) of the *Criminal Code* now reads:

286.2 (1) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

…..

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for

consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.
Exception
(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit
(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
(b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
(c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or
(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.
No exception
(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person
(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;
(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;
(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;
(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or
(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.
Aggravating factor
(6) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.
Note: Section 286.2 (2) applies to receiving material benefit from the sexual services of a minor, with the same exceptions, nonexceptions, and aggravating factors being applicable.

[56] *Criminal Code*, Section **286.3 (1)** Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.
A separate provision (S. 286.3 (2)) targets the offence of procuring a minor.

[57] *Criminal Code*, Section **197 (1)** common bawdy-house means, for the practice of acts of indecency, a place that is kept or occupied or resorted to by one or more persons.
[58] Communicating to provide sexual services for consideration
Criminal Code, Section 213 **(1.1)** Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.
Definition of public place
(2) In this section, **public place** includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.
[59] Presumably because buying sexual services is already criminally prohibited by the catch all clause, Section 286.1 (1), not just in places open to public view (see wording below).
[60] Advertising sexual services
Criminal Code, Section **286.4** Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than five years; or
(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.
[61] Obtaining Sexual Services For Consideration
Criminal Code, Section **286.1 (1)** Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of
(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present…
Note: There then follows a list of penalties for first and subsequent offences.
Definitions of place and public place
(5) For the purposes of this section, place and public place have the same meaning as in subsection 197(1).
Note: A separate provision, Section 286.1 (2) applies to obtaining for consideration, i.e., purchasing, sexual services of a minor.
[62] Immunity — material benefit and advertising
Criminal Code, Section **286.5 (1)** No person shall be prosecuted for
(a) an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or
(b) an offence under section 286.4 in relation to the advertisement of their own sexual services.
Immunity — aiding, abetting, etc.

(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

[63] The legal reform post Bedford was undertaken by the federal Conservative government of Prime Minister Stephen Harper, whereas the legal reform post Carter was undertaken by the federal Liberal government of Prime Minister Justin Trudeau.

[64] Lum (2018) notes that the federal Liberals were opposed to the legal reform carried out by the federal Conservatives, but when it was proposed for debate at the 2014 convention, the topic was withdrawn from consideration. The Youth Caucus of the Liberal party has been pushing for the topic to move forward.

[65] It is interesting that media reports relate the difficulties patients might face in accessing MAID, since only a small proportion of doctors are comfortable with participating in the process, for a variety of reasons (see Hune-Brown, 2017). Some physicians are so opposed to MAID, on moral and religious grounds that they are pursuing litigation to be exempt from even referring their patients to other willing health care providers. The interests of objecting physicians have been framed in terms of Charter rights to religious freedom and religious equality in the case of *The Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 (Ontario Superior Court of Justice, Divisional Court).

[66] See Beran (2012) and Freeman (1989) for a taste of the debates.

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