Addendum to Chapter 4 – Sex and the Supreme Court
Richard Jochelson, Kirsten Kramar

Following the publication of *Sex and the Supreme Court*, and a partially successful appeal by the Crown of the 2010 lower court *Bedford* case, the Supreme Court of Canada issued a unanimous decision in the case (*Bedford* 2013). The Court unanimously endorsed Justice Himel’s decision with a few caveats. The result was a wholesale invalidation of much of the anti-prostitution regime. The Court declared that the soliciting, living off the avails, and bawdy house provisions were not constitutional and provided Parliament with one year to propose a new law before the declaration of constitutional invalidity would come into effect. The decision upheld the lower court’s determinations on most accounts, noting that the trial judge was entitled to deference. The one exception was that Justice Himel was mistaken in revising whether the solicitation provisions violated s.2b (freedom of expression) of the Charter — this finding was to be previously determined by the Supreme Court in its 1990 *Prostitution Reference*.

The Court relied on the legal concepts of vagueness, overbreadth, arbitrariness and gross disproportion to conclude that the provisions considered violated the applicants’ security of the person in a way that was too severe to align with the main goal of the laws: the prevention of public nuisance. This was too low a price to put on the lives of sex workers according to the Court (paras. 93–123).

The Court was careful in striking the bawdy house provisions to limit the constitutional invalidity “as it relates to prostitution” and in striking the word “prostitution” from s.197 of the *Criminal Code* as it applies to s.210 only (para. 123). This means that the Court’s test for “harm” in obscenity and indecency jurisprudence continues to persist and is tacitly considered by the Court to be constitutional and sufficiently precise to provide a legal standard.

The Court was also very careful to note that the ways in which prostitution would be regulated would be up to Parliament. Barring unforeseen events, Steven Harper’s Conservative Government will undertake this legislative agenda. The Court provided some insight as to how a constitutional set of laws regarding prostitution could be concocted:

Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. (para 165)
Even as the anti-pornography feminists have begun to advocate against the *Bedford* decision by trying to influence legislative change (Benedet 2013), provinces have already begun weighing in on the debate. Manitoba Justice Minister Andrew Swan has argued that the law should “target the demand for sexual services while helping sex-trade workers get the addiction counseling, mental-health services and training they need to get off the streets” (Winnipeg Free Press February 15, 2014). Manitoba has thus formally advocated for the Nordic model, which targets pimps and customers under a criminalized and constitutional regime. Federal Justice Minister Peter MacKay acknowledged that the Nordic model was on the table, and the Federal Government has subsequently begun a public consultation process in its drafting exercise. According to the federal Justice Minister, “Doing nothing is not an option. We are therefore asking Canadians right across the country to provide their input through an online consultation to ensure a legislative response to prostitution that reflects our country’s values.” (Winnipeg Free Press February 17, 2014).

The early information tends to indicate that advocates for a non-criminal regulatory model for dealing with prostitution will not be carrying the day in the legislative process. Indeed, the early indications may be that the Nordic model of criminalization appeals to anti-pornography feminist activists as well as Conservative-minded Canadians by maintaining, perhaps even strengthening, the illegality of prostitution in Canada. The failure of the old model provides an opportunity for the Federal Government to craft a law directly impugning the sale of sexual services as illegal in a variety of new ways and, perhaps most significantly, by not impugning the actions of sex workers themselves.

Interesting also is the failure of any of the stakeholders involved to recognize the overlap between the sex performance industry and the sexual services industry. The current debate seems to reify a bright-line distinction between peddlers of obscenity and indecency and the sale of sexual services. Despite the obvious observation that many of the workers move back and forth between these modalities of work, the current debate ignores the fundamentals of the obscenity and indecency debate: that commercialism and sex are tolerated each day so long as the players do not contravene the harm calculus established by the Supreme Court (Labaye 2010).

The most influential voices in the current anti-prostitution legislative debate are merely grappling with the minutiae of whether social harm in the context of prostitution will be drawn at the level of criminalizing the supply or demand side of the commercial transaction. They are also perhaps grappling with more precise definitions of when the sale of sex has been triggered so as to attract the attention of the criminal law. In this context, the concerns of scholars such as Janine Benedet, who notes that the need for agency may eclipse the need to contain social harms against women, are unlikely to persist in this particular debate (Benedet 2013). It is clear that the current debate is a long ways away from endorsing conceptions such as the “pleasure principle,” which are discussed in the first chapters of *Sex and the Supreme Court*. It may be that the unconstitutionality of the prostitution provisions
are just what the advocates of criminalization needed — a chance to strengthen and better define how to criminalize the acts of prostitution in the twenty-first century.

**New References not in Sex and the Supreme Court**


*Canada (Attorney General) v. Bedford, 2013 SCC 72*
