

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

TERRI JEAN BEDFORD, AMY LEOVITCH, VALERIE SCOTT

Applicants

Court Seal

-and-

HER MAJESTY THE QUEEN (IN RIGHT OF CANADA)

Respondent

APPLICATION UNDER Rule 14.05(3)(g.1) of the *Rules of Civil Procedure*

NOTICE OF AMENDED APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for hearing on: May 31, 2007 at 10:00 a.m. at the Superior Court of Justice, 393 University Avenue, 10th Floor, Toronto, ON, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application, or to be served with any documents in the application, you or an Ontario lawyer acting for you must prepare a notice of appearance in Form 38C prescribed by the Rules of Civil Procedure, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGEMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LEGAL AID OFFICE.

Date: March 20, 2007

Issued by:

Local registrar

Address of

court office: 393 University Avenue, 10th Floor
Toronto, ON M5G 1E6

TO: **ATTORNEY GENERAL OF CANADA**
DEPARTMENT OF JUSTICE
Suite 3400, Exchange Tower
Box 36, First Canadian Place
Toronto, ON M5X 1K6

Michael Morris
Solicitor for the Respondent

APPLICATION

1. THE APPLICANTS MAKE APPLICATION FOR:

- (a) An Order declaring that ss.210 (bawdy house), 212(1)(j) (living on the avails) and 213(1)(c) (communication) of the *Criminal Code of Canada* violate s.7 of the *Charter of Rights and Freedoms* and as such are unconstitutional and of no force and effect;
- (b) An Order declaring that s.213(1)(c) of the *Criminal Code of Canada* violates s.2(b) of the *Charter of Rights and Freedoms* and as such is unconstitutional and of no force and effect; and
- (c) Such further and other relief as this Honourable Court may deem just.

2. THE GROUNDS FOR THIS APPLICATION ARE:

- (a) The Applicant, Terri Jean Bedford, worked in the sex trade in the late 1970's and the 1980's and since 1993 has worked as a dominatrix. She has been convicted of keeping a common bawdy house for the purpose of prostitution with respect to both her former and current work. In her former work in the sex trade, she was subjected to serious acts of violence when she was working on the streets. She never experienced this violence while working at indoor locations as a sex trade worker and then later as a dominatrix. She wishes to resume work as a dominatrix but is not willing to risk further arrest and prosecution under s.210 (bawdy house) of the *Criminal Code*;
- (b) The Applicant, Valerie Scott, has worked in the sex trade since the early 1980's and in recent years she has worked as an activist campaigning for the rights of sex workers. She is currently the Executive Director of Sex Professionals of Canada (SPOC) and, in her capacity as an activist, she warned the federal government that following the enactment of the communications law (s.213(1)(c)) in 1985, the violence against sex trade workers on the streets has escalated. To combat this violence, she posts a "bad date" list on the SPOC website so that sex trade workers on the streets can obtain information about customers who may pose a risk of harm to their physical safety. This Applicant also wishes to resume work in the sex trade by opening a secure and safe indoor location, but will not do so because of the current criminal prohibitions on bawdy houses;

- (c) The Applicant, Amy Lebovitch, has been a sex trade worker since 1997. She has worked on the streets but now chooses to work from her home for fear of violence when working on the streets. By working from her home, she believes she has increased her physical security, but she is now concerned about the legal consequences of working indoors. She is also concerned that her live-in partner will be charged with living on the avails for living with her in the home;
- (d) Twenty-one witnesses, who have tendered affidavit evidence for this Application, describe and outline the nature and frequency of physical and psychological violence experienced by sex trade workers in various cities and towns across Canada. Of the 21 witnesses eleven have worked, or are currently, working in the sex trade. Of these eleven, four currently work for groups or associations that provide assistance to sex trade workers. Eight witnesses have academic postings at various universities across Canada and have conducted empirical research into issues relating to violence against sex trade workers. One witness is a journalist and another is a current Member of Parliament. All 21 witnesses depose that the current legal regime significantly contributes to the risk of violence experienced by women who enter the sex trade;
- (e) The act of prostitution *per se* has always been a legal activity under the *Criminal Code* but the *Code* prohibits many other activities accompanying or associated with this lawful business. Under s.210, it is illegal to conduct business in an indoor location on a habitual and frequent basis, and the witnesses to this Application depose that violence is significantly reduced or eliminated in most indoor settings. Under s.212(1)(j) it is illegal to hire managers, drivers, and security personnel and the witnesses to this Application depose that these types of services can reduce or eliminate the incidence of violence. Finally, it is illegal under s.213(1)(c) to “communicate” for the purposes of prostitution and the witnesses to this Application depose that the prohibition on “communication” has compelled sex workers to make hasty decisions without properly screening customers when working on the streets;
- (f) These provisions deprive sex workers of their right to liberty under s.7 of the *Charter of Rights and Freedoms* by exposing them to the risk of imprisonment. These provisions also deprive sex trade workers of their right to security under s.7 of the *Charter of Rights and Freedoms* by creating legal prohibitions on the necessary conditions required for this type of work to be conducted in a safe and secure setting, thus exposing the sex worker to an increased risk of physical or psychological harm;

- (g) The deprivation of liberty and security in these circumstances is not in accordance with the principles of fundamental justice because these provisions are “arbitrary” as defined by the Supreme Court of Canada in *R. v. Caine/Malmo-Levine* [2003] 1 S.C.R. 571. An arbitrary law is measured by the standard of “gross disproportionality”. As the Court said: “if the use of the criminal law were shown by the appellants to be grossly disproportionate in its [negative] effects on accused persons, when considered in light of the objective of protecting them from the harm caused by [prostitution], the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*”;
- (h) The deprivation of liberty and security in these circumstances is not in accordance with the principles of fundamental justice, and in particular, the rule of law because these provisions create an alliance between the Government and the black market whereby the government permits the lawful pursuit of prostitution but forces the prostitute to rely upon a black market, the criminal element, to supply the services needed to conduct this business in a safe and secure environment;
- (i) The deprivation of liberty and security in these circumstances is not in accordance with the principles of fundamental justice because the provisions are overbroad in that they overshoot the mark by extending the criminal law to activities which are not rationally connected to the state objectives underlying the prohibitions; and
- (j) In 1990, the Supreme Court of Canada in *Reference Re: ss.193 and 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123 held that the s. 213(1)(c) communicating offence violated s. 2(b) (freedom of expression) but further held that the violation was saved by s.1 of the *Charter of Rights*. There is new empirical evidence not considered by the Supreme Court of Canada that shows that the law is not effectively achieving its stated objectives. Much of this evidence is found in government reports evaluating the impact of the 1985 communicating law. In light of new evidence the balancing of rights and interests by the Supreme Court of Canada under s.1 of the *Charter* will have to be revisited as a law which is ineffective and does not serve its stated objectives cannot constitute a s. 1 reasonable limit on the fundamental freedom of expression.

3. THE FOLLOWING DOCUMENTARY EVIDENCE will used at the hearing of the Application:

- (a) The Affidavits of the Applicants, Terri Jean Bedford, Valerie Scott and Amy Lebovitch;
- (b) The Affidavits of Wendy Babcock, Wendy Harris, ~~Alexandra Higherest~~, Linda Shaikh and Carol-Lynn Strachan;
- (c) The Affidavits of Susan Davis (Prostitution Alternatives Counselling and Education Society of British Columbia- PACE Society), Kara Gillies (Maggie's: The Toronto Prostitutes' Community Service Project), Maurganne Mooney (Sex Worker's Community Alliance) and Jody Patterson (Prostitutes Empowerment Education and Resource Society - PEERS);
- (d) The Affidavits of Professors Cecilia Benoit (University of Victoria), Augustine Branigan (University of Calgary), Deborah Brock (York University), Elliot Leyton (Memorial University of Newfoundland), John Lowman (Simon Fraser University), Gayle MacDonald (St. Thomas University), Fran Shaver (Concordia University) and Eleanor Maticka-Tyndale (University of Windsor);
- (e) The Affidavits of Libby Davies (Member of Parliament for Vancouver East), and Dan Gardner (*Ottawa Citizen*);
- (f) Report of the Special Committee on Pornography and Prostitution (1985) (Fraser Committee Report, excerpt: Section IV – Recommendations on Prostitution), Department of Justice Canada, Street Prostitution: Assessing the Impact of the Law (Synthesis Report) (1989), House of Commons, Report of the Standing Committee on Justice and the Solicitor General (October, 1990), Department of Justice Canada, Victimization of Prostitutes in Calgary and Winnipeg (1994), Report of the Federal/Provincial/Territorial Working Group on Prostitution (December, 1998);

- (g) Juristat, Canadian Centre for Justice Statistics, Street Prostitution in Canada (1995), Homicide in Canada (2000), Homicide in Canada (2001), Homicide in Canada (2002), Homicide in Canada (2003), Homicide in Canada (2004), Homicide in Canada (2005);
- (h) Hearings of the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness (January 31, 2005 – May 30, 2005), Report of the Subcommittee on Solicitation Laws (2006); and
- ~~(i) International Legislation (Holland, Germany, Australia, Nevada and New Zealand); and~~
- (i) Such further and other materials as Counsel may advise and this Honourable Court may permit.

March 20, 2007

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