Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36

Sonia Lawrence

It is no secret that our current government is skeptical of academic experts and their opinions on policy choices.[1] The *Bedford* case and the passage of Bill C-36 (*The Protection of Communities and Exploited Persons Act*) offer a window into the identification, mobilization, and reception of "experts" in the courts, the legislative process, and the public sphere. My purpose is to direct thought toward how the mobilization of expertise works in legal arguments and the relative narrowness of a test case "win." In this case, expertise about sex work and harm was offered to make a crucial legal point in the *Bedford* challenge. That expertise was accepted and formed the basis of the legal victory. But when the government drafted Bill C-36 and began Parliamentary hearings, both the legal questions and the political context shifted. In the new landscape, no expert could stop the unanimous Supreme Court "win" from turning into a crystal clear loss.

The particular strategy employed in the *Bedford* challenge was heavily dependent on the written word of experts rather than in-court testimony. The trial judge, Justice Susan Himel, faced 25,000 pages of evidence in 88 volumes. The evidentiary rules applied to the admission of expert evidence stipulate that the role of an expert is to "assist the court" and that experts "should never assume the role of an advocate." This language should give any careful scholar serious pause. It reveals the strict limits of the frame in which the law seeks and receives expertise—a frame in which a whole truth is possible and the limits of the "whole" are ascertainable. The specific legal question raised in the case was, "Do the three challenged positions violate section 7 of the Charter by infringing the life and security of the person of sex workers contrary to the principles of fundamental justice?" and not, "Can and should the government ban prostitution?" Both inside and outside the legal arena, a variety of academic and non-academic expertise was displayed and mobilized, including a sizable body of experiential expertise from current and former sex trade workers on both sides of the debate. I have no doubt that the voice of experience is critical. This is one of the central contributions of feminism to academic research, listening to the voices of women who have experienced the phenomena we are studying. But in this case, those voices revealed a wide range of contexts in which sex work is performed, and a wide range of

[1] See Alex Boutilier, "Prime Minister Stephen Harper rules out inquiry into missing and murdered aboriginal women, says murders a 'crimes' not 'sociological phenomenon.'", *Tor Star* (21 August 2014).

Canadian Journal of Law and Society / Revue Canadienne Droit et Société, 2015, Volume 30, no. 1, pp. 5–7. doi:10.1017/cls.2015.3

https://doi.org/10.1017/cls.2015.3 Published online by Cambridge University Press

reactions and conclusions based on that experience. Himel J. called the evidence of eight sex workers (for the applicants) and nine prostitutes or former prostitutes (for the respondents) a wash: "[I]t is clear that there is no one person who can be said to be representative of prostitutes in Canada; the affiants are an extremely diverse group of people whose reasons for entry into prostitution, lifestyles and experiences differ."[2] Himel J. did find that the academic experts supporting the legal challenge had presented the better evidence, evidence that the law itself was leading to harm in a way that violated section 7 of the Charter. Many of those on the other side, and especially those who presented the international and comparative evidence, she said, had "entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist. . . . it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, [but] where these witnesses act primarily as advocates, their opinions are of lesser value to the court."[3]

So the claimants won, a victory that largely stood up at the Supreme Court. But *what* was won? The timing of the Supreme Court decision meant it met up with four specific contemporary realities: (1) a government that has consistently foregrounded a law and order agenda, (2) a growing sense among the government and its supporters that the Supreme Court of Canada is ideologically opposed to this government and is politically motivated when it blocks government efforts,[4] (3) a narrative about sex trafficking which brings together the regulation of sex work and increasingly punitive regulation of immigration, and (4) a narrative about the lives and deaths of missing and murdered Indigenous women. These realities are visible in the government's response to their "loss," the *Protection of Communities and Exploited Persons Act*.[5] The draft and the hearings illustrate how, once the old law was jettisoned and the playing field was more clearly political, the ideological battle of experts sharpened. Bill C 36 followed the neoliberal narrative of innocent victims (sex workers are rendered immune from prosecution)[6] and loathsome or terribly misguided but in any event distinctly criminal law breakers.[7] This narrative broadly serves to obscure and deny the structural problems undergirding so much harm. It responsibilizes individuals and ignores the role of the state in creating or failing to alleviate these problems—including poverty, colonialism,

[2] *Bedford v. Canada*, 2010 ONSC 4264, para 88.

[3] *Bedford*, ONSC, para 182.

[4] I am referring to one case in particular, the Nadon reference (*Reference re Supreme Court Act,* ss 5 and 6, 2014 SCC 21), and the wider context of that case.

[5] SC 2014, C 25. In addition, of course, to the expert work of Department of Justice staff, see the work of Professor Benjamin Perrin, University of British Columbia Faculty of Law, who was Special Adviser, Legal Affairs & Policy in the Office of the Prime Minister from March 2012 until April 2013 and later authored a report recommending reform of Canada's approach to addressing prostitution entitled "Oldest Profession or Oldest Oppression: Addressing Prostitution after the Supreme Court of Canada Decision in *Canada v. Bedford*" (MacDonald Laurier Institute, January 2014). His approach largely tracks the approach taken in the *Protection of Communities and Exploited Persons Act*.

[6] *Protection of Communities and Exploited Persons Act* (SC 2014, c 25) s 20; Criminal Code (RSC, 1985, c C-46, as revised 12-16-2014) s 286.5.

[7] See for instance the detailed work on use of the language of "innocent victims" by government MPs: Elspeth Kaiser-Derrick, Presentation for the Roundtable, "Criminalized Women and the Law & Order Agenda" (Presentation delivered at the CLSA Conference "Law's Encounters: Co-Existing and Contradictory Norms and Systems," University of Manitoba Faculty of Law, 7 June 2014), unpublished, copy of speaking notes on file with author.

https://doi.org/10.1017/cls.2015.3 Published online by Cambridge University Press

and discrimination on the basis of gender and race. In the context of the post-*Bedford* passage of Bill C-36, the way in which the government and expert discourses avoided any question of women choosing to do sex work by placing all of it in the context of coercion is a rich source of material for understanding the politics of later neoliberalism as it is unfolding in Canada. The legal ground had changed. The act of selling sex for money used to be legal but it no longer is. The narrow basis for the legal challenge dissolved, revealing the flimsiness of that clever legal wedge. The record of the hearings reveals how a stifling and heartbreaking pathos took centre stage. References to specific children and their futures—sometimes already lost, sometimes full of potential—are everywhere.[8] The spectre of serial killer Robert Pickton, successfully leveraged to support the challenge to the legislation in the court case, turned. It now represented the grim reality of sex workers' lives, or rather, deaths. The new framing made sex work the killer.

Now we are heading into the long future. We now have a new law and no data on how this law works in any Canadian context. We need solid scholarship—on this, at least, supporters and opponents of the law can agree. But we should reflect on this experience, from the genesis of the court challenge(s) to the passage of the new *Act*, because Bedford offers a handy reminder of laws' embeddedness in context. Having a winnable legal argument does not necessarily mean you will advance your cause by winning. Relying on rights is a risky strategy, because they are neither static nor absolute. Peeling away the claims, the scholarship, the lived experience, leaves me asking whether the intricate doctrinal work, the hours of testimony on Parliament Hill, was ever anything other than just surface work, doomed from the start given the battle lines. Had the Supreme Court not left some gaps in their ruling, might we have seen the invocation of section 33, the notwithstanding clause, allowing the government to sidestep the Charter and pass the legislation anyway?[9] *Bedford* is not the only case in which expert social science evidence is mobilized in support of a novel legal challenge. *Inglis* (challenging the closure of the mother-baby program in a British Columbia jail), the polygamy reference,[10] and *Tanudjaja* (looking for a section 7 "right to housing") were all built on significant amounts of expert social science evidence. When we as scholars are in the space where advocacy and expertise meet, regardless of what side we are on, we still need to think hard about how we make our arguments and how we want to win. Social change is a constant struggle, not a short battle. The relationship between our government, our Supreme Court, and our Charter is contingent, political, changing. Law is a sociological phenomenon. The landscape will look different at some point. Then where will our principles—and our theories—be?

Sonia Lawrence
Osgoode Hall Law School
York University

[8] A number of parents testified that their missing or murdered daughters had been coerced into prostitution. Committee members more than once referenced their own children as part of their motivation to support Bill C-36.

[9] The *Constitution Act*, 1982, Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11, s 33.

[10] Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588.

https://doi.org/10.1017/cls.2015.3 Published online by Cambridge University Press