

CITATION: Bedford v. Canada (Attorney General), 2010 ONCA 814

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COURT OF APPEAL FOR ONTARIO

Rosenberg J.A.

BETWEEN

Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Applicants (Respondents in appeal)

and

Attorney General of Canada

Moving Party/Respondent
(Appellant in appeal)

and

Attorney General of Ontario

Intervener
(Respondent in appeal)

Michael Morris, Gail Sinclair, Julie Jai and Roy Lee, for the Attorney General of Canada

Alan Young, for Terri Jean Bedford, Amy Lebovitch and Valerie Scott

Shelley Maria Hallett, for the Attorney General of Ontario

Heard: November 22, 2010

On a motion to stay the judgment of Justice Susan Himel of the Superior Court of Justice, dated September 28, 2010, reported at 2010 ONSC 4264, pending appeal.

Rosenberg J.A.:

I. Overview

[1] The Attorney General of Canada supported by the Attorney General of Ontario moves for a stay of the judgment of Himel J. of September 28, 2010 concerning three provisions of the *Criminal Code* that prohibit various types of conduct associated with prostitution. The application judge found s. 210 of the *Criminal Code* as it relates to prostitution to be unconstitutional. She therefore struck the word “prostitution” from the definition of common bawdy-house in s. 197(1). She also declared ss. 212(1)(j) and 213(1)(c) to be unconstitutional and struck down those provisions.

[2] The effect of the judgment is to strike down the common bawdy-house provisions of the *Code* as they apply to prostitution, the living on the avails of adult prostitution offence, and the communicating for the purpose of prostitution offence. The judgment leaves intact a large number of other provisions that touch on prostitution such as provisions prohibiting procuring, living on the avails of prostitution of a person under the age of 18 years and bawdy-house provisions relating to acts of indecency.

[3] The application judge stayed her judgment until November 27, 2010. On November 22, at the conclusion of argument of this motion I continued the stay until I released my decision on this motion.

[4] The fundamental submission of the moving party and the Attorney General of Ontario on this motion is that the judgment creates a legislative void that has profound

implications for the public interest. They argue that the judgment should be stayed until this court can conduct a full review of the decision. The responding parties submit that the government evidence of harm to the public interest if a stay is not imposed is speculative. Counsel submits that only after the judgment has been in place for some time will it be possible to measure the impact; in effect, the motion is premature and the court should wait and see what happen. Further, the responding parties submit that there would be substantial harm if the judgment is stayed because to do so would perpetuate the law's contribution to violence against a vulnerable population.

[5] For the following reasons, I am satisfied that it is in the public interest that the judgment be stayed for a relatively short period to permit appellate review of the decision. Accordingly, the judgment will be further stayed until April 29, 2011.

II. Role of the Motion Judge and the *RJR-MacDonald* Test

[6] At para. 135 of her reasons, the application judge made the important point that the evidence before her supported “the notion that prostitution is an intractable social problem” and that there is “disagreement about the proper legislative approach to prostitution”. It is not the role of the courts to either solve that problem or fashion the appropriate legislation; that is the realm of Parliament, the legislatures, municipal governments and social agencies. As the application judge said at para. 25, it was not her role to decide what policy model is better. She recognized her duty was to determine whether the legislative scheme met minimum constitutional standards. She found that it

did not and it will be for this court to determine whether she was correct. My role is more modest. I must determine, by applying a test laid down by the Supreme Court of Canada, whether the *status quo* should be maintained pending the relatively short time it will take to review the decision in this court.

[7] It bears special emphasis that my perspective in deciding this motion is very different from that of the application judge. This different perspective explains in part why despite the concerns expressed by the application judge, I have decided that a temporary stay of the judgment is required. In particular, the Supreme Court of Canada has warned against a judge, hearing a stay motion, attempting to ascertain whether actual harm will result from the stay. In *RJR-MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 311 at p. 346, the court pointed out that to do so

would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[8] One further point to note regarding this motion is that I am not sitting in appeal of the application judge's decision not to suspend the declaration of invalidity. She gave very careful consideration to this issue at paras. 508 to 535 of her reasons. In making her determination she was bound by decisions from the Supreme Court of Canada and in particular *Schachter v. Canada*, [1992] 2 S.C.R. 679, to which she made extensive

reference. As she pointed out at para. 511, the Supreme Court has considered a suspension of invalidity to be a “serious matter” from the point of view of enforcement of the *Charter*. The perspective of the application judge is driven by that context. I am bound by a different body of law and by a different test, the test enunciated in *RJR-MacDonald*, where the context is the *prima facie* right of the government to a full review of the first-level decision and, as I will explain, the presumption of irreparable harm if the judgment is not stayed pending that review.

[9] The test for granting a stay pending appeal is set down in *RJR-MacDonald*. The court must be satisfied that:

- (i) There is a serious issue to be tried;
- (ii) The party seeking the stay would suffer irreparable harm should the stay not be granted; and
- (iii) The balance of convenience and public interest considerations favour a stay.

[10] The first part of the test has been satisfied; it is not disputed by the respondents that the issue before the court is a serious issue. The focus of the analysis will be on stages two and three of the *RJR-MacDonald* test. In cases involving the constitutionality of legislation, irreparable harm and balance of convenience tend to blend together and they are often considered together. This blending of the two stages in cases involving the constitutionality of legislation is understandable because the public interest is engaged at both stages: *RJR-MacDonald*, at p. 349.

[11] *RJR-MacDonald* instructs a motion judge that, in *Charter* cases, the onus of demonstrating irreparable harm to the public interest is less on a public authority than on a private applicant: p. 346.

[12] At the balance of convenience stage, I must determine which of the two parties will suffer the greater harm from the granting or refusal of the stay: *RJR-MacDonald* at p. 342. In constitutional cases, the public interest is a “special factor” that must be considered in assessing where the balance of convenience lies: p. 343. As I will explain more fully below, while the Attorney General does not have a monopoly on the public interest, a private party relying on the public interest to justify continuing suspension of legislation must, at the balance of convenience stage, demonstrate that the “suspension of the legislation would itself provide a public benefit”: *RJR-MacDonald* at p. 349.

[13] Therefore, unlike the application judge, I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

[14] This application is particularly difficult because of the findings made by the application judge concerning the link between the impugned provisions and the violence suffered by prostitutes. The application judge found that the applicants had established

that there are ways in which the risk of violence towards prostitutes can be reduced but that the impugned provisions throw up barriers, enforced by criminal sanction, that prevent prostitutes from taking measures that could reduce the risk of violence.

[15] There are obvious advantages to maintaining the *status quo* by staying the judgment. A stay will minimize public confusion about the state of the law in Ontario; for the time being the law in Ontario will be the same as in the rest of Canada. The police will be able to continue to use the tools associated with enforcement of the law that they say provides some safety to prostitutes, especially those working on the streets. The various levels of government will have the opportunity, should they choose to do so, to consider a legislative response to the judgment, which might be better informed following a full review by this court of the application judge's decision. Further, if a legislative response is required, sufficient time is needed because a response may be difficult to design not only because of the complexity of the issues surrounding prostitution but because of the uncertainty of the role of the province and municipalities in light of the Supreme Court of Canada's decision in *Westendorp v. The Queen*, [1983] 1 S.C.R. 43. In that case, the court struck down a municipal by-law directed at control of street prostitution.

[16] On the other hand, maintaining the *status quo* will leave in place a legislative framework that the application judge found seriously impacts on the physical security of a group of people, mostly women, who are pursuing an occupation that is not *per se*

illegal. While it is not my task to review the correctness of the application judge's decision, I cannot simply ignore those findings as they may inform the test for granting a stay. I am also conscious of the application judge's concern about staying the judgment as expressed at para. 2 of her reasons on October 15, 2010, granting a further temporary stay:

I expressed to counsel that I was concerned about extending the period of stay in light of my findings that the impugned provisions were being rarely enforced or were ineffective and that the law as it stands is currently contributing to danger faced by prostitutes. However, because all the parties consented and the extension was only for an additional thirty days, I am exercising my discretion and granting a stay of my judgement that the provisions are unconstitutional and should be of no force and effect, for an additional thirty days.

III. Decision Below

[17] The application judge based her decision on a voluminous record. In careful and lengthy reasons she found that the impugned provisions deprived the applicants of security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*. I will refer to more of the application judge's reasons below. But, in short, she found that prostitutes, especially street prostitutes, are vulnerable to acts of violence and the impugned provisions prevent them from taking precautions that can decrease the risk of violence. She went on to find that the provisions deprive the applicants of their security of the person in a manner that is not in accordance with the principles of fundamental justice. Finally, she found that the s. 7 violations could not be saved under s. 1 of the

Charter. Additionally, the application judge found that s. 213(1)(c) violates freedom of expression under s. 2(b) of the *Charter* and was not a reasonable limit under s. 1.

[18] The application judge dealt at length with the harm faced by prostitutes in Canada. As she pointed out, most of the evidence of harm was in relation to street prostitutes. She also considered whether violence is intrinsic to prostitution or whether there are ways to reduce the risk of harm. She found that the risk of harm could be reduced. This was the key finding in her reasons; because she then went on to find that enforcement of the impugned provisions prevents prostitutes from reducing the risk of harm. This finding established the crucial causal link between state action and the infringement of sex-trade workers' security of the person. The government had argued before the application judge that it was the clients who put prostitutes at risk, not the legislation. The government attacks this finding of causality in their appeal.

[19] The application judge then found that the infringement of the prostitutes' security of the person was not in accordance with the principles of fundamental justice. She began with the principle of fundamental justice that laws should not be arbitrary and found that s. 212(1)(j), living on the avails, is inconsistent with its objective of protecting prostitutes from exploitation and is therefore arbitrary. She found that on their own the bawdy-house and communicating provisions were each not arbitrary.

[20] However, the application judge found that the bawdy-house provision, when acting in conjunction with the other impugned provisions, is arbitrary. She made the same

finding with respect to the communicating provision. The clearest case was in relation to the bawdy-house provision. While the application judge determined that in-call work is the safest form of prostitution, it is rendered illegal. While out-call work is legal, it is not as safe and the living on the avails provision prevents prostitutes from taking measures such as hiring a driver or security guard that would make out-call work safer. The other alternative is street prostitution which the application judge found to be the most dangerous, especially because the communication prohibition forces prostitutes into brief encounters where they are unable to adequately assess risk: see reasons of the application judge at para. 385. The application judge similarly found that the communicating provision, in conjunction with the other impugned provisions, was arbitrary since moving prostitutes off the streets to combat social nuisance may exacerbate the harm that the bawdy-house provision seeks to prevent.

[21] The application judge also considered the overbreadth principle of fundamental justice. She found that the bawdy-house provision was overbroad because none of the harms the provision is aimed at, such as threats to public health or safety or eliminating neighbourhood disorder, need to be proved to obtain a conviction. Similarly, the living on the avails prohibition was overbroad because it caught non-exploitative arrangements. The communicating offence was not overbroad.

[22] Finally, the application judge found that all three provisions are grossly disproportionate to their objectives and therefore violate the proportionality principle of fundamental justice.

IV. Analysis: Applying the *RJR-MacDonald* Test for granting a stay

A. Findings on serious issue to be tried

[23] There was no dispute at the hearing of this motion that the Attorney General has met the first part of the test. These are serious questions, some of which have already been reviewed by the Supreme Court of Canada in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [the *Prostitution Reference*]. In the *Prostitution Reference*, a majority of the court upheld the validity of s. 193 (now s. 210) and s. 195.1(1)(c) (now 213(1)(c)) against challenges that those provisions infringe s. 7, albeit on different grounds than argued before the application judge. The majority also held that while the communication provision infringes s. 2(b) of the *Charter*, the violation is justifiable under s. 1. In his notice of appeal, the Attorney General of Canada submits, among other things, that the trial judge erred in failing to follow the *Prostitution Reference*.

B. Review of Evidence as it relates to Public Interest

[24] The real issues on this motion concern the second and third parts of the *RJR-MacDonald* test and particularly the third part, the balance of convenience. In cases involving the constitutionality of legislation, irreparable harm and balance of

convenience tend to blend together and they are often considered together. See for example, *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1997), 35 O.R. (3d) 304 at p. 311. This blending of the two stages in cases involving the constitutionality of legislation is understandable because, where the government is the applicant, the public interest is engaged at both stages: *RJR-MacDonald*, at p. 349. As well, the irreparable harm is not easily quantified in a case such as this in which monetary issues are not engaged and any harm to one side or the other cannot be cured by an award of damages at the end of the litigation: *RJR-MacDonald*, at p. 341. In the result, the same considerations that concern a court at the irreparable harm stage resurface in the balance of convenience stage.

[25] The focus of the government evidence on this application is the impact of a legislative void if the police are deprived of the power to investigate the impugned offences. Most of the evidence concerned the impact of the inability to enforce s. 213(1)(c), the communicating provision. To their credit, the police affiants generally make relatively modest claims about the effectiveness of s. 213(1)(c). The Attorneys General also filed material directed to the harm to the public interest resulting from failure to grant a stay in relation to the living on the avails and bawdy-house provisions, and the overall impact of the invalidity of all three of the impugned provisions.

[26] Before dealing with these two stages, I will set out the objectives of the impugned legislation as identified by the application judge, as a means of setting the context for this

motion. I will then summarize the evidence that the parties adduced, evidence directed to the issues of irreparable harm and balance of convenience and particularly to the question of properly identifying and situating the public interest.

(i) Section 213(1)(c) – the communicating provision

1. *The Objectives of s. 213(1)(c)*

[27] In her reasons, the application judge considered the objectives of the impugned legislation at length. Adopting the view of the Supreme Court of Canada in the *Prostitution Reference*, the application judge found at para. 274, that the objective of s. 213(1)(c), communicating for the purpose of prostitution, is to “address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex” and to take “solicitation for the purposes of prostitution off the streets and out of public view”. In the *Prostitution Reference*, pp. 1134-35, a majority of the Supreme Court found that the eradication of nuisance-related problems caused by street solicitation was a pressing and substantial concern.

2. *The Legislative void and s. 213(1)(c)*

[28] Staff Sergeant Randy Cowan is a member of the Peel Regional Police with 25 years experience as a police officer including 5 years as the Coordinator of the Vice Unit. He concedes that street prostitution “continues to be widespread in Peel Region”. The police respond to complaints by citizens through so-called “john sweeps” in which the

police “rely heavily on the ability to lay charges under s. 213(1)(c) of the *Criminal Code*”. After a sweep, there is a noticeable drop in street prostitution. He does not say in his affidavit how long the drop in street prostitution lasts. Further, while on the one hand he says that prostitutes and johns are deterred from returning to the area, he also concedes that “this activity continues in these areas despite this section being in force”. Still, the police rely on s. 213(1)(c) as a means of deterring the worst excesses of public solicitation. He said the following:

With this section of the *Criminal Code* intact, the john and the prostitute are forced to keep their activity as undetected as possible, yet as it stands we still receive complaints from residents regarding their activity. Without this section there would be no deterrent. This could lead to johns and prostitutes becoming more overt in their activity and thus becoming more of a community problem, with the police powerless to intervene because their activity is no longer unlawful.

[29] There are several important points to observe from this key passage of Staff Sergeant Cowan’s affidavit. First, the application judge found that the communicating provision forces prostitutes and their customers to conduct their negotiations in a manner that is least likely to be detected. The evidence referred to by the application judge shows that it is this very fact that leads to the greater risk of harm to prostitutes, since they have less time to assess the potential dangerousness of the client. As well, these sweeps may force prostitutes into more isolated and dangerous areas. The application judge quotes at length from the government’s own reports to support this premise. For example, according to the application judge, the 1998 *Report of the Federal, Provincial*

and Territorial Deputy Ministers Working Group on Prostitution found that the legislation has not had a serious impact on controlling street prostitution: para. 161 of her reasons. The 1998 *Working Group Report* also referred to research that “suggests that the illegal status of prostitution activities, especially those that occur in public or on the street, has contributed to a large amount of violence”: see para. 330. To a similar effect is the 2006 *Report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws*. The application judge quoted from this report at para. 331 of her reasons:

In many of the cities we visited, a number of witnesses indicated that the enforcement of section 213 forced street prostitution activities into isolated areas, where they asserted that the risk of abuse and violence is very high. *These witnesses told us that by forcing people to work in secrecy, far from protection services, and by allowing clients complete anonymity, section 213 endangers those who are already very vulnerable selling sexual service on the street. ...*

...

During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. *While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.*

...

According to a number of witnesses, section 213 also places street prostitutes in danger by forcing them to conclude their negotiations with clients more quickly, often leading them to get into the client's car too quickly. ...

...

Working out the details of the transaction before getting into a vehicle or going to a private location was considered important by all the prostitutes who testified. They told us that public bargaining would give them an opportunity to assess the likelihood of a potential client having violent tendencies.

[Emphasis added.]

[30] Staff Sergeant Cowan also stated that the police use s. 213(1)(c) to help prostitutes, whom they view as victims. He says that the possibility of laying charges allows the police to detain prostitutes for investigation and in this way “keep track of them, gain their trust, and sometimes help them get out of prostitution”. He says that: “[w]ithout a statutory authority or purpose to engage persons involved in this activity, police activity could and would be construed as harassment”.¹ Staff Sergeant Cowan also referred to the AVERT initiative to “monitor street prostitutes and guard against anonymous victimization and undetected foul play”. The database associated with this initiative contains the profile of 24 women. The program allows the police to assist women in overcoming their drug addictions and in exiting prostitution. Staff Sergeant Cowan asserts that without s. 213(1)(c) there would be no AVERT program and no

¹ While I accept what Staff Sergeant Cowan says, I should not be taken as approving of this use of the investigative detention power, a matter not argued before me.

ability to take proactive measures to assist prostitutes, or to search for them if they go missing resulting in a “reduced ability to protect prostitutes from violence”. I did not find this statement particularly compelling. In particular, I fail to see the link between s. 213(1)(c) and the ability to search for missing people. And, counsel for the responding parties makes the point that this “compassionate enforcement” only benefits a small group of sex workers.

[31] More compelling is Staff Sergeant Cowan’s evidence concerning the use of s. 213(1)(c) to reduce public solicitation in residential neighbourhoods and the associated problems identified by the Supreme Court of Canada in the *Prostitution Reference*. Staff Sergeant Cowan’s evidence in this respect is supported by the evidence from members of the Parkdale Community in Toronto and the Hintonburg community near Ottawa. These community members speak eloquently of the impact of street prostitution, which is often associated with drug use, on the quality of life in those communities. Finally, Staff Sergeant Cowan speaks of the possible increase in street prostitution in Ontario and more frequent confrontations between prostitutes and members of the public, should the judgment not be stayed.

[32] The possible impact on the Hintonburg community of the invalidity of s. 213(1)(c) is explained by the community member in her affidavit. While she speaks of the impact of the invalidity of all of the impugned provisions, a close examination of her affidavit

shows that it is the inability to enforce s. 213(1)(c) that would have the greatest impact on the community:

None of the alternatives to the prostitution laws would work. Legalizing would not stop the illegal sex trade. A lot of johns want anonymity and visiting a brothel is not anonymous; their car is parked there. In contrast, street prostitution takes minutes, it's anonymous and only costs \$10. Also the drug-addicted women could not work in brothels; neither could the ones who have STDs. ... In addition, the prostitutes in my neighbourhood were generally older (30-55 years of age) and most were drug-addicted. These are not the kind of women would could get work in a brothel.

[33] The evidence provided in the affidavit of Inspector Howard Page of the Toronto Police Service is similar to that of Staff Sergeant Cowan. He also makes the somewhat broader statement that:

Section 213(1)(c) is also one of the most effective tools the police have to investigate pimps and the exploitation of women within the sex trade. Information on pimps and related organized crime would often not come to light if arrests were not made for communicating for the purpose of prostitution.

While Inspector Page referred to no empirical data to support this rather bold claim, since the responding parties chose not to cross-examine him on his affidavit, the statement stands unchallenged on this motion.

[34] The Attorney General of Ontario provided two affidavits from Derek Parenteau who is employed as a Street Youth Worker at Evergreen Centre for Street Youth in Toronto. Through a drop-in centre operated by the Evergreen Centre, Mr. Parenteau has

had contact with many pimps and prostitutes. While I found his information interesting it was difficult to draw any helpful inferences from it. If nothing else, Mr. Parenteau's affidavits demonstrate the complexity of the treatment of prostitution by the law. His first affidavit is a summary of brief conversations he has had with pimps and prostitutes since the application judge rendered her decision. They have told him that there will be an increase in street prostitution, including prostitution by underage girls. He also provided the opinion that the average age of entry into prostitution for girls is 13 to 14 years and for boys is 12 to 13 years. It is difficult to know what conclusions to draw from this kind of information; the criminal prohibitions relating to living on the avails of prostitutes under the age of 18 years have not been not struck down, and the alleged involvement of underage youth in prostitution was obviously the state of affairs well before the application judge's decision. Finally, the pimps have also told Mr. Parenteau that they fear organized crime will become more involved in street prostitution. This statement is pure speculation from unnamed sources whose qualifications to make the observations are unknown. I give it no weight.

[35] The Attorney General of Canada also filed an affidavit from John Fenn who runs a diversion program in Toronto for persons charged with the communicating offence and being found in a bawdy-house. He attests to the success of this program, so-called "John Schools" in Toronto and elsewhere. He feels that these programs as well as a program to assist prostitutes called "Streetlight" will fold if the judgment of the application judge is not stayed because these programs are funded by fees charged to the accused for

attending the school. I would point out that the evidence given by Natashe Falle, who actually manages the Streetlight program, was to the effect that even without the support from fees charged to accused, there would be “a lot of other avenues” for funding.

[36] Mr. Fenn also offered the opinion that previous graduates will return to purchasing the services of prostitutes, that there will be more prostitutes in communities and that pimps will try to lure more women, and younger girls into prostitution. He also said, “It will be very difficult to reverse the harms done.” It is not clear to me that Mr. Fenn had the required expertise to offer these latter opinions and accordingly, I have attached no weight to these bald claims unsupported by any empirical or other data.

[37] Staff Sergeant Cowan and Inspector Page filed affidavits before the application judge and those affidavits were also filed on this application. The application judge did not expressly refer to those affidavits, but she did refer generally to the evidence of police officers filed by the Attorney General of Canada at paras. 89 to 94 of her reasons. She noted at para. 94 that those officers who were cross-examined “admitted that the level of violence faced by prostitutes on the streets is worse than it is indoors, and that safety precautions can be taken in indoor locations to reduce the level of violence”.

[38] To conclude, the Attorneys General have provided, on this motion, evidence of harm to the public interest, should the judgment not be stayed in relation to s. 213(1)(c). Admittedly, some of that evidence is less than compelling, for reasons I have provided. I

will consider the impact of that evidence below in applying the irreparable harm and balance of convenience parts of the test.

(ii) Section 210 – Bawdy-house provision

1. *The Objectives of s. 210*

[39] The application judge found, based on the historical record, that the objectives of the bawdy-house provisions (ss. 197 and 210), as they relate to prostitution, are to combat neighbourhood disruption or disorder, and to safeguard public health and safety.

[40] The application judge rejected the Attorney General of Ontario’s broader or “modern” objective based on a “concern for the dignity of persons involved in prostitution and the prevention of physical and psychological harm to them”. Even if this was an objective of the legislation, the evidence placed before the application judge made her doubt the effectiveness of the legislation in meeting that objective. The application judge found, at para. 361, that with respect to the bawdy-house provision, “the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction”.

2. *The Legislative Void and s. 210*

[41] In para. 539 of her reasons, the application judge recognized that a consequence of holding the provisions unconstitutional “may be that unlicensed brothels may be operated and in a way that may not be in the public interest”. She stayed her decision for up to 30 days to enable the parties to make fuller submissions on whether her decision should be

stayed. As noted, the parties subsequently agreed to a further stay pending this motion. The Attorneys General did not attempt to place evidence before the application judge despite her invitation to do so.

[42] The evidence of Staff Sergeant Cowan and Inspector Page provided on this motion is not so much directed to the question of the impact of operation of unlicensed brothels (the question raised by the application judge). Rather, their evidence was directed to the impact of the declaration of invalidity of the bawdy-house provision on the ability to investigate other offences. As I understand the import of most of this evidence, while there was some nuisance associated with the operation of bawdy-houses, the bawdy-house provision was most useful as a way to leverage investigations to uncover more serious criminal activities. Staff Sergeant Cowan described the bawdy-house investigations as “multi-layered”:

The first layer that often presents itself is the street level or bawdy-house layer, which begins with a complaint or discovery that a place is operating as a house of prostitution. This causes the police [to] begin an investigation regarding bawdy-houses. In the course of this investigation other layers become visible. These are usually more serious, and thus the effort to conceal them is greater. These layers are the human trafficking, extortions, assaults, threatening, exploitation and procuring layers. These investigations initially present as bawdy-house, communication for the purpose or living on the avails. If the police were no longer to have the legislated mandate to enforce those laws, then these very serious crimes would go undetected.

[43] The application judge reviewed in her reasons at paras. 514 to 535 the many other *Criminal Code* provisions that, in her view, would be available to investigate these other

offences. Staff Sergeant Cowan explains in his affidavit filed on this motion why many of these provisions would not be as effective as the bawdy-house investigation.

[44] Inspector Page gave similar evidence as that of Staff Sergeant Cowan. Unfortunately, for the applicant, the cogency of his assertions is undermined by the example he provided as to the supposed utility of the bawdy-house provisions. At paras. 14 to 17 of his affidavit, Inspector Page discusses a case reported in the Toronto Star in September of this year which he alleged came to light through a bawdy-house investigation, where a prostitute complained to police that she was being subjected to extortion. Inspector Page goes on to describe how “a couple of months later” the investigating officers noticed that these same premises, which were offering escort services through Craigslist, were being used for babysitting young children. Inspector Page goes on to make the claim that, “[n]one of this activity would have been discovered in the absence of the bawdy-house investigation.” Counsel for the responding parties made the point that this investigation could have been undertaken in view of the complaint of the criminal offence of extortion and the apparent commission of the corrupting children offences contrary to s. 172 of the *Criminal Code*. Although counsel for the responding parties chose not to cross-examine Inspector Page, I attach little weight to his assertions concerning the operation of s. 210. The lack of empirical evidence and the frailty of his anecdotal evidence leave me unconvinced on this aspect of Inspector Page’s evidence.

[45] Inspector Page goes on to assert that, “[i]n many instances, s. 210 is the only effective tool which law enforcement officers have to uncover human trafficking and links to organized crime”. Inspector Page also says that the provision provides a mechanism for seizing the proceeds of crime. He provides no empirical data or even anecdotal evidence to support these assertions. Finally, he asserts that bawdy-houses would be free to operate in residential areas “providing venues for organized crime, pimps, drug traffickers and the exploitation of vulnerable women and youth”. This assertion suffers to some extent from the failure to explain, in particular, why the drug laws do not provide adequate enforcement mechanisms.

[46] The information provided by Staff Sergeant Cowan and Inspector Page are supported by the affidavits of two community members. However, the affiant from Parkdale appears to associate the harm caused by a proliferation of bawdy-houses with their use as “crack houses”. It is unclear why drug enforcement legislation is incapable of coping with this problem. Indeed, the affiant from Hintonburg makes this point in her affidavit:

In addition to the work of the police, in particular, the prostitution sweeps, *the decrease in prostitution occurred in part because the community was able to get rid of the really active drug houses, the crack-houses.* As well, with urban renewal, the run-down houses in our neighbourhood have been torn down and rebuilt, and there are fewer drug houses. In the past year or so, prostitution has moved away, along with the drug trade. [Emphasis added.]

[47] The Hintonburg neighbourhood association formed a taskforce whereby community groups shared concerns regarding drugs and prostitution with various city departments. There did not appear to be any association between the bawdy-house provision and this community initiative.

[48] Staff Sergeant Cowan and Inspector Page deal at some length with the regulation of strip clubs. According to Staff Sergeant Cowan there is “already a large problem with strip club owners and massage parlour owners being wilfully blind to the prostitution occurring in their clubs”. It is unclear what inference is to be drawn from this information, except that there may be more prostitution in these clubs. Paradoxically, Detective Constable Balaga, of the Toronto Police Service, who provided an affidavit for the Attorney General of Ontario, offered the opinion that the application judge’s decision would lead to the closing down of strip clubs.

[49] Standing against the government evidence on this motion is the wealth of information before the application judge about the safety advantages of indoor prostitution. At para. 305, she referred to the finding of the 1998 *Working Group Report*:

Available data tends to demonstrate that indoor prostitution is less harmful physically than that which takes place on the street. The vast majority of crimes against prostitutes, including murders, are perpetrated against street prostitutes by customers and pimps, largely because of the anonymity, tension and high level of drug use that characterize street prostitution.

[50] And, at para. 306, the 2006 *Subcommittee Report*:

Much less is known about violence against people involved in off-street prostitution. As we have seen, these people are often invisible to conventional research, or at least more difficult to reach. However, according to witnesses, it would appear that off-street prostitutes are generally subject to less violence.

[51] Interestingly, Staff Sergeant Cowan supports at least some form of indoor prostitution. He said this at para. 27 of the affidavit placed before the application judge:

Under the Criminal Code, prostitution itself is not illegal. There are legal, safe ways to practice prostitution in Canada. I support this approach, and believe it is preferable to the legal regime in some parts of the United States, where prostitution itself is illegal, and police spend a lot of their time going after prostitutes rather than the pimps. [Emphasis added.]

[52] Counsel for the Attorney General of Canada explained that the legal way to practice prostitution involved some form of advertising in which the customer and the prostitute make contact and then the prostitute goes to the customer's hotel room or residence (so-called "out-call work"). Staff Sergeant Cowan also went on in the same affidavit to offer the opinion, that "there would be a huge increase in prostitution in Canada" if the impugned provisions were struck down and that "Canada would become a sex tourism destination and the number of young women and girls caught up in prostitution would greatly increase". He made this claim in the face of his own opinion that the price of sexual services is already "much lower" than it is in the United States because of our "already relatively liberal prostitution laws" and that prostitution is "already a large industry among business travellers". Even taking into account the

difficulty of predicting the impact of decriminalization of bawdy-houses, I find this part of Staff Sergeant Cowan's affidavit too speculative to warrant giving it much weight.

[53] The Attorney General of Ontario relied in this application on the affidavit of Cecilia Benoit, who had been a witness for the responding parties before the application judge. In the affidavit, Dr. Benoit refers to reports that sex-trade workers operating indoors experience fewer instances of violence and that those working independently in their own homes were able to retain most of their earnings. The Attorney General of Ontario relied upon a portion of para. 23 of Dr. Benoit's affidavit to highlight the importance of a regulatory framework. The complete paragraph is as follows:

Sex workers operating out of their own homes are also not immune to the threat of violence, as one respondent commented: "I had one trick threaten to kill me when I was working out of my home." These violent episodes, however, occur with far greater frequency and severity on the outdoor strip. It is therefore not solely the nature of the profession, but also the nature of the venue, that makes women susceptible to violence under the current laws. *In order to maximize the safety of sex workers it is not sufficient to simply repeal bawdyhouse prohibitions, as this repeal must be complimented or accompanied by a rational regulatory regime.* [Emphasis added.]

[54] Dr. Benoit's report, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers*, was also relied upon by the Attorney General of Ontario for the evidence that some bawdy-houses operate like sweatshops where the workers are vulnerable to economic exploitation by those in positions of control.

[55] The Attorney General of Ontario also relied upon portions of the transcript of the cross-examination of Dr. Frances Shaver that was before the application judge. These excerpts support the view that decriminalization alone will not ensure the safety of prostitutes. For example, Dr. Shaver agreed with this statement from a report she wrote:

Legislative review is one area in need of attention. *Legislative change in and of itself, however, will not be sufficient to improve the situation for sex workers.* Such changes must be combined with social policy changes, including education, support and advocacy, as other factors (e.g., public attitudes and opinion; the stigma attached to sex work) also have a negative impact on sex workers' lives. [Emphasis added.]

[56] As noted, the application judge found that the safest way to conduct prostitution is generally in-call and noted that the bawdy-house provisions make this type of prostitution illegal. She made this finding on the basis of government and Parliamentary reports and the evidence of Dr. John Lowman, an expert who had prepared several reports on prostitution for the federal Department of Justice. On this motion, however, I must consider the short-term impact of decriminalization, in the absence of any regulatory framework, since without a stay of the judgment, governments and social agencies would have little time to respond.

[57] Accepting the application judge's identification of the harm from enforcement of the bawdy-house provision, I must also take into account that there is no evidence from the responding parties as to how, in the relatively short time before this appeal is heard,

and in the absence of any regulatory regime, the safety of prostitutes will be measurably increased by suspending the bawdy-house provisions.

(iii) Section 212(1)(j) – Living on the avails

1. *Objective of s. 212(1)(j)*

[58] The application judge found, at para. 259, that the objective of s. 212(1)(j), the living on the avails of prostitution offence, “is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps”.

2. *The Legislative Void and s. 212(1)(j)*

[59] Staff Sergeant Cowan and Inspector Page provided some information on the impact of the striking down of s. 212(1)(j). Staff Sergeant Cowan states that this provision is used to investigate pimps who are exploiting girls and women. He states that the police are able to prosecute this offence without the evidence of the prostitute, who is often unwilling to testify. Also, these investigations may lead to the laying of human trafficking charges. Staff Sergeant Cowan provided some information to substantiate this assertion. Inspector Page provided similar evidence in his affidavit. Mr. Parenteau offered the opinion that the living on the avails offence protects prostitutes from exploitation by pimps to an extent that other charges do not, apparently because the prostitute does not have to testify to support the charge.

[60] One concern raised by Staff Sergeant Cowan is the impact of what he termed the “open market” should the judgment not be stayed. In his opinion, this open market

would increase the demand for prostitutes and he noted that prostitutes are often recruited and exploited at a young age. This opinion is, in some respects, merely an educated guess and I weigh its value accordingly. The opinion is also somewhat at odds with the affidavit the officer filed before the application judge where he attests to the success in deterring juvenile prostitution. However, I would not wholly discount this opinion.

[61] The application judge found that the living on the avails provision infringed the *Charter* rights of prostitutes and exposed them to risk of serious harm because, as interpreted by the courts, the provisions prevent prostitutes from taking steps to protect themselves such as allowing the prostitute to hire an assistant or bodyguard. She went on to find that the provision, whose objective was to protect prostitutes from exploitation “may actually serve to increase the vulnerability and exploitation of the very group it intends to protect”: para. 379. The affidavits of the officers meet this issue to some extent by stating that, in their experience, charges are only laid in circumstances where the police believe there is evidence of exploitation.

(iv) The Overall Impact of the Legislative Void

[62] Both Staff Sergeant Cowan and Inspector Page provided information on the overall impact of a declaration of invalidity with respect to all three provisions. The general import of these parts of the affidavits was that the police would have to abandon all ongoing investigations, that “red light districts” and street prostitution would proliferate, and that pimps and others would be free to exploit and victimize vulnerable

women and children. Staff Sergeant Cowan and Inspector Page also explained in some detail why investigations into offences under other provisions of the *Criminal Code* would not provide viable alternatives.

[63] Finally, the Attorney General of Canada relies upon the experience during the period that lap-dancing appeared to be legal following the trial decision in *R. v. Mara*, [1994] O.J. No. 264 (Ont. Ct. J. (Prov. Div.)), rev'd (1996), 27 O.R. (3d) 643 (C.A.), aff'd in part [1997] 2 S.C.R. 639. The material shows that it was difficult for municipalities to respond to what was considered a public health problem as well as increased risk of violence and coercion of employees of strip clubs. The difficulties that ensued as a result of the trial decision in that case may have been attributable to the lengthy (17-month) delay between the trial decision and when the Crown appeal was heard by this court. I am confident that there will not be that kind of delay in this case.

[64] While I found some of the claims somewhat overblown, particularly the claim that “all” ongoing investigations would have to be abandoned, the unchallenged evidence from these experienced police officers as to the short term harm that would occur cannot be ignored. This, it seems to me, is the strength of the governments’ claim on irreparable harm and balance of convenience. The invalidity of the impugned provisions would leave unregulated an area of activity that is associated with serious potential short-term harm to communities. Municipalities and provincial governments would not be able to quickly respond with a regulatory framework that would be necessary to address some of

the harms that the application judge recognized in her reasons. Further, as ineffective and perhaps counter-productive as some of the enforcement of the s. 213(1)(c) offence may be, it is unclear whether the police would be able to quickly develop lawful strategies to respond to the legitimate concerns of the public, like those identified by the community members from Parkdale and Hintonburg.

[65] I will now turn to parts two and three of the *RJR-MacDonald* test, dealing briefly first with the question of irreparable harm.

C. Findings on Irreparable Harm

[66] The applicant and the responding parties spent some time in argument about whether the government was entitled to a presumption of irreparable harm. The concept of such a presumption “in most cases” was enunciated in *RJR-MacDonald*, where the court held as follows at p. 346:

In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. *The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.* [Emphasis added.]

[67] Courts have held that this presumption is applicable even where a court has struck down the impugned legislation. As Richard C.J. said in *Canadian Council for Refugees et al. v. Canada*, 2008 FCA 40, at para. 34:

I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

[68] I agree with Richard C.J. that the presumption that Parliament was acting in the public interest in enacting the impugned provisions remains, although the application judge has struck down the legislation. The public interest is particularly engaged where criminal law is the focus of the challenge since criminal law is “designed to promote public peace, safety, order, health or other legitimate public purpose”: *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 at para. 74.

[69] In enacting these provisions, Parliament was attempting to promote or protect the public interest and so *prima facie* the government is entitled to the *RJR-MacDonald* presumption of irreparable harm. The responding parties argue, however, that the harm is not only not irreparable but also speculative and tentative.

[70] In addition to the presumption of irreparable harm to the public interest, the harm to which the Attorney General points, and which is supported by some evidence tendered on this motion, may be summarized as follows:

- Inability to protect vulnerable neighbourhoods from nuisance associated with street prostitution;
- Inability to assist prostitutes through investigative detention of the s. 213(1)(c) offence;
- Inability to continue the John School diversion programme;
- Inability to use the bawdy-house provision to initiate “multi-layered” investigations into crimes against prostitutes such as human trafficking, extortion, assault, threatening, exploitation and procuring;
- Inability to use living on the avails charges as a means of interrupting human trafficking and other serious criminal offences.

[71] Finally, as noted, the Attorney General relies upon the lack of any regulation of prostitution-related conduct as a result of the *de facto* legalization of street prostitution, bawdy-houses and pimping. The government argues that even if some decriminalization was seen as an appropriate response to the danger faced by prostitutes, governments at all levels need time to put a suitable regulatory framework in place.

[72] I am satisfied that the moving party has satisfied the irreparable harm test. While some of the evidence relied upon is somewhat speculative, that is the nature of the irreparable harm test in a case, like this, where the harm is not measured in monetary terms. The responding parties argue that the Attorney General has not demonstrated any irreparable harm because the provisions are rarely enforced and there are other methods open to the police to achieve the objectives of the legislation. They point to the long list of other *Criminal Code* provisions that the police could use to investigate prostitution-

related crimes and to the evidence of other enforcement techniques that have been employed in the past. Against this submission is the unchallenged evidence of two experienced police officers of the difficulties of using many of these other provisions and other enforcement techniques. Finally, as pointed out in *RJR-MacDonald*, at p. 341, the term “irreparable” refers to “the nature of the harm suffered rather than its magnitude”. Much of the responding parties’ submissions are more directed to the magnitude of the harm, an issue that is better analyzed at the third stage, balance of convenience.

D. Findings on Balance of Convenience

[73] While I have found that the Attorney General has met the test for irreparable harm, that finding does not determine the question of balance of convenience. At this stage, I must determine which of the two parties will suffer the greater harm from the granting or refusal of the stay: *RJR-MacDonald* at p. 342. In constitutional cases, the public interest is a “special factor” that must be considered in assessing where the balance of convenience lies: p. 343. The Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of the public interest, including concerns of identifiable groups.

[74] Here, the responding parties are private parties. As pointed out in *RJR-Macdonald* at p. 344, a private party alleging that a public interest is at risk must demonstrate that harm because a private applicant is “normally” presumed to be pursuing their own interest. While the responding parties here also rely on the public interest, there is an

element of private interest in this case; the three applicants before the application judge stated that they would like to work as prostitutes or conduct activity that may infringe the prostitution provisions free from criminal sanction: see evidence of Ms. Bedford summarized at para. 31 of the application judge's reasons; Ms. Lebovitch at para. 36; and Ms. Scott at para. 43.

[75] In the context of a suspension case, a private applicant relying on public interest must, at the balance of convenience stage, demonstrate that the "suspension of the legislation would itself provide a public benefit". However, because the government benefits from the presumption that it acts to promote the public interest, the "same principles would apply" where it is the government and not a private party that is the applicant: *RJR-MacDonald* at p. 349. That is, it is for the private party to show that suspension of the legislation would provide a public benefit.

[76] In this case, the respondent relies, as an aspect of the public interest, upon the considerations of an identifiable group; prostitutes who operate within a legally ambiguous context in which their occupation is not *per se* criminal, but virtually every method for carrying on that occupation is prohibited. Yet, as the application judge found, the impugned legislation regulating the occupation prevents prostitutes from taking relatively modest steps to increase their security.

[77] I am satisfied that the applicant has established that the balance of convenience favours staying the judgment in relation to communicating for the purpose of prostitution,

the s. 213(1)(c) offence. The evidence establishes that it is the short-term consequences of an inability to enforce this prohibition that will have the most deleterious impact on vulnerable communities such as Parkdale and Hintonburg. The nature and ability to implement a short-term, constitutional federal response, in light of the application judge's findings and the complexity of the issues, is far from clear. The experience with the lap-dancing case shows that municipalities will not be able to respond immediately to this gap in the legislative scheme. Moreover, in light of the *Westendorp* case, it is not obvious how affected municipalities could legally respond to the nuisance that would return to their communities. I also point out that the term "nuisance" masks the seriousness of the problem facing these communities because of the attendant social problems that are associated with street prostitution including increased violence, accosting of women and girls, and drug use.

[78] I appreciate the compelling evidence placed before the application judge that street prostitution is the most dangerous form of prostitution and that the communicating provision contributes to the risk of harm. The dreadful experience in Vancouver revealed by the *Pickton* case (see *R. v. Pickton*, 2010 SCC 32) is a compelling reminder of the danger of street prostitution. However, the police also say that they use the communicating provision to intervene to attempt to mitigate the harm. I repeat the point made earlier that on this kind of a motion, on the one hand, I have a limited right to review the impugned government action for effectiveness. On the other hand, the responding parties have not provided sufficient evidence to show that the suspension of

the legislation, in the absence of regulation and social programs, would itself provide a public benefit during the brief time that the judgment will be stayed pending the appeal. The balance of convenience test is by definition a balancing and I have been persuaded that, on balance, the *status quo* is preferable as it relates to the communicating offence.

[79] Similarly, I am satisfied that the declaration of invalidity of the living on the avails offence should be stayed. The evidence of harm to the public interest if a stay were not granted is less extensive for this offence than it is for the communicating offence. However, there is unchallenged evidence filed on this motion that this provision is used by police to protect against exploitation and physical harm to prostitutes in a context in which other provisions are ineffective because they depend upon evidence from the prostitute. As well, this provision is used to further investigations into the very serious offence of human trafficking.

[80] The most serious problem with the living on the avails provision, identified by the application judge, is that it overshoots the mark by criminalizing non-exploitive relationships, thus potentially preventing prostitutes from employing people who could provide a measure of safety. On the other hand, there is the evidence referred to earlier suggesting that, at least in the experience of the police officers who filed affidavits on this motion, police do not lay the living on the avails charge in the absence of evidence, which they believe shows an exploitive relationship. Police charging practices may not be relevant to whether the legislation meets minimum constitutional standards, see *R. v.*

Smith, [1987] 1 S.C.R. 1045 at p. 1078-79. That evidence may, however, assist in measuring the magnitude of the short-term harm should the judgment be stayed. Further, the respondent put little evidence before me of the benefit of a temporary suspension in the context of a regulatory void. Again, I highlight this point because I am bound by this consideration.

[81] The Attorney General has also met the balance of convenience test as it applies to the bawdy-house provision. Consideration of a stay in relation to the bawdy-house provision starkly demonstrates the different perspectives the application judge had to bring to bear as opposed to the perspective I must apply on this motion. For example, in finding that the bawdy-house provision infringed the proportionality principle of fundamental justice, the application judge's focus, applying *Malmo-Levine*, was on whether the deprivation of security of the person was grossly disproportionate to its objective of preventing public nuisance and interference with public health and safety. She found, based on the evidentiary record, that complaints about nuisance are rare and that enforcement has the potential of preventing prostitutes from taking measures to enhance their health and safety.

[82] However, as I have noted earlier, it is not the nuisance of bawdy-houses which represents the harm to the public interest upon which the government relies in its motion before me. Rather, the government relies on the inability to use bawdy-house investigations to investigate other potentially much more serious offences involving

exploitation of prostitutes. The responding parties did not suggest that I could not consider this kind of harm to the public interest. In any event, I am satisfied that *RJR-MacDonald* allows me to take into account these broader considerations, as the court explained at p. 344 of the reasons for judgment:

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. *Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought.* "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. [Emphasis added.]

[83] Admittedly, I have found some of the government's evidence of harm less than compelling. My principal concern, however, is with the regulatory void, a matter also referred to by the application judge. In that respect, I am concerned about the suggestion from counsel for the responding parties that the stay simply be lifted and to see what would happen. I cannot accept that this approach is in the public interest. The evidence of the responding parties' witnesses, Dr. Benoit and Dr. Shaver, relied upon by the Attorney General of Ontario, is that simple repeal of the bawdy-house prohibition will not maximize the safety of prostitutes. The extensive review, conducted by the application judge, of the legislative framework in other western democracies shows that

decriminalization has been accompanied, with varying degrees of success, by a regulatory scheme or improved social supports: see paras. 178-213 of her reasons.

[84] To conclude, by pointing to the findings of the application judge, the responding parties have demonstrated harm should a stay be granted in relation to each impugned provision. However, I am not satisfied that suspension of the legislation during the short period pending this appeal, in the absence of regulation and social programs, provides a sufficient public benefit to tip the balance of convenience in the responding parties' favour.

[85] Finally, I intend my order staying the judgment to be time-limited. This again, may to some extent, meet the application judge's concern expressed in her reasons on the application and on the motion to extend the stay. It is not satisfactory that the perfection of this appeal be delayed as occurred with the lap-dancing case.

V. Disposition

[86] Accordingly, an order will go staying paras. 1 to 3 of the judgment of Himel J. This stay will be in effect until April 29, 2011 or until the appeal is argued, whichever is the earlier, unless varied by a further order of this court or a judge of this court. The parties may wish to reconsider the timetable to which they had previously agreed and which would have delayed hearing of this appeal to sometime in late June, 2011. I note that counsel for the responding parties was prepared to argue the appeal as soon as

possible. This court is available to hear this appeal at the end of April, before the expiration of this order. This is not a case for costs.

Signed: "Marc Rosenberg J.A."

RELEASED: "MR" DECEMBER 2, 2010