

A New Chapter in Municipal Business Regulation?

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Every Canadian municipal lawyer knows the case of *Westendorp v. The Queen*, [1983] 1 S.C.R. 43 (S.C.C.), involving a City of Calgary bylaw ostensibly aimed at regulating the use of public streets. Enabling legislation allowed a municipal council to make bylaws controlling and regulating the use of all highways, sidewalks, and other public place. The City passed a bylaw prohibiting the use of streets by "those approaching or being approached by others for the purpose of prostitution" because such activities were "a source of annoyance and embarrassment to members of the public and interfere[d] with their right and ability to move freely and peacefully upon the City streets."

Canada does not criminalize prostitution; however, the federal *Criminal Code* makes certain aspects of plying the trade illegal. These include living on the avails of prostitution, keeping a common bawdy-house (that is, conducting prostitution in an indoor location on a habitual and frequent basis), and communicating in a public place for the purpose of engaging in prostitution (currently ss. 210, 212(1)(j), and 213(1)(c) of the *Code*). The Supreme Court of Canada held that the Calgary bylaw was, in intent and purpose, an attempt to legislate criminal law, a subject matter that fell exclusively in the federal government's jurisdiction. "However desirable it may be for the municipality to control or prohibit prostitution, there has been an overreaching in the present case which offends the division of legislative powers."

Two years later, a Special Committee on Pornography and Prostitution (the Fraser Committee), established by the federal government, published its report, *Pornography and Prostitution in Canada*. It recommended that the activities of prostitutes should be "de-criminalized as far as possible." The then Justice Minister rejected the proposals and instead, a different provision on communicating for the purpose of prostitution, s. 213, was passed in 1985.

Several other committees and reports revisited the issue since 1985. Municipalities continued to face challenges to bylaws regulating escort services, body-rub parlours (a.k.a. non-therapeutic massage establishments), lap-dancing bars, and other adult businesses based on the ruling in *Westendorp*. The courts have recognized business licensing and business regulation as legitimate municipal objectives provided that the bylaws do not attempt to regulate "morality" or otherwise go beyond the delegated powers. *See, e.g., Nordee Investments Ltd. v. Burlington (City)*, (1984), 48 O.R. (2d) 123 (Ont. C.A.); *Pimenova v. Brampton (City)*, 2004 CanLII 19371 (Ont. S.C.J.); and *Adult Entertainment Bar Ass'n v. Toronto (Municipality)*, 1995 CanLII 7302 (Ont. S.C.J.). (In one case, the business owner claimed that the effect of a bylaw regulating escort services was that the city had been "living off the avails of prostitution" by taking her money, knowing what she and her escorts proposed to do and were doing to earn it. That was illegal, she said, and made the bylaw invalid: *Strachan v. Edmonton (City of)*, 2003 ABQB 309 (Alta. C.A.)).

There's now a new wrinkle in the plain brown paper wrapper. In a recent ruling out of Ontario, *Bedford v. Canada*, 2010 ONSC 4264 (Ont. S.C. J. Sept. 28, 2010) Justice Susan Himel concluded that three provisions of the *Criminal Code* (living off the avails, keeping a bawdy-house, and communicating in public for the purposes of prostitution) offended the *Canadian Charter of Rights and Freedoms*, and struck the provisions as invalid.

Terri-Jean Bedford, Amy Lebovitch, and Valerie Scott (described in a news story as a "flamboyant dominatrix" and two former sex workers, respectively) had applied to the court seeking declaratory relief against the Attorney General of Canada. They argued that the provisions violated their s. 2(b) (freedom of expression) and s. 7 (life, liberty and security of the person) rights under the *Canadian Charter of Rights and Freedoms*, based on the proposition that the provisions prevented prostitutes from conducting their lawful business in a safe environment. The Attorney General of Ontario, however, argued that the physical and psychological harms visited on prostitutes were the result of the inherent inequality of the prostitute-customer relationship, and not the criminal law.

The court hearing resulted in over 25,000 pages of evidence in 88 volumes, amassed over two and a half years. Numerous experts (academics, police officers, sex workers, and others) testified on the effect of the laws and about what is done in other countries and jurisdictions (including Nevada). The 131-page ruling summarizes this evidence and the evolution of the law in Canada. Justice Himel concludes that the challenged provisions "individually and together, force prostitutes to choose between their liberty interest and their right to security of the person as protected under the [*Charter*]. I have found that these laws infringe the core values protected by section 7 and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society." The court pointed out that the case was not about whether or not there was a constitutional right to sell sex, but whether or not the law materially contributed to the violence faced by prostitutes and increased their risk of danger.

News reports indicate that the case is being appealed to the Ontario Court of Appeal. The *Bedford* ruling conflicts with a 1990 Supreme Court of Canada case, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (a.k.a. "the Prostitution Reference" case), in which the Court dismissed ss.

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philosophy." **Morals:** "Derived from the Latin term *moralis* which refers to manners or customs; making or being capable of making, distinctions between right and wrong conduct at the individual level." **Legality:** "derived from the Greek term, *legein*, which means to collect, and the Old English term *lag*, which refers to something laid down and settled." It has an emphasis on authority and preciseness, its strongest roots are with politics/rule-making and jurisprudence. **Codes of Ethics:** "[G]enerally articulates aspirational principles, such as forthrightness." Codes of Conduct: "[G]enerally asserts aspiration values or sets minimum expectation values." Van Wart, Montgomery, Codes of Ethics as Living Documents, Public Integrity 5, no. 4:331-346 (2003) (hereinafter "Van Wart").

4. Davies, Mark, *A Practical Approach to Establishing and Maintaining a Values Based Conflicts of Interest Compliance System*, Remarks for a session entitled *Rules and Tools for Managing Conflicts of Interest Issues*, The Global Forum on Fighting Corruption, Brasilia, June 7-10, 2005.

5. Tampa, FL, Ethics Code, art. VIII (2003) at http://www.tampagov.net/dept_human_resources/files/City_of_Tampa_Ethics_Code.pdf (last accessed Aug. 13, 2010).

6. CityEthics.Org, *Draft Model Municipal Ethics Code* (2006) at http://www.cityethics.org/content/model-code-introduction (last accessed Aug. 13, 2010).

7. Van Wart, *supra* note 3 at 334.

8. Swain, John W. and Duke, Matthew L., *Recommendations for Research on Ethics in Public Policy from a Public Administration Perspective: Barking Dogs and More*, Int'l J. Pub. Admin. 24, no.1:125-136 (2001).

9. Menzel, Donald C., Ethics Management for Public Administrators (New York, M.E. Sharpe, 2007); Lewis, C.W. & S.C. Gilman, The Ethics Challenge in Public Service: A Problem Solving Guide (2d ed. San Francisco 2005 Jossey-Bass).

10. City of Philadelphia, *IntegrityWorks*, *The place to learn why and how the City operates ethically*, at http://www.phila.gov/integrityworks/index.html (last accessed Nov. 10, 2010).

11. Jacksonville, FL, Ethics Code, ch. 602, § 602.1101 to 1104 (1999).

12. City of Atlanta, *Ethics Office Website* at http://www.atlantaga.gov/government/boards/ethics_ethicsofficer.aspx (last accessed Nov. 10, 2010).

13. *See, e.g.*, Miami-Dade, Miami-Dade Inspector General website at http://www.miamidadeig.org (last accessed Aug. 13, 2010).

14. *Id.*

15. The Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002), set standards for all U.S. public companies and accounting firms. It includes penalties for interfering with whistleblowers.

16. United States Sentencing Commission, Federal Sentencing Guidelines, Guidelines Manual, §3E1.1 (Nov. 2005), at http://www.ussc.gov/orgguide.htm (last accessed Aug. 13, 2010). Section 8B2.1, Guide to Effective Compliance and Ethics Programs, requires an organization under section 5C: "to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance...without fear of retaliation." *Id.* at 479.

17. Miami-Dade Commission on Ethics and Public Trust, *2009 Annual Report*, at 6 (staff and budget). *See* http://www.miamidadeethics.com/Publications/annual2009.pdf (last accessed Aug. 13, 2010).

18. Bradbury, Mark D., *Toward a Cost-Effectiveness Assessment of State Ethics Commission: An Analysis of Enforcement Outputs*, Pub. Integrity 9, no.4:333-347 (2007).

19. For more information about the City of New York's Conflict of Interest Board, see http://www.nyc.gov/html/conflicts/html/home/home.shtml (last accessed August 13, 2010).

20. For more information about the City of New Orleans' Ethics Review Board, see http://nolaethics.org/main/inside.php?page=mission (last accessed Aug. 13, 2010).

21. Ethics Review Board, *New Orleans: History of the Ethics Review Board*, at http://nolaethics.org/main/inside.php?page=mission (last accessed Nov. 10, 2010).

22. For more information about the City of Boise's Ethics Commission, see http://www.cityofboise.org/CityGovernment/EthicsCommission (last accessed Aug. 13, 2010). **ML**

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2(b) and 7 *Charter* challenges to what are now s. 210 and s. 213(1)(c)) of the *Criminal Code*. There, the Court found that the communicating offence represented a prima facie infringement of s. 2(b), but upheld the provision as a reasonable limit on expression under s. 1; further, both provisions clearly infringed the right to liberty under s. 7, but found that the infringement was in accordance with the principles of fundamental justice.

Counsel for the applicants in *Bedford*, York University professor Alan Young, noted that several municipalities collect business license fees from massage and escort businesses despite the "general understanding" that the businesses sell sexual services. The ruling eliminates the possibility that the localities are themselves "living off the avails." Asked for comment, Valerie Scott pointed to a future of sex workers as positive municipal citizens: "We would like to tell residents and business owners: Don't be afraid. We are not aliens. Sex workers across the country ... want to work with municipalities and to be good citizens running good businesses." **ML**

Ordinances

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every grievance its source in their spoken word.

IMLA took the opportunity to submit an *amicus* brief in response to the district court's language, and we urge you to do the same if you notice similar actions by judges in your jurisdiction.

Notes

1. 547 U.S. 410 (2006)
2. *Jackler v. Byrne*, 708 F.Supp.2d 319 (S.D.N.Y. 2010).
3. *Garcetti* at 421.
4. *Jackler* at 324 n.5 (S.D.N.Y. 2010).
5. Milkovich v. Lorain Journal Co., 497 U.S. 1 11 (1990) (citing L. Eldredge, Law of Defamation 5 (1978).
6. *Id.* at 13 (citing 1 F. Harper & F. James, Law of Torts § 5.28, p. 456 (1956).
7. *Milkovich* at 13-14 (emphasis added).

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