

**An Examination of the Prostitution Debate in Action: ‘Unpacking’ the Discourses,
Convergences, and Divergences in *Bedford***

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Abstract

Prostitution, sex in exchange for consideration, has never been illegal in Canada; however, activities surrounding prostitution have been criminalized in the *Criminal Code*. These prohibited activities include: working indoors (s. 210 keeping a common bawdy house), providing services to sex workers (s. 212(1)(j) living off of the avails of prostitution), and communicating in public for the purposes of prostitution (s. 213). In 2007 two former and one current sex worker, Terri Jean Bedford, Valerie Scott and Amy Lebovitch challenged the constitutionality of the above laws, arguing that they increased sex workers' vulnerability to harm. Six years later on June 13th, 2013 the Supreme Court of Canada heard the landmark case *Canada (Attorney General) v. Bedford*. Prior to hearing the case, the Supreme Court Justices read the submitted factums outlining the arguments of the appellants, respondents, and their interveners. The final decision was released on December 22nd, 2013 and the unanimous decision to strike down all three laws was made.

Using a discourse analysis inspired by Michel Foucault, this study 'unpacks' the meanings that are constituted within the factums submitted to the Supreme Court regarding the people who engage in sex work and the institution of prostitution. The convergences and divergences within the discourses are presented. Drawing on these findings, while applying the work of Wedeking's (2010) strategic legal framing alongside the governmentality perspective of risk, the tensions surrounding risk and choice are further explored. In doing so, the relationship between risk (taking/avoiding) and choice (making) is teased out. In this thesis I argue that risk and choice are strategically framed in the submitted factums to demonstrate the (un)constitutionality of Canada's prostitution laws. Furthermore, I argue that both the appellants and respondents agree that risk avoidance is an acceptable self-governance strategy for sex workers, however they diverge on what they consider to be acceptable risk avoidance measures. The conclusion of this study discusses the decision of *Canada (Attorney General) v. Bedford* to strike down the three prostitution laws and the subsequent introduction of the Protection of Communities and Exploited Persons Act.

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Chapter 1

Introduction

There has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue. Governments in Canada, as well as internationally, have studied the topic and produced recommendations ranging from creating laws aimed at protecting individuals, families and communities by promulgating tough criminal laws to decriminalizing or legalizing prostitution. Other legal solutions look at the reasons for the existence of prostitution in our society and emphasize the need for social and economic responses. None of the schemes proposed are without controversy. This case demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected. It highlights the role of the courts and their relationship to the other branches of government.

Justice Susan Himel of the Ontario Superior Court of Justice
Bedford v. Canada, 2010 at par. 1-2.

The debate alluded to by Justice Himel notwithstanding, until recently¹ it had never been illegal in Canada to exchange sex for money. Prostitution² has always been a dynamic issue in Canada; indeed Canadian legislative history speaks to the ways in which the prostitution laws have evolved over the last 150 years. The earliest prostitution and procuring laws in Canada were imported from England's laws (Bruckert & Hannem, 2013). It was through the enactment of the vagrancy laws in 1869 that "all common prostitutes" who were in public on the street were condemned, as well as those found in bawdy houses; the vagrancy laws also criminalized the customers who frequented bawdyhouses (Backhouse, 1985, 394). When the *Criminal Code of Canada* was enacted in 1892, the vagrancy and bawdyhouse laws were categorized under Part VIV "Offences Against Religion, Morals and

¹ That is, until December 6th, 2014 when the Protection of Communities and Exploited Persons Act came into effect (which also happened to be Canada's Day of Remembrance and Action for Violence Against Women).

² According to case law, prostitution is the exchange of sexual services of an individual in return for the payment by another (*Prostitution Reference [SCC]*, 1990, p. 1159) and will be used interchangeably with the term sex work throughout this thesis. There are different types of work within the industry and prostitution can be street-based or take place indoors.

Public Convenience”. The bawdyhouse provisions were moved in 1915 out of the vagrancy section of the *Criminal Code* and re-categorized into “Sexual Offences, Public Morals and Disorderly Conduct”. By 1953-1954 the revisions made to the *Criminal Code* re-categorized (again) the bawdyhouse laws into Part V “Disorderly Houses, Gaming and Betting” (Bruckert & Hannem, 2011). The vagrancy laws criminalizing street-based sex workers were repealed in 1972 and replaced with criminalizing public solicitation for the purposes of prostitution (Backhouse, 1985). The solicitation law was further reformed in 1985 to criminalize public communication for the purpose of prostitution after community associations lobbied against street-based prostitution (Brock, 2009; Bruckert & Hannem, 2013).

Once again, in 2007, we saw the prostitution laws being challenged. The above excerpt is taken from Justice Himel’ (2010) decision in the *Bedford v. Canada* (2009) case, the first of three cases (two of which were appeals), which addressed the constitutionality of the prostitution laws. Three years after the original decision of Justice Himel to strike down the prostitution laws³, the “landmark case” (The Globe and Mail, 2013; The National Post, 2012; The Toronto Star, 2013) *Canada (Attorney General) v. Bedford*, made it’s way to the Supreme Court of Canada [SCC] on June 13th, 2013. The ruling affects the legal regime governing prostitution in Canada. The factums submitted in this Supreme Court case reveals an engagement with multiple prostitution discourses⁴ as they endeavour to demonstrate the constitutionality, or unconstitutionality, of the governing legal regime. In this sense, they

³ The entire process from first instance to the Supreme Court hearing was six years as *Bedford, Lebovitch, and Scott* initiated the Charter challenge in 2007.

⁴ I will be using Foucault’s definition that discourses consists of statements that correspond and produce meaning and effects in the real world, that are not necessarily determinant of social practices (Carabine, 2001). This will be further developed in the methodology chapter.

provide a way to unpack⁵ how legal actors frame their arguments around an issue, like prostitution, when submitting to the Supreme Court (Wedeking, 2010). First let us take a brief look at how *Bedford* made it to the Supreme Court of Canada.

1.1 Contextualizing Canada (Attorney General) v. Bedford [SCC]

In 2007 Amy Lebovitch, Terri Bedford, and Valerie Scott, one current and two former sex workers, challenged the constitutionality of three provisions of the *Criminal Code* (CC): *keeping a common bawdy house* (s. 210), *living on the avails of prostitution* (s. 212(1)(j)), and *communication for purpose of prostitution* (s. 213). Bedford, Lebovitch, and Scott argued that these laws, which they maintain increase sex workers' vulnerability to harms, infringed on their rights to life, liberty and security of the person (s. 7 of the *Canadian Charter of Rights and Freedoms* (Charter)), and that CC s. 213 also infringed on their right to freedom of expression (s. 2(b) of the *Charter*). Justice Himel agreed with the former and struck down all three laws as unconstitutional.

Justice Himel's decision was partially upheld in the Ontario Court of Appeal and the presiding justices agreed that s. 210 (bawdy house law) was unconstitutional. The justices also upheld s. 212(1)(j) (living off of the avails) as unconstitutional but sought to resolve the issue (of over breadth) by writing in the words "*in circumstances of exploitation*". The constitutionality of the third section, 213 (communication for the purposes of prostitution) was upheld (*Canada (Attorney General) v. Bedford*, 2012). Finally, on October 25th, 2012 the Supreme Court of Canada announced that it would hear the appeal of *Canada (Attorney*

⁵ The overall objective of my research is to shed light on the framing of prostitution and its participants; therefore, I use the term unpack through this thesis because it means to reveal what is hidden.

*General) v. Bedford*⁶ on June 13th, 2013, and as previously noted, on December 22nd of that same year, the Supreme Court Justices struck down all three prostitution laws⁷.

1.2 The Significance of *Canada (Attorney General) v. Bedford* [SCC]

The Supreme Court's decision to hear the appeal was considered a "big deal" (Pacey, 2012) by many, including sex workers, advocates for sex worker rights, those who support the prohibition of the industry, as well as the general public. The Supreme Court only grants 'leave to appeal' for cases that are of public or national importance, which in this case involves the fundamental rights of sex workers to safety and security (Pacey, 2012).

This study is important and contributes to this the research on this topic in four ways. The first is that in looking back at the previous prostitution laws, we can see how the incarnations of the different laws tell us about society. For most of Canada's legal history and up until the 1970's the prostitution was a status offence under the vagrancy laws. In 1972, the vagrancy laws were challenged because it criminalized women who could not account for themselves. The offence was changed to criminalizing public solicitation for the purposes of prostitution and was supposedly gender neutral. After the Hutt decision of 1978, where the courts ruled that solicitation must be pressing and persistent, it became difficult to enforce that law. In response, and spurred on by community groups from gentrified areas where strolls were located, the law was changed in 1985 to criminalize public communication for the

⁶ [2013] 2 SCR 110 *Bedford*. From here after, *Canada (Attorney General) v. Bedford* will be referred to as *Bedford*.

⁷ We now know that the decision to strike down the prostitution laws was unanimous because the "impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7 [of the *Charter of Rights and Freedoms*]" ([2013] 2 SCR 110 *Bedford*: par. 7 [in introduction]). However, they also gave Parliament one year to address prostitution legally, if they so chose, as long as it did not infringe on the constitutional rights of prostitutes. We also know that Parliament did indeed decide to enact laws regarding prostitution, however this will be addressed within the concluding chapter. Unfortunately my research stopped before the decision was announced on December 20th, 2013 so I was unable to analyze its contents.

purposes of prostitution. Each of these incarnations of the laws tell us something about what is happening in society at that time, demonstrating power relations, preoccupations and priorities as well as gendered expectations and scripts. The factums presented in *Bedford* (and the subsequent law) also tells us a great deal about those things.

Beyond being considered a landmark case, the second reason it was important to analyze the *Bedford* factums is that this case effects what we value as a society. The decision that derived from this case is final and determined the unconstitutionality of the three prostitution laws. Prior to the ruling, there was a great deal of speculation about the possible outcomes, which ranged from the justices finding any or all of the laws constitutional and keeping them stated in the *Criminal Code*, to finding them unconstitutional and striking them down, potentially paving the way for decriminalization. Furthermore, this decision ultimately affects the lives of those who participate within the industry, but also all Canadians. By that I mean the *Bedford* decision determines whether or not we want prostitution to be regulated on the basis on outdated morality, or whether take seriously the safety and security of all citizens.

The third ‘so what’ reason is that systematically examining and analyzing the narratives surrounding prostitution from a variety of perspectives (including the state, sex workers and a range of other claims makers, including health organizations, sex workers rights groups, violence against women’s groups, religious groups and organizations advocating for the rights of racialized populations) rendered visible the embedded discourses, and teased out how prostitution and its participants are framed. This systematic examination shed light on the unlikely alliances between groups that traditionally have different views on institutions like the family, the market, and state regulation. For example religious groups

and the women's coalition have found common ground on the side of the Attorney Generals of Canada and Ontario in advocating for the regulation of prostitution.

On another level, the fourth contribution this thesis makes is more specifically to the literature on the prostitution debate in which discourses have been traditionally presented in fairly monolithic ways. There were over 25 000 pages of evidentiary record submitted to the Supreme Court of Canada for *Bedford*, and within those pages were the factums submitted by the appellants, the Attorney Generals of Canada and Ontario, the respondents, Bedford, Lebovitch, and Scott, and respective interveners. The interveners were comprised of various social groups and activists that included: sex workers' rights groups, feminist groups, public health groups, and religious groups. The appellants and respondents had a maximum of 40 pages to present their arguments with a maximum of 20 pages for their arguments on the cross-appeal, while their interveners had only 10 pages to do the same (Guideline for preparing documents with the Supreme Court of Canada, 2014). Every word and sentence constructed within those factums was purposeful and goal-oriented, therefore designed to impact the legal decision regarding the prostitution laws.

In this study, I have unpacked the discourses embedded in the factums, carefully teasing out the differences and similarities of the arguments between the appellants', respondents and their interveners. Thus, it is important to explore and analyze the factums, as they constitute the narrative that frames the institution of prostitution and those who participate in the sex industry. Using a discourse analysis that is inspired by the work of Michel Foucault, this thesis deconstructs the various meanings produced by the discourses presented in the factums to shed light on the construction of prostitution. Guiding this research project are the following two intersecting questions:

1. *What are the competing discourses presented by the appellants, respondents, and interveners in the Supreme Court Case Canada (Attorney General) v. Bedford (2013)?*
2. *How do these discourses serve to frame the institution of prostitution and its participants (prostitutes, customers, and third parties)?*

1.3 Chapter Outline

The next chapter (*Chapter 2) A Review of the Literature: A Presentation of the Prostitution Discourses and Regulatory Frameworks*, examines the established discourses of prostitution to provide a historical context of how prostitution has been discussed and what meanings have been attributed to the activity. This chapter also presents the frameworks used to regulate prostitution (internationally). I conclude this chapter by situating my project within the literature. *Chapter 3: Theoretical Framework* presents legal framing and the governmentality perspective of risk that form the conceptual point of departure for this project. *Chapter 4: Methodological Approach* outlines the steps taken to collect, code, and analyze my data. This chapter concludes by addressing some of the methodological limitations of this project. *Chapter 5: Findings: Unpacking the Factums* introduces and sheds light on how the discourses are constituted within the factums, drawing attention to convergences and divergences. In particular, it engages with the discourses to present how people who participate in sex industry, as well as the institution of prostitution, are framed. Drawing on my research findings, *Chapter 6: Discussion of Analytic Themes*, critically examines two tensions that emerged: risk and the question of choice and explore the interplay between these themes. The concluding chapter briefly summarizes my project, and discusses its contributions. The chapter concludes with directions for future research, and a discussion of the ways in which my project provides the basis for further inquiries related to *Bedford*.

Chapter 2

A Review of the Literature: A Presentation of the Prostitution Discourses and Regulatory Frameworks

As we saw in the introduction, there is an ongoing debate regarding prostitution and its regulation in Canada; therefore, in order to position my research this chapter presents an overview of the conversations and proposed solutions. The first part of this chapter presents four established prostitution discourses: community and policing discourse, moralistic discourse, radical feminist discourse, and sex workers' rights discourse. The second part examines frameworks used to regulate prostitution including: prohibition, legalization, and decriminalization.

2.1 Prostitution Discourses

2.1.1 Community and Policing Discourse

As indicated above, the first discourse to be presented is the community and policing discourse, which mainly focuses on street-based (visible) prostitution, public attitudes, and the police responses. Within this discourse, prostitution is considered harmful to the public reputation of the community in which it occurs (Kingston, 2014: 78; Weitzer, 2009: 192-193). Prostitution is said to be a “serious problem” that erodes “the quality of life and contribute[s] to neighbourhood decay and street disorder” (Weitzer, 2009: 193). A major concern that derives from this perspective is mistaken identity, wherein non sex-working women are identified as prostitutes and propositioned by customers, and men are mistaken as clients and propositioned for sex by prostitutes (Hintonburg Community Association, 2001; Kingston, 2014). As such, non sex-working women do not feel safe walking alone at night and avoid certain areas so as not to be approached by clients ‘cruising’ for sex, or by “pimps”

looking to recruit young women into the sex trade (Ferris, 2015: 45; Hintonburg Community Association, 2001; Kingston, 2014: 87; Weitzer, 2009: 192-193). In short, residents have had to alter their behaviours so as not to be mistaken for a prostitute or a client (Kingston 2014: 85).

Furthermore, Barry (1995) and the Hintonburg Community Association (2001), among others, argue that neighbourhood residents believe that the majority of prostitutes carry and transmit diseases to their clients, which may spread to their family members. One woman tells her story to the Hintonburg Community Association (2001) that upon finding out her husband had been with a sex worker, she “felt nauseous” (13) and had to get tested immediately for all sexually transmitted infections. While she was waiting for her test results she was afraid she had AIDS and would “see [her] family and friends at [her] funeral. [She] would see [her] little boy crying for [her]...and finally all of the HIV tests were negative” (Hintonburg Community Association, 2001: 13). Another Ottawa resident wanted to know why sex workers are “allowed to remain on the street spreading disease?” (Hintonburg Community Association, 2001: 11).

Another aspect of this discourse focuses on sex workers, customers and third parties, as a public nuisance within their communities. There are a number of components to the nuisance narrative. First it is argued that prostitution disrupts sleep for residents, due to noises from cars coming and going at “all hours of the night” (Kingston, 2014). One woman claimed she was annoyed from losing sleep and “sick of being victimized” for living in a community with prostitution (Hintonburg Community Association, 2001: 25). Second, street-based prostitution impedes the flow of traffic in neighbourhoods for residents who are going to and from work and school (Ferris, 2015). Finally there is the concern that street-based

prostitution brings with it other crimes, such as break and enters, theft, and drugs (Hintonburg Community Association, 2001; Kingston, 2014). In short, community members are being constructed as victims of the nuisances they perceive to be a result of street-based prostitution.

Community concerns surrounding the children of the neighbourhood also dominate this narrative. It is argued within this perspective that children may witness sex acts, be propositioned, or find used condoms, discarded syringes, other drug paraphernalia, or “environmental debris” (including litter and human waste) while playing or on their way to and from school (Hintonburg Community Association, 2001; Kingston, 2014: 83; Weitzer, 2009). In addition to being propositioned for sex, there is concern that children will be recruited as drug pushers by dealers who cater to prostitutes’ drug use (Hintonburg Community Association, 2001: 18).

There is also a concern that the presence of street-based prostitution negatively affects property values (Kingston, 2014). This discourse maintains that property values are lowered by the presence of garbage from syringes and used condoms on the residents’ properties and in the streets (Hintonburg Community Association, 2001: 29). We also see this discourse in media and news reports that publically associate particular neighbourhoods with prostitution (Kingston, 2014). Kingston (2014) maintains that the stigma associated with prostitution, has become “fused” with community members and business owners, resulting in feelings of embarrassment and residents being worried about the reputation of their neighbourhood as an area known for prostitution (79).

Similarly, from this perspective, business owners in areas where prostitution is visible are understood as legitimately concerned for their reputation and success because prostitution

is “‘bad for business’ [and] customers get put off from coming into the area” (Kingston, 2014: 80). These concerns have existed within the communities where prostitution is visible for many years, and nuisance arguments are part of the oldest narratives within the ‘prostitution debate’ (see the history of vagrancy laws in the introduction). Although, we saw the re-emergence of these arguments during the 1970’s, set in motion by gentrification, when Toronto endeavoured to ‘cleanup’ Yonge Street to make it “an acceptable and appealing street for people...to shop and visit...[and] an attractive place for a variety of businesses” residents asserted that “it is absolutely necessary that [the] government take action to minimize the offensive [behaviour] to the general public” (Brock, 2009: 35). Similarly, in the Ottawa Byward Market area, street-based sex workers and residents had co-existed for over 150 years. However, during the early 1980’s, the nuisance and public health arguments around street-based prostitution re-emerged when new residents with cultural, political, and economic capital started moving in and redefining the neighbourhood (Bruckert & Chabot, 2010: 11). Within this discourse, prostitution is seen as a problem that can be solved by ‘cleaning up’ the streets’ because it is offensive to the desired images of businesses and neighbourhoods. In short prostitution is constructed as detrimental to businesses and the overall appearance of downtown streets. Paradoxically, some literature within the community and policing discourse expresses concern for the quality of life for street-based sex workers. Notably this concern is characterized by a desire to save or rescue women from the street, rather than the inclusion of sex workers’ voices in addressing community concerns and collaborating on solving the issues (Kingston, 2014).

It is not surprising that community members bring forth the above complaints about prostitution to law enforcement agencies and local politicians to address. We see then that

law enforcement's response to the community complaints of prostitution as a public nuisance is to 'cleanup' the streets. Throughout the 1970's and 1980's, Canadian police chiefs were speaking out about the social harms and riskiness of prostitution, especially to "legitimate" businesses, and offered harsher and stricter criminal measures as their solution (Jeffery, 2004: 86). The police did not acknowledge prostitution as a legitimate profession, but rather a social nuisance.

On December 28th, 1985 Bill C-49 was enacted, which increased the ability of police to criminalize street-based prostitution with more surveillance powers (Brock, 2009). This was supposed to be a temporary bill that was to be reviewed in three years and amended, but that never happened. Bill C-49 became *S. 213* of the *Criminal Code* and was in effect until the recent Supreme Court decision of *Bedford*, which ultimately struck down this law. In Brock's (2009) work, she reported that one year after the enactment of Bill C-49, the prostitution related charges increased six fold over the previous years (84). Most of these arrests were of sex workers, and the majority of charges laid against customers were dismissed (Brock, 2009) – sex working women were (and still are) more likely to be arrested, prosecuted and incarcerated for prostitution related offences than their male customers (Flowers, 1998: 8). From this perspective sex workers are framed as both at risk (and therefore need to be 'rescued' or 'saved' from their life in the sex industry) and risky (and therefore need to be criminalized).

2.1.2 Moralizing Discourse

The second discourse to be considered from the literature on prostitution is the moralizing discourse. Historically, prostitution has been considered an immoral 'vice', contrary to Christian values (Bullough & Bullough, 1987). According to Bullough and

Bullough (1987), in the early Christian church, the “ideal woman was the virgin, particularly one who appeared sexless...all the things a prostitute was not” (71). Within this discourse we see an ‘othering’ effect between non-prostitute women and women who participate in prostitution (Bruckert & Hannem, 2013; Bullough & Bullough, 1987; Marques, 2010). Sex workers are considered “fallen women”, “harlots” and “whores” (Bullough & Bullough, 1987; Outshoorn, 2004; Pasko, 2013; Pheterson, 1993; Symanski, 1981). In Gail Pheterson’s work on whore stigma, she describes how ‘whore’ has been socially equated with prostitute and that a prostitute “is one who sells her honour by offering to hire her body for base gain or for an unworthy doing, specifically sexual intercourse” (1993: 39). Therefore, people who engage in prostitution do so at the price of their honour and dignity. We see this morality (religious and cultural) discourse reflected in Canada’s earliest prostitution and procuring laws imported from England; Bruckert and Hannem (2013) argue it continues to inform the governing of prostitution in Canada today.

The morality of sex itself is discussed within this discourse. There is sanctity in human sexual relations, which becomes “perverted by sexual activity with a prostitute; promiscuity is a sin” (Flowers, 1998: 159). According to Catherine MacKinnon (2011), when two people have sex, they are supposed to want it, and when two people are willing to have sex they generally do not have to pay for it, as it is its own “reward” (281). MacKinnon (2011) then goes on to argue that sex for consideration (in other words prostitution, sex for consideration of money or other benefit) is non-sexual, implying that all women who engage in prostitution do so as asexual beings. According to this narrative, there is no dignity in prostitution; only women who do not engage in prostitution “see real work, real love, dignity, and hope” (MacKinnon, 2011: 309).

Kingston (2014), notes that morality also layers over and permeates through nuisance arguments in that prostitution is considered to encourage the ‘cycle of decline’, which refers to the notion that where prostitution is present, other immoral activities begin to thrive. For instance, prostitution is linked with the transmission of diseases, drug use, and criminality (committing other criminal offences) (Kingston, 2014; Pasko, 2013; Symanski, 1981; Tyler, 2012). There are multiple instances when sex workers were associated with carrying and transmitting venereal disease (including HIV and AIDS) to men through unprotected sex, who then transmit the diseases to their families (Barry, 1995; Bruckert & Hannem, 2013; Symanski, 1981; Tyler, 2012). This speaks to the stereotype of the “free-living amoral prostitute...not only does she have sex for money rather than love, but she has become deadly as well” (Overs & Druce, 1994: 115).

Another prominent stereotype found within the literature is the drug-using prostitute. Drug use is assumed to be inherent to prostitution, “[o]ften women in prostitution are addicted to drugs; many use substantial amounts of alcohol too” (MacKinnon, 2011: 287). On one hand it is argued that prostitutes use drugs to ‘cope’ with selling sex, and on the other hand, engage in prostitution to support a drug dependency (Barry, 1995; Kingston, 2014; Roberts, 1992). Despite the reason, prostitution is linked to drug use, which according to this discourse contributes to the “cycle of decline” (Kingston, 2014). Additionally, prostitution is associated with criminal activity, “prostitution has a way of filtering back into larger criminal problems” (Kingston, 2014: 81) such as break and enters, theft, and drug trafficking (Kingston, 2014).

In short, in this discourse, we see this notion of equating sex workers with drug use, criminality and transmitters of disease, framed not as a community nuisance, but as a moral

issue in which sex workers are considered a threat to public and social morality. We see an overlap of arguments within the moralizing discourse with the concerns expressed within the community and policing discourse. The same narrative also emerges in the radical feminist discourse, which link drug-use/dependency to the harms inherent to prostitution. It is to this discourse we now turn.

2.1.3 Radical Feminist Discourse

Within the literature, male and transgendered sex workers are not acknowledged and the focus is on women in the sex industry. The previous discourses focus mainly on the risks and harms to society as a result of prostitution, and consider sex workers as part of that risk. This discourse speaks to the harms of prostitution to women, who are also referred to as “prostituted women” (MacKinnon, 2011: 277; Raymond, 2013: 91). Prostitution is constructed as inherently harmful and is the epitome of violence against women (Barry, 1995; Farley, 2004; Flowers, 1998; MacKinnon, 2011; Raymond, 2013). Barry (1995) writes that women’s lives are “without value...under male domination. Women are expendables. Women [are] throwaways. Prostitution [is] the cornerstone of *all* sexual exploitation” (9. Emphasis added). Therefore, prostitution is harmful to gender equality, because women will never be equal when men can ‘purchase’ and ‘use’ their bodies.

Furthermore, prostitutes are often described as entering prostitution as young girls under the age of 18 (MacKinnon, 2011). An example of this can be seen by Conservative MP Joy Smith’s repeated claims that the average age of entry into prostitution is 12-14 years old, ignoring the very significant empirical evidence that these statistics are spurious and the research she cites is limited to studies of underage prostitutes (Lowman, 2014: 2). Sex workers are constructed as having shared background factors such as extreme poverty, a

history of sexual and physical violence, victims of childhood molestation, and engaging in drug use (Barry, 1995; Flowers, 1998; MacKinnon, 2011). Raymond (2013) describes prostitution as “a class of women created and regulated to minister to the sexual appetites of men” (xxxvii). Thus, Barry (1995) maintains that the main source of sexual exploitation of women is prostitution, more specifically by the men who purchase (referred to as “johns”) and profit (labeled “pimps”) from the women, resulting in the perpetuation of gender and sex inequality (Barry, 1995; Raymond, 2013; Tyler, 2012).

Within this discourse, clients are described as insatiable hypersexual beings, who are not only paying for sex, but also for power and domination over women through sex (Balos, 2004: 18; Barry, 1995; Flowers, 1998). Flowers (1998) maintains that “many [male] customers of prostitutes are pedophiles (soliciting child prostitutes), child molesters, rapists, abusers, or substance abusers; many seek various sexual perversions” (128). Similarly, ‘pimps’ are framed as harmful to women because they recruit and ‘groom’ young girls and women into prostitution through the “seduction method”, which include promises of a relationship, love, and belonging (Hodgson, 1997: 43; Raphael, 2013: 57). Like the customer, third parties are powerful and control sex workers; they can and will become violent to ensure that they continue to make a profit (Barry, 1995; Jessome, 1996; MacKinnon, 2011).

This radical feminist perspective links the legal system to the perpetuation of violence to “prostituted women”. Criminalizing the women in prostitution alongside the men who purchase and profit reflects and reifies the dichotomy of “other women” and “prostitutes” (Baldwin, 2006: 113). Baldwin (2006) argues that there should be no distinction made between “other women” and “prostitutes” because all women are somewhat vulnerable to the men in their lives who exploit them physically, financially, and sexually.

Within this radical feminist discourse, the possibility that women would choose to engage in prostitution is rejected because “no woman would prostitute herself by choice or free will” (Outshoorn, 2005: 145). Raymond (2013) and Barry (1995) argue that when women claim that they have ‘chosen’ prostitution, it is actually a strategy of survival; it is a “choiceless choice” (Raymond, 2013: 19). Choosing to take money, or choosing to turn down certain activities gives the illusion that the woman is in control over her decisions (Barry, 1995: 33). It makes no difference “whether women experience forced entry or initial “choice”, they are still used and used up by an industry that exploits them to the hilt” (Raymond, 2013: 19). In short, choice does not exist in prostitution, all prostitution is either forced, coerced, or a means to survival (Balos, 2004; Barry, 1995; Jeffreys, 2012; Mackinnon, 2011; Raymond, 2013).

Furthermore, radical feminists in this perspective often refer to themselves as ‘abolitionists’ and link human trafficking with prostitution. For them, prostitution is equated to the trafficking of women and children (Barry, 1995; MacKinnon, 2011; Raymond, 2013). The conflation of prostitution and trafficking arose in the nineteenth century when women (from European and Western countries) were portrayed as being kidnapped, coerced, deceived, trapped, lured, and forced into prostitution (Kempadoo, 2005). The equating of trafficking and prostitution with white slavery continued to dominate international debates and conventions well into the twentieth century, and still dominates the radical feminist discourse (Kempadoo, 2005; Outshoorn, 2004; Raymond, 2013). However, white slavery has since been renamed ‘sexual slavery’.

2.1.4 Sex Workers' Rights Discourse

The fourth and final narrative that will be presented is the sex workers' rights discourse. Since the 1970's we have seen the emergence of new advocacy and conversations about prostitution (Beer & Tremblay, 2014; Brents & Hausbeck, 2010; Bruckert & Parent, 2006). As the name of this discourse suggests, the term prostitution has been replaced with sex work, a term coined by Carol Leigh also known as Scarlet Harlot (van der Meulen, Durisin & Love, 2013). The term sex work emerged in response and opposition to the radical feminist groups claiming that all women in prostitution were victims of violence and that prostitution is inherently dangerous (van der Meulen, 2012).

Within this discourse, it is argued that prostitution is a legitimate income generating activity, productive work, and sex workers are professionals in their 'trade' (Bruckert & Parent, 2006). There are different types of work within the sex industry and it is argued that indoor prostitution is similar to other forms of working-class labour (Bruckert & Parent, 2006; van der Meulen, 2012). As with any physically demanding labour, it requires stamina, physical strength, professionalism, control and endurance (Bruckert & Parent, 2006; van der Meulen, 2012). Despite framing sex work as legitimate labour, we are reminded within the literature that it is work that is marginal, criminalized, and highly stigmatized with limited social support (Bruckert & Parent, 2006; Maher, Pickering, & Gerard, 2013).

Much of the focus of the literature on sex workers' rights is on indoor or in-call prostitution, however they do discuss street-based prostitution and acknowledge the harms experienced by sex workers (Jeffrey, 2013; O'Doherty, 2011). Street-based sex workers are often the most vulnerable and marginalized individuals within the industry and make-up 5-20% of those in prostitution, however street-based and in-call sex workers experience

different types of harm risks (O'Doherty, 2011). It is also important not to generalize sex workers as victims from either location, and that violence and other forms of criminal exploitation are not inherent of prostitution (O'Doherty, 2011; van der Meulen et. al, 2013).

In addition to constructing prostitution as work, there has been a significant shift in the language and discussions of sex workers. This discourse opposes the radical feminist denial of choice within the sex industry, and instead maintains that people can and do choose to engage in prostitution. The choices made for working in the sex trade are similar to the choices made for working in other industries. For example: an individual may choose 'sex work' to reach financial goals, support immediate or extended family members, the flexible hours, to supplement other income, or to simply make a living (Maher, Pickering, & Gerard, 2013).

While the radical feminists define sex work as inherently violent, the sex workers' rights discourse focuses on the effects of the legal regime. As mentioned in the introduction, prostitution was not previously illegal in Canada, but there were sections of the *Criminal Code* that prohibited working indoors (s. 210), working with other people or living off of the avails of prostitution (s. 212(1)(j)), and communicating in public for purposes of prostitution (s. 213). It is argued within this perspective, prior to the Bedford decision, that the above prostitution prohibitions are harmful to sex workers as they undermine sex workers' ability to implement security measures (Brock, 2009; O'Doherty, 2011). It is accepted within the literature that working indoors is safer than the streets, yet the law prohibited this. The living off of the avails section made it illegal for sex workers to hire drivers, body guards, or work with others, and this was an indictable offence with a maximum prison sentence of ten years (O'Doherty, 2011, Wijers & van Doorninck, 2009). Finally, the communication law

prevented sex workers from screening clients prior to getting into a vehicle or negotiating the terms of their exchange and taking necessary precautions to ensure their safety and health in the work place (Wijers & van Doorninck, 2009).

Prostitution laws also perpetuate the stigma associated with prostitution by effectively marginalizing individuals who participate in it (this aspect of the discourse is similar to the radical feminist 'othering' narrative). This has increased the risk of not being hired by new or potential employers of sex workers, as well as being let go from their current job outside of the sex industry (van der Meulen, 2012). Thus, it is argued within this discourse that as long as prostitution continues to be criminalized, the stigma attached will remain.

It is unsurprising that another recurring theme within this perspective is the strained relationship between sex workers and the police. In a study conducted by Chris Bruckert and Frédérique Chabot, in collaboration with Prostitutes of Ottawa/Gatineau Work, Educate, and Resist (POWER) (2010), the accounts and experiences of 43 sex workers are presented, and it was found that in Ottawa there are few police officers who are allies of sex workers (49). The assessment of the police is not because they enforce the law, but rather, according to sex workers, the police "mis-use or abuse of [their] power" (Bruckert & Chabot, 2010: 49).

According to this research, sex workers known to police officers were often targeted when they were not working (Bruckert & Chabot, 2010). Bruckert and Chabot (2010) found that sex workers in Ottawa experience harassment, physical violence, sexual misconduct, confiscation and/or destruction of property, and outing (of their profession as a sex worker)⁸

⁸ Since it has long been recognized that prostitution is a stigmatized activity, sex workers aim to manage their experiences of being judged by being selective with whom they disclose their activities (Bruckert & Chabot, 2010: 60). This means that some friends, employers, and family members may be unaware of a person's engagement with prostitution. There are instances where police disclose this information to family, employers, and friends, which "does have potential serious repercussions by increasing the social isolation of the individuals [sex workers]" (Bruckert & Chabot, 2010: 60).

at the hands of the police. An effect of the abuse of police power is the lack of confidence in police by sex workers for protection or redress (Brock, 2009; Bruckert & Chabot, 2010: 61; Goodyear & Auger, 2013). As a result, much of the harm and violence experienced by sex workers goes unreported. On one hand, sex workers may be victims of police misconduct; therefore, reporting the incident to police is not a viable option. On the other hand, in addition to the risk of a sex worker facing a countercharge⁹, the reporting of sexual assault or violence is not taken serious by police officers because of their status as a sex worker (Goodyear & Auger, 2013).

According to Wijers & van Doorninck (2009), the Canadian prostitution laws succeed only in excluding sex workers from the protection of the laws afforded to other labourers in Canada. In a study conducted by van der Meulen (2012) that asked sex workers and allies what their 'ideal' sex industry entailed, "all suggestions revolved around basic labour rights and protections that are often taken for granted in many workplaces" (154). This included: employment contracts, access to workers' compensation through the Workplace safety Insurance Board, development of anti-discrimination policies (which would protect against unfair hiring and firing practices), payment for services provided beyond prostitution (e.g. stage shows and cleaning duties), basic level of cleanliness in employee areas, and eradicating customary pay-outs and club fees (van der Meulen, 2012: 154-155). Ultimately, it is argued that decriminalization and access to Canadian labour rights for sex workers will result in safer and healthier working environments, while also addressing and ending the stigma associated with prostitution through the acknowledgement of sex work as work.

⁹ A countercharge is when someone reports a criminal offence to the police, and then is also charged for another or related charge. In the case of sex workers, if a sex worker reports a bad date, or assault (sexual or physical) or any other type of criminal behaviour, they run the risk of being shamed, investigated, and then charged with a prostitution related offence (Goodyear & Auger, 2013: 221).

2.2 Regulatory Frameworks

In this section the regulatory frameworks that seek to address prostitution are presented. It is important to provide a description and background of the available frameworks because they are part of the conversations surrounding prostitution, and it was the Canadian legal framework—prohibition/criminalization—that was challenged in the Supreme Court case *Bedford*.

2.2.1 Prohibition/Criminalization

The prohibition legal framework criminalizes most, if not all, activities surrounding prostitution, which can include criminalizing the act of sex in exchange for money. There are two types of prohibition frameworks: the first criminalizes all participants of the sex industry, and the second model only criminalizes the purchasing of and profiting from sex work (Lowman & Louie, 2012). The first prohibition model was the legal framework in Canada prior, and leading up to, *Bedford*. Prostitution itself was not illegal, but related activities were, which resulted in the criminalization of all participants including sex workers, customers and third parties. Under this prohibition model, sex workers are more likely than the client to be arrested and prosecuted (Ditmore, 2011). It is under this framework that arguments reflective of the community and policing discourse and the moralizing discourse are found (Abel & Fitzgerald, 2010; Ditmore, 2011). Some countries that have adopted this framework include: the United Kingdom, Poland and the United States with the state of Nevada as the exception (Abel & Fitzgerald, 2010; Lowman & Louie, 2012).

A second type of prohibition model is the abolitionist version, which decriminalizes the women who sell sexual services, while criminalizing the purchasers and profiteers (Lowman & Louie, 2012). This legal framework aims to reduce the demand for prostitution,

with the overall objective of eradicating the sex industry altogether (Abel & Fitzgerald, 2010: 4). This framework also claims to protect women from prostitution and persistently conflates human trafficking and prostitution (Ditmore, 2011). Advocates of this approach reiterate the arguments presented throughout the radical feminist discourse. This model is also referred to as the Swedish model because it was adopted in Sweden in 1999 (Abel & Fitzgerald, 2010; Lowman & Louie, 2012); it has since been adopted in Norway, France and Iceland.

2.2.2 Legalization

The legalized framework takes different forms and is not necessarily advocated for in hopes of reducing harm to sex workers because legalized prostitution is often heavily state regulated (Abel & Fitzgerald, 2010). Prostitution is considered inevitable, or a necessary evil (Wijers & van Doorninck, 2009). Within a legalized regulatory framework, prostitutes are often mandated to register as a sex worker and there are only certain areas where they are permitted to work. Some additional regulations include: mandatory medical checks to ‘protect public health’, prohibitions on soliciting, and regulations of nationality and status (Wijers & van Doorninck, 2009). If a sex worker fails to comply with any of the regulations, they can be punished with fines and/or imprisonment.

Additionally, municipalities have the power to grant licenses to sex workers, which are restricted, effectively limiting the number of people who can register as a sex worker (Abel & Fitzgerald, 2010). Considering the number of restrictions and the stigmatizing effects of having to out oneself as a sex worker in order to register, there are many sex workers who work illegally, unregistered, and within the underground market (Abel & Fitzgerald, 2010; Wijers & van Doorninck, 2009). Amsterdam (the red light district) and the state of Nevada have both legalized prostitution.

2.2.3 Decriminalization

The decriminalization framework is the removal of laws governing prostitution and prostitution-related offences from the *Criminal Code* to mitigate harms of the industry, while protecting the human rights of sex workers (Abel & Fitzgerald, 2010; Ditmore, 2011). This framework reflects the arguments and represents the objectives outlined throughout the sex workers' rights discourse. In removing the regulations and prohibitions of prostitution, sex workers would be free to screen clients for potential bad dates, and would have access to safer working conditions without the risk of criminalization. This framework suggests that prostitution would be safer because there are other laws in place to protect sex workers, like all individuals, from physical and sexual assault, to protect underage persons from prostitution, and to safeguard against children and adults from being trafficked. On June 25th, 2003, New Zealand became the first country to fully decriminalize indoor and street-based prostitution nationally (Barnett, Healy, Reed, & Bennachie, 2010). Fifteen years after the Prostitution Reform, New Zealand stands by their decision to protect the rights of sex workers in their country and is often looked upon by researchers and advocacy groups as an example of what decriminalization would look like (Abel & Fitzgerald, 2010).

2.3 Pulling The Threads Together: Conversations and Solutions

Within the literature there are four prevailing discourses on prostitution. The first half of this chapter reviewed these discourses, and the second half of this chapter reviewed the frameworks that regulate prostitution. The first discourse focused on how prostitution is a threat to the image and reputation of communities, particularly to residents and business owners. Prostitution and street-based sex workers disrupt the quality of life of residents and is considered a social nuisance. The solution to community concerns within this discourse is

the criminalization of the participants of the sex industry, which is reflective of the first prohibition model (Lowman & Louie, 2012). The second discourse examines the construction of prostitution as immoral behaviour that inevitably leads to other immoral activities including: unprotected sex resulting in the transmission of disease, drug use, and criminality. In order to address this behaviour, the prohibition model that criminalizes sex workers alongside the customers and third parties is supported (Kingston, 2014). The third discourse presents the radical feminist perspective of prostitution as violence, and women as victims who have been forced into the industry. Therefore, it is unsurprising that the solution proposed within this discourse is the abolitionist version of the prohibition model (Barry, 1995; Lowman & Louie, 2012; MacKinnon, 2011). The final discourse discusses the legitimacy of prostitution as an income generating activity and/or employment. This discourse presents sex workers as autonomous individuals who earn a living similar to other physical labour workers, and therefore advocates for the decriminalization of prostitution (Ditmore, 2011; van der Meulen, 2012)¹⁰.

2.4 Situating My Project within the Literature on Prostitution

As outlined in the introduction, the research questions guiding this thesis are: What are the competing discourses presented by the appellants, respondents, and interveners in the Supreme Court Case *Canada (Attorney General) v. Bedford* (2013)? And, how do these discourses serve to frame the institution of prostitution and its participants (prostitutes, customers, and third parties)? In answering my questions, arguments from the above discourses will be touched upon in the findings and analysis. It is these discourses that provide a way of categorizing and organizing my findings.

¹⁰ The legalization of prostitution is not advocated for as a solution in any of the discourses presented, but it is a recognized regulatory framework.

It is evident that there is a solid body of work on prostitution in the literature; however, I faced some difficulty in finding literature that provided a comprehensive account of the prostitution discourses that went beyond the oversimplified debate of being ‘for’ or ‘against’ prostitution. *Bedford* provided me with a unique opportunity to explore and analyze themes within the discourses that ‘played out’ in the court factums. As such, this project enabled me to analyze the ‘prostitution debate’ in action, and in turn expand the discussion, and render visible obscured elements or themes within the discourses. There is also a lack of research regarding how legal actors frame the arguments in their factums, as a strategy to either maintain status quo, or for policy making and changing. This project seeks to fill this gap by providing an analysis of how the factums are framed to advocate for particular legal frameworks in a Canadian context.

Chapter 3

Theoretical Framework

In the previous chapter we saw that competing conversations have, over the last 20 years, come to dominate prostitution research. Prostitution is discussed as a public nuisance, immoral, equated with violence against women, and as a form of employment (Barberet, 2014; Brock, 2009; Ditmore, 2011; MacKinnon, 2011; Maher, Pickering & Gerard, 2013; Outshoorn, 2004). These diverging frameworks are often positioned as internally consistent and mainly exclusive (Barberet, 2014; Mahar et. al., 2013). While a useful categorization, the failure to acknowledge conceptual convergence *between* the frameworks and the points of divergence *within* each of the frameworks lacks nuance. Additionally, this project seeks to shed light on how the discourses are enacted, particularly in the context of the hearing by the Supreme Court of Canada. Accordingly, I will be drawing on the concept of framing and risk theory in this thesis to analyze the competing discourses in action presented in *Bedford*, while also drawing attention to both the convergences and divergences found within these conversations.

In this chapter I introduce Goffman's (1974) concept of framing and its origin, followed by Wedeking's (2010) strategic framing of legal documents and Benford and Snow's (2000) core framing elements. While framing provides a useful broad point of entry for analyzing the findings, it is important to move beyond this general analytic approach to more specific considerations of tensions that emerge within the findings. To this end I will be using the governmentality perspective of risk, as discussed by Lupton (2013, 2006, 1999, 1999), Garland (1997), Larner (2000), Mythen and Walklate (2005), and O'Malley (2006), to unpack these discourses.

3.1 Part One: Framing

3.1.1 Theorizing Framing: A Brief Introduction

Bateson's (1972) "*A Theory of Play and Phantasy*", introduced the term 'frame' and the concept of framing for descriptive and analytic purposes, and has been adopted in a range of disciplines. We see this in the social sciences in "psychology, particularly cognitive psychology, linguistics, and discourse analysis", political sciences, and sociology (Benford & Snow, 2000: 611). Perhaps most well known is Goffman's (1974) collection of essays on frame analysis. According to Goffman (1974) a frame refers to "definitions of a situation [that] are built up in accordance with principles of organization which govern events—at least social ones—and our subjective involvement with them" (10-11). It follows that framing allows people to "locate, perceive, identify, and label" what is happening within their social environment (Goffman, 1974: 21). The ways in which issues are framed have implications in politics, social movements and even legal decisions with respect to law making and law changing (Benford & Snow, 2000; Wedeking, 2010).

3.1.2 Strategic Framing Theory

In order to better understand the basis of strategic framing theory, it is useful to look at the contributions made by Riker's (1996) theory of rhetoric and heresthetic. Rhetoric is described as the attempt to persuade individuals to view issues in a particular way; and heresthetic is the "the art of setting up situations by composing the alternatives among which political actors must choose—in such a way that even those who do not wish to do so are compelled by the structure of the situation to support the heresthetician's purpose" (Riker, 1996: 9). In strategic framing, rhetoric and heresthetic are combined into what Wedeking (2010) identifies as the "manipulation of rhetorical dimensions" (619). Given that strategic

frames are “developed and deployed to achieve a specific purpose” (Benford & Snow, 2000: 624), the framing process is goal oriented and deliberate.

Strategic framing of court briefs¹¹ by appellants and respondents, as well as whether this framing influences legal decisions (Wedeking, 2010: 617) has been a largely neglected area of inquiry with the notable exceptions of Epstein and Kobylka (1992) and Wedeking (2010). Wedeking’s (2010) theory of legal strategic framing and frame typology, developed to analyze Supreme Court cases in the United States, can be adopted in this project for a Canadian context. Wedeking (2010) suggests that how court briefs are structured, at the very least, partially influences the Supreme Courts decisions (618). The “primary weapon” (Wedeking, 2010: 618) lawyers have at their disposal is how they frame issues within their factums by being strategic with their language through word choice. In other words, lawyers are selective in their presentation of the legal issues within their factums (Wedeking, 2010: 619). How these strategies are applied within the factums is dependent on the type of frame a lawyer chooses to employ.

3.1.3 Typology of Legal Frames

Wedeking (2010) posits that there are two types of basic frames that legal actors can choose when writing their court briefs: 1) the prevailing frame, and 2) alternative frame. Every issue has a prevailing frame, which represents the dominant discourse regarding how people are “talking and thinking about the issue and is similar to the policy status quo” (220). Prevailing frames do not originate within the courts; rather, cases that make their way up to the highest court do so with a pre-existing prevailing frame established by a range of actors including, media, social groups, etc. (Wedeking, 2010). Alternative frames, as the name

¹¹ Court briefs are the documents submitted to the Supreme Court in the United States, which are equivalent to Supreme Court factums in Canada.

suggests, are ways of viewing an issue through different perspectives (Wedeking, 2010). Of course there can be more than one alternative frame. Moreover, alternative frames can either be complimentary, with an outcome consistent with the goals of the prevailing frame, or they can be counterframes, where the desired outcome is inconsistent with the goals of the prevailing frame (Wedeking, 2010). Therefore, alternative frames would be used to advocate for policy change within the courts.

The type of frame, prevailing or alternative, that a legal actor chooses to present in court is strategic because how, and more importantly, what individuals think about any particular issue (in this case prostitution and prostitution law) is dependent on how the issue is 'known' (Wedeking, 2010: 618). As the preceding chapter detailed, there are four principle ways in which prostitution has been framed within the established discourses: prostitution as a community and public health concern and social nuisance (Barry, 1995; Weitzer, 2009), prostitution as immoral (Kingston, 2014; Symanski, 1981), prostitution as inherently violent (Balos, 2004; Barry, 1995), and finally, prostitution as legitimate work (Brock, 2009; van der Mueulen, 2012). Notably, three of the four prostitution discourses endorse at least some of the prostitution laws and thus the status quo; can be considered either a prevailing frame or a complementary alternative frame. The sex workers' rights discourse, which views the laws as a problem and not the solution, would be an alternative counterframe.

Considering the limited research on how court litigants use strategic framing for their written briefs, examining Snow and Benford's (2000) core elements has the potential to provide further insight into how legal actors' structure of written court documents can be analyzed. According to Snow and Benford (1988), framing involves three core elements: diagnostic framing, prognostic framing, and motivational framing. Diagnostic framing is

concerned with problem identification of an event or aspect of social life, and then determining responsibility for this issue (Benford & Snow, 2000). The second element, prognostic framing, is where strategies and solutions are proposed to address the identified problem. Finally, motivational framing “provides a call to arms or rationale” (p. 617) for engaging in corrective or ameliorative action (Benford & Snow, 2000) for the identified issue.

These elements are often strategically employed by social movement organizations in order to achieve consensus among organization members and promote mobilization for change or movement. In this case, those who are involved in submitting arguments, for example the interveners who argue for sex workers’ rights and decriminalization, and those interveners who advocate for abolition and criminalization of prostitution, are part of larger social movements. Therefore, framing is useful in that it provides a way to think about how appellants, respondents and their supporting interveners construct their factums to be submitted to the courts. However, in order to undertake an in-depth examination of the specific tensions that emerge in this issue, the expansion of the conceptual framework is needed that moves us from how things are framed to the contents of the framing.

3.2 Part Two: Risk

3.2.1 The Transformation of Risk

Risk is a dynamic concept, the meaning and significance of which has changed over time. The Renaissance Latin term “*riscum*” was first used in Germany before emerging as “*gefahr*” in German during the mid-sixteenth century, and then in English (as risk) in the late seventeenth century (Luhmann, 1993: 9; Lupton, 2013: 5). In the pre-modern period, risk was the possibility of an unpredictable danger, something to do with fate, an “act of God”

such as a flood from a storm (Lupton, 2013: 7). This concept of risk excludes human responsibility because people can, at best, attempt to predict risk and try to reduce the impact. Major change in the meanings and use of risk are associated with the emergence of modernity and the enlightenment (Lupton, 1999). With the idealization of the scientific method (positivism), the concept of risk became a technical notion, something that could be “*scientized*” (Lupton, 2013:7). Not only was risk transformed into a phenomena that could be described, quantified, and predicted, but now could also be managed or prevented (Beck, 1992: 99).

It was not until the beginning of the twenty-first century and the emergence of a neo-liberal state, that the contemporary meanings and use of risk arose¹². The word risk is associated with danger and high risk is associated with a lot of danger (Lupton, 2013: 9) and is generally related to undesirable outcomes. Over the last decade risk has emerged as a key principle for describing people and places, indeed the term is pervasive, ‘at-risk youth’, risky behaviours, high-risk neighbourhoods, etc. Risk has shifted from an objective danger, like a natural disaster, to something more subjective that *may* happen, and that *can* involve harm to someone or something (Lupton, 2013). In short “in contemporary Western societies, the noun ‘risk’ and the adjective ‘risky’ has become very commonly used in both popular and expert discourses” (Lupton, 2013:10).

3.3 Theorizing Risk

It was important to establish the contemporary meaning and use of the word risk before discussing risk in conceptual terms. Due to the fluid meaning of risk, the theoretical uses of risk have permeated multiple disciplines. Risk theory has been used in mathematical

¹² Neo-liberalism and risk will be further discussed in the subsequent sections. It was important to first lay the groundwork in the meanings and uses of risk before translating risk into theory.

and economic disciplines in calculation, assessment and probability, while also gaining popularity within the social sciences, and becoming something that social scientists ‘take on’, within sociology, criminology, and environmental studies (Mythen & Walklate, 2006). For the purposes of this research I am concerned with the governmentality perspective of risk, and therefore will briefly introduce the terms governmentality, governance and neo-liberalism. Following this introduction, is an examination of governance through risk by engaging with work developed by various theorists including: Lupton (1999, 2006, 2013), Garland (1997), Larner (2000), and O’Malley (2006). Finally Sanders (2006), conceptualization of sexuality and risk will provide a lens through which to think about gendered risk.

3.3.1 Governmentality Perspective of Risk

Before exploring the governmentality perspective of risk, it is useful to first introduce neo-liberalism and highlight contributions that have been illuminated by Foucault’s theory of governmentality. This will by no means be a comprehensive discussion of either neo-liberalism or Foucault’s work, but it will provide a point of entry to the discussion of risk. Governance is the approach or strategies to social regulation and control, while governmentality is the rationale or way of thinking about governance (Lupton, 2013; Schirato, Danaher & Webb, 2012). For the purposes of this thesis, I will be employing the work of critical theorists of governmentality who have picked up on Foucault’s insights and have taken their focus of study to governance in a neo-liberal society. This scholarship has shed light on responsabilization and on governance through risk.

Neo-liberalism can be described as a contemporary political era found in Western societies in which the rationale of governmentality has dominated since the eighteenth

century (Foucault, 1984; Garland, 1997; Lupton, 2013). Neo-liberalism shifts away from the ‘welfare’ state to governing at a distance; which requires personal responsabilization, encouraging individual freedoms and rights from excessive state intervention (Garland, 1997: 184; Lupton, 2013: 115). From this perspective, as state responsibility lessens, individual responsibility increases, as does the imperative to self-govern. Accordingly, while neo-liberalism indicates less *government*, it does not mean less *governance* (Larner, 2000: 12). Therefore, the rationale of governmentality in neo-liberalism relies on the voluntary compliance of individuals to regulate themselves in accordance with the interests of the state (Lupton, 2013: 118). In short, governance in a neo-liberal society is exercised “*on the part of the ‘subjects of power’*” or by the “*active subject*”, they are considered free agents of choice (Garland, 1997: 174, 182). The responsibility of personal and social welfare is dependent on the individuals themselves in a manner that reflects governmental objectives.

3.3.2 Governance Through Risk

While risk was not central to Michel Foucault’s work on governmentality, there is a growing body of scholarship that applies a governmentality perspective to risk (Lupton, 2013; Mythen & Walklate, 2005). Theorists Lupton (2013), Mythen and Walklate (2005) are interested not in the nature of risk itself, but in the discourses that constitute risk as a phenomenon, which produces ‘truths’ that become the basis for action (Lupton, 2013; Lupton, 2006). Such discourses on risk from a governmentality perspective focus on “the regulation of the body, how it moves in space and how it interacts with other bodies and things. These discourses also contribute to the constitution of selfhood, or subjectivity” (Lupton, 2013: 119). In other words, the focus is concentrated on risk as a strategy of

governance, by which individuals regulate their behaviour and interactions with others, and how they do so within their surroundings.

In neo-liberalism, individuals are encouraged to engage in self-regulation through risk avoidance. According to Lupton (2013), ‘good citizens’ seek advice from governmental agencies and experts who have identified the risks that have permeated different areas of life and how to take measures in avoiding and mitigating those risks (119-120). Thus, in order to be considered a ‘good citizen’, individuals are required to actively govern themselves through the avoidance of risky behaviours and practices (as defined by state agencies and other ‘experts’) (Lupton, 2013: 119; O’Malley, 2006: 52). Furthermore, according to O’Malley’s (1992) concept of prudentialism, those who are not cautious in their self-governance through acceptable risk avoidance are labeled as imprudent (Marques, 2010: 321). O’Malley (2006) also discusses how the risk of citizens being victimized in neo-liberalism is an individual issue wherein to prevent potential victimization, people are responsible for comporting in a manner that attracts the least amount risk, in the least risky of places (O’Malley, 2006: 52).

Governing one’s behaviour through risk avoidance is not only discussed in terms of preventing victimization or re-victimization, but also as a means of preventing offending behaviour. Findings from conventional studies on risk indicate that crime “arises out of an inappropriate or pathological risk taking in search of excitement” (O’Malley, 2006: 53). In other words, offending behaviour is linked to risk taking, as those who fail in appropriate self-governance may find themselves subjected to moral/criminal judgments, or stigmatization (Lupton, 2006: 14). Although, it has been acknowledged that some risk-taking behaviours are acceptable within Western culture (for example, in business financial risk),

these risk-taking individuals are not exempt from appropriately governing themselves in their risk taking (O'Malley, 2006: 53). Furthermore, Lyng (2005), O'Malley (2006), and Walklate (1997) argue that it is generally acceptable for certain individuals, while unacceptable for others, to engage in voluntary risk-taking. Thus, to engage in prostitution is unacceptable risk-taking.

3.3.3 Gender, Sexuality and Risk

Thinking about sexuality in relation to governance through risk draws our attention to the significance of gender scripts. Mindful that “the sexual body has always been targeted by ideas of danger, sinfulness, and immorality” (Sanders, 2006: 97), Sanders (2006) maintains that the act of identifying a certain group as sexually risky is a mechanism of regulation and control; which also affirms the boundaries of acceptable sexual behaviour, that which is unacceptable is risky (98).

In short, identifying a group (such as sex workers) as sexually risky is a tactic of governance, which is conditioned by intersecting social and structural factors including gender¹³. Gendered risk scripts not only differentiate the risk(y) behaviours of men and women, but also how women and men (should) manage risk. For example, voluntary risk-taking is more acceptable amongst men because risk-taking behaviours are associated with masculinity (O'Malley, 2006; Walklate, 1997). However, as previously mentioned, they are still required to self-govern their risk-taking behaviour appropriately, just as they are still responsible for avoiding risks. Alternatively, governing their behaviour to avoid risk is the acceptable means for women and is associated with femininity (O'Malley, 2006: 53; Sanders,

¹³ For the purposes of this research project I will be looking at gender in terms of female and male, I do acknowledge that gender is not dichotomous, however, within the data collected, the appellants, respondents, and interveners use the terms men and women. Also within the prostitution discourses presented, participants are discussed in terms of women and men.

2006: 106) because “[w]omen are after all the ‘Other’; typically defined as being outside the discourse of risk and risk seeking” (Walklate, 1997: 43). This type of gendered governance through risk can be seen in sexual assault campaigns that provide advice ranging from ‘appropriate’ clothing to utilizing the buddy system when traveling at night, so women can prevent assault. These types of campaigns are directed at female risk-taking and risk avoidance, making women responsible for preventing their own sexual assaults.

These gendered differences in risk-taking and risk avoidance are also present in normative sexual scripts. Consider the association of promiscuity with risk, which is different between men and women. Thrill-seeking sexual behaviour of heterosexual men, including high rates of sexual interactions, is accepted as an expectation, or “biologically natural to the point of being celebrated and encouraged” in contemporary Western culture (Sanders, 2006: 102, 106). Alternatively, women tend to be condemned for sexual promiscuity/activity¹⁴ (Pasko, 2013; Sanders, 2006, 2005).

3.4 Moving Forward

The purpose of this chapter is to develop a conceptual framework, which draws on contributions made within the theories of framing and risk. Goffman’s (1974) concept of framing coupled with Wedeking’s (2010) theory of strategic framing of written legal briefs provides an overall framework through which the *Bedford* factums can be analyzed. In this case, the appellants, respondents, and interveners submitted their factums to the Supreme Court, each with the purpose of influencing the legal decision by strategically framing their

¹⁴ Throughout history women, and young girls, have been condemned for sexual activity or promiscuity. Their sexuality is linked to morality; they were referred to as “the fallen” or the “wayward” and were often institutionalized for the moral offences that “contested [the] constraints of female heterosexual norms” (Pasko, 2013: 216). In the United States, as recently as 1972, judges were concerned about girls’ sexual morality and “girls, in comparison to their male counterparts, were sentenced more harshly for status offences, and despite the absence of serious law violations, were as likely as boys to be institutionalized” (Pasko, 2013: 217).

arguments. In other words, framing helps to illuminate the ways in which particular phenomena, such as prostitution, risk, choice, etc.... are conceptualized or assigned meaning. Risk theory, specifically the governmentality perspective of risk, allows me to position and analyze these concepts in a broader neo-liberal context. Therefore, the combination of employing theoretical considerations from both framing and risk theory, allows for additional analysis that goes beyond identifying convergences and divergences within the prostitution discourses presented in *Bedford*. For example, drawing from conceptualizations from both theories, further questions emerged regarding the framing of individuals who participate in prostitution. These theories are complimentary of one another, while also being cohesive with the methodology undertaken in this project. This will be demonstrated in the following chapter, which explains the methodological approach.

Chapter 4

Methodological Approach

This chapter sets out the methodological approach I employed for the collection and analysis of the data. I begin with a discussion of the epistemological and ontological framework, which underlies the research process. I then describe the particular methodology that I employ, a discourse analysis that is inspired and informed by Foucault. Following this I present, in detail, the research methods employed for this project.

4.1 Epistemological and Ontological Positioning

Every research project requires cohesion of three interconnected elements - epistemology, ontology and methodology (Guba & Lincoln, 1994: 108). My research project seeks to ‘shed light’ on how the discourses are used and presented by different individuals and organizations who submitted factums in *Bedford* including: the Attorney Generals of Canada and Ontario (appellants), Terri Bedford, Amy Lebovitch, Valerie Scott (respondents), and their interveners. This project is consistent with that of a key social constructivist assumption: that existence and knowledge are “socially manufactured through human interaction and language” (Houston, 2001: 846).

Social constructivism adopts a relativist ontology in which realities are socially and experientially formed (Guba & Lincoln, 1994). These constructs tend to be local and no construction is any more or less ‘true’ but “simply more or less informed and/or sophisticated” (Guba & Lincoln, 1994: 111). My project takes as its point of departure that discourses are constructed in multiple forms, speech, text, practices, and they define what is considered truth at particular times (Carabine, 1995). Therefore, the social constructivist ontology is consistent with my research project because as the discourses are constructed,

they are localized in relation to the *Bedford* case, and the findings will be presented in a manner that does not distinguish between better or worse discourses.

The social constructivist epistemology is premised on the notion that knowledge(s) is shaped or created through experiences and languages, and that it is “historically and culturally specific” (Houston, 2001: 846). What is considered knowledge and truth can differ between people and different groups (just like the arguments presented through competing court factums). For this project, I am particularly concerned with how knowledge(s) are enacted through what is said within the submitted arguments. This will result in rendering visible how discourses surrounding prostitution are transmitted through the discursive practices and strategic framing within the court factums.

4.2 Methodology

In this project my research questions are seeking descriptive answers, as I am aiming to shed light on the competing discourses that are constituted within *Bedford*, therefore, the most appropriate approach is a qualitative methodology. In order to answer my questions, I will be conducting a discourse analysis, but one that is inspired and informed by Foucault’s work. More specifically, I will be adapting Jean Carabine’s (1995) method of Foucauldian discourse analysis. However, before I discuss this type of analysis, it is important to conceptualize the meaning and use of discourse.

4.2.1 Conceptualizing Discourse (Meaning of Discourse)

There are various meanings and uses of the term discourse, and customarily they have been concerned with the language and linguistic patterns of speech and text (Flowerdew, 2013; Garrity, 2010; Hall, 2001). For the purpose of this research, my understanding of discourse is derived from Foucault’s work in *Archaeology of Knowledge* (1972 [1969]), wherein he defines the meaning of ‘discourse’ as “sometimes [...] the general domain of all

statements, sometimes as an individualizable group of statements, and sometimes as a regulated practice that accounts for a certain number of statements” (80). The regulated practice aspect of discourse speaks to how discourse is governed by internal linguistic rules (e.g. how knowledge is conveyed through sentence structure). However, for the purpose of this project, my interest and use of discourse is consistent with the first two elements of the above definition, wherein discourse is a group of statements that “in some way produce both *meanings and effects* in the real world” (Carabine, 1995: 268, emphasis added). Thus discourses have force, effects, and are productive.

From this point of departure, it is fruitful to think of discourse as the “ways that an issue or topic is ‘spoken’ of, through, for example, speech, texts, writing and practice” (Carabine, 1995: 268). In other words, discourses can produce representations or ways of speaking about a particular topic or issue¹⁵. However, not all discourses have equal effects, for instance, dominant discourses “hook into normative ideas and common-sense notions” and often create the most meaning and effect (Carabine, 1995: 268-269). Therefore, dominant discourses “convey messages about what is the norm and what is not”, or what is ‘acceptable’ or ‘unacceptable’ (Carabine, 1995: 277). A function of dominant discourses is to reflect and reinforce what is normal/typical and what is abnormal/non-typical (Gee, 2005: 72-73), and behaviour that is identified as different, abnormal or unacceptable can be translated into deviance through discourse (Gee, 2005: 76). There are real consequences when people and/or their behaviour are considered deviant. For example, as we saw in the literature review, during the 1970’s and early 1980’s, in the context of gentrification, there was a re-emergence of arguments in the dominant discourse of prostitution whereby visible

¹⁵ This is similar to how the concept of framing is used for descriptive purposes in discourse analysis (see Theoretical Framework page 28 and Benford & Snow, 2000: 611).

(street-based) sex workers were considered a nuisance and problematic to the community. The effect was the enactment and enforcement of a law that focused on street-based sex workers, a particular group and their specific behaviour¹⁶.

This does not mean that dominant discourses are static, as “we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable” (Foucault, 1978 [1976]: 100). Rather, discourses are fluid and can be influenced by other discourses that can in turn produce new ways of ‘speaking’ about an issue or topic. Furthermore, there is no objective truth or knowledge, instead knowledges are socially constructed and produced by being spoken of in terms of ‘truth’, and by the effects of power (Carabine, 1995: 275).

4.2.2 Method and Theory: A Brief Discussion

In any research project it is imperative that methodology and theory are in a “reciprocal relationship” (McCotter, 2001: 4). The concepts of discourse and knowledge[s] that are presented in this chapter are closely aligned to the theoretical concepts of framing and governance through risk, outlined in the previous chapter: A discourse consists of a group of statements, which are productive and produce the ‘know-how’, truths, and have effects. Framing is a process that conceptualizes and defines (frames) situations and assigns them particular reality statuses (Goffman, 1974: 3). Both are unconcerned with determining the ‘true’ reality, rather they are interested in examining how realities are conceptualized. Regarding the concept of risk, there is a history of how the meaning of the word risk has evolved over time (Lupton, 2013). Yet, how risk is assigned meaning determines the effect it

¹⁶ Bill C-49 was enacted by the government on the premise that there was a “*prostitution problem*”, the neighbourhoods were being inconvenienced and there was a need to protect the “*wives and daughters*” who were afraid to be outside after dark (Brock, 2009: 82). The ways in which prostitution was being discussed had an impact on the law and real effects. The punishment for this charge was a maximum fine of \$2 000.00 and 6 months in prison.

has in the ‘real world’. It does not matter what risk ‘really’ means, rather that it is used to govern the behaviour of social individuals. A Foucauldian inspired discourse analysis provides an approach to go through the factums, rendering visible the discourses within the *Bedford* factums, as well as offers a guide for examining how those discourses frame prostitution and its participants.

4.3 Method

Just as there are various definitions of discourse, so too are there various strategies to conducting a discourse analysis (Flowerdew, 2013; Gee, 2005; Rogers, 2013). While there is no ‘right’ or ‘set’ list of guidelines, some approaches are more suitable for certain research questions (Gee, 2005: 5). Researchers have developed strategies of conducting discourse analyses that are flexible, adaptable and transformable as they are applied in practice (Gee, 2005: 6). I was inspired by Foucault’s invitation for researchers to ‘shed light’ on the knowledges, because all forms of knowledges are subject to selection, normalization, hierarchalisation and centralisation (Foucault, 2003: 181). Since the aim of my research project is to render visible how the discourses are enacted within the factums, a discourse analysis inspired by Foucault, in other words a poststructural discourse analysis¹⁷, was conducted. A poststructural discourse analysis is defined by Graham (2011) as ‘being’ done within a Foucauldian framework employing his understanding of discourse as more than just language, but as statements that are productive, producing meaning and effects, *saying* and *doing*. A poststructural discourse analysis does not seek to be assessed as objective truth, or make claims of the ‘true’ meaning of what is said or not said (Graham, 2011).

¹⁷ While constructivism and poststructuralism are often discussed as distinct, paradigms, they do “share the same post-positivist stance” and because “constructivism and poststructuralism converge on linguistic issues” (Pouliot, 2004: 324-325), analyses of language can be conducted within a constructivist and poststructuralist approach.

In this project I adapted the methodological approaches of Carabine's (1995) Foucauldian discourse analysis. Carabine (1995) is concerned with the discursive practices by which a discourse is given meaning and force (288). A discursive practice is a mechanism through which discourses emerge and can be analyzed, and it focuses on language use, not on linguistic patterns, such as grammar or subject placement in a sentence (sentence structure). In the context of this research project, I focus my attention on the analysis of the discursive practices utilized within the Supreme Court factums, and thereby I am not concerned with linguistic patterns such as punctuation and grammar. Importantly, Foucauldian discourse analysis intends not only to shed light, but also to acknowledge the effects that discourses produce (Carabine, 1995; Holborow, 2012; Packer, 2011; Powers, 2001). My research project did not examine effects per se, or at least any effects that go beyond the discourses (which are effects in and of themselves); however, I will reflect on this in the conclusion.

4.4 Data Analysis

4.4.1 Sample

This research analyzed court factums that were submitted to the Supreme Court of Canada by the appellants, respondents and their interveners in *Canada (Attorney General) v. Bedford*, case 34788. Intervenors are individuals or groups of individuals who are neither the appellant nor respondent, but are allowed to participate in the court proceedings and submit their arguments to the court on either the side of the appellants or respondents. Court factums consist of seven parts: an overview of the case, the submitter's position, a statement of facts, questions and arguments, the provisions of the statute, and regulation or rule that is being relied on for the said arguments, and whether or not court costs are being sought (SCC, 2013:

FAQs par. 17). As such, all factums are available on the website of the Supreme Court of Canada¹⁸.

The appellants in this case were the Attorney General of Canada, and the Attorney General of Ontario and their overall position was that the prostitution laws were constitutional. The respondents were Terri Jean Bedford, Amy Lebovitch, and Valerie Scott (Bedford et. al) and argued that the laws were unconstitutional because they increased sex workers' vulnerability to harm in the sex industry. The interveners for the appellants included: Procureur Général du Québec, Christian Legal Fellowship, Catholic Civil Rights League, and Real Women of Canada (CLF), Evangelical Fellowship of Canada, the Women's Coalition for the Abolition of Prostitution (Women's Coalition), and Asian Women Coalition Ending Prostitution (AWCEP). The interveners for the respondents were: Aboriginal Legal Services of Toronto (ALST), British Columbia Civil Liberties Association (BCCLA), Downtown Eastside Sex Workers United Against Violence Society, Pace Society and Pivot Legal Society (Pivot), the Joint United Nations Programme on HIV/AIDs, Canadian HIV/AIDs Legal Network, British Columbia Centre for Excellence in AIDs Legal Clinic Ontario, and Institut Simone de Beauvoir¹⁹. It is important to note that not everyone who applied for leave to intervene in *Bedford* was granted intervener status, which means that some voices were excluded in this case. For example, seven sex workers' rights groups were refused intervener status, including POWER, Maggies, Stella, and New Zealand Prostitutes Collective Trust, which has in essence denied sex workers' voices.

¹⁸ The link is found at < <http://www.scc-csc.gc.ca/case-dossier/info/af-ma-eng.aspx?cas=34788> >

¹⁹ Sixteen of the seventeen submitted factums were analyzed. The factum by David Asper took no position with either the appellants or respondents in *Bedford*, and presented arguments of the common law doctrine of vertical *stare decisis*. This factum did not address prostitution or the prostitution laws, and therefore was excluded on the basis of relevance.

In order to draw out and analyze the discourses that were presented in *Bedford*, I adapted the strategies outlined by Carabine (1995) in her ‘*Guide to doing a Foucauldian discourse analysis*’. Carabine’s (1995) guidelines provide a way to examine how the language and discursive strategies were used to frame the institution of prostitution and sex work participants.

4.4.2 Strategies Employed

‘Doing’ a poststructural discourse analysis necessitates that the researcher must “be clear about objectives, limits, and most importantly, what one is *doing*” (Graham, 2011: 667 emphasis in original) through a detailed methodology. In this section I outline ‘what I did’ and detail my approach of the data analysis. For Carabine’s (1995) full guide please refer to Appendix A. One of Carabine’s (1995) strategies involves fully immersing oneself in your sources and that allows the researcher to familiarize themselves with their data and “aids analysis and interpretation” (281). This entails reading and re-reading the archive while taking detailed notes in order to provide the researcher with a ‘sense’ of what the documentation is about. I read all of the factums, in total 318 pages, thoroughly four times²⁰. The first read through provided a preliminary sense of the factums. The second time reading them, I took notes in a journal, where I identified themes, categories, and objects of the discourses. During the third reading I came up with questions that guided the process of the analysis. Together, these themes addressed 12 questions of interest organized into 2 broad

²⁰ The factums of the Procureur Général du Québec and the Institut Simone de Beauvoir were submitted in French and I had a colleague, who is fully bilingual, translate them into English. I acknowledge that it is possible that the contents of the translated factums are not completely accurate, as there are differences in presentation of words and sentence structure between written English and French texts. However, this project analyzed context and discursive practices as opposed to linguistic patterns, thus it was still valuable to understand what the factums were arguing. Please refer to Appendix C for the translated factums.

areas – participants and the institution of prostitution (For operational definitions and indicators please refer to Appendix B):

The Institution of Prostitution

Within the factums:

- How is prostitution discussed?
- How are indoor and street-based prostitution discussed?
- How is risk discussed?
- How are harms discussed?
- How are the direct and indirect impacts of the laws discussed?

Participants

Within the factums:

- How are clients discussed?
- How are third parties discussed?
- How are sex workers discussed?
- How are gender and gender relations discussed?
- How are young people discussed?
- How is race discussed?
- How is choice discussed?

Equipped with these questions, I was able to undertake the fourth reading of the factums, during which I also coded the data. For this process I used N-Vivo 10²¹, to manage the data in an organized manner. I then converted the coded questions from the N-Vivo format into separate word documents for each question and printed them out.

After coding for the questions, I began to go through the data in order to tease out patterns regarding, for example, the different ways the factums ‘spoke’ to prostitution, or how prostitutes’ gender, age and/or ethnicity, were discussed. In order to respond to the questions I read my coded data/notes multiple times identifying the meanings that were presented, pertaining to the above themes. Responding to the questions and seeing how the

²¹ N-Vivo 10 is research software developed by QSR International that allows for the organization and analysis of qualitative text-based data. Here you can create codes (called nodes) and the data is uploaded in PDF format. From there you highlight the sections from your data and drag it into the corresponding nodes. It has many other functions, but I used it exclusively to organize and code my data.

discussions formed ‘individualizable groups of statements’ (Foucault, 1972[1969]: 80), helped establish a general ‘sense’ of what was being said about prostitution (Carabine, 1995: 282). Thereby ascertaining the discourses that were being presented in *Bedford* by the appellants, respondents, and interveners regarding the participants in prostitution as well as prostitution itself.

The above strategies were used in the process of drawing out the discourses being transmitted by virtue of the ways the issues were ‘spoken’ of, whereas the following strategies were used in analyzing the nature of the discourses. The next step involved considering the ways in which the discourses were interrelated. This is done through the process of cross-referencing to examine associations between the themes through their language-in-use (Carabine, 1995: 285; Gee, 2005: 12). For example, contemplating how the meanings of sex workers (participant of prostitution) were connected with risks and harms (prostitution). Additionally, I explored the “discursive strategies” (Carabine, 1995: 288) employed within the factums; in particular, how they are used to give meaning and significance to prostitution or to the participants.

Lastly, I considered absences within the discourse, what was not ‘spoken’ (the silences), for instance, despite the appellants’ concern for systemic factors that contribute to prostitution, they rarely mention ethnicity within their factums. I also sought to ascertain counter-discourses by identifying prostitution discourses that were different from the dominant discourses presented in the literature review. To reiterate, dominant discourses can convey messages about social norms and what is considered to be appropriate behaviour (Carabine, 1995; Gee, 2005). Furthermore, it is important to note that Foucault (1978 [1976]) acknowledges the possibility of “different and even contradictory discourses within the same

strategy” (102). This is relevant for this project because it became clear that in addition to the expected debate between the appellants and respondents, there were competing arguments amongst the factums that were submitted within the same ‘side’.

4.5 Limitations

As with any research methodology, there are some limitations that must be acknowledged. One of the limitations of this Foucauldian inspired analysis is that it does not examine social structures, but focuses on the discourses alone (Silverman, 2006: 154-155). While recognizing the importance of such analysis, I maintain that examining how particular ‘realities’ are presented through the discourses, rather than social structures is important. As such, the court factums provide valuable insight into the meanings and knowledges that were transmitted and presented in those documents, and they can have real effects, which includes impacting the legal system.

Another limitation of looking at the discursive practices within the *Bedford* factums is that the conversations within *Bedford* were constrained by the case itself. Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees the *right to life, liberty and security of the person* and *Bedford* was a section 7 Charter challenge. As such, all of the submitted arguments had to relate in some way to safety and security of the person. Nonetheless, the arguments submitted in *Bedford* are important to analyze because nothing printed within the factums was there by accident, the appellants, respondents and interveners were mindful that their arguments were going into the court records. Furthermore, the appellants, respondents, and interveners still determined what arguments to present in their factums regarding prostitution and its participants, and analyzing their arguments helps to illuminate the discourses embedded in *Bedford*.

Another limitation specific to poststructural discourse analyses is the absence of ‘grammatical considerations’ by deliberately focusing on “social relations implied by discursive forms” (Parker & Burman, 1993: 157). Parker and Burman (1993) suggest that language always ‘does things’ and by not analyzing linguistic patterns, the ‘performative’ aspect of language is neglected. While, I acknowledge the significance of analyzing grammatical patterns of speech and texts, however, in the context of this project it was not necessary; the discursive strategies and practices were more relevant and significant. The documents that I analyzed were uniform, structured and regulated for court purposes. Each group that submitted a factum had to follow guidelines for the written structure, including required subheadings and the number of pages, thus the linguistic patterns were arguably restricted and stilted through regulation.

A final limitation is that this type of analysis is the potential to ‘cherry pick’ data, whereby the researcher draws upon relevant extracts to support the arguments being made, and making decisions about what information to collect and what data to analyze (Carabine, 1995: 306). Recognizing that this charge can be leveled at all research projects, Gee (2005) argues that some details will always *have* to be left out of the analysis (110, emphasis added). To address the potential for researcher selectiveness, I rigorously and systematically documented every aspect of the research endeavour, which demonstrates transparency and accountability of analytical decisions (Ortlipp. 2008: 697). Additionally, openness and transparency are not used to “produce an objective or value-free account of the phenomenon, because qualitative research of this kind does not yield standardized results”, rather it is to provide an articulate description and perspective of the situation being studied and the analytical decisions made throughout (Wainright, 1997).

As discussed throughout this chapter, my research project is qualitative and I am working from a social constructivist perspective. Under this paradigm, it would be contradictory to use the term validity relating to my analysis, as I am not making truth claims (Ortlipp, 2008). Instead, when working within a social constructivist paradigm, validity, reliability and generalizability can be redefined as: credibility, trustworthiness, and authenticity (Flicker, 2004; Golafshani, 2003). Keeping a journal, or a few, as was my case, is a way researchers can establish trustworthiness, by making their processes visible and transparent. This transparency can establish the trust, credibility, and authenticity for a researcher's integrity, and builds trust between the researcher and reader (Chenail, 1995; Wainright, 1997). While the term 'validity' is not relevant for the type of research I am conducting, it remains important for researchers to be rigorous and keep their processes and practices transparent throughout the project.

Chapter 5

Findings: Unpacking the Factums

This chapter presents how the appellants, respondents and the interveners in *Bedford* framed debates about the sex industry and its participants. The first section will highlight the role of the customers, the sex industry's third parties, and sex workers. The next section examines the rhetoric framing of the institution of prostitution. As I present the above findings as constructed in *Bedford* by the appellants and respondents, we see how the findings speak to the convergences and divergences of the well-established sex work discourses presented in the literature review including: 1) community and policing discourse, 2) moralizing discourse, 3) radical feminist discourse and 4) sex workers' rights discourse. Additionally, there are two tensions that are introduced within these findings: risk/risky and the question of choice. These tensions, which form the conceptual basis for the analysis, which will be further developed in the subsequent chapter: *Discussion of Analytic Themes*. I begin each subsection with a short overview before outlining the arguments presented by the appellants and their interveners followed by those of the respondents and their interveners.

A. The Participants

5.1 The Role of the Customers

Within the sex industry, customers are individuals who purchase sexual services. Both the appellants and respondents, along with their interveners, consistently present customers as men. The Women's Coalition for the Abolition of Prostitution (Women's Coalition) (an intervener for the appellants) explicitly states that “[a]lmost all buyers/johns and most pimps/profiteers are men” (2013: par. 2), and the Insitut Simone de Beauvoir (an intervener for the respondents) discusses a customer as a “man she [the sex worker] never

met” (2013: par. 30). Throughout the factums, customers are referred to as “*he*”, “*him*”, and “*men who purchase*”. However, as we will see in the coming sections, the appellants, respondents, and their respective interveners, framed the role of the customers in the sex industry in a very different way.

a) Appellants

5.1.1 Typology: The Risky/Violent Customer versus the Naïve Customer

The appellants and their interveners refer to the customers as “*johns*”²² or as “*buyers*”. Rarely are they referred to as customers or clients’ this was seen only 13 times for customers and 14 times as clients amongst the 159 pages of submitted factums by the appellants and their interveners. Indeed the dominant type of customer that the appellants and their interveners discuss is the risky and/or violent customer. As such, “*johns*”, in conjunction with “*pimps*”, are the main causes of harms and violence to sex workers (Attorney General of Canada, 2013; Attorney General of Ontario, 2013; AWCEP, 2013; Women’s Coalition, 2013), “[*t*]he harms suffered by prostitutes are at the hands of pimps and violent johns” (Attorney General of Canada, 2013: par. 2). We have seen this assumption of ‘male’ customers (and third parties) as the main cause of harm to prostitutes within radical feminist literature; for example, Barry (1995) and MacKinnon (2011) discuss the men who pay to exploit and have control over women’s bodies.

There are multiple reasons as to why customers are considered risky to sex workers; the Attorney General of Canada argued “*johns can become violent at any moment’ regardless of what precautions a prostitute takes*” (2013: par. 9). Moreover, customers may insist on moving to remote areas so that they have more control over prostitutes. According to the factum of the Evangelical Fellowship of Canada, customers “*reject or coerce unsafe*

²² The term “john” has been criticized as being dehumanizing and negating the individuality of individuals.

sex...even in allegedly safe “inside” prostitution condom usage is rejected by clients with physical, financial or other forms of coercion” (Evangelical Fellowship of Canada, 2013: par. 29). Those who are dangerous and purchasing sex *“are not likely to reveal their violent tendencies when seeking sexual services from prostitutes...it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway”* (Attorney General of Ontario, 2013: par. 23-CR). Such men are considered a risk to both street-based and indoor sex workers as they are unpredictable and *“regardless of where a john begins his purchase, his prostitution of a woman concludes in private, where the violence occurs”* (Women’s Coalition, 2013: par. 16). In short, the image is of customers as individuals with intrinsically violent natures that can materialize at any time.

Another characteristic of the customer is that they are desperate and perpetually on the prowl for women to have sex with. According to a police officer, an expert witness found in the Attorney General of Ontario, he expressed concern that *“women [are] afraid to walk home at night, for fear of being harassed by johns”* (par. 10-CR) and that *“women are subject to unwanted solicitation by would-be customers”* (par. 11-CR). Here, customers are framed as sexually insatiable men cruising around neighbourhoods propositioning random women for sex. This reaffirms the concerns raised in the community and policing discourse where residents felt they had to change their daily routines, and women would avoid going out at night so as not be mistaken as a prostitute (Kingston, 2014).

Much less prevalent in the framing is another type of customer - one who is unaware of the risks and harms of the sex industry or their own part in perpetuating these risks, who I refer to here as the “naïve customer”. The Asian Women’s Coalition Ending Prostitution (AWCEP) maintained that customers have *“no way of knowing the path to prostitution of any*

individual woman, including whether she has been coerced in ways the law can readily grasp, or coerced by circumstances of inequality” (2013: par. 26). The naïve customer is also invoked when the appellants note that customers need to be informed of the “*realities*” of prostitution and reformed in their own behaviour as participants. This can be achieved through diversion programs that “*deter johns from re-offending...assist in changing the attitudes of johns by educating them about the realities of prostitution and the harms it imposes on prostitutes and communities*” (Attorney General of Canada, 2013: par. 24).

In addition to causing physical harm to sex workers, customers, both risky and naïve, are implicated in undermining gender equality - prostitution exists as “*male demand plays in sustaining prostitution as a practice of inequality*” (Women’s Coalition, 2013: par. 21) because “[w]ithout customers there would be no solicitors” (Attorney General of Canada, 2013: par. 42). They are also concerned that if the laws were struck down, the demand for sex work would only increase²³ (Attorney General of Canada, 2013: par. 27).

In short, most customers are framed as sexual predators, with the potential to physically harm a sex worker at anytime. At the same time there are some who are capable of reform- simply naïve and uninformed to the harms of prostitution who, if they became educated, would not participate in the future.

b) Respondents

5.1.2 Risk of Harms: A Different Perspective

The framing of customers by the respondents, Bedford et. al, and their interveners, is more nuanced. Firstly, customers are referred to as “*clients*” or “*customers*” never “*johns*”. The connotation behind the use of clients or customers normalizes and positions prostitution as part of an economic/commercial exchange. Customers are not typically described as

²³ This is linked to the proposed solutions of the appellants.

manipulative or exploitative; rather, they are part of a contract, sex in exchange for money, between consenting and autonomous adults (Institut Simone de Beauvoir, 2013: par. 23). According to the respondents, customers “*of the sex-trade are drawn from all walks of life*” (British Columbia Civil Liberties Association (BCCLA), 2013: par. 31) and have different reasons for participating. The respondents and their interveners also recognized violence against sex workers by customers; though, they are not held solely responsible for the harms that can be experienced. Further harms also occur as a consequence of the existing laws “*increas[ing] the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction*”²⁴ (Bedford et. al, 2013: par. 11-CA). In other words they drew attention to other causes and factors, such as the prostitution laws, that contribute to harms sex workers and communities can experience, and recognized that while there is risk of customers being violent or harmful, that is not the norm.

5.2 The Sex Industry’s Third Parties

In the sex industry, a third party is “anyone involved in the transaction that is neither the sex worker nor the client” (Bruckert & Law, 2013: 106). Third parties provide diverse services and roles, and sex workers “may hire, work with, or work for, third parties” (Clamen, Bruckert, & Mensah, 2013: 7). How the appellants and respondents framed third parties is as divergent from each other as is the construction of customers. Similar to my findings regarding customers, the appellants referred to third parties as men using the pronouns “*he*” and “*him*” (Attorney General of Canada. 2013: par. 13), and that “*women who operate independently of male pimps are still the exception, not the norm*” (Attorney General of Canada, 2013: par. 100). The respondents, by contrast, did not explicitly frame third

²⁴ This will be expanded upon in the section that presents the framing of sex work.

parties as male or female, instead they constructed them as sex industry actors who have the potential to increase the security of sex workers.

a) Appellants

5.2.1 Third Parties: A Risky Participant, An Even Riskier Relationship

The Attorney general of Canada, Ontario and their interveners drew many parallels between third parties and customers. Most often third parties are referred to as “*pimps*” or “*profiteers*” throughout the factums, which include the terms: “*owners/managers of brothels, advertisers, and anyone else who constitute the demand for prostitution*” (AWCEP, 2013: par. 3). As indicated above, along with customers, third parties are understood to pose a significant risk of violence and exploitation to “*vulnerable women*” (Attorney General of Canada, 2013: par. 27). It is asserted that third parties are prevalent in prostitution and “*that up to 50 percent of prostitutes have pimps*” (Attorney General of Canada, 2013: par. 10).

Third parties are assumed to be “*exploitative*”, “*manipulative*”, and “*coercive*” (Attorney General of Canada, 2013: par. 10, 13; Attorney General of Ontario, 2013: par. 10, 72). They recruit women and children into prostitution through a ruse of love, indebtedness, intimidation (physical and psychological), violence and drug dependence (Attorney General of Canada, 2013: par. 10-11). The third party-sex worker relationship “*typically*” consists of violence and manipulation by third parties who target a sex worker’s vulnerabilities and “*prey upon these insecurities*” (Attorney General of Canada, 2013: par. 13). The exploitative nature of the third party-prostitute relationship is central to the radical feminist argument within the literature: see for example Barry (1995), Flowers (1998), Hodgson (1997), Jessome (1996), and MacKinnon, (2011). Furthermore, the appellants considered bodyguards hired by prostitutes to be a risk of harm for sex workers because there is “*no bright line*

between pimp and a bodyguard” (Attorney General of Canada, 2013: par. 80). Prostitution is understood to encourage exploitation since the vested economic interest means a third party may begin the relationship with sex workers as a bodyguard, but then turn violent and exploitative (Attorney General of Canada: 2013: par. 80).

The economic interest of third parties in the labour of sex workers is the motive for them to encourage or force sex workers to work in the sex industry (Attorney General of Canada, 2013: par. 39). This is seen in the appellants argument that even though “*the claimants claim to freely choose to engage in prostitution, many prostitutes are subject to the manipulation and exploitation of pimps, many of whom use physical violence in addition to psychological intimidation as a means of controlling prostitutes*” (Attorney General of Canada, 2013: par. 10). In short, the appellants and their interveners provide an image that suggests that third parties always present significant risks of harm to sex workers, in recruiting and maintaining their participation in the industry (Attorney General of Canada, 2013; Attorney General of Ontario, 2013; Evangelical Fellowship of Canada, 2013).

Another risk that the appellants and interveners identified in their factums is the link between third parties and human trafficking for sexual exploitation. More specifically, third parties are framed as perpetrators of human trafficking when the demand for sexual services is greater than the number of available sex workers. For example the Evangelical Fellowship of Canada (2013) stated in their factum: “*pimps and brothel owners have demonstrably turned to human trafficking to fill the void*” (par. 19). In short, the risk posed by third party extends to all women.

b) Respondents

5.2.2 Third Parties: Mitigating Risks of Harm

The respondents and their interveners maintained that there are a range of relationships between third parties and sex workers, which include: *brothel management, bodyguards/security, and any other form of paid assistance* (Bedford, et. al, 2013: par. 12). Recognizing the potential for violence, exploitation and “*parasitic*” (Bedford, et. al, 2013: par. 92) relationships between sex workers and third parties, they disputed the assumption that these relationships are necessarily always harmful. The respondents provided international evidence that “*shows that working indoors with third party assistance is significantly safer than working alone on the street*” (Bedford et. al, 2013: par. 45). Furthermore, third parties can offer services to sex workers that can help protect and mitigate the risk of physical harm (Bedford et. al, 2013: par. 65) including hiring protective services, such as a bodyguard, providing safe places for sex workers to take their clients, allowing escort services to promote workplace safety and supplying safer sex supplies (Bedford et. al, 2013; Canadian HIV Legal Network, BC-CfE, HALCO, 2013).

While third parties can aid in the protection of sex workers and mitigate risks of harm, their working relationships are strained due to the prostitution laws that criminalize “*living off of the avails*” of prostitution (*Canadian Criminal Code, s. 212(1)(j)*) and for “*keeping a bawdyhouse*” (*Canadian Criminal Code, s. 210*)²⁵. Additionally, within the factum of the interveners, Canadian HIV/AIDS Legal Network, The British Columbia Centre for Excellence on HIV/AIDS (BC-CfE) (2013), and the HIV & AIDS Legal Clinic of Ontario (HALCO) (2013), they maintain that often brothel managers are afraid to stock condoms as

²⁵ Currently these sections of the law no longer exist since the Supreme Court of Canada has subsequently ruled them unconstitutional.

they can be used by police as evidence of prostitution during a police raid (2013: par. 7). In other words there is a significant disincentive for an owner/operator to promote health and mitigate harm to sex workers' health.

5.3 Framing of Sex Workers

Sex workers are individuals who provide the sexual services. The appellants and respondents agree that sex workers are (predominantly) women. As previously noted with few exceptions, sex workers are described as female and the appellants' only referred to sex workers as women²⁶. The appellants, respondents and respective interveners referred to them as “*her*” and “*she*” throughout their factums²⁷. Gender is however, where the convergence ends as each side frames sex workers in very different ways.

a) Appellants

5.3.1 Sex Workers at Risk

According to the appellants, all (or certainly most or the ubiquitous ‘many’) sex workers, referred to as “*prostitutes*” or “*prostituted women*”, share similar backgrounds and vulnerabilities that render them vulnerable and at-risk of being tempted and trapped into prostitution (Attorney General of Canada, 2013; Attorney General of Ontario, 2013; AWCEP, 2013; Christian Legal Fellowship, 2013; Evangelical Fellowship of Canada, 2013; Women’s Coalition, 2013). The presentation of the Attorney General of Canada is unambiguous: “*many prostitutes share certain background factors that make them more vulnerable to being lured into prostitution*” (Attorney General of Canada, 2013: par. 12). These “*shared background factors*” include: childhood physical and sexual abuse, emotional

²⁶ The only factum to explicitly acknowledge men in the sex industry was the Aboriginal Legal Services of Toronto, on the side of the respondents, in paragraph 7.

²⁷ Throughout their factums, both the appellants and respondents render invisible male and transgendered sex workers despite the Report of the Subcommittee on Solicitation Laws’ estimating that men comprise 20-25% of the industry (Canada, 2006:10).

neglect, dissociation, isolation from family, lack of education, and/or job skills (Attorney General of Canada, 2013: par. 12). This is most certainly the case for street-based sex workers who “*are amongst the most disadvantaged and marginalized...they suffer from high rates of drug addiction, mental health problems and other afflictions. They are economically desperate*” (Attorney General of Ontario, 2013: par. 1-CR). Sex workers are framed as victims of their circumstances in addition to being exploited by “*pimps*” and “*johns*”. In short, it replicates the prostitution as harm arguments found in the radical feminist discourse and reiterates the framing of sex workers as victims.

Furthermore, when framing sex workers, the appellants often conflated women and ‘*children*’ and/or ‘*young girls*’. The infantilization of women, by merging them with children reifies their victimization and lack of agency (Barberet, 2014: 120). The Attorney General of Ontario asserted that the “*average age of entry into prostitution in Canada is somewhere between 13 and 16 years...While some of these children may work on the streets, many end up working in illegal bawdy houses, as do trafficked women and children*” (Attorney General of Ontario, 2013: par. 92). Sex workers are also infantilized in arguments suggesting that “[*m*]ost of those prostituted are women and girls” and “*many*” women only enter prostitution after being sexually abused and/or placed in state care as young girls (Women’s Coalition, 2013: par. 5). The Christian Legal Fellowship also infantilized women within their factum when drawing attention to the unacceptability of decriminalization because “*Parliament formally codified protections for women and girls from immoral sexual activity*” (2013: par. 19).

Sex workers’ vulnerability is also linked to issues of mental (in)competence. While the Attorney General of Ontario asserted that some of the women have an “*intellectual*

capacity of five or six years old, and have been taught basic skills so they can work as prostitutes”²⁸ (Attorney General of Ontario, 2013: par. 8-CR). More commonly the appellants and their interveners drew attention to substance use with the Attorney General of Canada citing Terri Bedford’s admission to drug use to support this argument (2013: par. 15). They argued that sex workers are generally unable to adequately assess their situations and take proper safety measures with clients or work indoors (Attorney General of Ontario, 2013: par. 99). This, they argued, is both because drugs impair judgment and causes financial desperation so that “*drug addicted prostitutes would work at any cost to fuel their addiction*” (Attorney General of Ontario, 2013: par. 7-CR).

In this context an interesting tension around the question of choice emerged in the factum of the Attorney General of Ontario which, on the one hand, maintains that sex workers’ competency is impaired by drug use, and on the other hand state that the decision to participate in this “*dangerous*” activity is made independent of the state by a “*responsible actor*” who can decide to exit the industry. The latter position holds sex workers accountable for their decision, and negates the state’s responsibility for any harm connected to the impugned prohibitions (Attorney General of Ontario, 2013: par. 19). The presentation around choice is convoluted, especially given how it is framed within the appellants’ factums, and will be ‘unpacked’ within the analysis section.

5.3.2 Ethnicity: Higher Risk Populations

Within the appellant factums, racialized and Aboriginal women are presented as being at a higher risk for sexual exploitation and inequality. The two interveners that focused on ethnicity and higher risk populations were: The AWCEP and The Women’s Coalition.

²⁸ Suggesting that women in prostitution have the mental capacity of children further infantilizes sex workers, which is consistent with framing sex workers as vulnerable and at risk victims of prostitution (Barberet, 2014).

While both the AWCEP and Women's Coalition expressed concerns that racialization increases the potential for exploitation, the AWCEP focused much of their arguments on indoor prostitution, arguing Asian women are considered a commodity because of their race. By contrast, the Women's Coalition articulated concerns for the number of Indigenous women being prostituted on the street due to marginalization.

The AWCEP interveners maintained that Asian and other racialized women have experiences in prostitution that differ from other *prostituted women*, be it “*real or imagined*” (AWCEP, 2013: par. 2). They suggested that the women's “*relative value*” (AWCEP, 2013: par. 2) to the customers is determined by their race. For example, Asian women would be sought after in bawdy houses/brothels and in special demand, as consequences of racist tropes prevalent in pornography, as well as more general stereotypical assumptions (AWCEP, 2013: par. 17) including “*The China doll, the Geisha, exotic, erotic, submissive, always willing and eager to please; the Lotus blossom []; romanticized and yet disposable [...], or much more explicitly the spoils of war*” (AWCEP, 2013: par. 17). Moreover, potential language barriers and high demand mean Asian women are at higher risk for being victims of trafficking, risk of exploitation/abuse by a third party, and continued prostitution (AWCEP, 2013: par. 13).

The Women's Coalition (2013), while concerned with how “*prostituted women*” who are racialized or “*have precarious immigration status*” are at a higher risk for exploitation (par. 7), focused on Indigenous “*women and girls*” and their overrepresentation in the street-based sex industry. They noted, “*in some Canadian cities, it is estimated that up to 50-70% of women in street prostitution are Aboriginal*” (Women's Coalition, 2013: par. 6). They argued that Aboriginal women are in need of protection from the violence and discrimination

that is prostitution. They explained that Aboriginal women are the most vulnerable and at risk for sexual exploitation and abuse resulting from the “*the legacy of colonial law and policy that has frequently left Aboriginal women dispossessed of their lands, their language culture, their ‘status’ and their children*” (Women’s Coalition, 2013: par. 6). In other words, Indigenous women, alongside other racialized women, are framed as a vulnerable population that are at a higher risk of being “prostituted”.

b) Respondents

5.3.3 Sex Workers and Risk Navigation

While the Attorney Generals of Canada, Ontario and their interveners constructed sexual service providers as victims, the respondents and their interveners framed these individuals as workers using the terms “*sex worker*” and at times “*prostitute*” (ALST, 2013; Bedford et. al, 2013; Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013; Pivot, 2013) as opposed to “*prostituted women*”. The respondents argued that sex workers come from many different backgrounds and are “*not indiscriminately in all circumstances placed in a position of subordination, submission or humiliation*” (Institut Simone de Beauvoir, 2013: par. 4). Instead it is argued that persons engaged in prostitution need to be granted equal protection under the law given that “*those who choose sex work, their choice is to engage in an activity that Parliament has conspicuously deemed lawful*” (Bedford et. al, 2013: par. 58). This is consistent with what we have seen in the literature relating to the sex workers’ rights discourse, where personal autonomy exists and women choose to provide sexual services for pay is central to their arguments.

The respondent’s framed sex workers as being capable of taking measures to protect themselves as well as decrease their risk of harm. Sex workers are considered to be part of a

“*sexual partnership*” with others, all of who are “*autonomous, equal and free*” (Institut Simone de Beauvoir, 2013: par. 23). Once again we see a clear convergence of arguments between the respondents and their interveners whereby they are consistent in their framing of sex workers as capable of navigating potential risks. They argued that some safety strategies sex workers could take include: assessing their surroundings and their situations; scanning vehicles for indicators of potential risks; screening potential clients by appearance, demeanor and signs of intoxication; letting another worker know where they are; and recording customer license plates (Bedford et al., 2013; Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013; Institut Simone de Beauvoir, 2013; Pivot, 2013)²⁹. However, sex workers’ ability to implement those strategies is undermined by the legal framework. Taking precautions takes time and therefore increases the risk of being criminalized – as a result sex workers may not take such precautions (Bedford et. al, 2013: 14-CA). In short, this reiterates the arguments that sex work laws are harmful to sex workers as presented by, among others, Brock (2009), van der Meulen (2011), and Outshoorn (2004) throughout the sex workers’ rights discourse.

The construction of sex workers as being able to reduce risks of harms to themselves and their capability to take safety precautions challenges the narratives of the appellants. Further confronting the appellants’ narratives, Pivot (2013) stated that the appellants’ presentation “*relies on stereotypes of street-based sex workers as desperate addicts who lack ordinary skills of perception and a rational self-interest in safety and survival*” (par. 20). The respondents maintained that the appellants’ framing of sex workers exacerbates the social stigmatization of the sex industry – an issue that will be expanded upon within the section focusing on the effects of the law.

²⁹ Sex workers as risk managers will be theoretically unpacked within the analytic discussion.

5.3.4 Hyper-Vulnerable Population and Higher Risks

Both the appellants and respondents recognized the over-representation of Aboriginal women in street-based prostitution, and both acknowledged the higher risks of harms as a result of their marginalization. Moreover, like the Women's Coalition, the respondents and their interveners focused on the disproportionate number of Aboriginal people, men and women, who are involved in street-based, including survival, prostitution (ALST, 2013; BCCLA, 2013; Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013). The Aboriginal Legal Society of Toronto defined survival sex work as "*a person choosing to engage in prostitution in a situation where they have very few or no other choices*" (2013: par. 2). Those who are involved in survival sex work are even more at risk for physical and sexual violence than street-based sex workers (ALST, 2013). Those who are part of a racialized group are hyper-vulnerable to those risks of harm.

Interestingly, this is one of the few places we see convergence between the respondents and the appellants arguments. For example both the AWCEP (2013) and the ALST (2013) used the same quote taken from The Oppal Report (2012) about the missing Aboriginal women in the Downtown East Side in Vancouver, which reads "*The over-representation of Aboriginal women within the women who disappeared from the DTES must be understood with in the larger context of the legacy of colonialism in Canada—a legacy of racism, colossal neglect, violence and abuse*" (ALST, 2013: par. 11; AWCEP, 2013: par. 29).

The ALST argued that it is important to understand that Aboriginal people are over-represented in street-based and survival sex work (2013, par. 3) as a result of colonialism in Canada: the "*impacts of colonialism have pushed many Aboriginal people to the extreme*

margins of society” making them “*the most vulnerable to harms*” (ALST, 2013: par. 8). Beyond this, the arguments of the appellants and respondents part ways: the ALST challenged the appellants’ framing of customers and third parties as being the predominate sources of harm as they construct the state as sharing responsibility for the risks of harms faced by any sex worker. This is further demonstrated by their arguments that “[*to*] *allow the state to continue to shed their responsibility for the marginalization of [] Aboriginal people and thus allow the continued violations of the life, liberty, and security of those individuals is to further perpetuate the legacy of colonialism*” (ALST, 2013: par. 24).

B. The Institution of Prostitution

5.4 Framing Prostitution

The Criminal Code of Canada does not define prostitution because prostitution itself has never been illegal, however case law has identified the “*basic definition of prostitution [as] being the exchange of sexual services of one person in return for payment by another*” (Prostitution Reference [SSC], 1990, p. 1159). This exchange occurs between sex workers and customers. This next section will outline how the appellants and respondents framed prostitution and unsurprisingly, their narratives are dissimilar. In this section I will present the appellants’ construction of prostitution as risky, to participants and non-participants alike, and the respondent’s construction of prostitution as an income generating activity and/or employment.

a) Appellants

5.4.1 Prostitution as Inherently Risky and a Symptom of Inequality

The appellants and their interveners mainly referred to sex in exchange for money in a manner that reflects the legal definition of “*prostitution*”, however there are tensions

regarding the construction of the sex industry. Although, a main point of agreement is their arguments that prostitution is “*inherently*” dangerous and/or violent. We have seen this assumption that prostitution is violence throughout the radical feminist discourse. The appellants further argued that due to the isolation of indoor venues, indoor prostitution is under-researched, making it impossible to substantiate the assertion that working indoors is safer than street-based sex work (Attorney General of Canada, 2013: par. 9). Indeed they argued that the risk of harms to sex workers might be greater indoors because it is “*inaccessible to law enforcement and community groups who might otherwise be able to provide protection*” (Attorney General of Canada, 2013: par. 75). However, the essential construction of prostitution is that it is risky or dangerous and that the risk of harm is intrinsic regardless of “*the venue in which it takes place and the legal regime governing it*” (Attorney General of Canada, 2013: par. 1).

The risk of human trafficking for the purposes of sexual exploitation and its link to prostitution was a significant concern of the appellants. They drew “*clear links*” between prostitution and the “*multi-billion dollar human trafficking industry*”, which they stated, has a profitability that is second only to the drug trade industry (Evangelical Fellowship of Canada, 2013: par. 19-20). Likewise, the Women’s Coalition argued, “*that trafficking, organized crime and child prostitution are facilitated by the secrecy of indoor venues*” (2013: par. 26). Thus prostitution is framed as essentially akin to human trafficking, further affirming that it is inevitably and inherently dangerous.

Additionally, prostitution is framed as exploitative and degrading to sex workers. The factums submitted by the Canadian and Ontario governments maintained degradation to be intrinsic to prostitution when they made a reference to the Conservative government’s

response to the Sixth Report of the Standing Committee on Justice and Human Rights, “*The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws*” by stating, “[t]his government views prostitution as degrading and dehumanizing, often committed and controlled by coercive individuals against those who are frequently powerless to protect themselves from abuse and exploitation” (Attorney General of Ontario, 2013: par. 84). Furthermore, the Attorney General of Ontario quoted Chief Justice Dickson’s assertion in the *Prostitution Reference* (1990), that exploitation, degradation, and subordination of women is part of the “*reality of prostitution*” (Attorney General of Ontario, 2013: par. 18-CR). We have already seen the appellants perceive customers as predators and perpetrators of harm, but here they create the image that prostitution is, in and of itself, harm.

The Women’s Coalition also argued “*sexual exploitation, coercion, and violence that define prostitution are practices committed overwhelmingly by men against women [...] Prostitution is a practice of sex inequality*” (2013: Par. 5&2). They agreed that prostitution involves the exploitation of women and that prostitution is a symptom of gender inequality as men are able to purchase and ‘use’ women’s bodies sexually. It is “*a global practice of sexual exploitation and male violence against women that normalizes the subordination of women in a sexualized form*” (Women’s coalition, 2013: par. 2). In addition to prostitution being a symptom of gender inequality and inherently harmful, the AWCEP argued that prostitution is also a means to maintain racial inequalities (2013: par. 9). Regardless of venue, women cannot be safe from “*the risks of sexist and racist violence*” (AWCEP, 2013: par. 22). They maintained that the dangers faced by women in prostitution are “*analogous to that faced by civilians in war zones*” (AWCEP, 2013: par. 8). Thus, the appellants and their

interveners perceived gender inequality as a fundamental part of sex work – prostitution reflects and affirms this inequality.

It is here that we see a tension amongst the appellants. Unlike their interveners, the Attorney Generals of Canada and Ontario framed prostitution as an “*economic activity*” or “*commercial activity*” (Attorney General of Canada, 2013: par. 94; Attorney General of Ontario, 2013: par. 23), a “*business*” (Attorney General of Canada, 2013: par. 38), a “*lifestyle*” (Attorney General of Canada, 2013: par. 42), a “*public*” or “*social nuisance*” (Attorney General of Ontario, 2013: 65; Attorney General of Canada, 2013: par.18-CR), and lastly, a “*social problem*” (Attorney General of Ontario, 2013: par. 49). By discussing prostitution as an economic activity or lifestyle, it is framed as a choice, and more importantly an economic choice. As such, it would not be eligible for the section 7 claim under the *Charter’s* right to life, liberty and security of the person, because “*personal choice to engage in particular commercial activities are not protected under s. 7*” and the personal choice to engage in prostitution is one of those unprotected economic activities (Attorney General of Canada, 2013: par. 94; Attorney General of Ontario, par. 22).

5.4.2 Risks to Public Morality

The appellants and the some of the interveners (from the religious right including The Christian Legal Fellowship, Catholic Civil Rights, and REAL Women of Canada, 2013; Evangelical Fellowship of Canada, 2013) considered the morality of prostitution at length. The Attorney General of Ontario uses historical accounts to establish that prostitution is harmful to “*public morals*” due to the “*obscenity*” of public displays of prostitution (2013: par. 65-66). They argued that the laws do not try to address private or individual morality, but rather they are protecting the “*core social values, including dignity and equality*”

(Attorney General of Ontario, 2013: par. 67). They framed morality as important to the collective good.

Similarly, the interveners from evangelical organizations evoked morality arguing that it is in the interests of Canadians that morals and values surrounding human dignity be upheld (Christian Legal Fellowship, 2013: par. 1, 23; Evangelical fellowship of Canada, 2013: par. 7-8, 10, 34). They acknowledged that morality alone cannot be the basis for legislation, but like the appellants, they maintained that “*Canadians’ [have a] strong moral disapproval of prostitution itself*” (Christian Legal Fellowship, 2013: par. 22). Furthermore, sex work is a “*conduct [that] a democratic society at large views to be immoral and harmful*” (Christian Legal Fellowship, 2013: par. 4). For these interveners, prostitution is an activity non-participants would generally find immoral. This is consistent with the literature framing the moralizing discourse (for example see the Peat Marwick study (1984) that found 56% of male and 74% of female Canadian participants thought that it was “morally unacceptable” for adults to participate in consensual prostitution).

5.4.3 Risks to Non-Participants and the Community

Aside from sex work/prostitution being dangerous and inherently risky to those who participate, the appellants dedicated a large portion of their allotted space to the risk of harms to non-participants/communities - what they conceive of as ‘*society*’. The Attorney General of Ontario (2013) specifically stated that “[p]rostitution harms all of Canadian society, and Canadian women in particular” (par. 84). There are a number of ‘*social harms*’ that are discussed, mainly that regardless of whether prostitution occurs indoors or on the street, it is harmful to the safety of residents and non-participants (Attorney General of Canada, 2013 (also in their CR); Attorney General of Ontario, 2013 (also in their CR); Christian Legal

Fellowship, 2013; Evangelical Fellowship of Canada, 2013). However, the appellants and their interveners maintained that, while all prostitution harms the community, the greatest harm is the result of street-based sector. The appellants' greatest concern was the potential "*exposure to [the] public display of sex for sale*" (Attorney General of Canada, 2013: par. 20). Children were used as a point of reference in linking prostitution and harm; the risk of exposure to any aspect of the industry is dangerous because the "*commercialization and commodification of human beings*" (Evangelical Fellowship of Canada, 2013: par. 10) negatively affects the rights of women and children³⁰.

In addition to the harms of prostitution to women and children, was the concern that prostitution will disrupt "*the daily lives of our citizens and even their children as they go to and from school*" (Attorney General of Canada, 2013: par. 41), and that residents are at risk for being solicited by sex workers and customers (Attorney General of Canada, 2013: par. 1-CR). The Attorney General of Canada noted that neighbourhood residents might fear going out at night, so as not to be propositioned for services or exposed to violence (Attorney General of Ontario, 2013: par. 10-CR). Other neighbourhood disturbances or nuisances that result from prostitution are said to include: "*noisiness*" and "*increased or impeding traffic*" (Attorney General of Canada, 2013: par. 18; Attorney General of Ontario, 2013: par. 34-CR).

Moreover, the appellants and their interveners all expressed concerns about the impacts on public health and safety, flowing from street-based sex work, and the associated (in their narrative) drug use. In their factum, the Procureur Général du Québec compares the effects of prostitution on public health to that of the "*SARS epidemic*" (2013: par. 15). Other public health concerns that the appellants presented included the risk of non-participants

³⁰ We also saw this argument of linking prostitution as harmful to the rights of women and children in the factums of the Women's Coalition (2013, see 5.3.1 Sex Workers at Risk).

coming into contact with “discarded condoms, syringes, and crack pipes” in their neighbourhoods including parks and schools (Attorney General of Ontario, 2013: par. 10-CR). It was also argued that there are other crimes that often accompany prostitution such as physical violence and organized crime (Attorney General of Canada, 2013: par. 87; AWCEP, 2013: par. 23). The appellants’ assertions of harms to communities draw from the central community and policing discourse (Kingston, 2014). Thus the appellants and their interveners’ associated prostitution, more specifically the street-based sector, to those other crimes further affirming intrinsic secondary harms of prostitution.

Finally, the appellants acknowledged that the enforcement of the legal prohibitions might affect the safety of sex workers, however they argue, “*at most it is but one of a myriad of factors that already establish the risks faced by prostitutes*” (Attorney General of Canada, 2013: par. 108). Moreover, the Attorney General of Canada consistently challenged the idea that the laws increase the risk of harm to sex workers (2013: par. 2, 60, 123) contending that beneficial effects of the laws that target the harms of prostitution outweigh any of the possible indirect harmful effects that the prohibition *might* have on those who participate in prostitution (Attorney General of Canada, 2013: par. 124, 128). In other words, the risks of harm to the community are greater (or more pressing) than the risks posed to the individuals engaged in prostitution.

Before I move onto the arguments of the respondents, I want to draw attention to a finding that emerged while unpacking the factums wherein we see a conflation of the moralistic and radical feminist discourses. Arguments presented within the factums of the Christian Legal Fellowship, the Evangelical Fellowship of Canada, reflected the narratives presented within the radical feminist discourse including: harm to women and children (see s.

5.4.3), linking prostitution to human trafficking (s. 5.2.1), and the framing of customers as violent (s. 5.1.2). This is a significant finding because we started with the four dominant discourses that were presented in the literature review, which constituted the prostitution debate; however, when analyzing the prostitution debate in action, we see considerable merging of the moralistic and radical feminist arguments. Moreover, in *Bedford*, the appellants' side has interveners that include radical feminists groups (Women's Coalition) and religious groups (CLF and Evangelical Fellowship). These are two groups that have historically had different views on institutions like the family, the market and the role of the state, but can be seen teaming up together for certain campaigns³¹ (Bernstein, 2007). This alliance between feminists who advocate for abolition and religious groups has been termed "Carceral feminism" by Bernstein (2007: 137).

b) Respondents

5.4.4 The Framing of Prostitution as Income Generating Activity and/or Employment

Unlike the appellants, the respondents and their interveners maintained that prostitution is a form of labour or employment; it is more commonly referred to as "*sex work*" and on occasion "*prostitution*" (BCCLA, 2013; Bedford et.al, 2013; Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013; Institut Simone de Beauvoir, 2013; Joint UN Programme, 2013; Pivot, 2013). From this perspective prostitution is a contract between consenting adults, characterized by negotiations, as is the case with any contractual relationship (Institut Simone de Beauvoir, 2013: par. 21). Specific to prostitution, some of the issues that need to be negotiated between the buyer and the seller are: price; "*condom use; assessment of a potential partner's sexual desires and preferences; assessment of a*

³¹ For example, we saw Christian based groups and radical feminists formed an alliance during the campaigns to end White Slavery (Bernstein, 2007: 143).

potential sexual partner's propensity for violence; the proposed location for sexual encounter; and ensuring consent prior to engaging in sexual activity" (BCCLA, 2013: par. 27), all of which are important for the safety, health, and survival of sex workers. Additionally, the Institut Simone de Beauvoir argued "*the right of a person to refuse a sexual contract is a principle that is fundamental to an individual's Canadian rights*" (2013: par. 23), that sex workers have the same rights as other contractual workers to change the terms of an agreement and refuse unwanted clients. As such, we have seen that recognizing prostitution as an income generating activity and/or employment is one of the main premises of the sex workers' rights discourse.

Additionally, the respondents challenged the construction of prostitution as inherently risky by asserting the appellants' argument is a "*statement of opinion*" (Bedford et. al, 2013: par. 7). They presented research that has found "*the majority of sexual practices that take place in a commercial setting do not cause any harm in a degree incompatible with the proper functioning of society*" (Institut Simone de Beauvoir, 2013: par. 14). This is not to deny the potential for harm; risks exist within sex work as in any other form of work. The intervener Canadian HIV Legal Network, BC-CfE, and HALCO pointed out that, "*sex work is not inherently violent but many sex workers experience violence*" (2013: par. 9). This is in part because unlike other labour sectors, prostitution is not protected under general labour regulations (Canadian HIV Legal Network, BC-CfE, HALCO, 2013).

Furthermore, responding to the framing of prostitution as an economic activity, and the eligibility for protection under the *Canadian Charter of Rights and Freedoms*, the respondents argued that a sex worker has chosen to engage in a dangerous profession and "*she is at liberty to make this choice*" (Bedford et. al, 2013: par. 11). It is also a choice to

participate in an activity that had (at that time) always been deemed lawful, thus, “*the fact that sex work is an economic activity is also irrelevant*” (Bedford et. al, 2013: par. 58).

5.4.5 Framing the Laws as Increasing the Risk of Harms in the Sex Industry

Responding to the appellants and interveners assertions regarding the risks and harms prostitution has on non-participants and sex workers, both the respondents and their interveners argued that the laws “*contributes to an increased risk of physical harm for those engaged*” (Bedford et. al, 2013: par. 20). For example *Criminal Code s. 212(1)(j)* prevents third parties from lawfully providing security services to sex workers that may mitigate the risks of physical harm that may even be life-saving (Bedford et. al, 2013: par. 65). Similarly, *s. 210* prevents sex workers from working in a safe space such as their homes or other indoor premises (Bedford et. al, 2013: par.98). The respondents drew attention to the impact of the closure of Grandma’s House³² in Vancouver, which provided an indoor space for street-based sex workers to bring customers.

Moreover, the impugned prohibitions impact sex workers’ control over their working conditions (Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013: par. 11; Pivot, 2013: par. 4). The respondents and their interveners disagreed with the appellants’ assessment that indoor sex work is as, or even more, dangerous than street-based sex work, pointing out that the communication law increases the risks of harm because it makes sex workers reluctant to take necessary safety precautions (BCCLA, 2013: par. 19). The laws force sex workers to “*jump quickly into a client’s car without taking the time to even do an environmental scan for visible weapons*” (Bedford et. al, 2013: par. 13). Thus street-based sex workers have little control over their environments including personal safety and the

³² Grandma’s House provided a safe space for street-based sex workers to bring their clients while there were high incidents of sex workers going missing. It is now known this took place at time, and in the geographical area, where a serial killer was targeting street sex workers (Bedford et. al, 2013: par. 9).

transaction in general. Furthermore, street-based sex workers “*suffer the highest risk of homicide and violence*” (BCCLA, 2013: par. 31) and many cases remain unsolved of the missing and murdered street-based sex workers in Canada (Bedford et. al, 2013: par. 25-26). Therefore for them, the communication law increases the risk of violence against “*vulnerable [sex-working] women*” (Pivot, 2013: par. 13).

The respondents and their interveners constructed the relationship between sex workers and the police as strained and one that is “*generally marked by distrust, which is fostered by the adversarial relationship created by the law*” (Pivot, 2013: par. 16). The police enforce laws that criminalize sex workers much more than customers and third parties, and they have been known to seize condoms from sex workers and brothels (Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013: par.7). Furthermore, the interveners argued that the police “*enforcement and harassment forces sex workers to work in remote areas that are often inaccessible to outreach workers*”, which hinders access to safer sex supplies that are essential for the health of sex workers and their customers (Canadian HIV Legal Network, BC-CfE, HALCO, 2013: par. 7). This displacement

Is not simply the innocuous movement of workers to less-disruptive locations but rather ‘this pattern of movement shows that attempts at criminalization does not eliminate the sex-trade but only serves to make working more dangerous for workers as workers move to more isolated locales. (Bedford et. al, 2013: par. 15-CA).

In a criminalized context, sex workers are less likely to access police services and protection and “*are less likely to report incidents of violence or abuse (“bad dates”) to police for fear of arrest*” (Pivot, 2013: par. 4). The respondents maintained that sex workers

will refrain from reporting incidents of violence to police so as not to be further harassed by police, or being tagged as a sex worker in the police data base (Pivot, 2013: par. 28).

5.4.6 Laws Exacerbate Social Stigma of Prostitution

The respondents and interveners maintained that the *Criminal Code* provisions exacerbate “*the stigma historically associated with sex work and contributes to the circumstances that make sex workers vulnerable to violence*” (BCCLA, 2013: par. 33). The Supreme Court of Canada has previously acknowledged the interaction between criminalization and stigmatization (Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013: par. 8). The laws that restrict sex workers from communicating and discussing:

...matters of health, safety and dignity in public before she engages in a sexual activity with a client [indicates] that she is “less than” – less deserving of the right to weigh the elements of the encounter and assess her potential partner, the recognition and assertion of her dignity, the ability to inform her own working conditions, and the right to exercise consent. (BCCLA, 2013: par. 33).

This creates an image that sex workers are “*not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration*” (BCCLA, 2013: par. 33). We have seen how this stigma contributes to the challenges that create vulnerability to harm in the sex worker rights discourse (see for example the work of Bruckert and Chabot 2010). In addition to stigmatizing sex workers, the interveners Canadian HIV/AIDS Legal Network, BC-CfE, HALCO and the Joint United Nations Programme on HIV/AIDS (Joint UN Programme) argued that stigma further legitimizes discriminatory practices towards sex workers, and clients, who are trying to access health care (2013: par. 8; 2013: par. 24). This includes access to HIV prevention, treatment, care, and support, which can result in serious

health consequences (Canadian HIV/AIDS Legal Network, BC-CfE, HALCO, 2013; Joint UN Programme, 2013).

5.4.7 Risks to Sex Workers versus Risks to Communities

The respondents argued that it is “*ethically unsound*” to deter and discourage conduct that is thought to be undesirable by increasing the risks of harm to those engaging in that conduct (Bedford et. al, 2013: par. 7, 112). Similarly, the ALST recognized “*the understandable desire to live in a neighbourhood free from some of the discomforts occasioned by street-based sex work*” (2013: par. 20); however, they also argued that you cannot balance those discomforts and social nuisances against the lives of those who are engaged in sex work (ALST, 2013: par. 20). The respondents stated that “*it is difficult to conceive of a reasonable justification*” for Parliament to continue contributing to an increase in risk of harm and death in order to address social nuisances (Bedford et. al, 2013: par. 113). The “*blanket prohibition*” (Bedford et.al, 2013; Pivot, 2013) ensures that prostitution is not recognized as legitimate employment, which exacerbates the risks of harm to sex workers. To this end, in order to mitigate risks of harm to sex workers and for prostitution to be recognized as legitimate employment, Parliament needs to acknowledge their responsibility for the exacerbated risk of violence that accompanies the blanket prohibition.

5.5 Concluding Thoughts

Throughout this chapter we have seen the emergence of two concepts: risky/risk, and the question of choice – these form the heart of the analysis in the coming chapter: *Discussion of Analytic Themes*. This chapter sought to present and unpack the convergences and divergences of the discourses found in the court factums of *Bedford* in order to shed light on how sex work industry participants and prostitution are framed.

The ways in which the appellants and respondents framed the participants and prostitution were intended to influence the decisions made by the Justices of the Supreme Court regarding the constitutionality of the prostitution prohibitions. As such, we know that the Supreme Court ultimately struck down all three challenged prohibitions and that Parliament has already proposed and passed new legislation (the *Protection of Communities and Exploited Persons Act*) regarding prostitution. This reveals that how prostitution and its participants were framed within the *Bedford* factums, has already started to have an effect on the laws.

Chapter 6

Discussion of Analytic Themes

The themes presented in the submitted factums, and outlined in the previous chapter, aid in illuminating the discourses in action surrounding both the institution of prostitution and the construction of its participants. In this chapter I critically engage with these themes in order to unpack the tensions that have emerged around issues of risk and choice, focusing particularly on the way gender conditions the narrative. I will be drawing on strategic framing theory, and deconstruct how the framing process is deliberate and purposeful, as well as risk theory to show how risk is used as a strategy of governance³³. Though rarely examined in the literature (see Marques (2010) and Sanders (2005) for notable exceptions), there is a dialectical relationship between the ways risk (taking/avoidance) and choice (making) is understood. I begin with the tensions around risk to provide a point of entry into the subsequent discussion of choice, in which the connection to risk is teased out and convergences and contradictions are unpacked.

6.1 Risk

Previously in *Chapter 5, Findings: Unpacking the Factums*, we saw that concerns about ‘risk’ permeate the factums submitted in *Bedford*. Given how pervasive (in popular and expert discourses) risk is, it is unsurprising that people, places, and behaviours are evaluated in relation to harm and danger in this context (Lupton, 2013: 9). This section will examine how risk is framed to produce competing and converging ‘truths’ regarding prostitution. I begin by presenting the strategic framing of riskiness, before unpacking the contradiction of

³³ This will be examined from the neo-liberalism rationale of governmentality because that is the current dominating political rule of Western societies, and has been since the eighteenth century (Garland, 1997; Lupton, 2013).

framing sex workers as simultaneously risky and at-risk; this section concludes with an examination of the construction of sex workers as risk managers.

6.1.1 A Risky 'Business'

The Ontario Court of Appeal asserted that “[e]veryone agrees that prostitution is a dangerous activity” (Attorney General of Canada, 2013: par. 48). Regardless of this (supposed) agreement, we see divergences pertaining to what constitutes the risk/riskiness of prostitution and whether or not risk is intrinsic. As we saw in the last chapter the appellants and interveners construct the entire institution of prostitution as “*inherently risky*”. We also saw that, from the perspective of the Attorney Generals (Canada and Ontario) and their interveners, customers and third parties pose a risk to sex workers and communities. However, sex workers, alongside their clients and third parties, were also framed as risky, especially to community members who were fearful of their “*children [being] exposed to johns, pimps, and prostitutes, and [their] public display of sex for sale*” (Attorney General of Canada, 2013: par. 20). Evidently, major concerns of the appellants are the risks resulting from the visibility of street-based prostitution.

Additionally, sex workers are framed as posing a risk to public health, principally by virtue of their use of illicit substances, which is considered pervasive in prostitution: “*drug use is not limited to street prostitution but affect prostitutes in escort agencies and bawdy houses*” (Attorney General of Canada, 2013: par. 14). According to the appellants, sex workers are prone to more risky behaviours because their “*drug addictions, mental health problems, and economic desperation...leads to risky decision-making*” (Attorney General of Ontario-Cross Respondent, 2013: par. 23). In addition to drug use, the Attorney General of Canada (2013) frames the prostitution lifestyle as a risk to health:

Expert, experiential and police evidence also demonstrates that the lifestyle of prostitutes often involves little sleep, poor nutrition, unprotected sex and abusive relationships. These factors can lead to health problems including injury, infection, including HIV and other sexually transmitted diseases, and an increased risk of cervical cancer. (2013: par. 16).

This creates the image of sex workers as contagious – individuals who will pass infections and diseases to others through their behaviour. There is nothing new here - female sex workers have consistently been considered “vectors of disease” - a ‘high-risk’ group that carry and spread sexual infections (Sanders, 2006: 102; see also Barry, 1995 and Matthews, 2008). Furthermore, the enforcement of the prostitution laws on sex workers is reflective of this assumption (Bruckert & Hannem, 2013: 56).

Finally, sex workers are considered to pose a risk to social and sexual norms. The appellants frame sex workers as poor “*role models for other troubled young people who might view that kind of lifestyle as an acceptable and easy way to make a living*” (Attorney General of Canada, 2013: par 42) and they are concerned that “*decriminalization can lead to the normalization of prostitution*” (Attorney General of Canada, 2013: par. 27). In short, sex workers are considered a danger to non-participants. In addition to the idea that sex workers are risky to non-participants, they also threaten women’s equality, which is how the Attorney General of Ontario (2013) supported their arguments that the prostitution laws are constitutional, and as well as their support for exit programs. At the same time sex workers are also constructed as a threat to public morality because selling sex is a behaviour that is “*regarded as opposed to human dignity, that is morally unacceptable and thus criminal*” (The Evangelical Fellowship of Canada, 2013: par. 1). Being constructed as a risk to social

norms and public morality effectively frames sex workers as deviants whose (risky) behaviour justifies their criminalization and offender status.

Sanders (2006) argues that the act of identifying a certain group as risky is a mechanism of regulation and control, which is a form of governance through risk. This is consistent with Hunt's (2003) argument that neo-liberal narratives of risk are deeply moralized. The result is that moral regulation and governance appears to be about managing risk (Hunt, 2003: 171, 187), demonstrating once again the merging of moralistic arguments with other narratives. In their factums, the appellants persistently frame prostitution and participants as risky and then use this riskiness to legitimize regulation and the importance of retaining sections 210, 212(1)(j), and 213 of the *Criminal Code*. We see this when the Attorney General of Canada stated in their factum that “[r]ecognizing a right to engage in risky economic activities in particular ways prohibited by law to try and make it safer would constitute a dangerous precedent” (2013: par. 70).

Constructing prostitution and sex workers as risky demonstrates strategic legal framing whereby the appellants adopt the prevailing frame in the submission of their Supreme Court factums. This strategy entails framing the issue of prostitution as harmful to communities, while also including the notion of harm to women's equality, and they are not advocating for policy change (Wedeking, 2012: 620). The appellants' arguments are consistent with the (previously) existing policy of criminalization³⁴, thereby attempting to maintain the 'status quo'.

³⁴ At the time of the hearing the current legal regime was prohibition/criminalization, however these laws were struck down as per the decision of the Supreme Court of Canada and a new set of laws have since been enacted.

6.1.2 Vulnerable and at-Risk

There is little disagreement within the factums that sex workers are vulnerable to physical, sexual violence, and robbery, however, there exists competing arguments regarding the causes and significance of said risks. One of the main points of divergence within the appellants' factums is that sex workers are being 'perceived, identified, and labeled' (Goffman, 1974) as both risky (as we have seen) and at-risk. Sex workers are constructed as victims, vulnerable and at-risk to the harms and violence that is the 'reality' of prostitution and therefore, are in need of state protection. This is related to the "*exploitative manner in which women and children are treated in prostitution*" (Attorney General of Ontario, 2013: par. 57). At the same time however, sex workers are framed as being at-risk because of their own characteristics, such as economic status, marginalization, and drug use³⁵ (Attorney General of Canada, 2013; Attorney General of Ontario, 2013, see also section 5.1.3) that make them vulnerable to prostitution. What is interesting is how we see, once again, the re-configuration of radical feminist and moralistic discourses within the factums of the Attorney Generals.

Moreover while characterizing sex workers as hyper-vulnerable, the appellants are adamant that it is the "*pimps*" and "*johns*" who are responsible for the harm experienced by sex workers (Attorney General of Canada, 2013; Attorney General of Ontario, 2013). They argued that the "*direct cause of the harms to prostitutes are non-state actors: violent johns and pimps*" (Attorney General of Ontario, 2013: par. 97). The distinction between the state

³⁵ This is consistent with research conducted by Lupton (2006) on risk governance, who found that social groups of young women identified as 'at-risk', were positioned as being particularly vulnerable, passive, powerless and weak, and/or considered a danger to themselves or others, simultaneously making them risky and at-risk (114). As a result, the same factors that identify sex workers as risky, such as drug use, also make them vulnerable of the harms argued to be intrinsic to prostitution; implying that the sex workers are at least partially responsible for their vulnerability or at-risk-ness.

and non-state agents and their role in prostitution implicitly denies state accountability for the harms experienced by sex workers. Additionally, the Attorney General of Ontario explicitly stated: *“the impugned provisions are not the direct cause of harm. They do not operate as a necessary precondition to the risk of harm faced by prostitutes. Those risks exist regardless; the actors directly posing the risk are not dependent on these criminal provisions”* (2013: par. 17). Consequently, from this perspective the responsibility for sex workers being at-risk for harm lies with those individuals who participate in prostitution, including sex workers themselves (this dynamic will be expanded later in this chapter in the section “Bad Choice Makers”).

Despite the appellants’ framing of sex workers as ‘at-risk’, they continue to strategically employ the prevailing frame (Wedeking, 2010), as they are not advocating for policy change, but rather desire to maintain the criminalization of those involved in prostitution, which is a type of prohibition/criminalization legal regulatory framework (see section 2.2.1 in the literature review). They argued that the laws are in place for both protection and the *“prevent[ion]of harm to prostitutes and those exposed to the public displays of prostitution [that] is closely linked to the goal of discouraging prostitution, precisely because of the degradation inherent to prostitution”* (Attorney General of Ontario, 2013: par. 78). Thus the strategy of framing sex workers as at-risk and risky is a form of governance whereby the criminalization of participants, sex workers included, is determined as necessary to protect sex workers as well as deter their engagement in prostitution. It responsabilizes sex workers who are participating in an activity that is deemed ‘inherently and inevitably’ risky, pushing them to self-regulate their behaviour in a very specific way – exiting the sex industry in order to minimize their risk of harms.

There is however some divergence within the factums on the appellants' side – for example, the Women's Coalition frame sex workers as victims of male violence and in need of protection because the *“buying and selling of women's bodies in prostitution is a global practice of sexual exploitation and male violence against women”* (2013: par. 2). Thus, prostitution results in a risk to women's equality, which is consistent with the radical feminist discourse, which equates prostitution with violence and inequality (this will be further developed in the Absence of Choice section). However the Women's Coalition oppose the appellants' strategy of criminalizing all participants because *“in criminalizing prostituted women, the state punishes women for their own sexual exploitation”* (2013: par. 12). Thus they advocate for a different legal policy that only criminalizes purchasers of sex and those who profit from the sale of sexual services (Women's Coalition, 2013). This is reflective of the Swedish model (or abolitionist version of the prohibition) aimed at eradicating prostitution. These arguments and policy adjustments are echoed by the AWCEP (2013) as they also support the *“striking down of prostitution offences as they apply to prostituted persons, while also supporting their continued application to pimps, buyers, etc...”* (par. 27). In short, this position resolves the tension of sex workers at-risk and risky by dismissing sex workers' accountability and ability of self-governance for their own 'at-risk-ness', unlike the Attorney Generals of Canada and Ontario who responsibilize them.

We see that although the Women's Coalition and AWCEP are interveners on the side of the appellants', they employ an alternative frame regarding the prostitution laws in the strategic writing of their factums. However, since their strategic framing of the solution (which relies on criminal justice intervention) is consistent with the goals of the appellants—criminalization of customers, third parties, and eradicating prostitution – their alternative

framing is complimentary to the prevailing frame employed by the Attorney Generals of Canada and Ontario (Wedeking, 2010: 621).

6.1.2(a) At-Risk and the Law

Risk also features prominently in the factums of the respondents and their interveners. Here however, sex workers are framed as at-risk due to the existence and enforcement of the prostitution laws (*Criminal Code* sections 210, 212(1)(j), and 213) which play “*a significant role in the perpetuation of violence*” (Bedford et. al, 2013: par. 2). The respondents argued, “*the legal regime [criminalization] contributes to the risk of harm faced by women engaged in lawful work*” (Bedford et. al, 2013: par. 2). More specifically,

Evidence show[s] that the effect of criminalization is to push the sex trade underground, making sex workers vulnerable to exploitation and violence, and marginalizing them from health care and social service, including access to HIV testing, education, prevention, care, treatment and support. (Canadian HIV Legal Networ, BC-CfE, HALCO, 2013: par. 7).

Additionally, six lower court judges determined that the legal provisions had “*severe*”, “*serious*”, and “*extreme*” impacts on the security of sex workers lives (Bedford et. al, 2013: par. 5). For example the respondents argued that the potential for criminalization as a result of the prostitution laws decreases sex workers’ ability to implement security strategies, including screening. Under this legal regime, sex workers have limited control over the transaction with customers because the laws force sex workers into making ‘snap’ decisions or risk being arrested. As noted in one of the factums, the laws prohibit sex workers from working together. Moreover, “*[if a] sex worker is rushing to avoid encounters with the police, she may misjudge – at great peril to her – the safety of a client. It must also be*

remembered that moving into a safer indoor location is [also] not an available legal option” (Bedford et. al, 2013: par. 14-CA). In framing the prostitution provisions as impacting the safety and security of sex workers (rendering them more at-risk), the respondents argue that *“state obligations lie in reducing the harms of sex work and not necessarily [by] reducing or eliminating the sex trade itself...when there are viable harm reducing options now available for consideration”* such as decriminalization (Bedford et. al, 2013: par. 83, 45- CA).

This is consistent with the sex workers’ rights discourse, which maintains that the legal frameworks applied to prostitution has an impact on and contributes to the contexts and working conditions of sex workers (Ditmore, 2011). By framing sex workers as being at-risk because of the effects (direct and indirect) of the prostitution laws, the respondents challenge the appellants’ denial of state responsibility, while also advocating policy change. Given the respondents construction of sex workers as at-risk, I argue that they employed an alternative counterframe as a discursive strategy in their factums. Their framing of the laws as exacerbating the risks of harm to sex workers is a strategic justification for policy change, which renders their goals inconsistent with those of the prevailing frame (Wedeking, 2010: 620-621). This counterframe is being employed as a strategy for delegitimizing criminalization and asserting the need for state (in)action and accountability, which would begin to pave the way for decriminalization.

6.1.3 Risk Managers

Governance through risk within neo-liberalism considers individuals accountable for their behaviour and interactions with others and encourages self-regulation through risk avoidance strategies (Lupton, 2013; O’Malley, 2006). As such, sex workers are constructed throughout the factums of the respondents and their interveners as risk managers, capable of

employing safety measures to mitigate their risks of harm. To this end, Pivot/SWUAV/Pace Society argue:

...evidence shows that during these interactions [between sex workers and customers prior to engagement], sex workers can decrease risk by: assessing the appearance, behaviour and demeanor of a client, including checking signs for intoxication; checking for dangerous items or features of a vehicle; reviewing a “bad date sheet; discussing the services that a sex worker may offer and the services sought; discussing price and terms of payment; discussing the location and venue where the service will be provided (indoor, outdoor, vehicle); and working in pairs with other sex workers who can observe the client, assist with the screening process, share information about bad clients, and record license plate numbers. (Pivot, 2013: par. 8).³⁶

The respondents and their interveners maintained that sex workers employ other risk management techniques, such as: hiring individuals (drivers and security persons), working in well lit areas, being familiar with their work environment, and being able to control the number of people entering and occupying their space (Bedford, 2013: par. 33). Framing sex workers as risk managers constructs (or positions) them as “active subjects” (Garland, 1997: 182), capable of self-governance with the competency to avoid risks.

It is argued that the screening practices are considered some of the most effective risk avoidance strategies that sex workers can employ, yet each of the above mentioned measures either increased sex workers potential to be criminalized, or are expressly prohibited under

³⁶ The evidence that is being referred to here is based on interviews with sex workers and expert witnesses who presented in the Bedford OCA (Ontario Court of Appeal)- this is also in line with arguments presented in the Bedford factum where these arguments are echoed and the evidence is based on the expert witnesses qualitative research and ethnographic studies including the “direct experience and interviews with hundreds of sex workers” (par. 33).

the prostitution laws (Bedford et. al, 2013; BCCLA, 2013; Canadian HIV Legal Networ, BC-CfE, HALCO, 2013; Institut Simone de Beauvoir, 2013; Pivot, 2013). Therefore, sex workers acting as good neo-liberal subjects (risk managers) put themselves at-risk for criminalization.

6.2 Choice

The conception of choice has been a major area of contention within the prostitution debates; more specifically whether or not women enter prostitution voluntarily or are forced into it (Brock, 2009; Bruckert & Parent, 2006; Marques, 2010; Outshoorn, 2004; Weitzer, 2010). This controversy was as apparent and as gendered throughout the factums as it is in the literature³⁷. This section will present tensions around choice by unpacking what was said about the absence of choice, constrained choice, and bad choice making.

6.2.1 Absence of Choice

Arguments within the appellants' and interveners' factums reflect the radical feminist discourse whereby selling sex for money is always damaging, oppressive and reflective of the "objectifying of the female body" (Barry, 1995: 30). In these documents sex workers are framed as victims, whereby prostitution is something that is done to women as a result of the male demand for sexual services –i.e. "*prostituted women*" (AWCEP, 2013; Women's Coalition, 2013). Indeed prostitution is the epitome of gender and sexual inequality, wherein this "*sexualized inequality is compounded by other systemic inequalities that determines who enters and remains in prostitution and that amplify the power of those who buy and profit*

³⁷ Historical and contemporary discourses of sex workers have always been part of larger discourses concerning the female ideals: the good wife/virginal daughter, female sexuality, the female body, and legal policies that have been implemented to distinguish "prostitutes from other women" (Bell, 1994: 40-41). As presented in the findings, sex workers were referred to as women throughout the factums of the appellants, respondents and their interveners. This is reflective of the prostitution discourses wherein sex workers are typically framed as women, again, ignoring the male and transgender populations that also make up the industry.

from the prostituted women” (Women’s Coalition, 2013: par. 5). In other words, in addition to male demand that force women to prostitute, there are also systemic inequities (e.g. gender, intersecting marginalizations), economic status and personal characteristics (e.g. drug use/addictions) (Women’s Coalition, 2013: par. 18), suggesting that these “*prostituted women*” are not in a position to freely choose (and therefore consent) to provide commercial sexual services.

Here we see that (some) women’s autonomy and agency is negated by assertions that women are incapable of making the free (and rational) choice to sell sexual services. Sexual exploitation is considered part of prostitution and the claims by women regarding their voluntariness are rejected and dismissed as unrepresentative – these sex workers are deemed “too few to count”:

A common argument for the decriminalization of prostitution is respect for the autonomy of individuals who are not forced into the industry and should not face restrictions. Yet scholarly research³⁸ demonstrates that a significant portion of sex workers have been manipulated or forced into the trade for the purpose of sexual exploitation. (Evangelical Fellowship of Canada, 2013: par. 19).

In the process the normative gender scripts that women do not enjoy sex, and certainly not with multiple partners, are reaffirmed; it follows that no woman would want to participate in prostitution (Pasko, 2013). It is on this basis that the Women’s Coalition ‘calls out’ the appellants for their insistence of criminalizing prostituted women, especially when the choice to exit the industry is unavailable to them (2013: par. 22). In short, a few of the appellants’ interveners (see AWCEP, Evangelical factums, and the Women’s Coalition) argue that due to

³⁸ The ‘scholarly research’ that this intervener is referencing is from the Fraser Committee conducted by the Ministry of Justice in 1985.

the forced nature of prostitution, sex workers are unable to self-regulate, and therefore are unable to engage in risk avoidance measures and leave the industry; and as such, they should not be held accountable criminally for being prostituted.

6.2.2 Constrained Choice

The notion of constrained choice is developed within the factums of the appellants and respondents in two distinct ways. The first, the continuum of choice, is closely aligned (but differs in a significant way) to the absence of choice, as it constructs sex workers as responsible individuals who have limited (but real) choice for survival other than the engagement in prostitution; the second engages with the question of how one participates in prostitution.

Choice exists on a continuum. On one end, there are individuals who have a plethora of options and opportunities and on the other end of the spectrum, there are those with extremely limited options; the decision to work in the sex trade industry can exist at either end of the choice continuum (Brock, 2009: 153). Survival sex work, identified in the ALST and BCCLA factums, is a form of constrained choice that exists at one end of the spectrum. Survival sex workers are considered the most vulnerable and at-risk population in prostitution, predominantly street-based, they experience the “*highest risk of homicide and violence, include many First Nations women, women who are addicted to drugs and/or alcohol*” (BCCLA, 2013: par. 31). Survival sex workers are also the least likely to move indoors off of the street regardless of the legal regime in place (ALST, 2013: par. 2).

Notwithstanding the limited nature through which survival sex workers choose to provide sexual services, the respondents and their interveners maintain that the fact that choice is constrained does not mean it is not also a legitimate choice. The ALST assert that it

is important not to view those who are involved in survival sex, including those who are Indigenous “*as simply victims doomed to a life of addiction and early death, whether at the hands of others or due to the inherent consequences of the life they live*” (2013: par. 16). Therefore, the risks of harm are also associated with the consequences of survival sex workers being racialized, marginalized, and/or experiencing other systemic inequalities. They also maintained within their factum that survival and street-based sex workers are risk managers, capable of employing the risk avoidance strategies discussed in section 6.1.3 on risk management (ALST, 2013: par. 19). Regardless of how constrained the choice is to participate in prostitution, it is still a choice made by people who are rational and who possess personal and sexual autonomy.

The other way in which constrained choice was framed within the respondent’s factums is related to how the laws inhibit (or constrain) how they conduct their business. For example, one of the respondent’s experiential witnesses disclosed that as a sex worker who worked both indoors and on the street felt that she was not only obliged to “*choose between [her] safety and [her] freedom*” (Bedford et. al, 2013: par. 13)³⁹ but that the legal consequences of working indoors are more severe⁴⁰. In short as we have already seen, even though sex workers are risk managers able to self-govern through risk avoidance behaviours, these behaviours are often highly constrained by the law.

When examining the arguments of the appellants, the Attorney General of Canada acknowledged the existence of “*highly constrained choice*” (2013: par. 69) for those who are

³⁹ Another expert witness presented research that female sex workers feel compelled to make split second decisions. This is especially so for street-based workers after the implementation of Bill C-49, the enforcement of this law has created a riskier work environment with unlit and unfamiliar areas. Also, those who operate on the street also became more lax in their screening process and conversations with potential customers. This was out of fear of being entrapped by undercover police and the increased risks of being arrested (Bedford et. al, 2013: par. 14 CR).

⁴⁰ In this sense, sex workers are constrained in choosing where to conduct their transactions, and how, or they risk being arrested and criminalized.

particularly engaged with survival, street-based prostitution. However, they follow up this acknowledgment with justifications for holding these ‘vulnerable’ sex workers legally accountable, asserting that some street-based sex workers have chosen to seek help in exiting prostitution. Thus we see the contradiction that sex workers as seen as both vulnerable and responsible.

6.2.3 Bad Choice Makers: The (Ir)responsible Sex Worker

Arguably the most significant characteristic of neo-liberal governance is the conception of the social actors as rational, autonomous, and choice-making subjects. In general, the governmentality perspective of risk focuses on unpacking the ways self-regulation of one’s behaviour to avoid risks reflects state interests and policies; otherwise known as prudentialism (embracing the norms and exceptions of society) (Lupton, 2013; O’Malley, 2006, 1992). In their factums, the respondents and their interveners framed sex workers as risk managers/avoiders, which should constitute them as responsible, autonomous subjects. By contrast the factums of the appellants and some of their interveners create a distinction between ‘good’ or ‘bad’ choice makers and ‘responsible’ or ‘irresponsible’ subjects⁴¹.

The Attorney Generals of Canada and Ontario argued that it was Parliament’s legitimate choice to enact a blanket prohibition on prostitution to tackle the most harmful aspects of it (2013). They further maintained that the Government is addressing the ‘problem’ by focusing on “*supporting programs that encourage those involved in the sex trade toward exit programs, and focusing on consistent enforcement of the criminal law*”

⁴¹ In accordance with governance theory on risk, neo-liberal subjects are tasked with self-regulation; they are to behave in appropriate ways in accordance with state ideology, those who do not are considered irresponsible (Lupton, 2013; O’Malley, 2006). Thus, women who choose prostitution are ‘bad’ choice makers, also rendering them irresponsible or imprudent (Marques, 2010).

(2013: par. 84). Therefore on one hand, sex workers who choose to take measures in exiting prostitution are framed as rational choice makers because “*risk presents only in consequence of an individual’s choice to engage in the risky activity*” (Attorney General of Ontario, 2013: par. 9). This coincides with the interests of the state and is therefore deemed responsible.

On the other hand, sex workers who voluntarily choose to engage in sex work, despite their awareness of the risks, are framed as making ‘bad’ choices. The Attorney General of Canada draws the conclusion that “*unlike the drug addict, the person who decides to engage in prostitution has the ability to remove herself from the circumstances*” (2013: par. 20). Similarly, the Christian Legal Fellowship argued in their factum, that sex workers have four choices: 1) not be “*prostitutes at all*”, which they claim is the safest, 2) to engage in ‘safer’ regulated spaces, 3) to participate in more risky manners, 4) or to break the laws (2013: par. 47-48). In other words, the only rational and responsible choice would be not to engage in prostitution, or to exit the industry altogether. This is where we see the relationship and interconnectedness between choice making and risk-taking/avoidance. Those who choose prostitution are taking risks because prostitution is risky; accordingly, those who exit the industry are effectively avoiding the risky activity.

The construction of sex workers as choice makers, albeit ‘bad’ choice makers, becomes more apparent when looking at gendered expectations of self-regulation and risk and applying it to sex workers. In order to be considered a ‘good’ citizen (those who make the ‘right’ choices), individuals are required to actively self-govern through risk avoidance measures. Moreover, in order for individuals to avoid victimization or criminalization, they must behave in such a manner that attracts the least amount of risk (O’Malley, 2006: 52). If an individual fails to avoid risk, then they may be held responsible for the harms that befall

them. Contextualizing this in broader gender roles, we can appreciate that men and women are treated differently based on their negotiations with risk-taking and avoiding (Marques, 2010: 322). According to Walklate (1997), sexual activities with men are framed as risky and inappropriate female behaviour, whereas for men engaging sexually with multiple female partners is appropriate and even celebrated. In other words sex workers are already discursively identified as imprudent (bad) women, despite their efforts to engage in prudent choice making decisions (such as the risk management strategies previously discussed) (Marques, 2010: 323).

Accordingly, sex workers who choose to engage or remain in prostitution challenge governmental objectives and state interests, which responsabilizes them for their own victimization and criminalization (Brooks-Gordon, 2006; O'Malley, 2006). This framing of sex workers as 'bad' choice makers, who deserve to suffer the consequences of their choices, has been noted in the sex work literature (see Barron, 2011; Bruckert and Hannem, 2013; Marques, 2010; Sanders, 2005). The Christian Legal Fellowships argued, "*it is only where the prostitute chooses to practice prostitution that she is exposed to the type of harm alleged in this case*" (2013: par. 49). Likewise, the Attorney General of Ontario stated in their factum that the "*decision to engage in an inherently dangerous activity is independent action by a responsible actor which weakens the connection between state action and the consequential harm*" (2013: par. 19). Here the appellants acknowledge, albeit in a limited manner, that the laws do affect the safety of sex workers, but only minimally and certainly not as much as the 'pimps' and 'johns', or even to the extent of the choices made by the sex workers themselves. This is reflective of governance through risk wherein individuals are responsible for any consequences, victimization, or criminalization that they experience.

Further efforts made to frame sex workers as bad choice makers was evident in the number of times the appellants denied that sex workers are legitimate risk managers. This was often done by reiterating the construction of sex workers as risky (to the community) and at-risk (from other participants and social and personal factors including poverty and, drug addiction). In their factum, the Attorney General of Ontario maintained that “*even if it were possible to screen out dangerous customers through lengthy face-to-face public communications, their drug use and mental health challenges would make such screening of questionable value*” (2013: par. 1). Here again the stereotype of the drug-using, street-based sex worker emerges in the appellants’ arguments to negate any form of competence sex workers have that is inconsistent with ‘appropriate’ or state sanctioned risk avoidance strategies.

The appellants and interveners challenged the construction of sex workers as risk managers, resulting in the negation of evidence presented to all three courts by the respondents (comprised of current and former sex workers) and their interveners. They explicitly expressed that despite the respondent’s assertion that the laws increased the risk of harm, “*the facts supporting the alleged deprivation are not adjudicative, but legislative and social, consisting of anecdotal and social science opinion evidence*” (Attorney General of Canada, 2013: par. 3). Taking into consideration that the ‘anecdotal evidence’ they are referring to was presented by sex workers (experiential witnesses) within the factums, the Attorney General essentially negates the experiences and voices of sex workers. Moreover, the abundance of rigorous social science evidence presented in court by the respondents and interveners was further dismissed as mere *opinion*.

6.3 Chapter Summary

With this chapter I sought to engage in an analytical discussion of the tensions of risk and choice and we saw that risk taking/avoidance is connected with choice making. It was important to begin the discussion with the tensions of risk and the legal actors' strategic framing of the concept as presented within the factums in order to provide a point of entry into unpacking choice and the connection to risk taking and avoiding.

This discussion has highlighted three tensions for each concept relating to the framing of sex workers. In relation to risk, sex workers were constructed as both risky *and* at risk, and the competing arguments were emphasized within the discussion. However, the respondents framed sex workers as risk managers, responsible neo-liberal subjects capable of self-governance through risk avoidance. With respect to how choice was framed within the factums, the three tensions that were discussed began with the absence of choice. According to the appellants, women who engage in prostitution are not participating through their own volition, and are denied the status of being rational, autonomous, free agents of choice. The second tension I unpacked was constrained choice, in which the choices available to sex workers for survival are limited, but are nonetheless valid and rational. Additionally, the enforcement of the prostitution laws constrains the choices sex workers have while participating in a lawful activity. Finally, with regards to 'bad' choice makers, sex workers are dismissed as irresponsible neo-liberal subjects, making the 'wrong' choice to engage in an activity that the state deemed risky. This is despite their efforts to take risk avoidance measures; however, because they are not the state approved strategies, voluntary sex workers are illustrated as risk-taking 'bad' neo-liberal subjects, deserving of the consequences they suffer as a result of their poor choice making.

Chapter 7

Conclusion

This project was inspired by an intellectual curiosity and a general sense of excitement and unease with the announcement that the Supreme Court of Canada would hear *Bedford*. The decision of this case ultimately affects the future of prostitution in Canada, and furthermore, the decision itself was influenced by the arguments presented to the Supreme Court Justices. Arguably, we have already seen the effects of the respondents and interveners' narratives and arguments within the decision released by the Supreme Court and their decision to strike down the prostitution laws (*Canada (Attorney General) v. Bedford*, Dec. 2013). With that being said, an analysis of the submitted factums of the appellants, respondents, and interveners identified the convergences and divergences of the discourses framing the institution of prostitution and sex industry participants. I rendered visible the 'prostitution debate' in action when unpacking the factums, where arguments that have traditionally formed the basis of this debate were echoed.

Before I summarize my main findings, I would like to step back and acknowledge the presence of gender within the factums. We ultimately see throughout the findings and analytic discussion, the reproduction of traditional gender scripts and stereotypes of women not enjoying sex unless it is (emotionally) "meaningful", and men as sexually insatiable (Flowers, 1998; MacKinnon, 2011). Within the factums, the appellants and interveners exclusively described sex workers as women in need of being protected and saved from prostitution. They also constructed customers as men who drive around neighbourhoods in search for women, and even young girls, to have sex with. Furthermore, third parties are framed as men who prey on vulnerable women and lure them into the sex industry. Gender

has been a major theme throughout the literature on prostitution, and it is present throughout the data reviewed. However, gender was not examined as a separate theme, instead it was discussed within the themes of the findings and analytic discussion.

Moving on to the findings, prostitution was framed as inextricably risky for sex workers and the community (by the appellants), and as an income generating activity with labour risks (by the respondents). According to the appellants, the laws are in place to protect sex workers and community from harms, and that the benefits of these laws outweigh any potential affects the laws have on the safety of sex workers. This was where we saw divergence within the side of the appellants as not all interveners agreed with the Attorney Generals' strategy of criminalizing sex workers amongst the clients and third parties. I also highlighted the merging of moralistic and radical feminist conversations within the appellants' and interveners' factums. However, the respondents and interveners were consistent in their arguments that the laws exacerbate the risk of harms faced by sex workers. I also found that while the appellants framed sex workers as victims of prostitution or circumstance and where customers and third parties are the main source of harm, the respondents referred to sex workers as professionals entering a consensual contract with customers. These findings contribute to the literature by providing evidence to how the discourses are played out in practice.

From these findings emerged two key tensions: risk and choice, which were unpacked within my analytic discussion. In neo-liberalism, it is expected that individuals will engage in self-governance through risk avoidance (Lupton, 2013; O'Malley, 2006). According to the appellants and their interveners, prostitution is inherently risky, and sex workers pose a risk to communities, women's equality, and to social norms of acceptable sexuality as a result of

their behaviour. This framing of sex workers as risky effectively leads to them being identified as deviant in that they are not good self-governing neo-liberal subjects. However, we also found that the appellants portrayed sex workers as at-risk of the harms and violence inherent to prostitution. By contrast sex workers were described by the respondents as risk managers, capable of employing risk avoidance strategies, such as: screening potential clients, hiring a driver/bodyguard, working with other sex workers, etc. They are rational individuals who are able to manage danger. However, the prostitution laws make it difficult for sex workers to employ such measures without risking criminalization.

Next I looked at the construction of choice in three ways: the absence of choice, constrained choice and 'bad' choice makers. The appellants and their interveners had competing choice arguments. On one hand, it was argued that prostitution is not a choice, and on the other, the appellants argued that despite how a person enters prostitution, there is always the choice to exit. Finally, sex workers are framed as 'bad' choice makers because of their decision to engage in an activity that the state has deemed risky. Exiting or avoiding prostitution is appropriate self-regulating behaviour for risk avoidance in prostitution. By contrast, constrained choice, the concept employed by the respondents, recognizes that choice exists on a continuum, and regardless of where an individual falls on the continuum it is still a choice made by people with personal and sexual autonomy.

Another interesting finding that emerged from the analysis was the idea that sex workers' risk-taking is linked with 'bad' choice making. I attend to the connection between risk and choice in arguing that the ways in which risk is constructed throughout the factums serve as a form of governance, ultimately determining acceptable behaviour and strategies for individuals to choose for avoiding risk. According to O'Malley (2006), individuals that

fail to avoid risks in ways that the state has deemed appropriate can lead to their victimization and criminalization, for which the individuals are responsible. The appellants frame prostitution as risky, and sex workers as risky/at-risk, effectively responsabilizing sex workers for their own victimization and criminalization. Thus, from this perspective sex workers are dismissed as irresponsible neo-liberal subjects, making the ‘wrong’ choice to participate and remain in the ‘risky business’ of prostitution. This sentiment remains despite the efforts made by sex workers to take risk avoidance measures, due to the fact that they are not choosing the state approved strategy of exiting prostitution.

Furthermore, I argue that the construction of risk and choice throughout the factums were strategies employed by the appellants and respondents to justify their positions on the constitutionality of the challenged prostitution laws. The appellants chose a prevailing frame for their factums and advocated for the prostitution laws to remain enforced; however, not all of their interveners followed suit, but instead, chose complimentary alternative frames. We saw this from the Women’s Coalition and the AWCEP when they advocated for decriminalization of the ‘prostituted women’. The respondents and their interveners chose alternative counterframes as a strategy within their factums to advocate for policy change. This finding also makes a contribution to the limited body of research on strategic framing of Supreme Court arguments, particularly in a Canadian context, by shedding light on how the discourses were used in the factums.

Directions for Future Research

During the writing process of this thesis, a number of ideas for future research emerged. Like that of many Foucauldian inspired studies, my research questions led to more descriptive answers rather than critical responses. The object of this project was to render

visible the competing discourses constituted within the factums of *Bedford*. Therefore, a natural direction for future research would be to critically analyze the decision of *Bedford*.

While the decision of the Supreme Court was released before I finished this project, the research and collection of data ceased prior to the court decision being announced. However, even without analyzing the Supreme Court document, we can see how the competing discourses presented by the appellants, respondents, and interveners played into the unanimous court decision to strike down all three anti-prostitution laws (CBC News, 2013). The Supreme Court gave parliament one year to propose new constitutional laws, if they so chose. Even though I have not examined the effects of the discourses on the new legislation, we see how the arguments of the appellants and their interveners presented in *Bedford*, subsequently played into the rhetoric of Bill-C 36, appropriately named the *Protection of Communities and Exploited Persons Act* (Parliament of Canada, 2014). This act frames prostitution as an “illicit activity practiced by women who have no option” and sex workers are once again presented as victims (MacCharles, 2014: par. 2). Selling sexual services is not illegal, while purchasing and profiting off of the sale of sex is criminalized. When Peter MacKay proposed the new laws, he presented the binary framework of sex workers as “victims” and clients as “perverts” (Harper, 2014: par. 4). The language used by MacKay, and ultimately the new laws, evoke the framing of prostitution presented in appellants and interveners narratives in *Bedford*. Additionally, the enactment of the Bill speaks to the policy makers’ disregard of the evidence presented at the Supreme Court by the respondents, which is another area where my work can be used as a stepping stone to critically explore the effects of the discourses presented in *Bedford*.

A further area of research that could be examined is the use of evidence and experts. There were various instances in which I made note of claims or statistics that were not referenced. Additionally, one could critically examine who is granted expert status and whose 'expertise' is negated. For example, in the factums, it was academics and police officers who were referred to as experts, while sex workers were considered experiential witnesses.

A final area for further research could be analyzing the process for which intervener status is granted in Supreme Court cases. Of particular interest is that in *Bedford*, the sex workers' activist groups like POWER, Maggie's, and Stella, were denied intervener status while religious groups, such as the Christian Legal Fellowship and Evangelical Fellowship of Canada were granted status, despite Canada being identified as a secular society. Also, David Asper was granted intervener status, wherein his arguments focused on legal precedence without mentioning prostitution anywhere in his factum.

Closing Reflection

As I end this thesis, I am reminded that this project presents but a glimpse into the comprehensive arguments and legal strategies within the factums of the appellants, respondents, and interveners submitted to the Supreme Court of Canada in *Bedford*. It is my hope that it contributes, even on a minor level, to an account of how the institution of prostitution and its participants (sex workers, customers, and third parties) are strategically constructed in the legal context of responsabilization and self-governance. In doing so, I realize that what my thesis simply offers is a chapter in the long and multifaceted 'prostitution debate' in Canada.

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Data Sources: Facts

Appellants

Attorney General of Canada: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM010_Appellant_Attorney-General-of-Canada.pdf>

Attorney General of Ontario: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM020_Appellant_Attorney-General-of-Ontario.pdf>

Attorney General of Canada on Cross-Respondent: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM021_Cross-Respondent_Attorney-General-of-Canada.pdf>

Attorney General of Ontario on Cross-Respondent: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM022_Cross-respondent_Attorney-General-of-Ontario.pdf>

Interveners

Asian Women Coalition Ending Prostitution: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM060_Intervener_AWCEP.pdf>

Christian Legal Fellowship of Canada, Catholic Civil Rights League, and REAL Women of Canada: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM050_Intervener_Christian.pdf>

Evangelical Fellowship of Canada: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM085_Intervener_Evangelical.pdf>

Procureur Général du Québec: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM040_Intervenant_PGQuébec.pdf>

The Women's Coalition for the Abolition of Prostitution: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM075_Intervener_Coalition.pdf>

Respondents

Terri Bedford, Amy Lebovitch, Valerie Scott (includes their factum on Cross-Appeal in the same PDF.): <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM030_Respondents_Terri-Jean-Bedford-et-al.pdf>

Interveners

Aboriginal Legal Services of Toronto: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM055_Intervener_ALST.pdf>

British Columbia Civil Liberties Association: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM080_Intervener_BCCLA.pdf>

Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, and HIV and AIDS Legal Clinic Ontario: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM065_Intervener_CanadianHIV.pdf>

Downtown Eastside Sex Workers United Against Violence Society, Pace Society, and Pivot Legal Society: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM090_Intervener_Pivot.pdf>

Institut Simone de Beauvoir: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM070_Intervenant_Beauvoir.pdf>

The Secretariat of The Joint United Nations Programme on HIV/AIDS: <http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/34788/FM095_Intervener_Secretariat.pdf>

Appendix A: Jean Carabine's (1995) Guide to Doing a Foucauldian Discourse Analysis (*modified for this project*)

1. Select your topic and identify possible sources of data.
2. Know your data through reading and re-reading as familiarity aids analysis and interpretation.
3. Identify themes, categories, and objects of the discourse.
4. Look for evidence of an *inter-relationship* between the discourses.
5. Identify the discursive strategies and techniques that are employed.
6. Look for absences and silences (what is implied).
7. Look for resistances and counter-discourses.
8. Context- outline the background to the issue.
9. Be aware of the *limitations* of the research, your data and sources.

Appendix B: Operational Question Guide for Data Analysis

Category One: The Institution of Prostitution	
Question	Operation Definition/Indicators
1. How is prostitution discussed:	Prostitution: is the exchange of sexual services for payment between individuals. This question seeks to determine the factors that frame prostitution by the appellants, respondents, and interveners. Prostitution was also referred to as sex work within some of the factums.
2. How are indoor and street-based prostitution discussed?	Indoor: prostitution that takes place off the street- for example in a person's home, a massage parlour, a brothel, etc.. Street-based: prostitution that is the most visible and the sale of sexual services begins on the street.
3. How is risk discussed?	Risk: a term that covers the potential effects related to prostitution, including harms, which can be prevented and/or managed.
4. How are harms discussed?	Harm: causing someone or something damage or impairment including: psychological harm, physical harm, social harm, etc...
5. How are the direct and indirect impacts of the laws discussed?	Direct Impacts: are the intended effects of the challenged prostitution laws, (for example: deterring prostitution) while indirect impacts are the unintended effects of the laws (for example: impacting the safety of sex workers). This question seeks to understand the rationale behind the prostitution laws, both for and against the laws' constitutionality.

Category Two: Participants of Prostitution	
Question	Operation Definition/Indicators
1. How are clients discussed:	Clients: individuals who purchase sexual services. When coding for this questions I looked for terms like: john, customer, purchaser, and client.
2. How are third parties discussed?	Third parties: is any individual who is involved with the transaction in prostitution, who is neither the client nor the sex worker. When coding for this question I looked for words like: pimp, profiteer, advertisers, brothel owners/managers, body guards/security, and drivers.
3. How are sex workers discussed?	Sex workers: any individual who provides sexual services to customers. For this question, I coded for terms like: sex worker, prostitute, and prostituted women.
4. How are gender and gender relations discussed?	Gender: refers to characteristics that differentiate between male and female. Gender relations: refer to the relationship associated with men and women in the sex industry.
5. How are young people discussed?	Young people: refers to any individual that is below the age of majority, which is 18 years old.
6. How is race discussed?	Race: is the categorization of individuals based on: hereditary, ethnicity, skin tone, and/or any physical/visible distinction.
7. How is choice discussed?	Choice: the right or opportunity for individuals to make decisions. This question seeks to understand how choice is framed and the competing arguments regarding a sex worker's choice, or lack thereof, to participate in prostitution.

Appendix C: Translated (to English) Factums

Factum of the speaker, Simone de Beauvoir Institute Part 1- concise statement of facts

The Simone de Beauvoir institute does not have representation to formulate on the facts and takes position in favor of integrality of the conclusions of judge Himel in first instance. ----- Part 2- concise statement of the litigated issues

We respectively submit that the arguments submitted by this intervention are useful in the resolution of the eight constitutional issues in question. ----- Part 3- concise statement of arguments

A- THE THEORY OF PREJUDICE APPLIED TO PROSTITUTION

3. According to the “abolitionism” point of view, prostitution leads to male violence towards women, which in consequence prevents the progress of equality between sexes. The notion of “prejudice” is at the heart of this discourse.
4. The Simone de Beauvoir institute does not adhere to the abolitionist and feminist discourse and does not view prostitution as being fundamentally detrimental/prejudiced against the female condition. The institute argues in favor of free will and considers that women who engage in prostitution should not be stigmatized or systematically labeled as victims. Sex workers are not indiscriminately in all circumstances placed in a position of subordination, submission or humiliation.
5. On matters of indecency, this court has defined a test in which a sexual act can be strictly reprehensible if it results in a serious risk of harm, in a manner affecting the greater good of a functioning society. On the occasions of the arrests of *Labaye* and *Kouri*, this court has enforced the principle and hopes that the laws governing the subject of sexuality should not be based or concentrated on the potential moral harm to society, but instead on the actual harm committed against individuals.
6. The theory of prejudice/harm offers a chart for analysis, which can be useful in resolving the constitutional questions of this nature. In applying these tests to the phenomenon of brothels and sexual solicitation, we conclude that there does not seem to exist any inherent harm to the proper functioning of society in these two instances.

(i) *The test defined in Labaye*

7. The matters on *Labaye* and *Kouri* brought attention to the phenomenon of swingers club. The two owners were acquitted of accusations to having run a brothel for the practice of indecent acts in the sense of Article 197(1) C.cr. seeing as the presence of clients

on the premises took part in consensual group sexual activities, which did not lead to any harm to those involved. The Court has defined an analytical framework based exclusively on the concept of harm. Therefore, the threshold of tolerance of the Canadian society is no longer a factor to consider. The alleged act must sufficiently bring about these intolerances, and cannot be considered criminal unless it leads to a detrimental effect in the proper functioning of society. This analysis of harm proceeds in two steps, which are based on the nature and degree of the harm.

8. The first step is concerned with the nature of the harm/prejudice. The alleged conduct must present a measurable risk caused to either the people or society. This must be a harm that brings attention to a value expressed and officially recognized by the *Canadian Charter of Rights and Freedoms* or by another fundamental law. Three types of harm are susceptible of being concluded as indecent: (1) the prejudice/harm caused to those whose autonomy and freedom can be restricted due to the fact that they are exposed to inappropriate conduct; (2) the harm caused to society because of the predisposition of others to engage in anti-social behaviors; and (3) the physical or psychological harm caused against the people who participate in said sexual activities.
9. The second step of the test defined by *Labaye* concerns the degree of harm. The harm/prejudice must reach a degree in which it becomes incompatible with the proper functioning of society. It consists of a demanding criteria that requires all of its members of a diverse society to be ready to tolerate behaviors which they may morally disapprove of.

(ii) The analysis of harm applied to brothels

10. The definition of a brothel according to Article 197 C.cr. is described as a location which one frequents for “means of prostitution” or “for the practice of indecent acts”. Although the criteria established in *Labaye* concerns the practice of indecent acts, it is believed to be relevant in the examination of the constitutionality of these brothels visited for “means of prostitution”.
11. Technically, many sexual activities likely to take place in brothels are not indecent in terms of the *criminal code*, but instead constitute of prostitution acts, which could lead to an accusation brought forth as a result of Article 210 C.cr.
12. The jurisprudence has given the expression of “prostitution” a very wide scope. In *the Reference re: Article 193 & 195.1(1)c) of the criminal Code (man.)*, judge Lamer indicated that the definition of prostitution simply relates to “*the offer made by a person, of their sexual services, in exchange for payment from another individual*”. According to the Court of Appeals of Quebec, it is not necessary for penetration, or fellatio, or masturbation to occur; that prostitution is limited to “*the fact of offering your body for lustful purposes, and leading to payment*”.
13. However, a wide spectrum of behaviors have been judged acceptable by the courts in

terms of indecency, and to which these acts by law are acts of prostitution. For example, massage parlors that offer their clients to be masturbated by naked women are not indecent. This court has accepted the lap-dance phenomenon, often called “ten dollar dances”, where the client can touch the stripper’s breasts and ass in an isolated room for payment. The clients can equally choose to entertain themselves in the private rooms by masturbating in front of the stripper. We estimate that these activities take place in swingers clubs such as *L’Orage* and *Coeur à Corps* do not present any significant difference to what occurs in brothels.

14. In summary, the analysis of harm demonstrates that the majority of sexual practices that take place in a commercial setting do not cause any harm in a degree incompatible with the proper functioning of society.
15. However, there exists a real risk that the very same facts can be applied in contradictory contexts of the law. A concrete example of this problem has recently occurred in Quebec with the accusation of the *Marceau* affaire. The majority of the bench at the Court of Appeals of Quebec stated that lap- dances offered at ‘nude bars’ consist of acts of prostitution; and that this confirms the decision made by the Court of the municipality of Laval to convict 10 individuals, in which 8 were strippers found in a brothel, to be in violation of Article 210(2)b) of the *Criminal Code*.
16. However, in 1999 for the Pelletier arrests, this very same court had determined that the lap-dances did not exceed the threshold of tolerance in the Canadian society, according to the criteria applicable at that time. Since that judgment, the establishments offering private dances have not significantly multiplied in Quebec. With the arrest of *Marceau*, we are permitting the police officers of Quebec to suppress the phenomenon, and to proceed with the arrest of all individuals who are found in these private lap- dance rooms at the time of a police intervention. The entirety of the strip- club staff, and their clients, including those who have not asked for a private

dance at the time of the police raid, could find themselves charged under Article 210(1)b) C.cr.

17. We believe that this dichotomy can provoke a dangerous state of confusion, which can become intolerable for the women who hope to offer private lap- dances. The state of the law on the matter must be sufficiently clear and precise to properly allow the women- along with bar owners, citizens and the police- to know, with a certain degree of confidence, the acts that are legally allowed or prohibited.

(iii) The Analysis of Prejudice applied to Solicitation

18. The legislative objective of Article 213 has been clearly identified by this Court in the “*Renvoi*”. The disposition is only a small part of prostitution, whether it be solicitation in public areas, in particular “the social nuisance coming from the public exhibition of sexual services being sold”, Article 213 does not address any other

issues related to prostitution.

19. The problem that Article 213(1)c) C.cr. is trying to prevent is found under the first type of prejudice listed in *Labaye*, that the harm to those whose freedom and autonomy may be restricted by the fact that they are exposed to inappropriate conduct. At the same time, the “visual pollution” is not a motive for criminalization. As it was stated by chief judge McLachlin in *Labaye*, “it is not an aesthetic prejudice due to a less attractive society” and adds that’s “the values or rights that we are searching to protect are the freedom and liberty of the members of the public, to live in an environment exempt of any social conducts that profoundly offend them”.
20. The feeling of disturbance provoked by seeing a sex worker in a skimpy outfit, trying to solicit sexual favors in exchange for money, does not constitute the type of harm depicted in *Labaye*. Only a profoundly offensive verbal display would respond to the demands of *Labaye*, one where the solicitation is both graphic and persistent. Many infractions of the Criminal Code can overcome the problem: the indecent actions in public and exhibitionism (art. 173), public nudity (art. 174) and disturbing the peace (art.175). We respectfully submit that the Criminal Code should not simply be used to cleanse the public space and mask the reality that certain people choose, (for the reasons that are valid to them, notably for means of survival) to exchange sexual favors for money.

B- COMMUNICATION: A NECESSARY TOOL FOR CONSENT

21. The second component of the intervention addresses the need to examine the notion of consent and rights in matters of sexual aggression. We respectfully submit that the exchange referred to in Article 213 (1)c) is a

necessary step to the formation of free and informed consent on the part of the two parties in a prostitution contract.

22. Throughout history, feminists from all schools (radical, liberal, Marxist or postmodern) bring value to rich and honest communication being at the heart of a healthy sexuality. In the context of prostitution, there is no doubt that the communication is indispensable in reducing the violence against women and protecting their autonomy.

(i) Sexual Aggression

23. Each one of the sexual partners involved is autonomous, equal and free. The right of a person to refuse a sexual contract is a principle that is fundamental to an individual’s Canadian rights.
24. Giving consent is the voluntary agreement, of all parties involved, to willingly participate in each separate sexual act performed on a specific occasion. The absence of consent is part of the *Actus Reus* and is entirely relevant in the state of mind of the

victim female. The perception of events that the accused may hold is not pertinent. This perception comes into play when the defense, of honest but mistaken belief in consent, is invoked at the *Mens Rea*. For the acts of the accused to be morally innocent, the proof must demonstrate that he believed that she the plaintiff had communicated her consent to the sexual act in question. The “tacit” consent is never used in defense. Even if the victim seemed to have consented, there is absence of consent if she did not want to submit to touching, and that she decided to allow the sexual activities or to participate in a true belief of fear for her safety. It is not even necessary that this fear be reasonable nor that it be communicated to the accused for the consent to be voided.

25. In short, the Court systematically reaffirms the sacrosanct character of autonomy and physical integrity of the sexual partner, and emphasizes the primordial importance of obtaining consent that does not allow for any kind of ambiguity.
26. The consent, by necessity, must be clarified. To truly exercise a person’s free will, the individual must be fully informed of the partner’s intentions before submitting themselves to a specific sexual act. Each person female has the right to determine in which instance she will give consent to physical contact, with whom the contact will occur, and in which location it will take place.

(ii) Solicitation

27. The Article 213(1)c) C.cr. prevents all possibility of communication in a public space. It is impossible for a sex worker female to negotiate with a client the terms of the sexual contract on the streets. She must relocate to a private area before beginning this discussion. This scenario is incompatible with the fundamental importance of the communication, in which the necessary prerequisites is the formation of consent, and places the woman in a potentially dangerous situation.

28. It could be difficult for a client to expand on the subject due to embarrassment, awkwardness, guilt, shame or fear. To reassure them of their safety, and for both parties to mutually agree and trust each other, the sex worker female must have the full ability to ask any necessary questions to the client; she must also be able to immediately communicate her limits by initiating this conversation on the sidewalk before being isolated in a room with her client.

29. In the current case, the Court of Appeals of Ontario estimates that the evidence does not demonstrate conclusively that the client screening process is an essential tool for ensuring the safety of sex workers. However, judge Himel has evaluated many sources of information in order to conclude upon the importance of good customer screening. All of these sources confirmed that article 213C.cr. places women in dangerous situations, and that this obligates them to negotiate their terms in too rushed of a manner with their clients.

30. The court of appeals of Ontario believes that there are other ways for women to protect themselves. The numerous methods listed by the court, however, seem inefficient if the women are not also accompanied with the possibility to talk with their clients at the very first

available moment. Conversely, a sex worker that relocates to a private setting with a man that she never met, relying solely on appearances and intuition, could potentially put herself in danger.

C - OVERVIEW OF DIFFERENT FEMINIST TRADITIONS

31. It is useful to look over the current feminist principles relating to the question of prostitution (radical, liberal, Marxist, postmodern). This examination of theories aids in identifying the different feminist positions on prostitution within major scholarly/intellectual traditions.
32. Radical feminists believe that the oppression consists of a universal experience shared by women across the world. The concept of “exploitation” outlines this theory. The radical feminists are preoccupied with the question of symbolism and object to the propagation of women’s images that can be considered as universally degrading, for example, pornography and hypersexualisation of youth. On the matter of prostitution, this stream is abolitionist.
33. The liberal feminists adopt the principle of political liberalism, which advocates for the freedom of the individual, of democracy and of free market. Liberal feminists fight against the inequality of sexes in political institutions & the workplace. They defend the autonomy of women and recognize their rights to work in the sex industry in a secure/safe manner.
34. Marxist feminists consider that these women submit themselves, even more than other female workers, to the adverse effects of capitalism. This stream advocates for the control of sex workers on their own working conditions. On matters of prostitution, the Marxist position varies. One point of view considers that prostitution submits women to economic exploitation. Another stream accepts prostitution and believes that this social phenomenon allows women to affirm their financial independence and freedom from men.
35. Postmodern feminists are inspired by the idea that there are many social realities, and that the feminist analyses must take into account these diversities. Concerning prostitution, the postmodern vision is nuanced. Prostitution is not wrong in itself, and does not present, *a priori*, the exploitation of women. The presence of violence, exploitation or abuse depends on specific circumstances in which we cannot generalize.
36. This overview of the different streams demonstrates that there is no single universal feminist view that is recognized on the question of prostitution. On the contrary, there exists a variety of different points of view, which are not all abolitionist.
37. **no funds requested.

Factum of the Procureur Général du Québec

Questions of litigation S. 210- against the bawdy houses, living, maintenance

6. The objective is to diminish the consequences and public manifestations related to prostitution to protect the prostitutes, and social harm caused by prostitution.

7. AGQ believes that the disposition tested by the criminal code conforms to S 7 of charter. For the following motives: they are not arbitrary since they are rationally related to objectives pursued by the legislator they are not excessive, they are not susceptible to be applied to those who have not engaged in these activities, targeted by these objectives. The effects are neither exaggerated nor disproportionate because they come from applications that cannot be assimilated to extreme measures to be disproportionate. They are at a legitimate interest to the government, in other words the contested dispositions are not in compatible with the ideas of human dignity, or disproportionate to the point of the interest of Canadians considering the criminalization of these behaviours which are considered obscene or intolerable.

Part 3

8. In order to answer to the constitutional questions the AGQ believes it to be appropriate to specify the nature of the relationship existing between the ethical measures contested by the harm caused against our rights to life liberty and security of the person in this effect it has been established that the rights S7 must be caused by the state ad there must be a sig. link between the causality and is important between the ethical measure and the harm caused to an individual.

10. Therefore it is to establish a distinction in one part caused to the protected rights of s7 by ethical measures and in the other part one caused to the rights by laws that are neither mandatory from the state and it would be unnecessary to hold the government responsible for the harms caused by the latter.

11. AGQ underlines that the plurality for factual elements like in the present power must be of the alleged origin of the rights of physical safety. In this situation a causal link could not be inferred by the Criminal Code prohibiting a specific behaviour.

12. The court underlines that the jurisprudence is not clearly fixed in the interpretation and to the legal proceedings to the principle of fundamental justice relative tot the protection against the ethical measures of arbitraries.

13. The AGQ maintains that the approach that must be retained is one that predicts these measures that are uniquely arbitrary once there is an absence of rational link or compatibility between the measures and the interest of the state that underlines them. 14. The AGQ is advised that the insisting a rational link between the ethical measures and the objectives permitting the assurance of justice and balance between in one part, the protection offered by the principles of fundamental justices, relative to the protection against the ethical measures of arbitraries, and in another part the belief in which the legislator is in need their quadrants

of legislative activity in order to adopt the measures in which they judge appropriate to handle these diverse societal problems. The link is rational to the rational fear of harm, the S 210 and that it is not arbitrary or unconstitutional. discusses marijuana.

15. The legislator is regularly in presence of variety of objectives and opinions representing an multitude of positions and a diversity of interests. Including opposing ones. After having sorted through these elements he will adopt the legislative position in order to obtain the most appropriate, to obtain the objectives which he will have the privilege to respond to the societal problems often being complex. Comparing prostitution to SARS and marijuana. Health concern.

16. Legislative objectives meet the needs of the constitution.

17. The fact there would be possible for the parliament to adopt a different regiment to be inspired by different countries for example, is not a factor pertaining to determining whether it satisfies the needs of the principles of fundamental justice.

18. The AGQ maintains that the choice of the legislator that is relevant to their prerogative must be assured and consider it being arbitrary was the disposition are rationally linked with the legislative objectives. This is the only way to preserve the latitude in which the legislator needs to be acquitted of his/her responsibilities.

19. Who is within the limits of their constitutions, the legislator is not held in adopting a precise or optimal disposition to solve a societal problem. (As long as it makes sense and does the job its alright, may not be the best but it works).

For street solicitation, it is not about an optimal law, but solving the question at the moment.

20. In the facts of ethical measures do not permit them to entirely solve the problems caused and that they may not be completely respected by citizens it is no longer a factor pertinent about whether it should be ethical.

Reference (discouraging behaviours in which parliament considers undesirable, can't be a matter of personal belief and individual opinion, has to be a collective right for constitutionality).

Part 2.2

21. The AGQ is in the opinion that it is most important to ensure uniformity and interpretations and application in different dispositions if the Charter, allowing ultimately to judge if a legislative measure is arbitrary. 22. In one part s 9 of the Charter, insists on protection of unlawful imprisonment and detention in this case one that is authorized by law, is not arbitrary if it is based on the rational criteria pursued by the legislators for the power of detention.

23. In another part, once the application of their first step in the proportionality justification tests in accordance to s. 1 of Charter. Talking of the measures is to protect and linked to the legislative objectives. (greater good of society)

24. does not mention prostitution.

25. In consequence the AGQ maintains that the criteria of the link of rationality is one in which is guided by the quadrant of application in principle for fundamental justice, relative the protection of arbitrary ethical measure.

26. The approach in this other case, persisted in the asking if a restriction is necessary in the realization of the legislative objective and should not be retained seeing as it does not permit to clearly limit the questions which relate to the political domain in relation to those that relate to the judicial system.

27. In fact, the evaluation of character deemed necessary in legislative disposition restraining the rights to life, liberty and security of the person, in effects allowing the tribunal to evaluation a posteriori the justice and the opportunity and the degree of efficiency of the contested measure in order to allow the legislator to adopt and legitimate interest. In reference to euthanasia, reasons of health and how it relates to treating euthanasia in the Criminal Code the validity of objectives, governmental legitimacy.

28. For this motive the AGQ maintain that the court should confirm the traditional approach and is willing for ethical measures to be arbitrary uniquely in the case where there is an absence of incompatibility between the last legislative objectives being pursued.

29. In consequence the AGQ is in the opinion that the dispositions contested are not arbitrary as they are rationally linked to the objectives of parliament. EX the reduction of prostitutes and social harms caused to communities by prostitution.

Part 3

30. First hand, it is established that the legislative disposition should have excessive use if it was limiting the rights to s7 of a person in refereeing to the means in which it would be more necessary to attain legislative objectives in its pursuit.

31. In regards to jurisprudence following the arrest of RC Haywood, estimating that the interpretation and the judicial system in the principle of fundamental justice should be specified.

32. These precisions would permit the ability of cohabitation between the protection of the ethical measures and the excessive uses of fundamental justice in the following... the protection against the arbitrary ethical measures, and the character disproportionality exaggerated by the effects of the disposition in regards to its objective. In each of these principles need to have their own judicial scope.

33. Certain judicial beliefs would indicate that these different principles of fundamental justice are interrelated. The AGQ therefore invites the court to clarify these differences in concepts by a matter to preserve the coherence between them.

34. In order for there to be protection against the ethical measures of the excessive use and for it to be identified with precision and for it to be applied in diverse situations, in a manner

that produces coherent and predictable results, the AGQ maintains that the principles of fundamental justices must be circumscribed in the analysis brought forth for the legislative language and the disposition restraining the rights in regards to the interpretive context.

35. The return to the analysis in regards to legislative language employed in relevance to the objective pursued disconnects the existence between the theory of imprecision, and that of excessive use.

36. In the means of the application for the theory of imprecision, it is established that the tribunal must examine the use of disposition attacking the light of the combination of its interpretive context.

37. Therefore in the quadrant of its interpretive function a tribunal must analyze certain aspects, such as the objectives, the context of the nature of the disposition being attacked, the social values in play, the legislative dispositions connected, and the judicial interpretations within the disposition.

38. The tribunal must establish if the terms of employment, by the legislator are reasonably being adapted to attain the pursued objectives.

39. In considering the connection with the theory of imprecision the AG is advised that the analysis brought forth by the legislative language of the disposition, combined with the interpretation based on its objective, must value in the application of the principle of fundamental justice and the excessive use. The judicial process of the disposition restrains the rights and is therefore the central element of this analysis.

40. In the disposition of the Criminal Code would not be the excessive use if all the necessities would be established that they are not susceptible to being applied to the people in which the acts are not in intervention with legislative objectives. Seriously limiting the use of this disposition could not be believed to be used in pretending that one is susceptible to people who are not or have nothing to do with organized crime. 5 or more people in committing acts which would be defined by the law (federal) are passible by imprisonment of 5 years or more, in which 2 of them have or connected to the accused, committing a series of infractions within the last 5 years, to have participated of activities in this gang to have contributed in an important way, in profit of the organization, under the direction or in association with such criminal acts, serious within the last 5 years.

41. The protection against the ethical measures, of excessive use could not be focused in the evaluation of proportionality between the effects of legislative restriction of rights and its objective. The appreciation of the proportionality is reserves in the application of the principles of the fundamental justice, against the character of exaggerated disproportionately of an ethical measure.

42. In addition the analysis brought forth by legislative language, in the disposition, restraining the rights must not conduct a tribunal to put back in play the well-funded objective pursued by the legislator. Making reference to firearms.

43. In the means of interpretation and application for excessive use the AG is reminded that

the tribunal must avoid reviewing the characteristics necessary in the opportunity of efficiency in the ethical measures contested. Determining excessive use.

44. In consequence the AGQ maintains that the legislative disposition would be an excessive use for example. In above and beyond that which is necessary to obtain governmental objectives once the needs in which it brings forth, makes it susceptible to the people in which the acts are not intervention with legislative objectives.

45. In regards to the analysis brought forth in legislative language in the disposition restraining the rights and the dispositions contesting should not have excessive use.

46. The AGQ is in the opinion that they are not susceptible to be applied to people that have not committed the behaviours that are targeted by their objectives whether it be the reduction of consequences harming the manifestation in public relating to prostitution, and the protection of prostitutes and the reduction of the social harms caused to communities by prostitution.

Part 4 Protection Against the Ethical Measures

47. It is established by the jurisprudence of ethical measures should have disproportionately exaggerated character once the acts of the state or the responses of the legislator are a problem which at this extreme point they are disproportionate at all legitimate interests of the government.

48. In addition, the AGQ invited the court to further specify the interpretation and the judicial process of the principle of fundamental justice, seeing as the jurisprudence could not provide a sufficiently actual indication permitting to qualify a measure, being exaggerated disproportionate.

49. The AGQ believes that the supplemental criteria should be established in the quadrant of application of the protection against ethical measure having disproportionately exaggerated effects in which

the PFJ could be applied in situations that lead to the production of coherent and predictable results.

50. In reasons of connection between s 12 of the Charter and the protection against the ethical measures having disproportionately exaggerated effects the AG believes that the tribunal in the application of the last PFJ must have recalled to similar criteria's which permits them to evaluate the characteristics of the exaggerated disproportionality of this measure.

51. In the quadrant of the analysis s 12 of the Charter it is established that the effects for a penalty or treatment must not be exaggerated disproportionate in relation to what would have been appropriate in this such case.

52. On this matter the court reiterates and maintains the view that it is not sufficient that a penalty be excessive to be judged disproportionate. And it must be excessive in the point that

it is not compatible with human dignity, and disproportionate that Canadians would consider this penalty intolerable and malicious.

53. It is important to underline that the criteria permitting the evaluation if a penalty is exaggerated disproportionate is a criteria deemed to be in good right strict and demanding. A criterion that is not used to undermine the Charter.

54. In addition this criteria being strict and demanding, permits the perseverance of certain differences in relation to the choice of the legislator, all in permitting to the tribunal to intervene in the more clear cases.

The reference: circumstances in which the court should intervene with legislative objectives and in which they should not.

55. In the absence of similar criteria to that of s 12 of the Charter, in the quadrant of protection against the application of protection of ethical measure, having exaggerated disproportionate effects, a tribunal could conclude an unconstitutionality of these measures, simply in reasons of negative effect or inconvenience.

56. In consequence the AG maintains that disposition in the CC prohibiting the behaviours which could be assimilate din extreme measures to the point of it being disproportionate in all legitimate interests of the government uniquely than it will be incompatible in regards to its effect with the human dignity and disproportionately to the point of the Canadian considering the criminalization of the behaviours as being hateful and intolerable.

57. In regards to this criteria the AG maintains that the disposition contested do not have exaggerated disproportionate effects. The criminalization by parliament of the behaviours linked to prostitution having consequences harmful in reason to their public manifestation effecting the protection of prostitutes and causing social harms to communities is not incompatible to human dignity and is not disproportionate to the point where legislative action should be considered as hateful and intolerable.

Conclusions

58. The AGQ puts value in approaching the conciliatory between the interpretation of PFJ in causes with the present power and latitude with the legislator is in need of legislative activity in order to adopt the measures that he judges appropriate and opportunities to respond to diverse and complex societal problems.

59. The interpretation and application of PFJ arbitrary excessive use and characterized as exaggerated disproportionate should not be conducted in the tribunal to evaluate the necessity, opportunity or efficiency of a legislative measure, or to redefine the government priorities and objectives in regards to the unfavourable effects that they can cause.

60. In consequence the measure of the legislator acts in conformity with the PFJ tribunal must respect the choices even if there are other choices that could have been predicted.

61. Costs- ** No funds requested.