The Role of Expert Testimony in *Bedford v. Canada* and *R. v. McPherson*

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Abstract

The following account of expert witness testimony prepared for Criminology 860 is excerpted from a paper I presented at a Conference on sex work and the law in Durham in 2014. The excerpt examines the courts' evaluation of expert witnesses in *Bedford v. Canada* and *R. v. McPherson*.

By drawing a distinction between the activist, advocate and public academic, I offer some comments about the researcher's role in law reform and policy debates, and the principles that should govern the way researchers interpret data and draw conclusions, whether inside or outside the courtroom.

Canada (Attorney General) v. Bedford[1]

In 2013 the Supreme Court of Canada found that the *Criminal Code* sections prohibiting bawdy-houses, living on the avails of prostitution, and public communication for the purpose of prostitution contravene section 7 of the *Canadian Charter of Rights and Freedoms*, which protects a person's right to life, liberty, and security of the person.

The case drew considerable attention around the world, as prostitution is one of the most contentious law and social policy issues of our day.

On one side, radical-feminists argue that the sale of sex should be legal, while its purchase should be a criminal offence (demand-side prohibition), as women will never be able to gain equality with men as long as prostitution exists. They assert that prostitution is female sexual slavery; prostitution constitutes male violence against women.

On the other side are libertarian feminists who argue that women cannot gain equality as long as their choices, including the choice to prostitute, are circumscribed. While all forms of slavery should be prohibited, prostitution should be treated as a form of work. It should not be the subject of criminal prohibitions that, they argue, endanger sex workers.

Much of the evidence the SCC used to strike down the law came from research on prostitution in Canada and internationally. But before it could reach this conclusion, the Supreme Court had to consider whether the Ontario Superior Court had properly evaluated the conflicting claims of expert witnesses. In *Bedford*, most of the expert witnesses who testified could be classified as falling into one of these two political camps.[2]

The Crown called researchers who claim that prostitution is inherently dangerous no matter where it occurs, which is why the court should uphold the impugned legislation. The applicants (sex workers Terri-Jean Bedford, Ami Lebovitch and Valerie Scott) called researchers who claim that risks to sex workers depend mostly on the circumstances in which they work, with the street being by far the most dangerous work venue. Given that the risks sex workers face are influenced by the circumstances in which they work, the impugned laws should be struck down because they endanger sex workers.

However, the role of the expert witness is not to support a particular model of law, but to assist the court in interpreting specialist knowledge. As it turned out, the Supreme Court of Canada found the litigants' expert testimony persuasive, and struck down the impugned legislation.

What follows is a first-hand account of my expert-witness experience in this case, plus commentary on *R. v. McPherson*, a case involving human trafficking.

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[1] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do).

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

The Role of Expert Testimony[3]

Kelliher (Village of) v. Smith, ([1931] S.C.R. 672) provides the classic statement of the role of the expert witness (Bruce 1999). In that case, the Supreme Court of Canada concluded that in order for testimony to be considered expert, "[t]he subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge" (cited in Bruce 1999). In *R. v. Turner*, ([1975] Q.B. 834, at 841) Justice Lawton concluded, "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury" (cited in Bruce 1999).

In *R. v. Mohan* ([1994] 2 S.C.R. 9) the Supreme Court of Canada identified four criteria to determine the admissibility of expert evidence:

1. It must be relevant.
2. Necessary to assist the trier of fact.
3. Should not trigger any exclusionary rules (e.g. hearsay), and
4. Must be given by a properly qualified expert.

Writing on behalf of a unanimous court, Justice Sopinka quoted approvingly from *R. v. Turner*, ([1975] Q.B. 834, at 841) that, "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary" (*R. v. Mohan*, at 24).

Like any witness, expert witnesses may testify as to the veracity of facts about which they have first-hand experience, but this is not the main purpose of their testimony. An expert is there to give an opinion. Courts expect the opinion to reflect the expert's personal knowledge in the realm of their expertise, plus the corpus of knowledge in the expert's field, which constitutes "hearsay," i.e. facts not proved in the evidence before the court. However, hearsay evidence alone would be unlikely to qualify its bearer as an "expert." As we shall see later, this is one of several reasons why *Invisible Chains* author Benjamin Perrin, another of Canada's leading advocates of demand-side prohibition, ran into problems when the Crown attempted to call him as an expert witness in the trial of a person charged with sex-trafficking.

Expert testimony is commonplace in civil litigation and criminal cases, but for many observers, it is a necessary evil. As Arnold (2013) observed after reviewing expert witness testimony internationally, "In virtually every jurisdiction surveyed, adversarial bias was identified as the single most important problem with expert opinion evidence. Guarding against what we term

[3] Thanks to Rhys Davies QC of Davis and Company for providing me with extensive commentary on the case law relating to expert testimony.

‘advocacy by experts’ has become a major focus for stakeholders.”[4] It became a relevant factor in the Ontario Superior Court’s assessment of expert testimony in *Bedford* too.

In the case of a Charter challenge, the expert is not only expected to assist the court in understanding esoteric knowledge, but also provide evidence that relates specifically to the arguments at hand, and to help establish “legislative facts.”[5] As the Supreme Court of Canada explained in *MacKay v. Manitoba* ([1989] 2 S.C.R. 357 at 361):[6]

> In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts. Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions.

In *R. v. Bedford*, although none of the parties objected to any of the expert witnesses their adversaries called to testify, they each argued that the court should discount most of their adversary’s expert evidence because of their advocacy, and for various methodological reasons.

Competing Arguments about Expert Witnesses

One of the primary objectives of each party in *Bedford* was to discredit the other party’s expert witnesses. They used two strategies to achieve this end: a) assailing the methodology of the other party’s expert witnesses, including their interpretation of the secondary literature; and b) establishing that confirmation bias had contaminated their opinions so that their testimony crossed the line into advocacy. The two sets of arguments show the willingness of supporters of prohibition – in this case the Crown – to distort and even fabricate evidence. By way of illustration, I compare what the Crown said about my testimony with its claim that its own expert witness testimony was not biased.

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[4] In several Canadian cases, lack of independence and impartiality of an expert witness has led to serious miscarriages of justice (*R. v. Mohan* p.21). In 2014, the Supreme Court of Canada clarified the rules governing expert testimony when it ruled that an expert’s experience – in that case the experience of a police officer – does not establish “fact.” The ruling arose in relation to an RCMP officer’s claim that in 1,000 drug smuggling cases he had never personally experienced one involving a courier who did not know they were transporting drugs (Fine 2014). This ruling suggests that the courts would not rely on a police officer’s testimony about his or her experience of the characteristics of sex workers, including the average age of entry.

[5] Adjudicative facts relate to the specific circumstances of the parties to a proceeding. Most criminal and civil litigation concerns adjudicative facts. Legislative facts relate to the purposes of legislation, to the political/cultural/social issues that legislation addresses. Legislative facts may come to the fore when a court considers constitutional arguments.

[6] Cited in the Applicant’s Ontario Superior Court factum, para. 16.

Here is what the Crown argued about my testimony:

> Dr. Lowman has made up his mind on the issue of the law and adult prostitution…
>
> Dr. Lowman is a long-time advocate of decriminalizing all aspects of the practice of adult prostitution. In fact, his advocacy on behalf of decriminalization pre-dates Parliament's 1985 enactment of the communication provision. As early as 1984 he had been expressing the opinion that the *Criminal Code* operates in a manner which violates the security of the person for prostitutes in Canada.[7] He also stated in cross-examination that "*when the 1985 law was brought in, it struck me that it entrenched what I believed the evidence to show was a contradictory and self-defeating law*".[8] Dr. Lowman expressed these opinions prior to conducting any of his major studies on the impact of the 1985 change in the law. This raises an issue as to the bias he brought to bear when he conducted these empirical studies purportedly demonstrating a connection between risk of harm and the change in the *Criminal Code* provisions governing prostitution.
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> More significantly, Dr. Lowman's evidence and testimony in cross-examination is in the nature of advocacy, rather than objective expert opinion. Dr. Lowman candidly acknowledged this during his cross-examination when he described, and then affirmed, that his affidavit was "*argument*".[9]
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> [Lowman's evidence] is replete with partisan arguments.(Factum of the Respondent, the Attorney General of Canada, paras. 61-62).

For the following reasons, these arguments involved more than distorting evidence.

1) Regarding the suggestion that my "advocacy predated the enactment of the communicating law in 1985," the first time that I came close to stating a position on law reform, was in the final two paragraphs of the 424 page *Vancouver Field Study of Prostitution* (Lowman 1984, pp. 423-424, emphasis added):

> The immediate solutions to [the] various factors which seem instrumental in the genesis of prostitution are not likely to occur rapidly, and perhaps will not occur at all. Our results suggest that that criminal law cannot play much of an effective role in controlling adult prostitution. To the extent that it seems reasonable to conclude that prostitution should be decriminalized or legalized *if Canadian law is to actually honour the idea that prostitution itself is legal*. And in this respect, decriminalization appears to be the more egalitarian option to the extent that while this strategy does not deny the possibility of regulating prostitution, it does avoid the likelihood that regulation in the form of legalization will just become another way of exploiting prostitutes, an idea which our [prostitute research participants] often vehemently opposed.
>
> The only problem is that the information generally made available to the public about prostitution may make this a politically unfeasible strategy. Should that be deemed the case it is unlikely that the design of the new criminal laws to control prostitution will be particularly effective, especially because the hard repressive line is just as politically untenable.

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[7]Joint Application Record, Vol. 21, Tab 53, pp. 5909-5910, Lowman Transcripts, Vol. 1, Qs. 64-65

[8]Joint Application Record, Vol. 21, Tab 53, pp. 5957-5958, Lowman Transcripts, Vol. 1, Qs. 210-213; see also pp.6429 – 6431, Qs.1682-1688

[9]Joint Application Record, Vol. 21, Tab 53, p. 5899, Lowman Transcripts, Vol. 1, Qs.24-25, line 25

Are these the words of a strident advocate of a preconceived overarching political agenda regarding prostitution? Is this statement, eight years after its author began researching prostitution, the equivalent of the likes of Crown expert witness Melissa Farley who, before she had published any research on prostitution, established an activist organization designed to abolish prostitution because it constitutes violence against women?

When one defines prostitution as violence against women, it is not possible for the research to do much other than bolster that conclusion. *The Vancouver Field Study of Prostitution* was exploratory, commissioned by the Department of Justice Canada as background research for the Special Committee on Pornography and Prostitution (The Fraser Committee, 1985). The Department of Justice set the agenda for that study, not me.

2) At no point in 1984 did I argue that, "the Criminal Code operates in a manner that violates the security of the person for prostitutes in Canada."[10] My initial critique of prostitution law was that it was contradictory and self-defeating; statements about the way the law exposed sex workers to violence emerged much later.

3) The Crown argued that Lowman stated in cross-examination, "*when the 1985 law was brought in, it struck me that it entrenched what I believed the evidence to show was a contradictory and self-defeating law …* Dr. Lowman expressed these opinions prior to conducting any of his major studies on the impact of the 1985 change in the law."

Did one need to conduct a study of the communicating law in order to argue that it entrenched a set of laws that were contradictory and self-defeating law?

No.

My criticism of prostitution law prior to the enactment of the communicating law concerned the public nuisance attributed to street prostitution, which was the main issue of the day when the Fraser Committee delivered its report to the government in 1985. That critique arose from my Doctoral research, which examined the effect of law enforcement and other control measures on patterns of crime. Historically, criminologists and geographers explained crime patterns in terms of the characteristics of offences and offenders. My thesis was that researchers also should take social control and law enforcement into account when explaining crime patterns. Prostitution

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[10]The source given for this claim is the following two paragraphs from the cross-examination: "Para 64.*Q. Am I also correct that the policy that you prefer would be for there to be safe, legal venues where prostitutes can engage in prostitution? Would that be correct?* A. That is correct. It took eight years of research for me to start to form those conclusions. Para 65.*Q. I was going to ask you about that. Is that not a policy or am I correct that that's a policy you've been advocating for over 25 years?* A. The first time that I start to make any kind of … normative commentary on prostitution ... – is probably at the end of the *Vancouver Field Study of Prostitution* in 1984, after which point I'd been studying displacement of prostitution as part of my doctoral degree.

featured in this analysis as one of several empirical vignettes illustrating how law enforcement initiatives sometimes displaced criminal activity. The prostitution example concerned the way that enforcement of laws against off-street prostitution establishments in Vancouver in 1975 displaced prostitution onto the street, thereby creating “the prostitution problem” – the uncontrolled spread of street prostitution – that led to the establishing of the Fraser Committee in 1983.

When several lobby groups claimed that a series of court decisions that emasculated the “soliciting law” caused the spread of street prostitution in the late 1970s and early 1980s (Lowman 1984, p. 417),[11] I provided evidence showing that the expansion of street prostitution pre-dated those decisions (Lowman 1984, pp. 418-420). Street prostitution increased dramatically when police in Vancouver (Lowman 1984, 1986a) and Toronto (Brock 1998) closed key off-street locations, thereby displacing prostitution onto the street. Because Canadian prostitution law permitted prostitution, but made it almost impossible to practice it legally, I suggested that it was contradictory. Because the soliciting law sought to keep prostitution law out of view, but bawdy-house and procuring laws effectively prohibited indoor prostitution – and, when enforced, pushed it onto the street – I suggested that it was self-defeating. The Fraser Committee (1985) agreed with this analysis, arguing that the legislature should either criminalize prostitution or, if it was to remain legal, decide where and under what circumstances it can occur.

The Fraser Committee recommended wholesale rather than piecemeal law reform, suggesting that the legislature revise the *Criminal Code* to allow the provinces to regulate small-scale brothels, and allow one or two sex workers to work indoors, exempt from the bawdy-house prohibition. Instead, the Conservative government of the day chose to revise only the street prostitution law. Because the legislature did not alter the structure of prostitution law, one did not need to evaluate the communicating law to say that it entrenched a set of laws that were contradictory (prostitution is legal as long as you do not do it) and self-defeating (enforcement of laws against indoor prostitution displaced it onto the street creating a more intractable problem).

When the evaluation of the communicating laws was completed four years later (Fleischman 1989), it concluded that the communicating law had not reduced street prostitution.[12] My question in a 1986 article concerning the possibility of a Constitutional challenge to the prostitution laws in combination, which the Crown raised during cross-examination, concerned

[11] The soliciting law made it an offence to solicit in a public place for the purpose of prostitution. When the Supreme Court of Canada ruled that soliciting involved pressing and persistent conduct (*R. v. Hutt* (1978) 2 S.C.R. 476), it made that law much more difficult to enforce.

[12] My first publication reporting the effects of the communicating law (Lowman 1986b, pp. 203-205) noted that street prostitution had reduced by between one third and two thirds, depending on the stroll. As the subsequent evaluation established (Lowman 1989), the reduction was short lived. Two years after the repeal of the soliciting law and enactment of the communicating law, street prostitution numbers exceeded those preceding the law change.

the contradictory and self-defeating nature of the law. It had nothing to do with the security of the person argument that would later arise in *Bedford*.

Even so, *The Vancouver Field Study* did provide information about violence against sex workers (Lowman 1984 p. 229-230, 249 and tables S32, M29, M36 and M37). When the Department of Justice contracted us to carry out the Vancouver component of its evaluation of the communicating law (Lowman 1989), the *Statement of Work* included the following questions:

> What are the perceptions of the key actors involved (e.g. police, Crown prosecutors, defence attorneys, judges, prostitutes and customers, and ordinary citizens) of the new law? Is there a perception that it is effectively meeting its objective? …What, in the experts' views, have been the impacts of the new law on the business of prostitution (*e.g. some have expressed the fear that it would be pushed underground, thereby increasing violence against and the exploitation of prostitutes*)… (p. 3, emphasis added).

The Government of Canada initiated the research questions that would ultimately lead me to conclude that prostitution laws materially contributed to violence against sex workers. However, it was not until the mid-1990s, when the Department of Justice funded *Violence Against Persons Who Prostitute in British Columbia* (Lowman and Fraser 1995), our first explicit study of violence against sex workers, that we began to elaborate this argument – i.e. ten years after the enactment of the communicating law.

In addition to the Vancouver field study, our evaluation of the communicating law and our study of violence, the Department of Justice contracted me to conduct four updates of the communicating law evaluation.

If I was biased, why did the Department of Justice keep contracting me to perform that research? And yet, twenty years later, here were Department of Justice attorneys arguing that the court should give my opinion little or no weight because it was biased.

4) The assertion that Lowman's evidence and testimony was "argument" should come as no surprise. What is an expert "opinion" if not "argument," albeit one designed to assist the court in understanding how specialized research knowledge could help to establish whether the impugned prostitution laws materially contributed to violence against sex workers? I used the term "argument" to explain how qualitative research methods contributed to the understanding of the effects of the impugned prostitution laws. My use of the term argument was a response to the Crown's research methods expert witness,[13] who argued that only quantitative research using an experimental or quasi-experimental design is able to generate causal statements(which also are "arguments"). I explained why many social scientists disagree with the Crown methodologist's scientism, and suggested that qualitative research – especially case studies – can generate causal arguments.

[13] Affidavit of Dr. Ronald-Frans Melchers.

The same Crown attorneys who suggested that the applicants' experts were biased argued that their own expert witnesses were objective and methodologically sound:

> Issues relating to harms of prostitution and the sex industry around the world are controversial and provoke heated debate. The social science evidence of all of Canada's experts complies with the principles of research methodology. Several of them are world-renowned experts, and have also taken positions against prostitution. It is their scholarship, however, that has informed these positions, and not the reverse. This can be contrasted with many of the Applicants' experts whose advocacy appears to have led their scholarship. In some cases, the advocacy of the Applicants' experts in support of decriminalization predates their own empirical research(Factum of the Respondent, the Attorney General of Canada, para. 178).

Against these assertions, the Applicant's cross-examination of Farley established that in the mid-1980s she was not involved in the prostitution issue, but was campaigning against pornography (p. 10).[14] That campaign involved civil disobedience that led to her arrest 13 times in nine different countries. The cross examination established that Farley's first publication on prostitution was in 1994, in which she argued, "prostitution is a terrible harm to women … is abusive in its very nature, and that prostitution amounts to men paying for a woman for the right to rape her."[15] However, as Farley acknowledged, she reached this conclusion on the basis of anecdotal evidence from "survivors," not on research. She agreed that she still held the same opinion about prostitution on the day of her cross-examination. Farley nevertheless insisted that she based her belief that prostitution is a human rights violation on her research. If that was the case, Bedford's attorney Alan Young asked, how come she started an advocacy organization – *Prostitution Research and Education* – in 1995 based on that premise, and with the goal of abolishing prostitution, several years before she published any research on prostitution?[16] Young demonstrated that almost all the evidence that demand-side prohibitionists rely on to substantiate their sweeping claims about the nature of prostitution derive from politically motivated studies.

What about the integrity of Farley's research methodology? The Crown recognized that non-probabilistic samples cannot be generalized (factum at para. 9). Why, then, did it rely on Farley's evidence concerning prostitution in Canada when the only Canadian research she has done was a non-probabilistic sample of a study of 100Vancouver Downtown Eastside sex workers, which employed "prostitution survivors" as interviewers? Farley and her colleagues used this sample to make sweeping statements about prostitution in Vancouver as a whole, both on the street and indoors (Farley et al. 2003, 2005).[17] The fact that they drew their sample from the most

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[14]Joint Application Record, Vol. 50, Tab 14, p. 10.
[15]Joint Application Record, Vol. 50, Tab 14, p.10("Prostitution: the oldest use and abuse of women").
[16] Joint Application Record, Vol. 50, Tab 14, p. 28.
[17] Incredibly, the Crown argued that, "Lowman's empirical evidence is restricted to Lower Mainland B.C. In spite of this, he feels no limitation in expanding his causal conclusions based on that region to Canada as a whole. This violates a basic principle of research methodology – agreed to by all the expert affiants (including Dr. Lowman in

marginalized sex workers in the city and that they failed in their attempt to purposively sample indoor sex workers did not temper their sweeping generalizations.[18]

The Applicant's factum noted that Farley's citations in her affidavit supporting her assertions were "often incorrect or missing, and her characterization of other scholars' findings [were] misleading, selective or inaccurate" (para. 284). She often attempted to raise "individual anecdotes to the level of common ordinary experience" (para. 293). Further, it pointed out that her "controversial work has been subject to serious criticism, including accusations of misrepresentation of data, by coalitions of academics and in the Scottish and New Zealand legislatures" (para. 283).

How did the Ontario Superior Court evaluate these various arguments the two parties' expert witnesses?

The Ontario Superior Court's Evaluation of Expert Testimony in *Bedford*

The witness testimony in the *Bedford* application did not occur before the judge in open court, but in closed-door sessions where the applicants' attorneys and the Crown could examine their own witnesses and cross-examine their adversary's witnesses. The examination and cross-examination of witnesses was transcribed, and the package of transcripts, expert witness affidavits and supporting evidence – which amounted to roughly 25,000 pages – delivered to the judge.

There were two interveners at the Ontario Superior Court level: the Province of Ontario and a coalition of Christian organizations (the Christian Legal Fellowship, Real Women of Canada, and the Catholic Civil Rights League). The Province of Ontario was empowered to cross-examine witnesses whereas the Christian Coalition's involvement was limited to the submission of a factum. Both interveners supported the Crown's argument that the impugned *Criminal Code* sections – the bawdy-house, living on the avails and communicating laws – did not violate the Charter.

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principle, if not application) – that, when conducting purposive sampling, it is necessary to qualify any conclusions reached by restricting those conclusions to the discrete sample studied. It follows that no study on prostitution in one city can be generalized to represent prostitution in another city and certainly not to a country at large" (Factum of the Respondent, the Attorney General of Canada, para. 167). I use the word "incredibly" in this regard, because the Crown confused *sampling* and *case study* analysis. During cross-examination, I asserted that an analysis of prostitution in Vancouver can be used to demonstrate the material contribution of prostitution law to violence against sex workers without needing to examine other cities. As the Supreme Court of Canada *Bedford* decision noted: "The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7."It is not necessary to generalize the case study of Vancouver to other cities or Canada as a whole to establish that an s.7 violation has occurred.

[18] For a critique of the methodology, see Lowman 2013.

In the case of experts, each witness prepared an affidavit that was distributed to the opposing party and interveners. Each expert witness then appeared for cross-examination by the opposing party, with an opportunity for re-examination by the party calling the witness. Because the judge, who serves as a gatekeeper ensuring that only properly qualified experts testify, was not present, she did not have an opportunity to question any of the witnesses about their credentials or testimony. Had the qualification of expert witnesses occurred in front of the judge, some of the Crowns experts, such as those who had never done any research in Canada, may not have been qualified as experts, as it is difficult to see how their testimony spoke to the constitutional integrity of the impugned laws. In any event, all the expert testimony was admitted into evidence, which left Justice Himel to evaluate its weight. Neither the Ontario Court of Appeal nor the Supreme Court of Canada took issue with Justice Himel's subsequent evaluation of the expert testimony.

Justice Himel found that "some of the evidence tendered on this application did not meet the standard set by Canadian courts for the submission of expert evidence" (para. 352). When it came to the Crown's expert witnesses, she found Melissa Farley's evidence to be problematic:

> Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence. Furthermore, in her affidavit, she failed to qualify her opinion regarding the causal relationship between post-traumatic stress disorder and prostitution, namely that it could be caused by events unrelated to prostitution.
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> Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions. For example, comments such as, "prostitution is to the community what incest is to the family," and "just as pedophiles justify sexual assault of children … men who use prostitutes develop elaborate cognitive schemes to justify purchase and use of women" make her opinions less persuasive.
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> Dr. Farley stated during cross-examination that some of her opinions were formed prior to her research, including, 'that prostitution is a terrible harm to women, that prostitution is abusive in its very nature, and that prostitution amounts to men paying for the right to rape her (paras. 353-356).

For these reasons, Justice Himel assigned "less weight" to Farley's evidence. Similarly, she concluded that Drs. Raymond and Poulin,

> were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research. For example, some of Dr. Raymond's statements on prostitutes were based on her research on trafficked women. As well, during cross-examination, it was revealed that some of Dr. Poulin's citations for his claim that the average age of recruitment into prostitution is 14 years old were misleading or incorrect. In his affidavit, Dr. Poulin suggested that there have been instances of serial killers targeting prostitutes who worked at indoor locations; however, his sources do not appear to support his assertion. I found it troubling that Dr. Poulin stated during cross-examination that it is not important for scholars to present information that contradicts their own findings (or findings which they support) (para. 357)

Despite this criticism, demand-side prohibitionists continue to use the likes of Poulin, Raymond, and Farley, as some of their main authorities for their assertions of fact.[19]

Justice Himel also stated that, "the applicants' witnesses are not immune to criticism," although she criticized only one:

> The respondent asks this court to assign little weight to Dr. Lowman's opinion. The respondent called Dr. Melchers, a research methodologist, to provide an opinion on Dr. Lowman's three major prostitution-related studies. Dr. Melchers was highly critical of Dr. Lowman's empirical observations, largely based on the language of causality used in his affidavit. …. [which] made a direct causal link between the Criminal Code provisions at issue and violence against prostitutes; however, during cross-examination [Lowman] gave the opinion that there was, rather, an indirect causal relationship. …During cross-examination, Dr. Lowman gave nuanced and qualified opinions, which more accurately reflect his research (paragraph 358).

Justice Himel's comment that, during cross-examination, Lowman "gave nuanced and qualified opinions," suggests that, during a cross examination that took four days and involved roughly 1800 questions, he did not cross the line into advocacy. Perhaps that is why Justice Himel made no comment to the effect that she was giving his testimony less weight.[20]

R. v. McPherson: The Judge as Gatekeeper of Expert Witness Testimony

> The controversial decision of Madam Justice Susan Himel of the Ontario Superior Court to gut federal prostitution laws with the stroke of a pen this week is a striking example of judicial activism run amok.[21]
>
> Benjamin Perrin, (2010b)

University of British Columbia Law School Professor Benjamin Perrin is another of Canada's most vocal advocates of demand-side prohibition, a position he articulated in *Invisible Chains: Canada's Underground World of Human Trafficking* (2010a).[22] Named one of the top Canadian books of the year by the *Globe and Mail*,[23] Perrin aspired to offer "evidence-based law and policy responses to human trafficking" (p. 251). He constructed his description of trafficking

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[19]See, for example, Smith (2014), which uses Farley's research as a definitive source of fact about the buyers and sellers of sexual services in Canada.

[20] Although Justice Himel said that she could decide the case without reference to any of the expert witness testimony, she referred to it repeatedly throughout the decision.

[21]Perrin's characterization of the 2010 Ontario Superior Court *Bedford* decision as "judicial activism" – i.e. a decision based on personal or political considerations rather than law – is a familiar refrain of Canadian Conservatives who are frustrated by the setbacks the courts have dealt Stephen Harper's tough-on-crime and other policy agendas since he became Prime Minister in 2006. In cases related to assisted suicide, detention of refugees, mandatory minimum prison sentences, and safe-injection facilities, the courts have found the Conservative government's policies and laws constitutionally wanting. Given that one of the primary purposes of the *Charter of Rights* is to hold the government accountable to a constitutionally enshrined set of values, the *Bedford* decision suggests that the Charter is functioning very much as intended.

[22] Although its subtitle refers to "human trafficking," *Invisible Chains* does not examine forced labour in general, but is restricted to sex trafficking.

[23]http://www.law.ubc.ca/faculty/Perrin/

primarily from police and court files, interviews with police officers, NGOs and government personnel, and an analysis of government documents. "For ethical reasons" he explained, "and because of the perceived difficulty of locating victims years after their cases were discovered, trafficked persons were not interviewed" (p. 252). Perrin's statement about the ethics of interviewing trafficking victims is curious.

In Canada since 1981, researchers have interviewed what must now amount to tens of thousands of sex workers, including trafficked women, in which case it is difficult to figure out what ethical obstacle stood in Perrin's way. It meant that he did not talk to any trafficked person, leaving his description of trafficking entirely as hearsay.

In a 2011 trial of a person charged with human 31 human trafficking offences involving four complainants under s. 279 of the *Criminal Code*, the Crown sought to qualify Perrin as an expert in human trafficking.[24] The Crown proposed that he testify about patterns of interaction between traffickers and their victims, and methods that traffickers use to recruit and control their victims. Although Justice Baltman of the Ontario Superior Court thought that the jury would not need expert opinion in this regard, if it did, Perrin was not qualified to provide it: "The professor was a career advocate, and did not provide the appearance of objectivity." Justice Baltman observed that, "Professor Perrin has no expertise or formal training in the fields of criminology, psychology or sociology. However, he has involved himself in the issue of human trafficking since 2000, in a number of capacities" including campaigning for legislative change, with his work culminating in the publication of *Invisible Chains*. "Neither that study nor any of his publications on domestic sex trafficking have been peer reviewed before publication" (*RE: R., and McPherson*[2011] O.J. No. 6548, 2011 ONSC 7717, para. 7).

Justice Baltman noted that, "Professor Perrin openly advocates a more aggressive approach to the prosecution and sentencing of those who live off the avails of prostitution, and takes a very sharp view of those who think otherwise…" She then quoted Perrin's *Globe and Mail* article which painted Justice Himel's *Bedford* decision as "judicial activism run amok" (para. 9).[25]

[24] Thanks to Tamara O'Doherty for bringing this case to my attention.

[25] Regarding the substance of Perrin's claim, far from "judicial activism," the Ontario Court's decision, which the Supreme Court of Canada upheld, indicates a system of constitutional accountability that is fulfilling its mandate. The court's decision ought to be evaluated in light of the Canadian experience over the past 30 years, when at least 300 street sex workers were murdered, and many more went missing. Every government committee and task force that has examined the *Canadian Criminal Code* sections on prostitution has recommended extensive law reform, beginning with the Fraser Committee in 1985 (for a description of these committees and task forces, see Lowman 2011). The Fraser Committee was unable to ascertain what Canadian prostitution laws as a whole were trying to achieve. Was it regulation of prostitution or its eradication? Why was prostitution legal, but almost impossible to practice without violating a criminal law? The Committee argued that, if prostitution is legal, the legislature should decide where and under what circumstances to allow it; or it should criminalize prostitution. The Committee preferred the first option, recommending a blend of decriminalization and legalization. The main problem since the Fraser Report made these recommendations is that the legislature cannot decide whether prostitution should be regulated or prohibited, despite a consensus that the legal "status quo is unacceptable" (Standing Committee on Justice and Human Rights, 2006). With women being murdered and disappearing in their hundreds, who could fault

Baltman argued that there would be little probative value in Perrin's proposed evidence, as his "observations are one sided and second hand." *Invisible Chains* "was limited to interviews of approximately fifty individuals in government, law enforcement and NGO capacities, as well as the analysis of Access to Information filings from various government departments…" Moreover, it "did not involve field work, clinical studies, or, most importantly, direct interaction with either the victims of sex trafficking or sex worker advocacy groups" (para. 30).

The Crown was advancing Perrin as an expert about people to whom he had never spoken.

Because he was a "career advocate" Justice Baltman observed that Perrin:

> [D]oes not provide the appearance of objectivity. While his efforts to end human trafficking and raise consciousness about this issue are doubtless laudable, his professional life is anchored in his role as advocate for the victims of sex trafficking and lobbyist for policy change in government. He has publicly stated that in his view sex work should not be decriminalized. His testimony would not be that of an objective academic but rather a dedicated lobbyist. Even if, as the Crown proposes, his evidence could be edited to exclude his personal opinions, it will nonetheless be guided by his highly prosecutorial perspective" (paragraph 31).

Justice Baltman concluded that, because "Professor Perrin is not a psychologist and has minimal if any contact with women directly involved in the sex trade, he is no more qualified than the average person to explain the psychology which may lead them to remain in abusive relationships" (para. 32).

Not only was the potential probative value of his evidence limited, but also "considerable prejudice could result from this testimony." In Justice Baltman's eyes, Perrin's evidence "may well cast the Respondent as part of an epidemic of human trafficking hidden in the underbelly of Canadian society. The Respondent will then need to diffuse not only … the allegations of the individual complainants, but also the acts of all other sex traffickers described by Professor Perrin in his research" (para. 33). Designed to generate "moral disgust and anger within the jury," his evidence could have resulted in "considerable moral prejudice" to the respondent (para. 34).

Perrin's experience serves as a cautionary tale for researchers who make advocacy and activism a central part of their professional activity. Of course, that is not a reason for academics to avoid advocacy; but it suggests that academics who turn their advocacy into activism to achieve a particular social or political cause, particularly a controversial one, may undermine their ability to promote that cause.

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the courts for examining the constitutional integrity of the laws and, when finding them wanting, forcing the legislature's hand?

Activism does not necessarily render an academic politically ineffective. In 2012-2013 Perrin took a leave of absence from UBC to serve as a legal and policy advisor in the Office of Prime Minister Stephen Harper, where his views on prostitution undoubtedly found favour.[26] Nevertheless, his experience – together with that of Farley, Raymond and Poulin – suggests that academics should think twice before hitching their wagon to an activist organization in the area in which they conduct their research.

Does this mean to say that they should not talk about the policy and law reform implications of their research? No, it does not. They have an institutional obligation to do so, and, in my eye, a moral obligation as well. But in the process, they have to walk a fine line between performing their role as a "public academic," and think twice before converting evidence-based advocacy into activism.

The Role of the Researcher: Activist, Advocate or Public Academic?

In the contemporary political and economic environment, pressure on universities to justify the public funding they receive has meant that administrators feel the need to produce something more than degrees and esoteric journal articles that only a handful of academics can understand. Researchers are encouraged to commercialize their activities where possible, and to make their research accessible to the public as way of contributing to the greater good. Part of their role is to provide independent commentary on the way society works, culturally and technologically:

> In our knowledge based-society, political choices require assessment of complex questions. The university can contribute the understandings from scientific, social scientific and humanistic research to political deliberation (Fallis 2008).

Such a contribution was precisely the sort made in *Bedford* and in the various parliamentary hearings where academics have discussed the findings of their prostitution research. More and more, university administrators are expecting academic researchers to make these kinds of contributions.

A professor's job generally includes research, teaching and service in that order of priority. In many universities, the service component of the job has come to include service to the community at large as well as the academic community – especially in the social sciences and humanities where it is not possible to develop patents and trademarks. Community service brings with it the expectation that at least some faculty play the role of "public academic," which means that, "their academic writing, produced according to the canons of scholarship in their discipline and intended as a contribution to scholarly knowledge, is accessible to the educated public"

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[26] According to UBC's web site (http://www.law.ubc.ca/faculty/Perrin/) Perrin was an in-house legal counsel for Harper, and the "lead policy advisor on all matters related to the Department of Justice, Public Safety Canada (including the RCMP, Canada Border Services Agency, Canadian Security Intelligence Service, Correctional Service of Canada, and Parole Board of Canada), and Citizenship and Immigration Canada."

(Fallis 2008). One way of making knowledge accessible to the public is dialogue with journalists, writing opinion editorials for newspapers, speaking at town hall meetings, and working with community organizations. During my academic career, I have been involved in all these activities.

At Simon Fraser University, many professors include their media work – interviews with radio, television and print media journalists – as a core component of their community service. Their CV's list their media interviews and appearances. To facilitate this form of community service, universities systematically manage their public profile, and have media relations departments to promote research and other university initiatives. The SFU Public Affairs and Media Relations (PAMR) office was set up to transmit "news and information about the university to media and the general public."[27] Its services include the preparation of media releases describing research and other faculty initiatives, announcements matching faculty experts with current issues, coordinating SFU's web presence – including publishing *SFU News Online* – and providing media training workshops for faculty.

PAMR also publishes *On the Record*, "a guide for successful interaction with members of the media." So important has the role of public academic become that, in 1999, SFU inaugurated the President's Award for Service to the University Through Public Affairs and Media Relations. Four of the twenty winners to date were criminologists, which is hardly surprising given that crime is newsworthy.

The rise of the public academic aside, governments often contract criminologists to conduct criminal justice policy research. Such work, by its very nature, asks researchers to provide evidence-based evaluation of policies.

Can the Social Scientist be a Neutral Observer?

When describing the role of what he calls the "public intellectual," George Fallis asserted that:

> Although some professors and students see themselves as 'activists' and welcome the role of critic, most professors and students are uneasy. .. [I]ndeed most, professors … see themselves as impartial, neutral scientists providing objective documentation and analysis of social phenomena. Yet, it is difficult to separate entirely social science and social criticism."

I do not think it is possible to separate them entirely. Every social-scientific observer has a standpoint. Their gender, race, class, politics, worldview, epistemology, and a host of other factors shape the questions they ask about society and how they interpret their observations of it. Objectivity in the Nineteenth and Twentieth Century positivist sense is an illusion, even if some

[27] http://www.sfu.ca/pamr/about.html

researchers still cling to it. It is much more difficult for public academics to cling to it, because their role is to interpret research findings, not just make them publicly available.

When it comes to prostitution and the law – a subject that has been contentious, and thus newsworthy, for the past thirty years in Canada – journalists usually ask researchers to explain how their findings inform policy and law reform debate.

Because they will find journalists and politicians asking them to evaluate the evidence claims of police, government officials and various moral entrepreneurs involved in the prostitution debate, the very act of providing an opinion may compromise the public academic's perceived independence.

Researchers should provide opinion nonetheless, using a few simple principles to guide them:

> Don't lie, mislead or exaggerate. Never, ever, lie. It could be tragic for you and the university. Don't mislead or exaggerate or stretch the truth… It will damage your credibility…Only make statements you can support with facts (SFU media guide, *On the Record*).

I first read those words in SFU's media guide for faculty way back in the 1980s, an academic lifetime ago.

Is that advice necessary?

Apparently it is, as we have seen a persistent pattern of demand-side prohibitionists – academics included – misleading, exaggerating, and stretching the "truth" in their attempts to influence court decisions and shape law reform.

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