

## THE CASE OF THE REASONABLE HYPOTHETICAL SEX WORKER

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*This article critically considers the expanded use of reasonable hypotheticals in challenging the constitutionality of criminal offences under section 7 of the Canadian Charter of Rights and Freedoms (Charter). The author consolidates concerns raised by judges and scholars over use of the device and explains how these concerns are amplified in the first two constitutional challenges to three of Canada's new criminal prostitution laws with potentially significant consequences for constitutional limitations on what can and cannot constitute a crime. The reasonable hypothetical is a device originally used by courts to evaluate the constitutionality of mandatory minimum sentences under section 12 of the Charter based on the circumstances of a reasonable hypothetical offender, rather than those of the actual offender before the court. Judges later expanded the use of the device to evaluate the constitutionality of criminal offences under section 7 based on the circumstances of a reasonable hypothetical accused, rather than those of the actual accused before the court. However, the process through which constitutionality is evaluated differs, raising distinct concerns about the use of hypotheticals in evaluating the constitutionality of criminal offences that have largely gone unexamined and unacknowledged. Concerns raised by judges and scholars about the use of reasonable hypotheticals fall into three categories: (1) the "air of unreality," where the rights violation at issue does not arise on the facts of the case before the court; (2) the nature and scope of evidence that can, should, or must be before the court in cases where the device is used; and (3) the appropriate remedy where an impugned law applies in a constitutional manner to the offender or accused before the court, but in an unconstitutional manner in hypothetical circumstances. Each of these categories of concern is aggravated in the first two constitutional challenges to some of Canada's new criminal commodification offences; the way hypotheticals are used in section 7 cases obscures the experiences of victims and complainants and allows courts to adjudicate constitutionality and remedy constitutional breaches based solely on hypotheticals and expert evidence. The author suggests that if courts continue to allow accused in criminal proceedings to use reasonable hypotheticals to challenge the constitutionality of offences under section 7 of the Charter, they undertake their evaluation of constitutionality with the benefit of adjudicative fact evidence about the circumstances of the case before them, to directly address how rights, interests, and values in tension with those of the hypothetical rights claimant may be relevant to a potential section 1 justification and tailor a remedy that meaningfully attends to the experiences of victims and complainants.*

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## I. INTRODUCTION

The reasonable hypothetical is a device originally used by courts to evaluate the constitutionality of mandatory minimum sentences based on the circumstances of a reasonable hypothetical offender, rather than those of the actual offender before the court.<sup>1</sup> Specifically, courts used the device to consider whether the application of a mandatory minimum sentence to a reasonable hypothetical offender constituted cruel and unusual punishment under section 12 of the *Canadian Charter of Rights and Freedoms*, in circumstances where the application of the mandatory minimum to the actual offender would not constitute cruel and unusual punishment.<sup>2</sup> The rationale behind permitting courts to use reasonable hypotheticals in these cases was to ensure that offenders were not sentenced pursuant to unconstitutional laws simply because the ideal factual situation on which to evaluate the constitutionality of a mandatory minimum sentence had not yet, or might not, come before the courts. This approach appears to be generally consistent with Canadian courts' interpretation of the Constitution's supremacy clause to mean that a person subject to a law may challenge its validity on any basis.<sup>3</sup>

Over time, courts expanded their use of reasonable hypotheticals to evaluate the constitutionality of criminal offences based on the circumstances of a reasonable hypothetical accused, rather than those of the actual accused before the court.<sup>4</sup> In these cases, instead of

<sup>1</sup> See e.g. *R v Smith*, [1987] 1 SCR 1045 [*Smith*]; *R v Nur*, 2015 SCC 15 [*Nur*]; *R v Lloyd*, 2016 SCC 13 [*Lloyd*] (where the Supreme Court found mandatory minimum sentences violated section 12 of the *Charter* and declared them of no force and effect). But see *R v Goltz*, [1991] 3 SCR 485 [*Goltz*]; *R v Morrissey*, 2000 SCC 39 [*Morrissey*] (where the Supreme Court upheld the constitutionality of mandatory minimum sentences).

<sup>2</sup> *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

<sup>3</sup> *Constitution Act, 1982*, s 52(1), being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. See e.g. *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 [*Big M*]; *R v Morgentaler*, [1988] 1 SCR 30. But see *R v Hills*, 2020 ABCA 263 at paras 264–68 [*Hills*] (where Justice Wakeling reasons that *Big M* does not support the use of hypotheticals because in that case the retailer did not have to rely on a third party's constitutional right).

<sup>4</sup> See e.g. *R v Heywood*, [1994] 3 SCR 761 [*Heywood*]; *R v Mills*, [1999] 3 SCR 668 at para 41 [*Mills*]; *R v Appulonappa*, 2015 SCC 59 [*Appulonappa*].

looking at a hypothetical about someone who has already pled or been found guilty of an offence to assess the constitutionality of the potential sentence that offender might face, courts consider a hypothetical accused to assess whether the accused in the case before the court should face any consequences at all for their actions. Courts have considered reasonable hypotheticals in evaluating whether an offence was overbroad or grossly disproportionate to its objectives under section 7 of the *Charter*. While this use of reasonable hypotheticals generally accords with the idea that an accused may defend a criminal charge against them by arguing the charge is constitutionally invalid, courts allowing these cases to be argued based on reasonable hypotheticals have offered no specific justification for why the device was or should be permitted, and no specific test for how the device should be used or applied.

Judges and scholars have raised concerns about the use of reasonable hypotheticals in evaluating constitutionality. Dissenting Supreme Court justices have consistently criticized the device whenever it has been successfully used, beginning with Justice McIntyre's dissent in *Smith*, the very first case where the Supreme Court found a mandatory minimum sentence unconstitutional based on a reasonable hypothetical.<sup>5</sup> In their concurring judgments in *Hills*, two justices of the Alberta Court of Appeal recently echoed some of those criticisms in a decision now under appeal to the Supreme Court.<sup>6</sup> Concerns raised by judges and scholars about reasonable hypotheticals fall into three general categories: (1) the "air of unreality," where the impugned laws are constitutional in the circumstances of the case before the court, but unconstitutional in hypothetical circumstances; (2) the nature and scope of evidence that must, can, or should be before the court in cases where the device is used; and (3) the appropriate remedy where an impugned law applies in a constitutional manner to the accused before the court, but in an unconstitutional manner in hypothetical circumstances.

While some judges and scholars have criticized the use of reasonable hypotheticals in evaluating constitutionality, they have not focused directly on the distinct way in which the device is used in section 7 cases to review the constitutionality of criminal offences compared with how it is used in section 12 cases to review the constitutionality of the length and severity of sentencing. The central difference is that in section 7 challenges to criminal offences, cases argued based on reasonable hypotheticals proceed without any adjudicative fact evidence. The device thus allows the accused to prevent the court from ever hearing about the actual circumstances of the case before it, and thereby preclude the court from knowing about the experiences of victims or complainants impacted by the actions of the accused when adjudicating constitutionality and remedying hypothetical rights' violations. This has potentially significant consequences for constitutional limitations on what can and cannot constitute a crime.

The first two constitutional challenges to three of Canada's new criminal prostitution laws served as provocation for this article.<sup>7</sup> In both cases, the accused contended that the impugned offences violated section 7 of the *Charter*, relying on reasonable hypotheticals. In the first case, *Boodhoo*, the Ontario Superior Court of Justice upheld the constitutionality of the impugned offences. In the second, *Anwar*, the Ontario Court of Justice found the

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<sup>5</sup> *Smith*, *supra* note 1.

<sup>6</sup> *Hills*, *supra* note 3.

<sup>7</sup> *R v Boodhoo*, 2018 ONSC 7205 [*Boodhoo*]; *R v Anwar*, 2020 ONCJ 103 [*Anwar*].

impugned offences unconstitutional.<sup>8</sup> I argue that these cases aggravate the concerns raised by judges and scholars about the use of reasonable hypotheticals and raise concerns not yet examined by the courts or in the literature particularly relevant to determining the constitutionality of criminal offences enacted in an area of highly contested social and public policy. In the first part, I outline the history of reasonable hypotheticals in evaluating the constitutionality of mandatory minimum penalties and criminal offences, identifying an important difference in how the device is used and applied in these two different contexts. In cases argued under section 12 of the *Charter*, courts always hear and consider evidence about the circumstances of the case before them; in cases argued under section 7, they almost never do. In the second part, I consolidate concerns raised by judges and scholars over the use of reasonable hypotheticals in constitutional cases. In the third part, I critically examine the first two constitutional challenges to some of Canada's new criminal commodification offences with this difference and these concerns in mind. I demonstrate how the use and application of reasonable hypotheticals in these cases obscured the circumstances of the accused and the experiences of the victims and complainants and elevated the relevance of expert evidence and social scientific research. I argue that the use of reasonable hypotheticals and the accompanying emphasis on social and legislative fact evidence, and avoidance of adjudicative fact or experiential evidence has the potential to bias decisions in areas of highly contested public policy toward a finding of unconstitutionality and a remedy declaring impugned offences of no force and effect. I highlight how concerns over the use of reasonable hypotheticals are thus amplified in cases where hypotheticals are used to evaluate the constitutionality of criminal offences under section 7. If courts continue to evaluate the constitutionality of criminal offences in section 7 cases based on reasonable hypotheticals, I encourage them to address these concerns directly, including by considering evidence about the actual circumstances of the case before them; critically examining whether the hypothetical circumstances are likely to be captured by the impugned offence; meaningfully assessing whether the hypothetical rights' violation may be demonstrably justified under section 1 (with particular regard to the actual circumstances of the case before them); and carefully attending to the just scope and effect of remedies.

## II. THE USE OF REASONABLE HYPOTHETICALS IN CONSTITUTIONAL CASES

The reasonable hypothetical is a device that allows judges to consider the constitutionality of legislation in the context of hypothetical circumstances that are reasonably likely to arise. Originally used to evaluate the constitutionality of mandatory minimum sentences, the circumstances on which constitutionality was assessed were those of a reasonable hypothetical offender. Courts now also evaluate the constitutionality of criminal offences based on the circumstances of a reasonable hypothetical accused. This section outlines the history of using reasonable hypotheticals in constitutional challenges and explains the difference in the role and relevance of actual and hypothetical circumstances in cases where mandatory minimum penalties are challenged under section 12 of the *Charter*, and cases where criminal offences are challenged under section 7 of the *Charter*.

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<sup>8</sup> At issue in *Boodhoo*, *ibid*, were ss 286.2(2), 286.3(2), 286.4 of the *Criminal Code*, RSC 1985, c C-46, and at issue in *Anwar*, *ibid*, were ss 286.2(1), 286.3(1), 286.4 of the *Criminal Code*.

## A. THE REASONABLE HYPOTHETICAL OFFENDER: CHALLENGING MANDATORY MINIMUM PENALTIES

Section 12 of the *Charter* provides: “Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.”<sup>9</sup> The test for whether a particular penalty constitutes cruel and unusual punishment usually involves an assessment of proportionality.<sup>10</sup> The question courts ask when assessing proportionality under section 12 is whether the treatment or punishment is grossly disproportionate when compared to a fit or appropriate sanction.<sup>11</sup> To be considered grossly disproportionate, a punishment must not be “merely excessive,” but must be “so excessive as to outrage standards of decency” and so disproportionate that Canadians “would find the punishment abhorrent or intolerable.”<sup>12</sup>

Because of the high threshold for what constitutes cruel and unusual punishment, courts began to consider constitutionality based on circumstances other than those present in the case before them. Otherwise, “the Court feared that unconstitutional laws might remain perpetually on the books if judges had to await ideal factual challenges to invalidate a law.”<sup>13</sup> Reasonable hypothetical scenarios allowed courts to examine the potential reach of a sentencing provision by considering theoretical consequences. In *Smith*, the Supreme Court of Canada held that a mandatory minimum sentence could be found unconstitutional if it constituted cruel and unusual punishment in the case of a reasonable hypothetical offender. In that case, the actual offender argued that while the mandatory seven-year term of imprisonment for importing narcotics into Canada contrary to section 5(2) of the *Narcotic Control Act* would not likely constitute cruel and unusual punishment on the facts of the case before the Court, the mandatory sentence could constitute cruel and unusual punishment to others.<sup>14</sup> A majority of the Court struck down the mandatory minimum sentence on the basis that it could catch a student driving to Canada from the United States with her “first joint of grass.”<sup>15</sup> Because it could ensnare people for whom the mandatory minimum sentence would be grossly disproportionate, the mandatory minimum sentence violated the section 12 guarantee against cruel and unusual punishment.

Peter Hogg described the test employed in *Smith* as “the test of the most innocent possible offender,” putting the question this way: “is it possible to imagine a hypothetical case for which the minimum sentence would be grossly disproportionate?”<sup>16</sup> Lauren Witten succinctly highlighted: “Judges no longer needed to wait for a perfect claimant; instead, they could create one.”<sup>17</sup> In his dissent in *Smith*, Justice McIntyre expressed his concern that this approach would “constitutionally entrench the power of judges to determine the appropriate

<sup>9</sup> *Charter*, *supra* note 2, s 12.

<sup>10</sup> But see Lisa Kerr & Benjamin L Berger, “Methods and Severity: The Two Tracks of Section 12” (2020) 235 94 SCLR (2d) 235 (where the authors argue that a different analytical approach is more appropriate in section 12 cases involving the nature or method of a criminal sanction, rather than its severity).

<sup>11</sup> *Smith*, *supra* note 1.

<sup>12</sup> *R v Ferguson*, 2008 SCC 6 at para 14 [*Ferguson*]; *Smith*, *ibid* at 1072; *Morrisey*, *supra* note 1 at para 26.

<sup>13</sup> Lauren Witten, “Proportionality as a Moral Process: Reconciling Judicial Discretion and Mandatory Minimum Penalties” (2017) 48:1 Ottawa L Rev 81 at 88.

<sup>14</sup> *Narcotic Control Act*, RSC 1970, c N-1, s 5(2), as repealed by *Controlled Drugs and Substances Act*, SC 1996, c 19.

<sup>15</sup> *Smith*, *supra* note 1 at 1053.

<sup>16</sup> Peter W Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf updated 2021) 53-4.

<sup>17</sup> Witten, *supra* note 13 at 88.

sentence in their absolute discretion,” unduly limiting “the power of Parliament to determine the general policy regarding the imposition of punishment for criminal activity.”<sup>18</sup> The most innocent offender test allowed courts to scrutinize any restrictions on the system of individualized sentencing by judges.

For a span of almost 30 years following *Smith*, however, the Supreme Court did not strike down any mandatory minimum penalties based on a reasonable hypothetical.<sup>19</sup> During that time, in *Goltz* and *Morrisey*, the Supreme Court upheld the constitutionality of mandatory minimum sentences, constraining the use of reasonable hypotheticals by circumscribing the hypothetical circumstances upon which the question of proportionality could be decided.<sup>20</sup> In upholding the minimum sentence of seven days imprisonment for driving while prohibited, Justice Gonthier (writing for the majority) reasoned in *Goltz*:

A reasonable hypothetical example is one which is not far-fetched or only marginally imaginable as a live possibility. While the Court is unavoidably required to consider factual patterns other than that presented by the respondent’s case, this is not a licence to invalidate statutes on the basis of remote or extreme examples.... The applicable standard must focus on imaginable circumstances which could commonly arise in day-to-day life.<sup>21</sup>

In upholding the constitutionality of the minimum sentence challenged in *Morrisey*, the Supreme Court further reduced the aperture of the reasonable hypothetical to allow consideration of only “imaginable circumstances which could commonly arise with a degree of generality appropriate to the particular offence.”<sup>22</sup> The Supreme Court also stressed that the “reasonableness of the hypothetical cannot be overstated.”<sup>23</sup> Peter Sankoff suggests the decision in *Morrisey* might have ended the potential of hypotheticals in section 12 challenges to mandatory minimum sentences had Parliament not proceeded to thereafter dramatically increase the number of offences carrying mandatory minimum sentences.<sup>24</sup>

In 2015, following significant growth in the number of statutory minimum penalties in the *Criminal Code*, the Supreme Court breathed new life into the reasonable hypothetical in *Nur*.<sup>25</sup> According to Hogg: “[S]uddenly and without explanation [the Court] re-embraced *Smith* and struck down mandatory minimum sentences that were appropriate to the defendants before the Court on the basis that they would be grossly disproportionate to non-existent hypothetical offenders.”<sup>26</sup> In *Nur*, the Supreme Court identified a question at the heart of the case to be who the Supreme Court should take as an offender in analysing the

<sup>18</sup> *Smith*, *supra* note 1 at 1105.

<sup>19</sup> The Supreme Court’s restrictive approach to reasonable hypotheticals led some scholars to suggest that the device itself was limited. See e.g. Debra Parkes, “From *Smith* to *Smickle*: The Charter’s Minimal Impact on Mandatory Minimum Sentences” (2012) 57 SCLR (2d) 149; Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Sentences” (2001) 39:2&3 Osgoode Hall LJ 367 [Roach, “Searching for *Smith*”].

<sup>20</sup> *Goltz*, *supra* note 1; *Morrisey*, *supra* note 1.

<sup>21</sup> *Goltz*, *ibid* at 515–16.

<sup>22</sup> *Morrisey*, *supra* note 1 at para 50.

<sup>23</sup> *Ibid* at para 30.

<sup>24</sup> Peter Sankoff, “The Perfect Storm: Section 12, Mandatory Minimum Sentences and the Problem of the Unusual Case” (2013) 22:1 Const Forum Const 3 at 6–7 (where the author points to the fact that when *Morrisey* was decided, there were only a handful of minimum mandatory penalties involving imprisonment in the *Criminal Code*, but by 2013 there were at least 40).

<sup>25</sup> *Nur*, *supra* note 1.

<sup>26</sup> Hogg & Wright, *supra* note 16 at 53–4.

constitutionality of a mandatory minimum sentencing provision. Chief Justice McLachlin reasoned that the Supreme Court had consistently held that a challenge to a law under section 52 of the *Constitution Act* does not require that the impugned provision contravene the rights of the claimant because it is “the nature of the law, not the status of the accused, that is in issue.”<sup>27</sup> Chief Justice McLachlin said: “If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely.”<sup>28</sup> She made it clear that the key question is simply “whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples’ situations, resulting in a violation of s. 12.”<sup>29</sup>

A year later in *Lloyd*, another case where the Supreme Court found a mandatory minimum sentence unconstitutional, the Supreme Court affirmed the two-part test to be applied in evaluating whether an impugned sentence provision violates section 12 of the *Charter*.<sup>30</sup> The test, first articulated in *Goltz* and most recently affirmed in *R. v. Boudreault*, asks: (1) whether the sentence is grossly disproportionate in the case of the particular offence and offender; and (2) if not, whether the sentence could be grossly disproportionate in a “reasonable hypothetical” scenario.<sup>31</sup> The first part, a particularized inquiry, asks whether the sentencing provision in question is grossly disproportionate as applied to the individual offender before the court. This requires that the court consider the actual circumstances of the offender before the court. The second part, considered in cases where the impugned provision is not grossly disproportionate in the circumstances of the offender before the court, then asks whether it is grossly disproportionate in a reasonable hypothetical scenario.<sup>32</sup>

## B. THE REASONABLE HYPOTHETICAL ACCUSED: CHALLENGING CRIMINAL OFFENCES

Section 7 of the *Charter* guarantees “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>33</sup> To establish an infringement of section 7, an impugned law must deprive someone of the right to life, liberty, or security of the person, and that deprivation must be inconsistent with a principle of fundamental justice. The test for whether the rights’ deprivation caused by a criminal offence accords with substantive principles of fundamental justice often involves an assessment of proportionality. Proportionality in this context generally involves comparing “the beneficial effect of a law on one interest or value with its harmful impact on another interest or value.”<sup>34</sup> Courts examine whether the offence has an effect that is overbroad or grossly disproportionate when compared to its objective.<sup>35</sup> It has long been

<sup>27</sup> *Nur*, *supra* note 1 at para 51, citing *Big M*, *supra* note 3 at 314.

<sup>28</sup> *Nur*, *ibid*. This, Chief Justice McLachlin reasoned, would violate the rule of law.

<sup>29</sup> *Ibid* at para 57.

<sup>30</sup> *Lloyd*, *supra* note 1.

<sup>31</sup> *R v Boudreault*, 2018 SCC 58 at para 49 [*Boudreault*], citing *Nur*, *supra* note 1 at para 77.

<sup>32</sup> The Supreme Court also confirmed this approach in *Ferguson*, *supra* note 12 at para 30: “Ordinarily, a s. 12 analysis for a mandatory minimum sentence requires both an analysis of the facts of the accused’s case and an analysis of reasonable hypothetical cases.” But see also *Boudreault*, *ibid* (where the Supreme Court suggested the term hypothetical was somewhat of a misnomer, where the hypothetical circumstances were those of an offender in another decided case); and *R v Morrison*, 2019 SCC 15 (where the Supreme Court preferred reasonably foreseeable application to reasonable hypothetical).

<sup>33</sup> *Charter*, *supra* note 2, s 7.

<sup>34</sup> Hamish Stewart, “*Bedford* and the Structure of Section 7” (2015) 60:3 McGill LJ 575 at 586.

<sup>35</sup> See e.g. *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 120 [*Bedford SCC*] (for the questions asked in regard to each).

accepted that any accused may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid.<sup>36</sup> Courts are permitted to inquire into the “nature of the law” including its range or scope.<sup>37</sup> In *Heywood*, Justice Cory pointed to the Supreme Court’s use of “reasonable hypotheses” in considering constitutionality under section 12 of the *Charter* in holding that the same process might properly be undertaken in evaluating constitutionality under section 7 of the *Charter*.<sup>38</sup> At issue was section 179(1)(b) of the *Criminal Code*, which made it an offence for persons who had been convicted of specific offences to be “found loitering in or near a school ground, playground, public park or bathing area.”<sup>39</sup> In *Heywood*, the Supreme Court found the limitation on liberty broader than necessary to achieve its objective of protecting children from becoming victims of sexual offences. They relied on a hypothetical scenario involving “a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his consumption of alcohol.”<sup>40</sup> They reasoned that “[e]ven if that man never committed another offence, and was not considered to be a danger to children, at the age of 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada.”<sup>41</sup> The hypothetical circumstances of this “most innocent possible offender” differed significantly from the circumstances of the actual offender, whose behaviour largely accorded with the very types of behaviours Parliament had targeted in enacting the offence. Previously convicted of sexual assault, the accused was found photographing young girls in a playground.

In *Appulonappa*, decided the same year that reasonable hypotheticals were given new life in *Nur* and *Lloyd*, the Supreme Court confirmed as a general principle that “[i]t is indeed established that a court may consider ‘reasonable hypotheticals’ to determine whether a law is consistent with the *Charter*.”<sup>42</sup> There, they considered whether section 117 of the *Immigration and Refugee Protection Act*, which made it an offence to “organize, induce, aid or abet” the coming into Canada of people in contravention of that *Act*, violated section 7 of the *Charter*.<sup>43</sup> The accused did not contend that the offence was unconstitutional as it applied to the allegations against them, which “were part of a for-profit smuggling operation.”<sup>44</sup> Instead, they argued the offence was unconstitutional because it “may lead to the conviction of humanitarian workers or family members assisting asylum-seekers for altruistic reasons,”<sup>45</sup> thereby, exceeding the legislative intent of the impugned legislative provision. In that case, the appellants advanced two hypothetical scenarios. The first scenario was the situation of a person assisting a close family member to flee to Canada. The appellants cited as examples a mother carrying her small child, or the father of a household taking his family dependants with him aboard a boat. The second scenario was the case of a person who, for humanitarian motives, helped people to flee from persecution, noting that “[h]umanitarian aid to fleeing people is not merely hypothetical; it is a past and current reality.”<sup>46</sup> In finding

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<sup>36</sup> *Big M*, *supra* note 3.

<sup>37</sup> *Nur*, *supra* note 1 at para 60 (referencing *Big M*, *ibid*).

<sup>38</sup> *Heywood*, *supra* note 4.

<sup>39</sup> *Ibid* at 772.

<sup>40</sup> *Ibid* at 799.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Appulonappa*, *supra* note 4 at para 28.

<sup>43</sup> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 117(1).

<sup>44</sup> *Appulonappa*, *supra* note 4 at para 10.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* at para 30.



the violation of the section 7 guarantee of liberty did not accord with the principle of fundamental justice against overbreadth, the Supreme Court made no reference to the two-part test set out in *Nur*. In allowing the applicants to argue the case based on reasonable hypotheticals, the Supreme Court simply pointed to *Nur* as authority for the proposition that a court may consider reasonable hypotheticals to determine whether a law is consistent with the *Charter*.<sup>47</sup> The lack of a clear test to be applied in section 7 cases argued based on reasonable hypotheticals, and in particular, the failure to explicitly require any consideration of the very circumstances of the accused and the case before the court, lie at the heart of the concerns highlighted in this article.

While the Supreme Court in *Appulonappa* did not lay out a test expressly requiring consideration of the actual circumstances of the case before them, there was some evidence on the record about those circumstances and how they diverged from the hypothetical scenarios. The Supreme Court's reasons provide some insight into how the actual circumstances might matter to determining the constitutionality of an offence (particularly in evaluating whether a section 7 violation may be demonstrably justified under section 1) and remedying any constitutional breaches in section 7 cases. The Supreme Court found the Crown had not satisfied its burden of providing a demonstrable justification under section 1, but they reasoned that the record before them demonstrated why it is not always necessarily the case that an overbroad law will fail the minimal impairment branch of the section 1 analysis.<sup>48</sup> The suggestion that a section 7 violation might be demonstrably justified can also be seen in the Supreme Court's decision in *Bedford*, discussed further below.<sup>49</sup> Without evidence of the actual circumstances of the case before the court, a meaningful assessment of proportionality under section 1 may be precluded. The Supreme Court in *Appulonappa* also tailored the remedy in that case by reading the impugned offence down as not applicable to persons who give humanitarian, mutual, or family assistance, while leaving the prohibition on human smuggling in place. The charges against the accused were remitted for trial on that basis.<sup>50</sup> Without evidence of the actual circumstances of the case before the court, courts may not be aware of why a tailored remedy might be appropriate.

### C. CIRCUMSTANCES OF THE ACTUAL OFFENDER OR ACCUSED

The circumstances of the actual offender or accused before the court are in evidence in cases where reasonable hypotheticals are used to evaluate the constitutionality of mandatory minimum penalties under section 12 of the *Charter*, but they are not usually in evidence where reasonable hypotheticals are used to evaluate the constitutionality of criminal offences under section 7 of the *Charter*. The actual circumstances of the case are always before courts in cases when they consider whether a mandatory minimum penalty violates section 12 of the *Charter* because of the clear two-part test identified above. The first part of that test evaluates whether the impugned provision constitutes cruel and unusual punishment in the

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<sup>47</sup> *Ibid* at para 28.

<sup>48</sup> No further explanation was offered by the Supreme Court. *Ibid* at para 81.

<sup>49</sup> *Bedford SCC*, *supra* note 35. The suggestion that a section 7 infringement may be demonstrably justified can be contrasted with the Supreme Court's reasoning in *Nur* that it is only in exceedingly rare cases that a section 12 infringement could be justified under section 1. *Nur*, *supra* note 1 at para 111. See also *Boudreault*, *supra* note 31 at para 97.

<sup>50</sup> *Appulonappa*, *supra* note 4 at para 86.

circumstances of the accused. When courts evaluate whether criminal offences violate section 7 of the *Charter* based on reasonable hypotheticals, however, they ordinarily do not know the actual circumstances of the accused, in part because there is no requirement that the two-part test applied in section 12 cases be applied in section 7 cases, and in part because challenges to criminal offences argued based on reasonable hypotheticals usually proceed before trial. While the Supreme Court reasoned in *Heywood* that they may properly undertake the “same process” as was used in *Smith* to determine the constitutionality of section 179(1)(b) of the *Criminal Code*, they did not strictly undertake that same process, instead evaluating whether the impugned offence violated section 7 of the *Charter* with regard only to hypothetical circumstances.<sup>51</sup> No rationale appears to have been offered for dispensing with the particularized inquiry reflected in the first part of the test promulgated in section 12 cases. The absence of any evidence about the actual circumstances of the accused and the experiences of victims and complainants in section 7 cases has the potential to impact the evaluation of constitutionality and the imposition of an appropriate remedy for any constitutional breaches, with potentially significant implications discussed in Part IV using examples drawn from the first two challenges to new commodification offences enacted in 2014.

### III. CONCERNS OVER THE USE OF REASONABLE HYPOTHETICALS IN CONSTITUTIONAL CASES

Scholarly attention to the use of reasonable hypotheticals in constitutional challenges in Canada has been largely supportive, in part because scholars in Canada are generally critical of mandatory minimum penalties, and reasonable hypotheticals have been a useful tool for challenging them. Kent Roach promoted stronger judicial intervention in the area of mandatory minimum sentences and expressed specific concerns over the Supreme Court’s deference to Parliament in the post-*Smith* era.<sup>52</sup> Lisa Dufraimont proposed a more generous approach be taken to reasonable hypothetical analysis following the narrowed approach taken by the Supreme Court in *Goltz* and *Morrisey*.<sup>53</sup> Debra Parkes suggested that courts should “subject the purported goals, justifications and impacts of mandatory minimum sentences to a more searching form of Charter scrutiny.”<sup>54</sup> That scrutiny is occurring: in the five years after the decisions in *Nur* and *Lloyd*, approximately 120 decisions adjudged mandatory minimum prison terms unconstitutional.<sup>55</sup>

However, judges and scholars have raised three categories of concern over the use of reasonable hypotheticals in evaluating the constitutionality of both mandatory minimum penalties and criminal offences. The first relates to the device itself and to allowing an offender or accused to benefit from hypothetical unconstitutional application of laws when the laws are constitutional in their own circumstances. The second relates to the evidence that is or ought to be before the court in these cases. The third relates to the appropriate remedy where a criminal offence, in particular, has been found unconstitutional in hypothetical

<sup>51</sup> *Heywood*, *supra* note 4 at 799.

<sup>52</sup> See generally Roach, “Searching for *Smith*,” *supra* note 19.

<sup>53</sup> Lisa Dufraimont, “*R. v. Ferguson* and the Search for a Coherent Approach to Mandatory Minimum Sentences Under Section 12” (2008) 42 SCLR (2d) 459.

<sup>54</sup> Parkes, *supra* note 19 at para 5. See also Janani Shanmuganathan, “*R. v. Nur*: A Positive Step but Not the Solution to the Problem of Mandatory Minimums in Canada” (2016) 76 SCLR (2d) 329.

<sup>55</sup> *Hills*, *supra* note 3 at para 146.

circumstances that are reasonably likely to occur. This section consolidates and explains each of these concerns. The next section highlights how these concerns are aggravated in section 7 cases, most notably through failure to consider the actual circumstances of the case.

### A. THE AIR OF UNREALITY

Throughout its history, the use of reasonable hypotheticals has been consistently rejected by some of the judges asked to adjudicate constitutionality based on circumstances other than those of the offender or accused in the case before them. When the reasonable hypothetical was first adopted by the Supreme Court in *Smith*, Justice McIntyre dissented. He pointed out that there was an “air of unreality” to the appeal before the Court because the question of cruel and unusual punishment did not appear to arise on the facts of the case before them. He reasoned that under section 12 of the *Charter*, “individuals should be confined to arguing that *their* punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party.”<sup>56</sup>

In concurring judgments in *Hills*, two justices of the Alberta Court of Appeal recently criticized strongly the continued use of reasonable hypotheticals in evaluating the constitutionality of mandatory minimum sentences as cruel and unusual punishment.<sup>57</sup> In upholding a four year mandatory minimum sentence, echoing Justice McIntyre’s dissent in *Smith*, Justice O’Ferrall reasoned: “There is an air of unreality about the fact that, although [the offender] was not subject to cruel and unusual punishment, the prospect of another offender in a hypothetical case being subject to it led to a declaration of legislative invalidity.”<sup>58</sup> He reasoned that because section 12 protects an individual’s right, only the situation before the courts can be taken into consideration: “But for the approved reasonable hypothetical analysis, the accused could care less about the constitutionality of the law. His complaint is with respect to his treatment or punishment.”<sup>59</sup> The Court of Appeal upheld the four-year mandatory minimum, rejecting the claim that it is “cruel and unusual” within the meaning of section 12.<sup>60</sup> The Supreme Court of Canada has agreed to hear the appeal.<sup>61</sup>

Another concern that exposes a distinct kind of “air of unreality” is a concern that even Supreme Court justices regularly disagree on whether the hypothetical on which they have been asked to adjudicate constitutionality is itself reasonable. In each of *Nur* and *Lloyd*, when reliance on reasonable hypotheticals was revitalized, three justices dissented. Writing for the dissent in *Nur*, Justice Moldaver found that the reasonable hypothetical approach did not justify striking down the mandatory minimum at issue in that case. He disagreed with the majority of the Court, reasoning that the hypothetical circumstances were speculative and strained the bounds of credulity; they were not “grounded in ... experience and common sense.”<sup>62</sup> He also reasoned that the Crown’s discretion in the case of a hybrid offence served as a “safety valve” such that the least serious cases would not be subject to the mandatory

<sup>56</sup> *Smith*, *supra* note 1 at 1083–84 [emphasis in original].

<sup>57</sup> *Hills*, *supra* note 3.

<sup>58</sup> *Ibid* at para 103.

<sup>59</sup> *Ibid* at para 109.

<sup>60</sup> *Ibid* at para 19.

<sup>61</sup> *Hills v R*, 2021 CanLII 10736 (SCC).

<sup>62</sup> *Nur*, *supra* note 1 at para 125, citing para 62.

minimum sentence.<sup>63</sup> The hypothetical in the case before the Court assumed the Crown would elect to proceed by indictment on the hybrid offence when “the fair, just, and appropriate election would be to proceed summarily.”<sup>64</sup> The majority of the Court rejected this argument.<sup>65</sup>

One year later, Justices Wagner, Gascon, and Brown dissented in *Lloyd*, similarly pointing to the unreasonableness of evaluating the constitutionality of a mandatory minimum sentence in hypothetical circumstances that do not firmly demonstrate that a conviction would ensue. Pointing to the decision in *Goltz*, they reasoned:

If the circumstances described in a hypothetical scenario might not result in a conviction for the offence at issue, then the hypothetical is not reasonable and should not be considered. . . . The analysis must focus on the effect of the sentence once a conviction has properly been secured, rather than the effect of the sentence where the innocence of the accused remains debatable.<sup>66</sup>

In section 12 cases, the hypothetical circumstances must demonstrate that the offence in relation to which the offender before the court is to be sentenced has been committed. There is a distinct “air of unreality” to deciding a mandatory minimum penalty constitutes cruel and unusual punishment contrary to section 12 of the *Charter* in hypothetical circumstances that might not give rise to an offence at all, thus never raising the question of sentence. There is a similar “air of unreality” to finding a criminal offence violates a right guaranteed by section 7 of the *Charter* when it is not clear the hypothetical circumstances are certain to satisfy the elements of that offence. This point is considered directly in Part IV with reference to two constitutional challenges to criminal prostitution laws.

## B. EPISTEMIC PRIVILEGING OF EVIDENCE

In evaluating constitutionality based on reasonable hypotheticals, courts take judicial notice of the effect of impugned laws in hypothetical circumstances that are reasonably likely to arise. The concept of proving a violation through reasonable hypotheticals is suggested to rely on common sense. In *Nur*, the Supreme Court expressly limited hypotheticals to scenarios that were “grounded in judicial experience and common sense.”<sup>67</sup> However, the idea of allowing judges to resort to common sense has itself been critiqued.<sup>68</sup> To respond in part to concerns about how judges apply common sense, judges adjudicating constitutional challenges to criminal offences based on reasonable hypotheticals increasingly rely on social science evidence. Social science evidence is a form of expert evidence that explains the impacts of law using quantitative or qualitative methods.<sup>69</sup> Benjamin Perryman suggests that

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<sup>63</sup> *Ibid* at paras 149–52.

<sup>64</sup> Shanmuganathan, *supra* note 54 at para 19.

<sup>65</sup> *Nur*, *supra* note 1 at para 86.

<sup>66</sup> *Lloyd*, *supra* note 1 at para 90 [footnotes omitted].

<sup>67</sup> *Nur*, *supra* note 1 at para 62.

<sup>68</sup> See e.g. Dana Phillips, *Epistemological Justice in Strategic Challenges To Legislation under Section 7 of the Canadian Charter of Rights And Freedoms* (PhD Dissertation, York University, 2021) [unpublished] (where the author critically assesses the treatment of expert evidence and social science research in *Bedford*); Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power, and Rhetorical Practice* (Montreal: McGill-Queen’s University Press, 2017) (where the author asks whose experiences and knowledge count as common).

<sup>69</sup> Benjamin Perryman, “Adducing Social Science Evidence in Constitutional Cases” (2018) 44:1 *Queen’s LJ* 121 at 126.

social science evidence is becoming the “new normal” in *Charter* litigation.<sup>70</sup> In promoting the use of legislative and social fact evidence in constitutional challenges, the Supreme Court has warned that “*Charter* decisions should not and must not be made in a factual vacuum.”<sup>71</sup> Thus, constitutional challenges invite applicants to extend the evidentiary record to include evidence of the impact of the impugned laws on third parties. Alan Young suggested that to overcome arguments against the use of reasonable hypotheticals, litigants should move beyond mere hypothetical arguments to include legislative fact evidence, to demonstrate “how the adverse impact of law on third parties is not just a potential outcome but is actually taking place on a recurring basis.”<sup>72</sup>

While the impact of impugned laws is increasingly established through expert testimony, the use of social and legislative fact evidence in constitutional cases has itself been subject to some scrutiny. Young called reliance on legislative fact evidence a mixed blessing.<sup>73</sup> He observed that while a comprehensive record of available research can enhance decision-making, legislative fact evidence is rarely subjected to crucial analysis of admissibility and probative value.<sup>74</sup> He also raised a concern about the volume of legislative fact evidence required in constitutional cases where questions of constitutionality hinge on the impact of impugned legislation on third parties not before the court.<sup>75</sup> Some suggest that trials resting only on social science evidence are trials the government is “bound to win because it has deeper pockets and thus a greater capacity to commission research and hire experts.”<sup>76</sup> However, as the challenges to the criminal prostitution laws considered below demonstrate, this is not always the case and can depend significantly on the nature and scope of the available body of social science evidence when a proceeding is heard. In some cases, the government may not be able to provide the court with the kind of expert evidence courts increasingly look to in constitutional cases;<sup>77</sup> not all facts relevant to the potential application of constitutional tests have been or can be established through qualitative or quantitative methods.<sup>78</sup> Hogg raised these specific concerns about cases where the validity of a law depends on the state of the evidentiary record (which can be costly to construct in individual cases) and the state of the evidence itself (which in many areas of social scientific consideration may be incomplete).<sup>79</sup> Whose experiences are and are not reflected in the evidence? How does or might social science evidence reinforce one narrative of a problem

<sup>70</sup> *Ibid* at 125.

<sup>71</sup> *MacKay v Manitoba*, [1989] 2 SCR 357 at 361.

<sup>72</sup> Alan N Young, “Proving a Violation: Rhetoric, Research and Remedy” (2014) 67 SCLR (2d) 617 at para 38.

<sup>73</sup> *Ibid* at para 47.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> Parkes, *supra* note 19 at para 42, referencing Kent Roach, “The Charter versus the Government’s Crime Agenda” (2012) 58 SCLR (2d) 211 at para 51.

<sup>77</sup> See e.g. Perryman, *supra* note 69 (where the author also notes that “[w]hile government may be the quintessential ‘repeat player’, this does not necessarily make them a have litigant. In theory, governments have unlimited economic resources, but in practice legal departments are significantly more constrained in what resources can be allocated to a particular case” at 143); Debra M Haak, “The Good Governance of Empirical Evidence About Prostitution, Sex Work, and Sex Trafficking in Constitutional Litigation” (2021) 46:2 Queen’s LJ 187 [Haak, “Good Governance”] (discussing the body of peer reviewed empirical scholarship published about prostitution, sex work, and sex trafficking in Canada between 2014 and 2019).

<sup>78</sup> See e.g. Haak, “Good Governance,” *ibid* at 219–23 (discussing the limitations of what can and cannot be known about prostitution, sex work, and sex trafficking through social scientific methods).

<sup>79</sup> Hogg & Wright, *supra* note 16 at 38-8 and 38-9. See especially Haak, “Good Governance,” *ibid* (where I argue that the existing body of empirical literature in Canada reflects issue bias that might not be apparent to courts presented with this evidence).

in an area of complex social and public policy-making? These are live questions in the case of the reasonable hypothetical sex worker, discussed below.

The use of reasonable hypotheticals in section 7 cases magnifies the potential role and relevance of social and legislative facts and minimizes the role and relevance of adjudicative facts, obscuring the circumstances of the accused, along with the experiences of any complainants or victims. Where legislative or social facts are facts about the cause and effect of social phenomena, adjudicative facts are facts about the actual circumstances of the very parties to the litigation.<sup>80</sup> But adjudicative facts can also demonstrate the cause and effect of social phenomena and may be particularly important in doing so where experiences similar to those of the victims or complainants are not clearly or meaningfully reflected or discussed in the available body of social scientific scholarship. Courts are now regularly relying on expert evidence establishing social and legislative facts in cases where constitutionality is decided based on reasonable hypotheticals and doing so without any reference to adjudicative facts about the actual circumstances of victims or complainants in the case before them, or any experiential evidence from individuals directly impacted by impugned laws. In his reasons in *Hills*, Justice O’Ferrall highlighted this concern in the context of that criminal proceeding, reasoning: “Even more bizarre is the prospect of expert witnesses, during the course of a criminal trial, giving evidence supporting or contradicting reasonable hypotheticals (or reasonably foreseeable applications of the law), all for the purpose of filling some perceived evidentiary gap.”<sup>81</sup> While the Supreme Court has reasoned that accused need not wait for there to be adjudicative fact evidence to proffer before challenging constitutionality,<sup>82</sup> surely where such evidence is available, specific to the accused before the court and the offence at issue about which proportionality is to be assessed, it should form part of the evidentiary record.<sup>83</sup>

## C. REMEDYING THE HYPOTHETICAL RIGHTS VIOLATION

Constitutional remedies are afforded under section 24(1) of the *Charter* and section 52(1) of the *Constitution Act, 1982*.<sup>84</sup> In the case of challenges to mandatory minimum penalties and criminal offences, section 52(1), known as the supremacy clause, applies. It provides as follows: “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>85</sup> A variety of remedial techniques have been used to carry out the mandate conferred by section 52(1).<sup>86</sup> In its recent decision in *Ontario (Attorney General) v. G.*, the Supreme Court provided guidance to lower courts on how to determine the appropriate remedy in constitutional challenges to legislation.<sup>87</sup> There the Supreme Court

<sup>80</sup> See generally Hogg & Wright, *ibid* at 60-2.

<sup>81</sup> *Hills*, *supra* note 3 at para 103.

<sup>82</sup> *Mills*, *supra* note 4 at paras 39-43.

<sup>83</sup> Unlike Justice O’Ferrall, I do not suggest that expert evidence not be admitted, but rather, that it not be admitted instead of adjudicative fact evidence which may be available to the court.

<sup>84</sup> *Charter*, *supra* note 2, s 24(1); *Constitution Act, 1982*, *supra* note 3, s 52(1).

<sup>85</sup> *Constitution Act, 1982*, *ibid*. For a discussion of what the author calls the “qualified supremacy clause” see Kent Roach, “Charter Remedies” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 673 at 675-84.

<sup>86</sup> See generally Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 6th ed (Toronto: Irwin Law, 2017) at 444-59.

<sup>87</sup> 2020 SCC 38.

affirmed these twin guiding principles: (1) respect for the legislature's role; and (2) respect for the purpose of the *Charter*.<sup>88</sup> Where a finding of unconstitutionality rests on a finding about the effects of legislation, courts can strike down legislation in its entirety or grant a tailored remedy of reading in, reading down, or severance.<sup>89</sup> Personal remedies such as constitutional exemptions have also been used to remedy constitutional violations, however, they are rare and generally used in cases where laws have an unconstitutional impact on the party before the court,<sup>90</sup> which is generally not the case where unconstitutionality is found based on reasonable hypotheticals.

In *R. v. Sharpe*, the Supreme Court identified concerns specific to the question of appropriate remedy when legislation is found to be constitutional in some cases and problematic in others.<sup>91</sup> In refusing to strike down the offence at issue in that case, Chief Justice McLachlin asked: "Why, one might well ask, should a law that is substantially constitutional be struck down simply because the accused can point to a hypothetical application that is far removed from his own case which might not be constitutional?"<sup>92</sup> Hogg simply asked why the Supreme Court should ever intervene to strike down laws for overshooting their purposes in circumstances where they are also clearly achieving their purposes.<sup>93</sup> Young, however, pointed to the need to develop a coherent and consistent approach to laws that are "substantially constitutional and peripherally problematic."<sup>94</sup> He pointed to reading down or reading in as more nuanced remedies.<sup>95</sup>

While the Supreme Court recently resolved the question of the remedies available where section 12 challenges to mandatory minimum penalties result in a finding of cruel and unusual punishment, a range of remedies remain available where section 7 challenges to substantive criminal laws result in a finding of overbreadth or gross disproportionality. In *Ferguson*, the Supreme Court reasoned that constitutional exemptions are not an appropriate remedy for unconstitutional mandatory minimum sentences, holding that if a law providing for a mandatory minimum sentence violates the *Charter*, it should be declared inconsistent with the *Charter* and hence of no force and effect under section 52.<sup>96</sup> However, in criminal proceedings where the constitutionality of criminal offences is challenged based on reasonable hypotheticals, courts must more directly deal with the "extent of the inconsistency" in remedying a constitutional defect.<sup>97</sup> Tailored remedies such as reading down or reading in may be more appropriate, yet not clearly called for in cases where the actual circumstances of the accused before the court are unknown. The possible implications of basing decisions about constitutionality on only hypothetical circumstances (and sometimes legislative fact evidence) without hearing about the actual circumstances of the case before the court are discussed further in the next section.

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<sup>88</sup> *Ibid* at para 102, citing *Schachter v Canada*, [1992] 2 SCR 679.

<sup>89</sup> *Ibid* at para 110.

<sup>90</sup> See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5.

<sup>91</sup> 2001 SCC 2 (where the Supreme Court held that the appropriate remedy in that case was to read into the law an exclusion of the problematic applications).

<sup>92</sup> *Ibid* at para 111.

<sup>93</sup> Hogg & Wright, *supra* note 16, vol 2 at 47-24.

<sup>94</sup> Young, *supra* note 72 at para 8.

<sup>95</sup> *Ibid* at para 61.

<sup>96</sup> See e.g. *Ferguson*, *supra* note 12.

<sup>97</sup> *Constitution Act, 1982*, *supra* note 3, s 52(1).

#### IV. THE REASONABLE HYPOTHETICAL SEX WORKER

The first two constitutional challenges to three of Canada's new commodification offences provide an opportunity to consider each of these three concerns — the air of unreality, the nature and scope of evidence, and the appropriate remedy — with a view to their implications for section 7 challenges to offences enacted in an area of highly contested social and public policy, where the available body of empirical evidence may be incomplete and reflect the experiences of only some of the stakeholders considered by Parliament in the policy-making process. In this section, I discuss the context in which Canada's new criminal prostitution offences were enacted and how the first two constitutional challenges to some of those laws aggravate the concerns raised in the previous section, with particular regard to the absence of evidence about the actual circumstances of the case, and the heightened role and relevance of hypothetical circumstances accompanied by expert testimony about social and legislative facts.

##### A. CONTESTED POLICY CONTEXT AND IMPUGNED LAWS

Policy related to the commercial exchange of sex is always made in a highly contested policy space where different stakeholders prioritize different and, at times, divergent, interests.<sup>98</sup> It is therefore relevant to ask whether and how the use of reasonable hypotheticals foregrounds and, potentially, obscures, the experiences of some of those stakeholders, particularly if the effect is to prioritize the interests of some stakeholders considered in the policy-making process over others in adjudicating constitutionality and remedying constitutional rights violations. In 2014, Parliament enacted the *Protection of Communities and Exploited Persons Act*,<sup>99</sup> a legislative scheme aimed at ending demand for prostitution in an effort to end the practice of prostitution itself. The criminal offences enacted with *PCEPA* specifically target activities with the potential to create or perpetuate a market for sexual services, a term interpreted by Canadian courts to require that the service be sexual in nature and for the purpose of sexually gratifying the person receiving it.<sup>100</sup> The centrepiece of the new legislative scheme is section 286.1 of the *Criminal Code*, which makes it an offence to obtain sexual services for consideration (the "Obtaining Offence").<sup>101</sup> The Obtaining Offences makes prostitution itself illegal for the first time in Canada.<sup>102</sup> Additional offences include: (1) obtaining a financial or material benefit from the exchange of sexual services for consideration (section 286.2, the "Material Benefit Offence");<sup>103</sup> (2) procuring

<sup>98</sup> See generally Hendrik Wagenaar, Helga Amesberger & Sietske Altink, *Designing Prostitution Policy: Intention and Reality in Regulating the Sex Trade* (Bristol: Policy Press, 2017).

<sup>99</sup> SC 2014, c 25 [*PCEPA*].

<sup>100</sup> Haak, "Good Governance" *supra* note 77; Canada, Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: Department of Justice, 2014), online: <[www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf](http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf)> [Department of Justice, *Technical Paper*].

<sup>101</sup> *Criminal Code*, *supra* note 8, s 286.1.

<sup>102</sup> See *House of Commons Debates*, 41-2, vol 147, No 101 (11 June 2014) (where, at second reading, the Minister of Justice said: "The purchasing offence targets the demand for prostitution, thereby making prostitution an illegal activity" at 1700); *Debates of the Senate*, 41-2, vol 149, No 86 (9 October 2014) (where the Honourable Denise Batters said: "the purchasing offence makes the prostitution transaction illegal" at 1430-40); Department of Justice, *Technical Paper*, *supra* note 100 (where the Department of Justice set out that the Purchasing Offence makes prostitution itself an illegal practice: "[E]very time prostitution takes place, regardless of venue, an offence is committed" at 5); *R v Alexander*, 2016 ONCJ 452 (where the Ontario Court of Justice held that section 286.1 of the *Criminal Code* rendered prostitution illegal in Canada at para 14); *Anwar*, *supra* note 7 (where the Ontario Court of Justice noted the activity is now illegal at para 122).

<sup>103</sup> *Criminal Code*, *supra* note 8, s 286.2.



someone to offer or provide sexual services for consideration (section 286.3, the “Procuring Offence”);<sup>104</sup> and (3) advertising an offer to provide sexual services for consideration (section 286.4, the “Advertising Offence”).<sup>105</sup> These offences are situated together in the *Criminal Code* under the heading “Commodification of Sexual Activity” (the “Commodification Offences”).

To fully understand the range of interests at issue in prostitution law and policy-making in Canada, and consider whether and how reasonable hypotheticals may foreground some of those interests and obscure others, the conceptual distinction between prostitution and sex work matters.<sup>106</sup> Parliament focused this new policy approach on the activity of prostitution and on the adverse impacts of exchanging sexual services for consideration on a range of stakeholders, particularly individuals who do or might engage in prostitution (*including* in a context of human trafficking), the communities in which prostitution takes place, and women and girls in those communities (particularly, Indigenous women and girls). In the preamble to *PCEPA*, Parliament pointed to concerns over the risk of violence associated with prostitution and the exploitation that occurs in prostitution.<sup>107</sup> Unlike previous criminal laws that aimed to reduce the nuisance caused by prostitution,<sup>108</sup> Canada’s current policy approach aims to reduce or eliminate the market for sexual services, in an effort to eradicate prostitution itself.<sup>109</sup>

Constitutional challenges to Commodification Offences are usually based on a claim that prostitution-specific criminal laws violate the rights of sex workers who engage in prostitution.<sup>110</sup> The term sex work is not synonymous with the word prostitution. While it has not been consistently defined for legal purposes in Canada, the term sex work is usually used in two ways that make it conceptually distinct from prostitution. First, it is often used to refer to a wide range of activities in the sex industry. Prostitution, or the direct exchange of sexual services for consideration, is one such activity. Thus, sex workers engaging in prostitution are a subset of all sex workers. Second, of relevance to the question of whose interests are foregrounded in cases argued based on reasonable hypotheticals, the term sex work is usually used to refer only to those sellers or providers who engage in prostitution by choice or on consent, in the absence of third party coercion or trafficking. Thus, constitutional challenges to criminal prostitution laws are founded on claims about the impact of those laws on some of the people who engage in prostitution – most notably, those who do so in the absence of exploitation. In cases argued based on reasonable hypotheticals, hypothetical scenarios centre individuals, usually women, who wish to engage in prostitution and employ measures that have the potential to increase their safety or reduce their risks while doing so, arguing those

<sup>104</sup> *Ibid.*, s 286.3.

<sup>105</sup> *Ibid.*, s 286.4. Two further prostitution related offences specific to communicating for the purpose of prostitution remain in a different part of the *Criminal Code* (sections 213(1) and 213(1.1)).

<sup>106</sup> See generally Debra Haak, “Re(de)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking” (2019) 40 Windsor Rev Legal Soc Issues 67.

<sup>107</sup> *PCEPA*, *supra* note 99, Preamble.

<sup>108</sup> And in the case of the Living on the Avals Offence, the exploitation associated with prostitution.

<sup>109</sup> See generally Debra M Haak, “The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada’s New Prostitution Laws” (2017) 50:3 UBC L Rev 657 [Haak, “Constitutional Validity”]; Department of Justice, *Technical Paper*, *supra* note 100 at 3 (where the Department of Justice said that *PCEPA* was informed by the evidence and decision in *Bedford*; public consultations held in February and March of 2014; jurisprudence; and domestic and international research and government reports).

<sup>110</sup> See e.g. *Boodhoo*, *supra* note 7; *Anwar*, *supra* note 7; *R v NS*, 2021 ONSC 1628 [NS]; *R v MacDonald*, 2021 ONSC 4423 [MacDonald].

measures are precluded by impugned offences. These hypothetical scenarios are situated outside of exploitive or coercive contexts and, as I discuss further below, they are silent on the question of whether violence is in fact avoided. Sex workers were one of the stakeholder groups considered by Parliament in enacting the Commodification Offences, particularly in enacting the immunities and exemptions described in greater detail below, but they were not the only stakeholders considered by the government in choosing the current policy approach to prostitution or by Parliament in enacting the criminal laws associated with that policy choice. As discussed in more detail in the next section, the question of whose experiences are and are not reflected in the hypotheticals and in the available body of empirical scholarship forming the foundation for expert testimony in constitutional cases where no adjudicative fact evidence is heard has the potential to bias decisions about constitutionality toward a finding favouring the interests of some stakeholders over others.

## B. CRITICALLY CONSIDERING THE USE OF REASONABLE HYPOTHETICALS

The first two constitutional challenges to some of the Commodification Offences enacted by *PCEPA* were argued based on reasonable hypotheticals constructed to demonstrate the adverse impact of impugned offences on female sex workers who wished to voluntarily sell sexual services employing measures the applicants claimed were precluded by the impugned offences. Both challenges were brought in cases where the applicant offenders and accused did not themselves exchange sexual services for consideration. In *Boodhoo*, male offenders who had already been found guilty of the Material Benefit Offence, the Procuring Offence, and the Advertising Offence brought a motion arguing that the offences deprived individuals of the section 7 right to liberty (because they carried the potential of up to 14 years in jail) and deprived those engaged in the sale of sexual services of the right to security of the person.<sup>111</sup> In *Anwar*, one male and one female accused argued before trial that those offences deprived “escorts, prostitutes, and other sex workers”<sup>112</sup> of the right to security of the person guaranteed by section 7 of the *Charter*.<sup>113</sup> In *Boodhoo*, the Ontario Superior Court of Justice upheld the constitutionality of the Material Benefit Offence, the Procuring Offence, and the Advertising Offence, reasoning that the impugned laws were not overbroad or grossly disproportionate to their aims.<sup>114</sup> Two years after the decision in *Boodhoo*, the Ontario Court of Justice in *Anwar* found the Material Benefit Offence, the Procuring Offence, and the Advertising Offence unconstitutional.<sup>115</sup>

These cases aggravate concerns raised by judges and scholars about relying on reasonable hypotheticals and social scientific evidence in adjudicating constitutionality and remedying constitutional breaches. In both *Boodhoo* and *Anwar*, the question of whether the impugned criminal offences violated section 7 of the *Charter* was decided without any reference to the actual circumstances of the offenders or accused before the Court, or any direct evidence from anyone who had themselves exchanged sexual services for consideration, including those impacted by the actions of the offenders and accused before the Court. Instead, both

<sup>111</sup> *Boodhoo*, *ibid* (Factum of the Applicants at para 17).

<sup>112</sup> *Anwar*, *supra* note 7 (Notice of Constitutional Questions at 2).

<sup>113</sup> *Ibid* (Notice of Application at 2). The accused did not plead a violation of the right to liberty.

<sup>114</sup> *Boodhoo*, *supra* note 7. They also held that the Advertising Offence was not arbitrary.

<sup>115</sup> *Anwar*, *supra* note 7 (Justice McKay found that these violations were not demonstrably justified under section 1 of the *Charter*).

courts looked to hypothetical circumstances where there were no victims, the hypothetical sex workers were not exploited, and the hypotheticals were silent about whether they experienced any harm in prostitution. In *Anwar*, where the Court found the offences unconstitutional, the Court also looked to expert testimony about the adverse effects of prostitution-specific criminal laws on adult sex workers. The Court's reasons in *Boodhoo* and *Anwar* and the divergent decisions on constitutionality aggravate concerns about: (1) the appropriateness of evaluating constitutionality with reference only to hypothetical circumstances rather than also to the actual circumstances of the accused before the court; (2) the impact of legislative or social, rather than adjudicative or experiential, fact evidence; and (3) in the *Anwar* case, the potential of an appropriate remedy in the case of laws that may be substantially constitutional, but peripherally problematic. Each of these concerns is discussed in turn.

## 1. AIR OF UNREALITY

The concern over the “air of unreality” in relying on reasonable hypotheticals is primarily a concern that the rights violation at issue in hypothetical circumstances does not arise on the circumstances of the very case before the court. It is difficult to know whether there is an “air of unreality” to most section 7 cases argued based on reasonable hypotheticals because the circumstances of the case are unknown. Unlike cases where reasonable hypotheticals are used to challenge mandatory minimum penalties, where the two-part test mandates considering the actual circumstances of the case, and where evidence about those circumstances is therefore necessarily heard by the court, when reasonable hypotheticals are used to challenge criminal offences, courts expect the constitutional challenge to take place before a trial and do not require any evidence about the actual circumstances of the charge(s) before them. The judge in *Boodhoo* explained the intention of proceeding this way: “In my view, motions challenging the constitutionality of offence sections of the *Criminal Code*, based upon ‘reasonable hypotheticals’, should be brought by way of pre-trial motion, and not following conviction. Unlike motions challenging the constitutionality of mandatory minimums, such motions, if successful, would avoid a trial.”<sup>116</sup>

The constitutional challenge in *Boodhoo*, however, was allowed to proceed following a trial, and the actual circumstances of the case demonstrate that the impugned laws captured the very kinds of behaviours Parliament was concerned about in enacting the offences, notably, the risk of violence associated with prostitution and the exploitation that occurs in it. While the decision about constitutionality does not refer to adjudicative facts (because the constitutional challenge was argued based on reasonable hypotheticals), evidence about the actual circumstances is referenced in two related decisions and in the parties' factums.<sup>117</sup> Having services identified by the Supreme Court in *Bedford* as having the potential to reduce risks while engaging in prostitution available to her did not reduce the victim's exposure to violence in that case.<sup>118</sup> In fact, the offenders were a direct cause of some of the violence she experienced and they failed to safeguard her from the violence she experienced at the hands of a sex buyer. One of the offenders, whom the 16-year-old victim had met the previous day

<sup>116</sup> *Boodhoo*, *supra* note 7 at para 2, n 1.

<sup>117</sup> *R v Boodhoo*, 2018 ONSC 7207 [*Boodhoo II*]; *R v Chisholm*, 2018 ONSC 7802 [*Chisholm*].

<sup>118</sup> I use the word “victim” here because that is how she is referred to in the concurring decisions where the facts appear.

on a bus, offered to rent her a hotel room after she had been kicked out of both her mother's house and her boyfriend's house. That offender and the victim agreed that she would begin escorting and would receive 60 percent of the profits. She had not previously been involved in escorting. Thereafter, for a period of about six weeks, she was required to provide sexual services to countless men, compelled to continue providing sexual services when she did not want to, and expected to take cocaine "as part of her sex work."<sup>119</sup> The offenders took all of the profits and she received none. The offenders together determined when she worked, where she worked, when she ate, and when she slept. She said that she was physically assaulted on a daily basis and punished if she did not sell sexual services. She was also assaulted by a sex buyer during the short time she was involved with the offenders: "She was driven to an isolated area, dragged out through the driver's side door by her hair, assaulted over the hood of the car, and abandoned after being robbed and having her cell phone smashed."<sup>120</sup>

By contrast, the hypotheticals upon which the Court was asked to adjudicate constitutionality in *Boodhoo* differed substantially from the actual circumstances of the victim in that case and, importantly, obscured any potential experience of violence or exploitation. The hypotheticals pointed to measures with a potential to improve safety, measures ostensibly undertaken for the actual victim by the offenders, which the offenders argued were precluded by the impugned offences.<sup>121</sup> In *Bedford*, the application judge found that prostitutes in Canada face a high-risk of physical violence.<sup>122</sup> She found that the violence experienced by those engaged in prostitution is primarily inflicted by male clients against female prostitutes,<sup>123</sup> but that it "comes from clients, pimps, drug pushers, members of the public, coworkers and even police officers,"<sup>124</sup> and that there is always potential for danger from any client.<sup>125</sup> In *Bedford*, the application judge found that there were measures with the potential to reduce the risk of violence and that the laws then in place prevented prostitutes from taking those measures while engaging in what was at the time a legal activity.<sup>126</sup> These measures specifically included: (1) working indoors (then prohibited by the Bawdy-House Offence); (2) paying security staff such as an assistant or bodyguard (then prohibited by the Living on the Avails Offence); and (3) early screening of customers encountered on the street to assess the risk of violence (then prohibited by the Communicating Offence).<sup>127</sup> In enacting the Commodification Offences, however, Parliament took the view that prostitution could not be made safe enough. The Minister of Justice said at the Second Reading of Bill C-36: "[W]e do not believe that other approaches, such as decriminalization or legalization, could make prostitution a safe activity."<sup>128</sup> *PCEPA* was accompanied by a lengthy preamble in which Parliament expressed "grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it."<sup>129</sup> The question of

<sup>119</sup> *Chisholm*, *supra* note 117 at para 15. See also *Boodhoo* II, *supra* note 117 at paras 5–9.

<sup>120</sup> *Chisholm*, *ibid* at para 16.

<sup>121</sup> *Boodhoo*, *supra* note 7 (Factum of the Applicants).

<sup>122</sup> *Bedford v Canada (Attorney General)*, 2010 ONSC 4264 at para 293 [*Bedford* ONSC].

<sup>123</sup> *Ibid* at para 121.

<sup>124</sup> *Ibid* at para 298.

<sup>125</sup> *Ibid* at para 122.

<sup>126</sup> *Ibid* at paras 361–62.

<sup>127</sup> The application judge found that two factors appeared to affect the level of violence experienced by prostitutes, which she described as "location or venue [of work] and individual working conditions." *Ibid* at para 360.

<sup>128</sup> *House of Commons Debates*, *supra* note 102 at 1700.

<sup>129</sup> *PCEPA*, *supra* note 99, Preamble.

whether and to what extent violence can be eliminated in prostitution remains highly contested.

As discussed above, related to the concern over the “air of unreality” is a concern over the reasonableness of the hypothetical. It is not possible to know whether the rights’ violation at issue in *Anwar* arose on the actual circumstances of that case (or whether the actual circumstances of that case may have demonstrated that the impugned laws captured the very kinds of behaviours Parliament was concerned about in enacting the offences) because the constitutional challenge was heard before a trial. However, one of the hypotheticals in *Anwar* does raise a concern over the reasonableness of the hypothetical circumstances on which the Court was asked to adjudicate constitutionality, particularly when the Court was prevented from hearing any direct evidence about whether those circumstances occurred in the case before them. In *Anwar*, the Court considered two hypotheticals, one of which mirrored the known circumstances of the accused, but with the added hypothetical circumstance that the incidence of violence and assaultive behaviour by clients was “effectively zero.”<sup>130</sup> Whether this hypothetical is one that is reasonably likely to occur was not directly considered by the application judge. In assessing the reasonableness of whether the incidence of violence and assaultive behaviour by clients would be reduced to “effectively zero,” the Court should have considered whether this is an imaginable circumstance “which could commonly arise with a degree of generality appropriate to the [exchange of sexual services for consideration].”<sup>131</sup> No adjudicative fact evidence was proffered against which to test the accuracy of the conclusion that violence and assaultive behaviours by clients was effectively zero in the actual circumstances of the case itself, which formed the basis of the hypothetical. This hypothetical was also silent about whether violence and assaultive behaviour were experienced at the hands of any of the others found by the application judge in *Bedford* to inflict violence against prostitutes. The hypothetical offered no information about potential exploitation.

While there was no adjudicative fact evidence before the Court about the circumstances of the women and girls employed by the accused to provide sexual services for consideration, nor any evidence from anyone who had themselves ever engaged in providing sexual services for consideration, an Agreed Statement of Facts signed by the parties included some information taken from police interviews with six women employed by the accused.<sup>132</sup> The information contained in the Agreed Statement of Facts provided some evidence about the experience of exploitation in prostitution, identified as a concern by Parliament in enacting the impugned offences. The advertisements to which the women responded did not identify that the job involved prostitution; they learned that upon contacting the accused. All of the women said that they took the job out of financial need. Many described the constrained nature of their choice to take the job. One specifically identified that because she needed the money, she felt she had no choice but to take the job.<sup>133</sup> Two of the women specifically told police they had never worked in prostitution before, and it was not something that appealed

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<sup>130</sup> *Anwar*, *supra* note 7 at paras 142–51.

<sup>131</sup> *Morrisey*, *supra* note 1 at para 50.

<sup>132</sup> The Supreme Court has identified that there are inherent problems where evidence is adduced by way of agreed facts, particularly related to accuracy of evidence. See e.g. *Morrisey*, *ibid* at paras 32, 50. Agreed Statements of Fact are also not complete recitations of the evidence individuals referenced in them might give if afforded that opportunity.

<sup>133</sup> *Anwar*, *supra* note 7 (Agreed Statement of Facts at para 90).

to them.<sup>134</sup> Another had never had sex before, and said that she cried the first night “but she needed the money and wanted to take the job.”<sup>135</sup> Another described her experience with her first client as being awkward, “hating the situation in which she found herself.”<sup>136</sup> Yet another described her first experience as “being scared, awkward, shy and uncomfortable and just wanting it to be over with.”<sup>137</sup> Most described feeling they had no choice but to continue in the job once they had begun. One said she felt she had made a mistake taking the job as an escort and wanted out.<sup>138</sup> Another expressed relief at finally being able to get out following the police execution of the search warrant.<sup>139</sup> Several of the women also expressed concern over the male accused becoming upset with them for not making enough money; one described him as being “very strict,” as getting “pissed off,” and as having told her things could be “really worse.”<sup>140</sup> Another said she was “so overwhelmed with stress that when she was not at work she felt the need to be there just so that she did not ‘piss them off.’”<sup>141</sup> After her first week of work, one woman said she felt depressed, alone, and had no one to talk to.<sup>142</sup>

Finally, the concern over deciding constitutionality based on hypothetical circumstances that may not lead to a charge being laid or satisfy the elements of an impugned offence is particularly important in constitutional challenges to Commodification Offences alleging the violation of sex workers’ rights. Canada’s current criminal legislative framework applicable to adult prostitution was constructed to respond directly to the 2013 decision of the Supreme Court in *Bedford*, but in the context of a new overall policy approach that foregrounds the harms associated with or accompanying prostitution itself.<sup>143</sup> Alongside adopting a new overall policy approach to prostitution, in proposing *PCEPA*, the government tried to respond directly to findings made in *Bedford* about means whereby those who continued to engage in prostitution following the change in legislative approach could potentially reduce their risk of experiencing violence. The application judge in *Bedford* had found that the risk of violence could be reduced, but not necessarily eliminated, if prostitutes were able to take the precautions outlined above.<sup>144</sup> In an effort to ensure that the new laws did not prevent prostitutes from taking those specific measures while engaging in the now unlawful commercial activity, the new legislative scheme includes immunities and exemptions. In particular, Parliament: (1) immunized those engaged in exchanging their own sexual services from prosecution so that they no longer needed to choose between their liberty interest and their security interest to employ the measures identified in *Bedford*;<sup>145</sup> (2) excluded certain non-exploitive relationships from the Material Benefit Offence, so that those who continue to exchange their own sexual services are not prevented from hiring bodyguards and others to enhance their safety;<sup>146</sup> and (3) limited the locations in which communicating would

<sup>134</sup> It appears from the Agreed Statement of Facts that none of the women had ever worked as an escort before, however, that is only directly stated about two of them.

<sup>135</sup> *Anwar*, *supra* note 7 (Agreed Statement of Facts at para 89).

<sup>136</sup> *Ibid* at para 78.

<sup>137</sup> *Ibid* at para 107.

<sup>138</sup> *Ibid* at para 68.

<sup>139</sup> *Ibid* at para 113.

<sup>140</sup> *Ibid* at para 97.

<sup>141</sup> *Ibid* at para 83.

<sup>142</sup> *Ibid* at para 107.

<sup>143</sup> *House of Commons Debates*, *supra* note 102 at 1655–1700. This is reflected in the full name of Bill C-36: “An Act to amend the *Criminal Code* in response to the Supreme Court of Canada decision in *Attorney General of Canada v. Bedford* and to make consequential amendments to other Acts.”

<sup>144</sup> *Bedford* ONSC, *supra* note 122 at para 300.

<sup>145</sup> *Criminal Code*, *supra* note 8, s 286.5.

<sup>146</sup> *Ibid*, s 286.2(4).

constitute an offence, so that those offering or providing their own sexual services were not prevented from communicating in all public spaces.<sup>147</sup> It is therefore important for courts evaluating the constitutionality of any of the new offences to ensure that the immunities and exemptions do not apply in the hypothetical circumstances; if they do, then the circumstances would not give rise to an offence.

The question of whether a criminal offence in fact captures the behaviours set out in the hypothetical circumstances on which constitutionality is evaluated (and thus in fact violates the right to liberty or security of the person) is clearly an important one, directly related to the potential air of unreality in deciding section 7 cases based on reasonable hypotheticals, and one of particular relevance in the case of the reasonable hypothetical sex worker. As Chief Justice McLachlin reasoned in *Nur*:

Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact?<sup>148</sup>

The Court in *Anwar* reasoned that because the immunities and exemptions would be difficult to navigate and because some activities would, as a result, be fraught with the *risk* of criminal liability, the Material Benefit Offence deprived “sex workers and other individuals within the expected reach of the provisions of the right to liberty.”<sup>149</sup> There is an “air of unreality” to evaluating constitutionality and basing a finding of a violation of the right to liberty on only a hypothetical *risk* of criminal liability, in the face of immunities and exemptions drafted with a specific eye to eliminating that risk. Add to this the distinct “air of unreality” when cases not involving exploitation or harm are unlikely to ever lead to charges because of written enforcement guidelines that provide a further “safety valve” similar to that identified by Justice Moldaver in relation to the exercise of Crown discretion in his dissenting reasons in *Nur*.<sup>150</sup>

## 2. ROLE AND RELEVANCE OF EXPERT TESTIMONY, LEGISLATIVE FACT EVIDENCE, AND CIRCUMSTANCES OF THE CASE

The increasing reliance on expert testimony to establish social and legislative facts in constitutional challenges argued based on reasonable hypotheticals present two concerns of particular importance in the context of prostitution policy and criminal laws enacted as part of it. The first relates to the heightened role of a certain kind of social and legislative fact evidence — social science research and associated expert opinion — over adjudicative fact evidence, and in some cases, over firsthand experiential testimony, even when the latter is or could be available to the court and affords insight into the actual reach of impugned laws. This has the potential to obscure the experiences of some populations in the direct contemplation of Parliament in enacting impugned laws in this contested policy space. The

<sup>147</sup> *Ibid*, s 213(1.1).

<sup>148</sup> *Nur*, *supra* note 1 at para 61.

<sup>149</sup> *Anwar*, *supra* note 7 at paras 204–206.

<sup>150</sup> See e.g. British Columbia Association of Chiefs of Police Missing Women Commission of Inquiry Advisory Committee, “Sex Work Enforcement Guidelines & Principles” (November 2017); British Columbia, Vancouver Police Department, “Sex Work Enforcement Guidelines” (Vancouver: Vancouver Police Department, January 2013).

second relates to limitations on the nature and scope of available social scientific research. Whose experiences are and are not reflected in the type of evidence provided to judges tasked with deciding constitutionality? How does or might social science evidence reinforce one narrative of a problem in an area of complex social and public policy-making, thereby biasing decisions in favour of the interests or rights of some stakeholders over others? Combined with the concerns about the use of hypotheticals discussed in the previous section, the exclusive reliance on expert testimony and legislative fact evidence has concerning implications for the application of the proportionality test under section 1 of the *Charter* and for the application of an appropriately tailored remedy where a constitutional breach is found.<sup>151</sup>

Expert testimony based on social science research directly impacted the finding of unconstitutionality in *Anwar*. In *Boodhoo*, the Court upheld the constitutionality of the impugned offences where constitutionality was considered based on reasonable hypotheticals but without expert evidence,<sup>152</sup> while in *Anwar*, the Court found the impugned offences unconstitutional, based on reasonable hypotheticals accompanied by expert evidence. There, the accused provided the Court with evidence from two expert witnesses qualified to provide evidence within the scope of “social science research and theory on the structure and operation of the sex industry in Canada and other jurisdictions, and in the legal regime surrounding the sex industry in Canada and other jurisdictions.”<sup>153</sup> In relying exclusively on the evidence of these experts, Justice McKay reasoned:

Mr. Atchison and Ms. Stirling are both quantitative researchers. I find that they take an evidence-based approach to the study of prostitution. The conclusions which they have reached based upon their own research and the research of others leads them to take a position in the debate over prostitution. However, it is not a position which is based on any bias. Both witnesses contributed significant evidence-based opinions to the factual underpinnings of this case.<sup>154</sup>

By contrast, the Court accorded no weight to the evidence of the Crown’s two experts, qualified to give evidence on “[t]he study of the overrepresentation of Indigenous women and girls in prostitution,”<sup>155</sup> and “[t]he theory, research and policy on prostitution as a practice in gender inequality,”<sup>156</sup> reasoning that their evidence was not impartial and objective. That finding was based in part on the Crown experts’ unwillingness to separate sex work from human trafficking. However, Parliament specifically chose not to separate sex work from human trafficking in enacting *PCEPA*. Whether such a distinction can or should be drawn in prostitution policy-making is contested. Because the Court in *Anwar* found all three offences unconstitutional, the charges against the accused were withdrawn and, as mentioned above, no evidence about the actual circumstances of the case, including about the experiences of victims or complainants, was ever heard. However, in that case, the

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<sup>151</sup> See Witten, *supra* note 13 at 100 (where the author argues the reasonable hypothetical is generally a poor tool for assessing proportionality).

<sup>152</sup> While not referenced in the decision about constitutionality, it is also possible that the actual circumstances of the case, and the exploitation and violence experienced by the victim, impacted the Court’s decision.

<sup>153</sup> *Anwar*, *supra* note 7 at paras 24, 40 (Chris Atchison and Andrea Sterling).

<sup>154</sup> *Ibid* at para 78.

<sup>155</sup> *Ibid* at para 52 (Cherry Smiley).

<sup>156</sup> *Ibid* at para 62 (Dr. Maddy Coy).



charges had been laid following a seven-month human trafficking investigation.<sup>157</sup> The accused were charged with the impugned offences as well as trafficking offences. It is unclear from the record why the trafficking charges never proceeded to trial.

The use of reasonable hypotheticals in section 7 challenges to criminal offences allows the accused to avoid contending with the actual circumstances of the case, and precludes courts from knowing about the experiences of victims or complainants when adjudicating constitutionality. This is particularly concerning in challenges to prostitution specific criminal laws, where there is scant social science evidence available about the experience of exploitation occurring in prostitution. As noted above, the Supreme Court said that constitutional issues should not be argued in an “evidentiary vacuum.” To fill the perceived evidentiary vacuum, courts increasingly rely on social science evidence. However, relying on social science evidence through expert testimony and ignoring adjudicative fact evidence about the actual circumstances of those impacted by the behaviour of accused charged under criminal laws being evaluated by the courts creates a different kind of evidentiary vacuum. That evidentiary vacuum might be filled in a straightforward way – by ensuring adjudicative fact evidence is also heard and considered by courts, including through the application of the two-part test applied in section 12 cases.

If the only evidence upon which courts base their findings of (un)constitutionality in section 7 cases argued on reasonable hypotheticals is expert evidence about the impacts of impugned laws, then courts should be made aware of limitations on the body of empirical scholarship, including related to what is or can be known through social scientific research methods. One potential limitation on what empirical scholarship establishes relates to the question of issue bias. Policy studies scholars acknowledge that policy-making is political and involves disagreement over values and competition between and among stakeholders prioritizing different and, at times, divergent interests.<sup>158</sup> Issue bias can arise in the policy-making process when evidence has the potential to obscure the experiences of some stakeholders and bias decisions towards particular outcomes.<sup>159</sup> Issue bias is not a question of whether evidence is scientifically accurate, that is, whether it is scientifically valid and fairly used, but rather whether the existing body of evidence adequately reflects the populations and concerns relevant to policy-makers.<sup>160</sup> Issue bias in a body of empirical evidence is particularly concerning in constitutional litigation, where courts may not be (made) aware of what has and has not been considered, or can and cannot be known through

<sup>157</sup> Adam Miller, “Police Charge 2 in 7-Month Human Trafficking Investigation, Shut Down Escort Website,” *Global News* (10 November 2015), online: <globalnews.ca/news/2330498/police-charge-2-in-7-month-human-trafficking-investigation-shut-down-escort-website/>; “Two Charged in Human Trafficking Case,” *The Hamilton Spectator* (10 November 2015), online: <www.thespec.com/news/canada/2015/11/10/in-brief-human-trafficking-charges-laid-wounded-soldier-receives-honorary-degree.html>.

<sup>158</sup> See e.g. Justin Parkhurst, *The Politics of Evidence: From Evidence-Based Policy to the Good Governance of Evidence* (Abingdon: Routledge, 2017) at 43, 65 [Parkhurst, *Politics*]. See also Justin O Parkhurst & Sudeepa Abeysinghe, “What Constitutes ‘Good’ Evidence for Public Health and Social Policy-Making? From Hierarchies to Appropriateness” (2016) 30:5–6 *Social Epistemology* 665 (where the authors discuss the hierarchy inherent when some methodological approaches are placed as pre-eminent, including through claims of objectivity); and Aziza Ahmed, “Medical Evidence and Expertise in Abortion Jurisprudence” (2015) 41:1 *Am J L & Med* 85 (where the author cautions against overestimating the objectivity of scientific and medical expertise and under-theorizing the role of politics in judicial decision-making).

<sup>159</sup> Parkhurst, *Politics*, *ibid* at 2, 71.

<sup>160</sup> *Ibid* at 109. See also Haak, “Good Governance,” *supra* note 77 at 41–42 (for a discussion of how to contend with issue bias in constitutional cases).

social scientific methods, and base decisions solely on expert evidence drawing on what has been considered. In the case of constitutional challenges to the Commodification Offences, I argue elsewhere that the existing body of peer reviewed empirical scholarship about prostitution, sex work, and sex trafficking in Canada since the Commodification Offences were enacted reflects issue bias:

It is conducted entirely from within one theoretical and normative framing of a complex and contested area of public policy.... [It focuses] almost exclusively on the experiences and concerns of one relevant population—sex workers—who represent a subset of all those engaging in prostitution and only one population in the contemplation of Parliament in deciding to enact the current prostitution policy. It notably excludes other relevant populations, including those who have been trafficked, those who have exited prostitution, women and girls in Canada who may be impacted by prostitution and by the policy approach taken to it, and the communities in which prostitution takes place. It largely ignores or obscures the concerns of anyone other than active sex workers who may be impacted by prostitution, prostitution policy choices, prostitution-specific laws, or the absence of such laws.<sup>161</sup>

I suggest some potential reasons for this issue bias. These include: (1) difficulty in gathering data about prostitution, sex work, and, particularly, sex trafficking; (2) the lack of consistent conceptual clarity between and among the terms prostitution, sex work, and sex trafficking; and (3) an increased overall focus on the idea of harm reduction as a discrete policy goal, including in sex work, where it stands in opposition to the legislative goal of reducing or eliminating prostitution itself.<sup>162</sup> Another significant reason for this issue bias in scholarship in Canada may be the openly political agenda of researchers working in this field. In a recent article, Cecilia Benoit, a leading scholar researching about and with sex workers in Canada, discussed how “successful knowledge translation strategies ... aim to ensure the research questions we ask, and the empirical processes we engage in, are advantageous to those we aim to benefit.”<sup>163</sup>

Concerns raised about the reliance on legislative and social facts and the exclusion of adjudicative facts and experiential evidence in section 7 cases argued on reasonable hypotheticals point towards the need for a renewed focus on the section 1 proportionality analysis. Following the Supreme Court’s decision in *Bedford*, the approach to section 7 has become a highly individualistic approach.<sup>164</sup> In *Bedford*, the Supreme Court held: “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

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<sup>161</sup> Haak, “Good Governance,” *ibid* at 219–20 [footnotes omitted] (where the author outlines the findings of a modified scoping review of peer reviewed empirical scholarship about prostitution, sex work, and sex trafficking between when *PCEPA* was enacted and 2019).

<sup>162</sup> Unlike harm reduction related to drug use, the harms associated with prostitution are generally harms caused directly by third parties. See generally Erin Joan Graham, *More Than Condoms and Sandwiches: A Feminist Investigation of the Contradictory Promises of Harm Reduction Approaches to Prostitution* (PhD Thesis, University of British Columbia, 2014) [unpublished] (for a critical consideration of harm reduction policies in prostitution).

<sup>163</sup> Cecilia Benoit & Róisín Unsworth, “Early Assessment of Integrated Knowledge Translation Efforts to Mobilize Sex Workers in Their Communities” (2021) 50:1 *Archives Sexual Behaviour* 129 at 138. This language is taken from the abstract. Those the authors aim to benefit are “unified in the opinion that sex work in Canada should be decriminalized and the basic human rights of sex workers upheld.”

<sup>164</sup> See generally Colton Fehr, “The ‘Individualistic’ Approach to Arbitrariness, Overbreadth, and Gross Disproportionality” (2018) 51:1 *UBC L Rev* 55; Stewart, *supra* note 34.

one person is sufficient to establish a breach of s. 7.”<sup>165</sup> Some scholars said that after *Bedford*, it might be sufficient to establish that an impugned law violated the rights of one hypothetical person.<sup>166</sup> The reasoning in *Anwar* suggests they were correct.

But, in *Bedford*, the Supreme Court tempered this individualistic approach with an expressed willingness to expand the use of section 1 in section 7 cases. Chief Justice McLachlin specifically left open the possibility that the government could establish that a section 7 violation was justified under section 1 of the *Charter* depending on the importance of the legislative goal and the nature of the section 7 infringement.<sup>167</sup> She reasoned that, while rooted in similar concerns, section 7 and section 1 are analytically distinct because they ask different questions:

The question under s. 7 is whether the law’s negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose.<sup>168</sup>

The question under section 1 is “whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest.”<sup>169</sup>

The Court in *Boodhoo* found the legislative objectives of PCEPA were based on pressing and substantial concerns identified from government research.<sup>170</sup> One cannot help but wonder whether knowing the actual circumstances of the victim in that case, which demonstrate some of Parliament’s concerns in enacting the impugned laws, allowed the application judge to better appreciate the pressing and substantial goals of the impugned laws in furthering the public interest. Among the concerns identified by the application judge in *Boodhoo* as pressing and substantial (underpinning the objectives of the impugned offences) were that the majority of sellers are women and girls, with Indigenous women and girls being disproportionately represented in prostitution, and that entry into and remaining in prostitution are influenced by socioeconomic factors. The Court identified it to be pressing and substantial that prostitution is dangerous and poses a risk of violence regardless of venue or legal framework, and that trafficking occurs in prostitution. The Court also recognized the following concerns as pressing and substantial: (1) prostitution negatively impacts the communities in which it takes place; (2) the purchase of sexual services creates a demand for prostitution, which maintains and furthers pre-existing power imbalances, and ensures that vulnerable persons remain subjected to it; and (3) third parties promote and capitalize

<sup>165</sup> *Bedford* SCC, *supra* note 35 at paras 123–27 [emphasis in original]. See also *R v Michaud*, 2015 ONCA 585 (where the Ontario Court of Appeal saved a section 7 violation under section 1).

<sup>166</sup> See e.g. Don Stuart, Comment on *R v Tinker*, 2017 ONCA 552, 50 CR (7th) 207; Stewart, *supra* note 34 at 589.

<sup>167</sup> *Bedford* SCC, *supra* note 35 at paras 129, 161–63.

<sup>168</sup> *Ibid* at para 125.

<sup>169</sup> *Ibid*.

<sup>170</sup> The Court found this in considering whether an infringement of section 2(b) could be justified under section 1 of the *Charter*.

on this demand by facilitating the prostitution of others for their own gain.<sup>171</sup> With particular reference to equality concerns, the Court in *Boodhoo* reasoned:

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.<sup>172</sup>

The ability of courts to find the right facts on which to evaluate the constitutionality of laws enacted in areas of highly contested public policy is fraught. As Young observed: “Establishing a clear and non-contentious set of facts to provide the foundation for public policy decision-making can be a daunting task, whether undertaken by the legislature or judiciary, and undertaking this exercise within the framework of adversarial justice further complicates the process.”<sup>173</sup> Courts evaluating constitutionality with reference to expert testimony about legislative and social facts should well attend to the full range of stakeholders and interests in the contemplation of the government in making policy choices and of Parliament in enacting impugned laws, and whether and how those stakeholders and their interests are (and are not) reflected in the existing body of empirical scholarship and in the evidence on which they are asked to determine constitutionality. The use of reasonable hypotheticals in *Anwar* amplified the impact of scholarly evidence and obscured any potential impact of adjudicative fact or experiential evidence, likely with a direct impact on the Court's assessment of constitutionality.

### 3. REFLECTING ON THE REMEDY

Because the actual circumstances of the accused in *Anwar* are not known, it is impossible to know whether the offences found unconstitutional in that case were “substantially constitutional but peripherally problematic.”<sup>174</sup> The finding of unconstitutionality in *Anwar* did not result in the impugned offences being declared of no force and effect, however, because the application judge reasoned that the Provincial Court does not have the power to make a formal declaration that a law is of no force and effect. Instead, he granted an order dismissing the charges against the applicants. Without knowing the actual circumstances of the case, it is impossible to know whether this is a just outcome. It also makes tailoring a remedy difficult, with the potential to lead courts with jurisdiction to grant them toward declarations of invalidity. A court cannot know that a more nuanced remedy might be required if they never hear about the circumstances of the accused before them and the victims or complainants in the case.

A recently released third decision about the constitutionality of these same three offences highlights the concern about remedies in cases where the constitutionality of the Commodification Offences is adjudicated with reference only to hypotheticals and expert

<sup>171</sup> *Boodhoo*, *supra* note 7 at para 52.

<sup>172</sup> *Ibid.*

<sup>173</sup> Young, *supra* note 72 at para 48.

<sup>174</sup> *Ibid* at para 8; *Anwar*, *supra* note 7.

evidence. In *NS*, the Ontario Superior Court of Justice declared the Commodification Offences at issue in *Boodhoo* and *Anwar* inconsistent with section 7 of the *Charter* and of no force and effect.<sup>175</sup> That case was also argued based on four hypotheticals, two of which were similar to the two hypotheticals before the Court in *Anwar*. As in *Anwar*, it is impossible to know whether the offences found unconstitutional were “substantially constitutional but peripherally problematic.”<sup>176</sup> The application was argued before a trial and without any adjudicative fact evidence about the actual circumstances of the case itself. No experiential evidence is referenced in the decision. There was only one expert witness, who had also provided evidence to the Court in *Anwar*. The actual circumstances of the case are unknown.

Unlike in *Appulonappa*, where the Supreme Court read down the impugned offence to not apply to persons in the three categories of conduct found to be overly broad, allowing the charges against the accused to be remitted for trial, in *NS* the Court declined to tailor a remedy to make the impugned provisions constitutionally valid. They did so because Parliament had made it clear that it wished “to eventually end commercial sex work in Canada,”<sup>177</sup> and tailoring a remedy by removing the offending exception to the exemption and broadening the immunity from prosecution would not clearly fall within the wishes of Parliament. It would “significantly alter the scheme enacted by Parliament.”<sup>178</sup> In three subsequent decisions, Ontario judges found the decision to be plainly wrong, declining to follow it. The Ontario Court of Appeal recently allowed the appeal of the Superior Court’s decision in *NS*, setting aside the acquittals and ordering a new trial.<sup>179</sup>

## V. CONCLUSION

Benjamin Berger has observed that some of the most contentious moral and ethical issues in Western democracies have transferred from the domain of representative politics to the courts through the constitution, which gives the judiciary a new role in defining the substantive limits of criminal law.<sup>180</sup> The commercial exchange of sex is one such contentious moral and ethical issue. As courts embrace their role in defining the limits of criminal law in relation to this issue, careful attention should be paid to how those limits are drawn. This article has considered the use of reasonable hypotheticals in constitutionally delimiting Parliament’s use of criminal offences. The reasonable hypothetical has concerned both judges and scholars since it was first used in *Smith*. Its distinct use and application in section 7 cases aggravates the concerns they have raised, suggesting it may not in its current application, be an appropriate means of evaluating whether criminal offences, particularly those enacted in areas of highly contested social and public policy, are constitutional. As discussed in this article, in the section 7 context, the device obscures the experiences of

<sup>175</sup> The Court also declined to exercise its discretion to suspend the declaration of invalidity: *R v NS*, 2021 ONSC 2920 [*NS Remedy*]. See also *NS*, *supra* note 110 (where the Court considered the question of constitutionality).

<sup>176</sup> Young, *supra* note 72 at para 8.

<sup>177</sup> *NS Remedy*, *supra* note 175 at para 38.

<sup>178</sup> *Ibid.*

<sup>179</sup> *MacDonald*, *supra* note 110; *R v Williams* (24 June 2021), Brampton Court File No 18-00000980 (Oral Reasons for Ruling) (Ont Sup Ct); *R v Maldonado Vallejos*, 2021 ONSC 5809; *R v NS*, 2022 ONCA 160 [*NS CA*]. But see also *R c Kloubakov*, 2021 ABQB 960 (where the Court upheld the constitutionality of the offences).

<sup>180</sup> Benjamin L Berger, “Constitutional Principles” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) 422.

victims and complainants and foregrounds hypothetical contexts, including hypothetical contexts where some of the harms identified by Parliament in enacting impugned laws do not occur. It emphasizes reliance on what has been or can be empirically known through social science methods. It may preclude a meaningful section 1 proportionality analysis and an appropriately tailored remedy.

The first two constitutional challenges to some of Canada's new criminal prostitution laws served as provocation for this article. Whether or not one believes that a declaration that these laws are unconstitutional is a good result, the process through which this result is reached may not reflect what Dana Phillips has termed "epistemological justice."<sup>181</sup> The use of reasonable hypotheticals allowed the Courts in *Anwar* and *NS* to avoid contending with adjudicative facts in the cases before them and to decide the constitutionality of impugned offences without direct experiential evidence from anyone engaged in prostitution or otherwise impacted by prostitution or by the laws enacted to contend with it. These kinds of facts can, as the *Boodhoo* case exposes, reflect experiences that complicate the hypothetical narratives and reveal the complexity of policy-making in this area of highly contested social and public policy. The tension between hypothetical circumstances that show an unconstitutional effect of an impugned offence and actual circumstances that demonstrate why Parliament enacted that impugned offence in the first place is exactly the tension that underlies the "air of unreality" concern raised by judges and scholars. It is also the tension that courts in section 7 cases should be addressing when they apply tests of proportionality under section 7 and section 1 of the *Charter*. It is the very tension that may be obscured or hidden from the court through the application of the one-step test applied in section 7 cases where the constitutionality of offences is evaluated based solely on reasonable hypotheticals. If courts continue to evaluate the constitutionality of criminal offences under section 7 with reference to reasonable hypotheticals, there are steps they could take to better assure the adverse impact of the concerning features of the device is limited: (1) attend to the actual circumstances of the case; (2) ensure that the hypothetical circumstances are captured by the impugned offence;<sup>182</sup> (3) meaningfully address whether the rights' violation is demonstrably justified under section 1 of the *Charter*; and (4) tailor the remedy in light of both the actual circumstances of the case and the rights violation. The experiences of the victim in *Boodhoo* demonstrated the objectives of the impugned Commodification Offences to be pressing and substantial.<sup>183</sup> If relying on reasonable hypotheticals means courts do not hear about those experiences, then a just and nuanced assessment of proportionality under section 1 and an appropriately tailored remedy are precluded, impacting the judiciary's constitutionally mandated role in defining the substantive limits of criminal law.

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<sup>181</sup> Phillips, *supra* note 68.

<sup>182</sup> This was one of the reasons why the Ontario Court of Appeal allowed the appeal in *NS*. See *NS CA*, *supra* note 179.

<sup>183</sup> See *Boodhoo*, *supra* note 7; Haak, "Constitutional Validity," *supra* note 109.