

Out of the Shadows

WHY CANADA MUST DECRIMINALIZE CONSENSUAL, ADULT SEX WORK

Prostitution – the purchase and sale of sexual services – is legal in Canada.

However, most actions associated with prostitution are criminalized. These activities include communicating in public for the purpose of prostitution [s. 213(1)(c), “the Communication Law”], having or keeping control over a location regularly used for prostitution [ss. 210, 211, 212(c), “the Bawdy House Law”], and facilitating or managing another person’s sex work or sharing income from such services [s.212(1) (except for subsections (g) and (i) and (4), “the Procurement Law”] (together, “the Prostitution Laws”).

The government recently made keeping a common bawdy house a “serious offence” for the purposes of s. 467.1(1) [defining “criminal organization.”]. This regulatory change gives police expanded surveillance and seizure powers. Under the changes, a group of three or more sex workers or managers who keep a common workspace now constitute a “criminal organization” at law.

It is the view of FIRST and Pivot Legal Society that these criminal laws directly undermine the health, safety, and dignity of sex workers. Criminalization perpetuates stigma against sex workers and exposes them to negative social attitudes and harmful stereotypes. These laws force sex workers into the shadows.

For the most vulnerable sex workers – survival, street-based workers – criminal laws fail to address the underlying conditions that affect their lives.

Rather than criminalizing individuals, social supports are essential to address the conditions of poverty, homelessness, drug or alcohol dependence, mental health or disability, and oppression experienced by many survival sex workers, particularly Aboriginal and First Nations people.

We call for social support, not individual punishment. The voices and concerns of sex workers can no longer be relegated to the shadows.

1. Who are Canada’s Prostitution Laws enforced against?

Prostitution Laws in Canada are enforced unevenly over time and place. Urban, street-based workers and their clients are the most policed sex workers and receive the most criminal convictions, despite comprising only a small minority of the overall industry. Arrest rates fluctuate year-to-year and across cities, especially in response to police “crackdowns” on urban, street-based sex work at certain times.ⁱ

Since 1985, when the Communication law replaced the former solicitation law, enforcement has focused on street-based sex workers and their clients.ⁱⁱ

Males and females have been charged at nearly equal rates in recent decades. Between 1986-1995, almost of half of adults charged with prostitution-related offences were male.ⁱⁱⁱ This likely indicates changes in enforcement practices to also target clients seeking

street-based workers after 1985. Of course, gender remains an imperfect proxy for workers and clients given the number of male and transgendered sex workers.

Despite estimated parity in charging rates between street-based sex workers and clients, sex workers tend to receive stiffer sentences than clients, including imprisonment and probation.ⁱⁱⁱ Assuming again that the gender of offenders roughly correlates with worker and client, it has been surmised that the sentencing disparity reflects sex workers' greater likelihood to have previous criminal convictions and to be charged with multiple offences. Street-based sex workers, those most in need of police *protection* and social support, are facing the highest levels of *punishment*.

2. *What are the direct effects of criminal law enforcement against sex workers and their clients?*

In spite of uneven enforcement, Prostitution laws make *all* sex workers vulnerable to potential charge and criminal conviction. This undermines sex workers' ability to promote transparency, safety and minimum labour standards throughout the industry, and can hinder individual workers' ability to take security precautions.

The spectre of police surveillance, combined with municipal injunctions against loitering or nuisance, has pushed street-based sex workers in many cities into more isolated and unsafe areas.^{iv} The Communications law has also led many sex workers to communicate quickly with clients, undermining their ability to assess trustworthiness and for other workers to record licence plate numbers. This directly undermines worker safety and security. The "Not in my backyard" approach has pushed street-based sex workers into the shadows and made them more vulnerable to violence.^v

In the early 1980s, for example, municipal and policing efforts in Vancouver pushed street-based workers out of the West End of Vancouver to more remote and isolated strolls in the Downtown Eastside of Vancouver. Rates of violence against these street-based workers increased exponentially.^{vi}

Canadian criminal laws against keeping a common bawdy house and procurement undermine sex workers' and clients' ability to secure safer and more transparent indoor work spaces.^{vii} To reduce the likelihood of conviction, particularly under the new "criminal

organization" definition, more sex workers may resort to street-based or call-out work. That is, they may not work at a regular workspace, even though it would be a safer and more controlled space, from fear of being charged with keeping a common bawdy house. Drivers, security personnel, and screening receptionists – important personnel for safer, indoor work – may be deterred from working with sex workers, particularly during periods of increased crackdowns on indoor work.

If convicted, a criminal record can make it extremely difficult for those who want to exit the sex trade to find legal employment and accessible housing.

3. *What are some of the indirect consequences of the Prostitution Laws?*

Even when sex workers are not charged under the Prostitution provisions, the criminal laws have a number of indirect, negative consequences.

Criminal laws pose a serious barrier to sex workers ability to access workers compensation and other labour protection even where they technically qualify. Many sex workers also experience housing discrimination or illegal eviction if their occupation is discovered. Where a person undertakes part-time or casual sex work, he or she is vulnerable to unlawful dismissal by another full or part-time employer.

One of the most serious impacts that criminalization has is in the area of child welfare. Many sex workers face losing custody of their minor children if it comes to state attention that they are engaging in full or part-time sex work. This, in turn, has serious implications for the fabric of a sex worker's entire family and home life.^{viii}

4. *What about the exploitation of minors and trafficked persons for the purposes of prostitution? What about ongoing violence against sex workers?*

The *Criminal Code* already separately prohibits the commercial sexual exploitation of minors [ss. 212(2), (2.1), (4)], the trafficking of persons [279.01 – 279.04], and all forms of physical and sexual violence against sex workers. These provisions are not at issue in the Ontario or British Columbia *Charter* challenge cases.

All forms of violence against sex workers are prohibited, just as they are for any other person. The

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- probation, usually involving attendance at “John Schools.” The majority of men (56%) were only fined. See Duchesne, *supra* note i at 10.
- iv For a discussion of the role that community protestors and police play in sex workers’ use of public space, see Teela Sanders, “The Risks of Street Prostitution: Punters, Police, and Protesters” (2004) 41 *Urban Stud.* 1703 (“... [T]he way in which police and protesters control the sites of street prostitution has significant implications for the way in which the street market is organised and for the safety of individual women. Secondly, solutions sought through community safety policing result in the geographical displacement of prostitution at both local and national levels. Thirdly, local policies that focus on the ‘disorder’ in relation to the presence of prostitution inevitably criminalise individuals rather than tackling the issues associated with making the sex market safer for those who sell and buy commercial sex.”)
- v For a discussion of the role of law and violence against street-based sex workers, see J. Lowman, “Violence and the Outlaw Status of (Street) Prostitution” (2000) 6 *Violence Against Women* 987. See also, “Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws” (Vancouver: Pivot Legal Society, 2004), available online: <http://www.pivotlegal.org/Publications/reportsvfd.htm>.
- vi See Jennifer Alan, “Street Safety for Sex workers: 100 Years of Insecurity” in *History of Sex Work: Vancouver: Who we were, Who we are*, (Community Education Programs, Continuing Studies, Simon Fraser University and History of Sex Work: Vancouver, 2007). For a personal recounting of this time period and the impact on sex workers, see Michael Harris, “The Unrepentant Whore: How Jamie Lee Hamilton changed the way we look at Canada’s underclass”, *The Walrus*, June 2010 (available online: <http://www.walrusmagazine.com/articles/2010.06-society-the-unrepentant-whore/>).
- vii For studies that find indoor workers experience less violence by clients, See Stephanie Church, Marion Henderson, Marina Barnard, & Graham Hart, “Violence by clients toward female prostitutes in different work settings: questionnaire survey” (2001) 322 *British Medical Journal* 524 (“Multiple logistic regression showed that working outdoors rather than indoors was associated with higher levels of violence by clients than was the city, drug use, and duration of, or age that women began, prostitution”).
- viii For a full discussion, see Pivot Legal Society, “Voices of Dignity”, *supra* note v.
- ix In a series of interviews with sex workers in Vancouver by Pivot Legal Society, many participants reported a tenuous relationship with law enforcement. Some reported failures by police to follow up reports of physical or sexual violence against sex workers. Others reported their unwillingness to report violence to the police from fear of arrest. See Pivot Legal Society, “Voices of Dignity”, *supra* note v.
- x For a full discussion of this position, see Pivot Legal Society, “Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform” (Vancouver, B.C.: Pivot Legal Society, 2006), available online: <http://www.pivotlegal.org/Publications/reportsbd.htm>
- xi For a discussion of Sweden’s 1999 *Act Prohibiting the Purchase of Sexual Services*, see Yvonne Svanstrom, “Prostitution in Sweden: debates and policies 1980-2004” in *International Approaches to Prostitution: Law and policy in Europe and Asia*, Geetanjali Gangoli and Nicole Westmarland, eds., (Bristol, UK: The Policy Press, 2006).
- xii For literature examining the motivations and characteristics of clients of commercial sex workers, see Luke Xantidis & Marita McCabe, “Personality Characteristics of Male Clients of Female Sex Workers in Australia” (2000) 29 *Archives of Sex. Behav.* 165; C. Atchison, L. Fraser & J. Lowman, “Men Who Buy Sex: Preliminary Findings of An Exploratory Study” in J.E. Elias, V.L. Bullough, V. Elias, and G. Brewer, eds., *Prostitution: On Whores, Hustlers and Johns* (New York: Prometheus Books, 1998): 172-203; J. Lowman & C. Atchison, “Men Who Buy Sex: A Survey in the Greater Vancouver Regional District” in Cecilia Benoit and Fran Shaver, eds., *Critical Perspectives on Sex Industry Work in Canada*, (2006) 43 *Special Issue of the Canadian Review of Sociology and Anthropology* 281.
- xiii The B.C. Coalition of Experiential Communities, a consortium of sex worker activists, is currently spearheading a project entitled “Opening the Doors: Building transparency and accountability in the sex industry.” The project aims to bring transparency and minimum labour standards to the commercial sex industry. It also seeks to combat exploitation and coercion in the industry, whether against youth, trafficked persons, migrants, or any other person. The project adopts a certification model, inspired by the “Serving it Right” program for employees who serve alcohol to patrons. A full report will be released after feedback from relevant stakeholders, including sex workers, service providers, police and law enforcement, city officials, and other relevant community members. Such legitimization models provide important opportunities for improvements across this industry.
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