Are We Chasing Rainbows?: Achieving the Decriminalization of Prostitution in Canada

by

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Abstract

Prostitution has often been referred to as the oldest profession in the world. Yet the Canadian legislature and courts refuse to recognize it as a profession but merely as a social nuisance or worse yet a social evil. While the act of selling sex in exchange for money is technically legal in Canada, all related activities are criminalized. The majority of social science studies concerning the impact of prostitution-related laws on the health, safety and wellbeing of prostitutes indicates that criminalization jeopardizes the safety of prostitutes, as well as their access to health and social services and recommends the decriminalization of the profession. Despite these studies and requests from sex workers and experts, the government has refused to repeal any of the prostitution-related laws. This paper outlines the societal and legislative treatment of prostitution and then seeks to determine whether decriminalization is a viable goal in Canada.
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Chapter 1

Introduction

Who said that every wish would be heard and answered
when wished on the morning star?
Somebody thought of that
and someone believed it,
and look what it's done so far.
What's so amazing that keeps us stargazing?
And what do we think we might see?
Someday we'll find it, the rainbow connection,
the lovers, the dreamers and me.

- “Rainbow Connection” by Kenny Ascher and Paul Williams

Prostitution has often been referred to as the oldest profession in the world. Yet the Canadian legislature and courts refuse to recognize it as a profession but merely as a social nuisance or worse yet a social evil. While the act of selling sex in exchange for money is technically legal in Canada, all related activities are criminalized. This essentially means that it is impossible for a prostitute to carry out the legal activity of selling sex, without violating one or more criminal laws. This treatment of prostitution as a crime is directly related to the stigma surrounding sex work, as well as fears relating to morality, public order, and sexually transmitted diseases.

My analysis begins from the assumption that prostitution is not inherently evil but is a legitimate form of work. This stems from the idea that sex for pleasure is just as valid and valuable as sex for love or procreation. The decriminalization of adult prostitution would allow prostitutes to carry on their business with access to the protections provided by employment standards and occupational health and safety standards. In addition, prostitutes
would be able to report criminal law offences committed against them without fear of being arrested themselves. I believe that prostitutes should be provided with safer environments in which to practice a trade that is legal in Canada.¹

This paper will begin by outlining the societal and legislative treatment of prostitution and then seek to determine whether decriminalization is a viable goal in Canada. While there is no general consensus on how prostitution should be treated by the state, most individuals have strong feelings about the morality or legitimacy of sex work. Some view prostitution as a threat to the stability of the nuclear family, whereas others view it as an expression of female autonomy and sexual power. The government has focused on the nuisance and exploitation associated with sex work and adopted a quasi-criminal approach to handling it. Despite the numerous studies outlining the harms caused by prostitution laws and requests from sex workers and experts, they have refused to repeal any of the prostitution-associated laws. Studies by many prominent social scientists and advocacy groups have shown that since the inception of the communicating law in 1985, violence towards street prostitutes has increased substantially since it causes them to modify the way in which they practice their trade and created dangerous working conditions.

To date, it has been the radical feminists and residential groups that have had the ears of the legislature and judiciary. This may have been one of the causes for the reluctance to repeal the prostitution-associated laws. Without any strong sex worker rights groups prior to the 1980s, the legislature and the courts were missing an important voice in the debate.

¹ This paper will only address adult prostitution and not youth prostitution or trafficking, which have their own set of unique issues.
However, the rise of sex worker rights groups, sex-as-work feminists and sex radicals may signal that the tide is turning in favour of decriminalization.
Chapter 2

Background

1 Societal Treatment of Prostitution

Despite the widespread and persistent nature of prostitution, as a society we have been unable to reach a consensus on how we view it and subsequently what treatment we choose to afford to it. This may be due in part to the varied prostitution scene in Canada, which John Lowman describes in the following terms:

The Canadian contact sex service trade — that which is usually referred to as “prostitution” — ranges from female sexual slavery (the gorilla pimp) and survival sex (sale of sexual services by persons with very few other options, such as homeless youth and women in poverty) through to more bourgeois styles of sex trade (including some street prostitution) where both adults are consenting, albeit it in a way that is shaped by their gender, occupation, ethnicity, socio-economic status and cultural values.²

Views of prostitution cut across political, economic and social class lines. Conservatives see prostitution as threatening the sanctity of marriage and the family, while liberals see prostitution as another expression of autonomy that should only be interfered with when causing actual harm to other individuals.³ Not surprisingly, feminists in particular have had a hard time reconciling a theory that conforms to their broad coalition of values and have


instead developed a number of conflicting theories. The main theories that frame the feminist prostitution debate are radical feminism, sex radicalism and sex as work.⁴

1.1 Prostitution as a Social Evil

Female sexuality has always been a difficult concept for the feminist movement. It can, at the same time, be something that empowers us and is a source of exploitation and abuse. Women who are open and in touch with their sexuality are seen as empowered. However, a woman who chooses to use her sexuality to make money is seen as vulnerable and damaged. Radical feminists have had difficulty understanding the type of woman who makes a rational choice to commodify her body and assumes that she has instead been coerced into it. As stated by Janice Dickin McGinnis in “Whores and Worthies: Feminism and Prostitution”:

[M]ainstream feminism has fundamental problems with accepting prostitution as just something some women choose (for a variety of reasons) to do for a living. This problem stems in part from an admirable urge to protect women from the victimization that often accompanies the trade but also from the fact that women as a group have traditionally been denied their rights only because they are different from men - that is, for reasons having solely to do with sex and its fellow-runner, sexuality. For feminism, the commoditization of sex has become confused with the objectification of women, prostitution capable of definition only in a top-down, male-female position. It has become a useful symbol of general female powerlessness in what is referred to by some in the movement as “the patriarchy”. But while prostitution-as-symbol may be useful for the purposes of feminist criticism, it is inimical to the interests of the prostitutes themselves. In this instance, the women's movement is deliberately going against the interests of individual women, women the movement is loath to cast as evil and therefore must cast as misguided. Such a position is at best arrogant of the opinion of a certain class of women, at worst dangerous for individuals in that class. Furthermore, the sort of double-talk which purports to support prostitutes - women defined in this instance only by the way in which they make their living-out of one side of the feminist mouth while condemning that manner of making a living out of the other side is at best

laughable, at worst deadly for the development of feminism as a viable blueprint for the future.\(^5\)

Prostitution has made strange bedfellows out of these radical feminists and conservatives who both seek to eradicate it, albeit for different reasons. The views of radical feminists are based on the belief that all sex work is inherently violent no matter what the circumstances are. The violence inherent in prostitution includes not only physical violence inflicted on the prostitutes but also a much more subtler form of violence that stems from the idea that when a woman sells her body to a man, it turns into a commodity that he owns and controls and reinforces that notion of male dominance over female sexuality. One of the most well known theorists of radical feminism, Andrea Dworkin, asserts that:

> What prostitution does in a society of male dominance is that it establishes a social bottom beneath which there is no bottom. It is the bottom. Prostituted women are all on the bottom. And all men are above it. They may not be above it much but even men who are prostituted are above the bottom that is set by prostituted women and girls. Every man in this society benefits from the fact that women are prostituted whether or not every man uses a woman in prostitution. This should not have to be said but it has to be said: prostitution comes from male dominance, not from female nature. It is a political reality that exists because one group of people has and maintains power over another group of people.\(^6\)

Prostitution harms not only the prostitute herself but all women since it perpetuates the belief that women are only good for their sexuality, which they must use to satisfy men. Radical feminists believe that the only appropriate treatment for prostitution is abolition since prostitution can never exist in a way that will not harm both the women involved in it and all women in general.


\(^6\) Andrea Dworkin, “Prostitution and Male Supremacy” (Prostitution: From Academia to Activism Symposium, delivered at the University of Michigan Law School, 16 October 1992) [unpublished].
The radical feminist view of prostitution also assumes that women enter prostitution because they had no choice or were forced into it by abusive males and need protection from this exploitation. Prostitutes are seen as never being able to consent to sex work because they are not capable of giving it. This paternalistic view assumes that the women in sex work are unable to make rational choices because no one would choose prostitution as an occupation. Janice Raymond explains that a woman’s willingness to remain in sex work can be equated to a woman’s desire to remain in an abusive relationship:

> When a woman remains in an abusive relationship with a partner who batters her, or even when she defends his actions, concerned people don't say she is there voluntarily. They recognize the complexity of her compliance. Like battered women, women in prostitution often deny their abuse if provided with no meaningful alternatives.7

Since radical feminists see prostitutes as victims, they believe that the clients of sex workers and those that ply young women into the trade should be harshly penalized under the criminal law, while the prostitutes themselves should not face criminal sanctions. Therefore, the government’s role is to save these women from exploitation and help them pursue “respectable” occupations. The understanding is that the desire of these women is to exit sex work and will willingly do so.

What these mainstream feminists have failed to do is listen to what the sex workers are actually asking for. By denying sex workers a voice, their arguments fail to take into account the realities of these women’s lives and address the practical problems they face. Prostitutes

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are not concerned about the broader feminist concerns of exploitation of women, they are more concerned with the economic realities in which they live.

1.2 Sex Radicalism

Sex radicals view sex work as a meaningful contribution to society that provides sexual services to individuals whose needs might not otherwise be met. They view sex as a legitimate individual need and sex workers as providing a therapeutic and healing function in society by satisfying those needs. This rids sex that occurs outside of marriage of all the guilt and shame historically attached to it. They argue that the violence associated with prostitution is not an inherent part of it but a result of the social stigma attached to sex work and the gender imbalance in society. They also argue that there are women who have freely chosen to practice this trade for the positive benefits it creates for them and their clients. These women should not be prevented from practicing a trade which they chose and which is legal in Canada. While they do not deny that prostitutes experience harm practicing their trade, they believe that the way to eliminate this is to educate individuals about healthy sexuality. They further argue that since legal and socially-sanctioned relationships have failed to protect women from abuse in the form of domestic violence, sex work should not be singled out as inherently violent. Under this view, prostitution should be decriminalized and allowed to persist. Any attempts to eliminate it are seen as further male control of the expression of female sexuality. Therefore, prostitution is seen as an expression of sexual autonomy, which liberates society from the patriarchal and puritanical views of sex.
1.3 Prostitution as Work

Sex worker feminists view prostitution as a legitimate form of labour that prostitutes voluntarily choose to practice. As summarized by Frances Shaver, a leading theorist of the sex as work approach:

[P]rostitution per se is NOT different from other work. As in other sectors of the service industry, sex workers are selling their services, not their bodies. Furthermore, the alienation they may experience on the job and the distancing techniques they adopt are not unique to prostitution. Sex work, like other kinds of work such as cooking, child care, and nursing, can be performed as a “labour of love”, or as paid labour.8

These feminists see all forms of labour as potentially exploitative but subject to various laws and regulations which prevent exploitation. Therefore, the conditions under which sex work is practiced needs to be challenged rather than the sex work itself. The principle demands of the sex worker feminists are the decriminalization of prostitution and the extension of human rights and labour rights to prostitutes. Much like the famous quote of Pierre Trudeau, “There’s no place for the state in the bedrooms of the nation”, sex worker feminists believe that the government is not justified in interfering with consentual adult sex, regardless of whether there is an exchange of money. They also believe that the harms associated with prostitution are not inherent to prostitution but rather a result of the criminal laws which force them to work in dangerous conditions and creates stigmatization. Once prostitution is decriminalized, the potential harm that does arise from exploitative sex work can be dealt with by general criminal laws and municipal regulations.

2 Harms Associated with Prostitution

2.1 Violence

Social science has just now been turning its attention to the harms experienced by sex workers. The nature of their activities leaves them vulnerable to many different types of harm, including physical assault, rape, psychological abuse, and exploitation. Many large studies have been conducted in metropolitan areas where sex workers were interviewed on the violence and injuries they experienced while working their trade. The results show that both street and off-street prostitutes experience violence, with street prostitutes experiencing substantially more violence.

John Lowman, one of the foremost advocates of the decriminalization of prostitution, has conducted several large studies in Vancouver. In a study conducted in 1996, Professor Lowman compiled data on the murders of prostitutes in British Columbia between 1960 and 1994 by reviewing newspaper articles, Vancouver Police Department records and RCMP databases. He discovered that since 1978, the first year for which any murder of a prostitute in British Columbia has been recorded, there were 67 known prostitutes murdered.9

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Professor Lowman updated his research in 2005 for his submission to the Subcommittee on Solicitation Laws in order to determine the homicide rate of prostitutes in British Columbia from 1960 to 1999. His findings are summarized below:

**Table 1: Sex Worker Homicides in British Columbia between 1960-1999**

<table>
<thead>
<tr>
<th>Year Range</th>
<th>Number of Sex Worker Homicides</th>
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<tbody>
<tr>
<td>1960-1964</td>
<td>0</td>
</tr>
<tr>
<td>1965-1969</td>
<td>0</td>
</tr>
<tr>
<td>1970-1974</td>
<td>0</td>
</tr>
<tr>
<td>1975-1979</td>
<td>3</td>
</tr>
<tr>
<td>1980-1984</td>
<td>8</td>
</tr>
<tr>
<td>1985-1989</td>
<td>22</td>
</tr>
<tr>
<td>1990-1994</td>
<td>24</td>
</tr>
<tr>
<td>1995-1999</td>
<td>50?</td>
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</tbody>
</table>

The data shows a substantial increase in murders in the mid-1980s, which Professor Lowman has attributed to the enactment of the communicating law and the subsequent police campaigns to reduce the nuisance associated with street prostitution. The increase in murders in the mid-1990s has been partially attributed to the serial killer Robert Pickton, who has been accused of killing 15 prostitutes from Vancouver’s Downtown Eastside between 1995 and 2002. The data from this period is uncertain since there are still a number of missing women from Vancouver’s Downtown Eastside that have not yet been found.

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A study done by the Canadian Centre for Justice Statistics found that between 1991 and 1995, 63 known prostitutes were murdered across the country. Most of them appeared to have been killed by clients, while 8 were killed by pimps or in a drug-related incident and the remaining 5 were killed by spouses or boyfriends. Almost all of the murdered prostitutes were female, which accounted for 5% of all female murders during that time. In addition, due to the nature of street prostitution, identification of the murderer was very difficult. At the end of 1996, 54% of the cases remained unsolved, compared to 20% of cases involving victims that were not in the sex trade.11

Leonard Cler-Cunningham and Christine Christensen conducted a survey of the violence experienced by street level prostitutes who worked various strolls in Vancouver. The results of their findings are summarized below:

Table 2: Summary of Findings from “Violence Against Women in Vancouver’s Street Level Sex Trade and the Police Response”12

<table>
<thead>
<tr>
<th>Type of Harm</th>
<th>Frequency</th>
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<tbody>
<tr>
<td>Harassment</td>
<td>83.1%</td>
</tr>
<tr>
<td>Robbery</td>
<td>53.7%</td>
</tr>
<tr>
<td>Physically Threatened</td>
<td>70.5%</td>
</tr>
<tr>
<td>Threatened with a Weapon</td>
<td>44.5%</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Type of Harm</th>
<th>Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Physically Assaulted without a Weapon</td>
<td>51.2%</td>
</tr>
<tr>
<td>Physically Assaulted with a Weapon</td>
<td>30.3%</td>
</tr>
<tr>
<td>Refusal to wear a Condom</td>
<td>82.9%</td>
</tr>
<tr>
<td>Rape without a Weapon</td>
<td>45.8%</td>
</tr>
<tr>
<td>Rape with a Weapon</td>
<td>40.7%</td>
</tr>
<tr>
<td>Kidnapping/Confinement</td>
<td>41.9%</td>
</tr>
<tr>
<td>Attempted Murder</td>
<td>33.1%</td>
</tr>
</tbody>
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Apart from direct physical violence by clients, street prostitutes also report being harassed by the public and the police. This includes insults being yelled at them, being chased away and having food and bottles thrown at them.\(^{13}\)

While street prostitution only accounts for 5% to 20% of all prostitution activity in Canada, the most common mistake when evaluating the harms associated with prostitution has been to equate the experience of all types of prostitution to street prostitution.\(^{14}\) Escorts and off-street sex workers have often reported feeling safer compared to street workers, which they attributed to the ability to screen clients and the presence of other workers. In a study by Tamara O’Doherty on the violence experienced by off-street sex workers, she found that

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massage parlours were perceived as the safest working environment with 52% of workers reporting that they were not at all concerned with their safety while working there.\footnote{O'Doherty, \emph{supra} note 4 at 44.}

However, off-street sex workers may still be exposed to significant risks, which can include:

\begin{itemize}
  \item the failure of the agency to adequately screen their clients;
  \item the failure of the agency to provide a driver;
  \item pressure from the agency to meet certain clients or to work in unsafe locations;
  \item the inability to assess the safety of a location before arriving when performing out-call work;
  \item the possibility that the client may not be alone; and
  \item exit routes that may not be easily identifiable or accessible.\footnote{\emph{Supra} note 13 at 25-26.}
\end{itemize}

\section*{2.2 Psychological Harms}

In addition to physical harm, prostitutes often experience substantial psychological harm and mental abuse. Cecilia Benoit and Alison Millar conducted a study documenting the working conditions of current and exited sex workers in Victoria, British Columbia. They found that prostitutes experienced higher levels of depression than the general population. Half of the individuals interviewed during the study reported experiencing either past or current depression, in comparison to the general population who reported a rate of 6\% for females and 3\% for males. Prostitutes also reported high levels of attempted suicide, anxiety attacks,
emotional trauma, sleep disorders, flashbacks, migraines, chronic fatigue syndrome and eating disorders.\textsuperscript{17}

Prostitution can also have a negative impact on the personal lives of sex workers. Many prostitutes often feel that they have to lie about their profession to loved ones and thus experience feelings of isolation. Some also have anxiety about finding a potential partner that will accept their work and the long-term affects that this type of work will have on a relationship.\textsuperscript{18}

### 2.3 Exploitation

The stereotypical view of prostitution is the street prostitute who is exploited and controlled by an abusive pimp. However, the reality is that a very small number of prostitutes are controlled by a pimp. Most of the exploitation of prostitutes is done by the corrupt managers of agencies and indoor venues. The study conducted by Cecilia Benoit and Alison Millar found that while escorts and sex workers in indoor venues felt safer compared to street workers, they did experience less control over their working conditions. While independent sex workers were often able to keep virtually all of the money they earned, escorts and sex workers in indoor venues were required to submit a portion of their earnings to the agency and were subject to fines for breaking management rules. Independent sex workers also had


\textsuperscript{18} O'Doherty, \textit{supra} note 4 at 69.
more control over the number of clients they saw, the types of clients and the activities they performed.\textsuperscript{19}

### 2.4 Nuisance

In addition to the harm experienced by prostitutes, street prostitution can have a negative effect on the neighbourhoods in which it occurs. Residents and businesses in areas where street prostitution occurs have voiced concerns over the increase in noise and traffic at all hours of the day and night. The associated violence and drug trade also brings increased noise as a result of alterations between prostitutes and clients or drug dealers. Residents and business owners have often reported finding litter strewn over their property in the form of discarded needles and used condoms. This poses a significant health risk to children who may be exposed to the litter on lawns or in parks. In some neighbourhoods, the residents have been exposed to harassment when they are mistaken for prostitutes or clients. Business owners have experienced lower profits in these areas as a result of having to spend money to clean up their property and the reduction in customer traffic due to a fear of being harassed by prostitutes or clients.\textsuperscript{20}

\textsuperscript{19} Supra note 17 at 43-49.

\textsuperscript{20} Federal-Provincial-Territorial Working Group on Prostitution, \textit{Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution Related Activities}, (Ottawa: Department of Justice, 1998) at 37; Supra note 14 at 31-34.
Chapter 3

Legislative Treatment of Prostitution

Prostitution is prevalent in many countries around the world. While each country has their own way of dealing with it, there are three broad legal approaches to dealing with prostitution: criminalization, decriminalization and legalization. Criminalization suggests that sex work is a social ill and should be abolished. The treatment of prostitution as a crime is directly related to stigma surrounding sex work, as well as fears relating to morality, public order, and sexually transmitted diseases. The key indicators of a criminalization system are the existence of prostitution and/or prostitution-related activities in the criminal code of a state. Decriminalization refers to the removal of all criminal laws relating to the operation of the sex industry. It is usually used to refer to total decriminalization, that is, the repeal of all laws against consensual adult sexual activity in commercial and non-commercial contexts. The decriminalization approach aims to support occupational health and safety and workplace issues through existing legal and workplace mechanisms. Legalization argues that sex work will always exist since there will always be a demand for it. Proponents of legalization believe that the harms associated with prostitution can be dealt with by state regulations. The key indicators of a legalized system are the existence of state regulations and conditions, including licensing or registration of brothels and workers, mandatory health testing of prostitutes and zoning regulations.

Canada has adopted a quasi-criminal approach where the act of selling sex for money is legal but all associated activities are criminalized. This makes it virtually impossible to practice
prostitution without violating one or more criminal laws. With the enactment of the communication laws in 1985, Canada now has one of the toughest criminal approaches to prostitution in North America.

1 History of Prostitution Laws

Canada’s first prostitution laws were adopted from the English model that treated prostitution as a violation of public order. These laws criminalized various activities related to prostitution through bawdy house and vagrancy provisions. The bawdy house laws made it an offence to keep a bawdy house, to be an inmate in a bawdy house, or to be found in a bawdy house. Under the vagrancy law, a woman who was “found in a public place and does not, when required, give a good account of herself” was considered to be a vagrant. These laws were clearly targeted at female prostitutes, rather than their male clients.

By the twentieth century, the laws were expanded to include provisions criminalizing procuring and living on the avails of prostitution. These new laws were created in response to the prevailing concern over the white slave trade and were intended to protect women and children from sexual exploitation. Both the current bawdy house and procuring provisions are substantially similar to these older laws, with only slight refinements made to the definitions and penalties.

The vagrancy law remained in place until the 1970s when public debate about prostitution was reignited due to the increased visibility of street prostitution in residential

21 Criminal Code, R.S.C. 1970, c. C-34, s. 175(1)(c).
neighbourhoods. A report released by the Royal Commission on the Status of Women recommended repeal of the vagrancy provision.\textsuperscript{22} Numerous other feminist and civil liberties organizations also increased pressure for similar change. In response, the vagrancy law was repealed in 1972 and the solicitation law was enacted. Rather than targeting a specific class of persons, the solicitation law now sought to target a specific activity, namely, the act of soliciting for the purposes of prostitution in a public place. The new law also sought to rectify the gender discrimination of the vagrancy law since it now applied equally to men and women selling sexual services.

The new law caused a significant amount of controversy since there was no established definition as to what “solicit” meant. The issue remained unresolved until February 1978 when the Supreme Court of Canada adopted a very narrow definition in \textit{R. v. Hutt}\textsuperscript{23}. The Court found that in order to meet the standard for criminal behaviour, the conduct had to be pressing and persistent. The courts were also hesitant to define an automobile as a public place under the provision. The usual police tactic of using an undercover officer to solicit a prostitute was no longer consider ample evidence for a charge since the conduct was not pressing and persistent. Police forces in Toronto and Vancouver attempted to argue that approaching a series of customers constituted pressing and persistent conduct, however, the Supreme Court of Canada dismissed the argument on the grounds that they merely consisted of separate incidents.\textsuperscript{24} Therefore, the police found it difficult to apply the law and eventually


ceased using it. The subsequent increase in street prostitution was accredited to both the inability of the police to use the soliciting law and the police campaigns against bawdy houses that occurred in Toronto and Vancouver. In Vancouver, the police investigated and closed two prominent cabaret clubs in 1975, where prostitutes often met their clients. A similar undertaking occurred in Toronto in 1977 when the police used the death of a young shoe shine boy to close the body rub parlours on Yonge Street. No longer able to work indoors, many of these women turned to the streets.

Seeking reform of the solicitation law, the Law Reform Commission of Canada released their Report on Sexual Offences, which recommended clarifying the gender neutrality of the law and conducting further studies on the prostitution-related laws. In response to this report, the government passed Bill C-127 to amend the Criminal Code by adding a definition of prostitute as a person of either sex who engages in the exchange of sexual services for money.

At this time, the government launched a national study to review the state of prostitution and prostitution-related offences in Canada. In 1985, the Special Committee on Pornography and Prostitution, better know as the Fraser Committee, released its report. The study found that prostitution was widespread and varied, with economic conditions being the major reason for entry into it. The study also found that while the Canadian public opposed further criminalization of prostitution and related activities, there was support for measures intended to reduce the nuisance associated with it. The Committee concluded that it was the

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contradictory nature of the prostitution laws that had caused an increase in street prostitution and violence towards prostitutes. The Committee recommended against piecemeal reform of the current laws since an entire overhaul of the prostitution laws was needed. They recommended a number of legal and social reforms that would allow prostitution in certain circumstances and provide support for those wishing to leave the trade. Their most controversial recommendations were law reforms that would permit up to two prostitutes to work out of a residence (the cottage-industry model of prostitution) and the municipal licensing of small scale brothels. The Committee also recommended that procuring and living on the avails only be criminalized when violence or threats of violence were present.26

The government chose to ignore the Fraser Committee’s recommendations and instead enacted the communicating law. Section 213 of the Criminal Code27 criminalizes communication in a public place for the purposes of engaging in prostitution or obtaining the services of a prostitute. The provision applies both to men and women selling sexual services and clients and includes motor vehicles in the definition of public place.

The legislation enacting the communicating law included an evaluation clause providing for a mandatory review within three years. In 1987, the Department of Justice commissioned five regional studies to evaluate the impact of the communicating law in Canada’s large

26 Special Committee on Pornography and Prostitution (Fraser Committee), Pornography and Prostitution in Canada (Ottawa: Department of Justice, 1985).

The Department of Justice commented that while the communicating law clarified the government’s intention to quash street prostitution, it did not clarify where prostitution could legally occur or whether the government intended to abolish it all together:

It is difficult to know whether the legislators hoped that the [communicating law] would reduce the incidence of prostitution by:
a) convincing prostitutes and customers to give up the practice entirely; or 
b) by encouraging them to work in less offensive modes, such as escort services or bars, or in areas where their activity would annoy no one.29

The study concluded that the communicating law had little impact on street prostitution since it was as prevalent as it had been before the enactment of the provision:

In the two Canadian cities in which street prostitution presented the greatest problem, Vancouver and Toronto, the legislation has had virtually no success in moving prostitutes off the street. Both street counts and interviews with key respondents in these cities suggest that, at best, prostitutes have simply been displaced to new areas. Street prostitutes in both cities stated that the law was not a deterrent.30

All the law did was make it more difficult for prostitutes to safely practice their trade and stigmatized the profession as a whole. Further, the law did not achieve its additional goal of ensuring equal gender enforcement since female prostitutes were still the major targets.

The new prostitution laws were extremely controversial and as a result many evaluations have been conducted in order to determine their effectiveness. Two of the most


30 Ibid. at 74.
comprehensive studies were conducted by the Federal Provincial Territorial Working Group and the Subcommittee on Solicitation Laws. In 1992, the deputy ministers responsible for justice established the Federal Provincial Territorial Working Group to evaluate the legislation, policy and practices of the prostitution laws by conducting consultations in British Columbia, Nova Scotia, Saskatchewan, Alberta, New Brunswick, Manitoba, Ontario and Quebec. While the Working Group concluded that the Criminal Code provisions were inconsistent, they were unable to reach a consensus on the repeal of the communicating and bawdy house laws.\textsuperscript{31} In 2003, the Subcommittee on Solicitation Laws was established to review the prostitution laws in order to improve the safety of sex workers and reduce the exploitation and violence they experience. The Subcommittee conducted an extensive review of the communicating law provisions by consulting with numerous public interest groups, academics and experts. The Subcommittee concluded that “the status quo with respect to Canada’s laws dealing with prostitution is unacceptable, and the laws that exist are unequally applied”.\textsuperscript{32} However, the subcommittee failed to reach a consensus on legislative reforms. The members of the Subcommittee from the Liberal, New Democratic, and Bloc Québécois parties were of the view that:

\ldots Canada’s current quasi-legal approach to prostitution — in which adult prostitution is legal \textit{per se}, but nearly impossible to practise without breaking the law — should be recognized as contradictory. Much like the conclusion reached by the Fraser Committee 20 years ago, they feel that since adult prostitution is legal in Canada, the conditions under which it can be practised must be stipulated…\textit{[S]}exual activities between consenting adults that do not harm others, whether or not payment is involved, should not be prohibited by the state. They feel that it is essential to strike a balance between the safety of those selling sexual services — without judging them — and the right of all citizens to live in peace and safety. In order to ensure that both individuals selling sexual

\textsuperscript{31} \textit{Supra} note 20 at 73-74.

\textsuperscript{32} \textit{Supra} note 14 at 87.
services and communities are protected from violence, exploitation and nuisance, the majority of the Subcommittee urges reliance on Criminal Code provisions of general application targeting various forms of exploitation and nuisance, such as public disturbance, indecent exhibition, coercion, sexual assault, trafficking in persons, extortion, kidnapping, etc. The approach proposed by these members is premised on the idea that it is preferable to concentrate our efforts on combating exploitation and violence in the context of prostitution, rather than criminalizing consenting adults who engage in sexual activities for money.\footnote{Ibid. at 89-90.}

While the members of the Subcommittee from the Conservative party were of the view that:

\[
\text{\ldots}[M]\text{embers from the Conservative Party see prostitution as a degrading and dehumanizing act, often committed and controlled by coercive or opportunistic individuals against victims who are frequently powerless to protect themselves from abuse and exploitation\ldots}[T]\text{he Conservatives do not believe it is possible for the state to create isolated conditions in which the consensual provision of sex in exchange for money does not harm others. They believe that all prostitution has a social cost, and that any effort by the state to decriminalize prostitution would impoverish all Canadians — and Canadian women in particular — by signalling that the commodification and invasive exploitation of a woman’s body is acceptable\ldots}[B]\text{ecause of the negative elements it attracts, prostitution is unacceptable in any location — commercial, industrial or residential, including massage parlours and private homes.}
\]

\[\text{[The Conservatives] propose a new approach to criminal justice in which the perpetrators of crime would fund, through heavy fines, the rehabilitation and support of the victims they create. These fines would also act as a significant deterrent. As for the prostitutes themselves, the Conservatives recommend a system in which first-time offenders and those forced or coerced into the lifestyle are assisted out of it, and avoid a criminal record. However, those who freely seek to benefit from the “business” of prostitution would be held accountable for the victimization which results from prostitution as a whole.}\footnote{Ibid. at 90-91.}\]

In response to the subcommittee’s report, the government issued the following statement:

\[
\text{Prostitution is degrading and dehumanizing, often committed and controlled by coercive individuals against those who are frequently powerless to protect themselves from abuse and exploitation. Prostitution harms all of Canadian society, and Canadian women in particular. The Government condemns any conduct that results in exploitation or abuse, and accordingly does not support any reforms, such as decriminalization, that would}
\]
facilitate such exploitation. Commodification and exploitation of women is never acceptable.

For these reasons, the Government will continue to address prostitution by focusing on reducing its prevalence. This involves prevention, education and awareness initiatives, supporting programs that encourage those involved in the sex trade toward exit programs, and focusing on consistent enforcement of the criminal law. ³⁵

Today, prostitution-related activities are regulated under sections 210 to 213 of the Criminal Code, which cover offences related to keeping or using common bawdy houses, transporting a person to a bawdy house, procuring, living of the avails of prostitution and communicating for the purposes of prostitution.

1.1 Bawdy House Laws

The bawdy house provisions in the Criminal Code are substantially similar to the laws adopted from the English model in the 1800s. Section 210 states that:

210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who
(a) is an inmate of a common bawdy-house,
(b) is found, without lawful excuse, in a common bawdy-house, or
(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

A “common bawdy-house” is defined as a place that is kept or occupied, or resorted to by one or more persons, for the purposes of prostitution or to practice acts of indecency. Any space is capable of being a bawdy house provided that there is frequent or habitual use of it for the purposes of prostitution or for the practice of acts of indecency and the premises are controlled or managed by prostitutes or individuals with a right or interest in that space. To be found guilty of keeping a common bawdyhouse, a person must have some degree of control over the care and management of the premises and must participate to some extent in the illicit activities involved there, although not necessarily participating in the sexual acts. To be found guilty of being an inmate of a bawdy-house, a person must be a resident or a regular occupant of the premise. To be guilty of being found in a bawdy house, a person must have no lawful excuse for his or her presence there and must have been explicitly found there by the police. Finally, to be guilty of knowingly permitting the premises to be used for the purposes of a common bawdy house, a person must have actual control of the place and must have either agreed to or encouraged use for that purpose.

Section 211 criminalizes the transportation of an individual to a bawdy house:

211. Every one who knowingly takes, transports, directs, or offers to take, transport or direct, any other person to a common bawdy-house is guilty of an offence punishable on summary conviction.
1.2 Procurement Laws

Procurement is the most serious prostitution-related offence and carries the toughest penalties. Section 212(1) lists various methods of procurement and makes it a crime to live off the avails of prostitution. Under section 212(3), evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdyhouse is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution.

212. (1) Every one who

(a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
(b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
(c) knowingly conceals a person in a common bawdy-house,
(d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
(e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
(f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
(g) procures a person to enter or leave Canada, for the purpose of prostitution,
(h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
(i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or
(j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).
1.3 Communicating Laws

The communicating law prohibits communication in a public place for the purposes of prostitution and is the most widely used prostitution-related provision. Section 213 states that:

213. (1) Every person who in a public place or in any place open to public view
(a) stops or attempts to stop any motor vehicle,
(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

2 Legislative Objectives

In Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)36, six of the justices of the Supreme Court of Canada agreed that the purpose of the prostitution-associated legislation was not prohibitive. However, the combination of provisions fails to present a clear picture of where the legal act of prostitution can take place. The contradictory and confusing nature of these provisions makes it difficult to determine exactly what the legislature had in mind when they enacted them.

2.1 Bawdy House Laws

The bawdy house provisions are based on old English laws, which were intended to prevent common nuisance and the dissolution of moral values.\textsuperscript{37} Since the latter is no longer a valid objective in Canada’s secular society, the current objective of the provision is to combat nuisance. In addition, the Fraser Committee found that section 210 works in conjunction with section 212 to prevent “the institutionalization and commercialization of prostitution”.\textsuperscript{38}

2.2 Procurement Laws

There is general consensus that the legislative objective of section 212 is to prevent the control and exploitation of prostitutes by individuals seeking to profit from them. The Supreme Court of Canada, in \textit{R. v. Downey}\textsuperscript{39}, confirmed that section 195 [now section 212] applies only to parasitic relationships:

> It can be seen that the majority of offences outlined in s.195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195 (1)(j) is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(j) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp.\textsuperscript{40}


\textsuperscript{38} \textit{Supra} note 26.


\textsuperscript{40} \textit{Ibid.} at para. 50.
2.3 Communicating Laws

In the Reference case, the province of Manitoba brought a reference to the Supreme Court of Canada in order to determine the constitutionality of the communicating and bawdy house laws. The Court upheld the constitutionality of the laws. However, the judges were unable to agree on the legislative objective of section 195.1(1)(c) [now section 213(1)(c)]. Chief Justice Dickson (with Justice LaForest and Justice Sopinka concurring) found that:

…I would characterize the legislative objective of s. 195.1(1)(c) in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(c) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.41

Similarly, Justice Wilson (with Justice L'Heureux-Dubé concurring) found that:

While it is an undeniable fact that many people find the idea of exchanging sex for money offensive and immoral, it is also a fact that many types of conduct which are subject to widespread disapproval and allegations of immorality have not been criminalized. Indeed, one can think of a number of reasons why selling sex has not been made a criminal offence. First, as Lamer J. notes in his s. 1 analysis of the legislative objective underlying s. 195.1 (1)(c), more often than not the real "victim" of prostitution is the prostitute himself or herself. Sending prostitutes to prison for their conduct may therefore have been viewed by legislators as an unsuitable response to the phenomenon. Or the legislators may have realized that they could not send the female prostitute to prison while letting the male customer go and been reluctant for that reason to make prostitution a criminal offence. Another explanation may be a reluctance on the part of legislators to criminalize a transaction which normally occurs in private between consenting adults. Yet another possibility is that the legislature simply recognized that prostitution is the oldest trade in the world and is clearly meeting a social need.

41 Supra note 36 at para. 2.
Whatever the reasons may be, the persistent resistance to outright criminalization of the act of prostitution cannot be treated as inconsequential.

I mention these possible reasons for the continuing legality of prostitution not for the purpose of endorsing any particular theory but rather to emphasize that the legality of prostitution must be recognized in any s. 7 analysis and must be respected regardless of one's personal views on the subject. As long as the act of selling sex is lawful it seems to me that this Court cannot impute to it the collective disapprobation reserved for criminal offences. We cannot treat as a crime that which the legislature has deliberately refrained from making a crime.42

Justice Lamer was the only one to find that the objective of the prostitution-associated laws was the eradication of prostitution:

…prostitution itself is not a crime in Canada. Our legislators have instead chosen to attack prostitution indirectly. The Criminal Code contains many prohibitions relating to the act of taking money in return for sexual services. Among the offences that relate to prostitution are the bawdy-house provisions, the procuring and pimping provisions, as well as other more general offences that indirectly have an impact on prostitution-related activities, for example provisions such as disturbing the peace. In my view, these laws indicate that, while on the face of the legislation the act of prostitution is not illegal, our legislators are indeed aiming at eradicating the practice. This rather odd situation, wherein almost everything related to prostitution has been criminalized save the act itself, gives one reason to ponder why Parliament has not taken the logical step of criminalizing the act of prostitution. Many theories have been offered as a response to this question, but it seems to me that one possible answer is that, as a carry-over of the Victorian Age, if the act itself had been made criminal, the gentleman customer of a prostitute would have been also guilty as a party to the offence. That situation has now been rectified, in that the section reaches out to the customers of prostitutes, although the act itself is still not illegal…I find that the legislative objectives of the section go beyond merely preventing the nuisance of traffic congestion and general street disorder. There is the additional objective of minimizing the public exposure of an activity that is degrading to women, with the hope that potential entrants in the trade can be deflected at an early stage, and to restrict the blight that is associated with public solicitation for the purposes of prostitution.43

42 Ibid. at para. 142-143.

43 Ibid. at para. 92 and 96.
3 Enforcement Practices

After the communicating law was enacted, the police were quick to enforce it. Between 1986 and 1996, six to ten thousand charges were laid each year. This was followed by a slight decline between 1997 and 2005 when four to six thousand charges were laid. In contrast to the number of charges laid under the communicating provision, there were only a few hundred charges for bawdy house, living on the avails and procuring offences since 1986. This has resulted in a two-tiered system of prostitution where indoor prostitution is left alone to flourish while those without the resources to practice prostitution indoors have been the target of police crackdowns. This inconsistency is a result of the complaint driven nature of the enforcement of the prostitution-related offences. Street prostitution causes more nuisance to the public and therefore becomes a more visible target. The number of charges laid for communicating compared to all other prostitution-related offences highlights the concern for the public nuisance aspect of prostitution over all other concerns such as the exploitation of prostitutes. It is clear that the voices of the prostitutes are being drowned out by the voices of residents groups both in terms of the legislation that is being enacted and the way that the legislation is enforced.

One of the most comprehensive reports on the enforcement of the prostitution-related laws was carried out by the Canadian Centre for Justice Statistics in 1997. The report analyzes prostitution-related offences that were reported between 1977 and 1995. In 1995, there were 7,165 offences reported across the country. Of all the prostitution-related charges laid, 92%

were for communicating, 5% for procuring and living on the avails and 3% for bawdy house offences. In 1985, prior to the enactment of the communicating law, only 22% of prostitution-related charges were for soliciting, 58% for bawdy house offences and 19% for procuring.\textsuperscript{45} The communicating law has shifted the focus from indoor prostitution to street prostitution since it has provided the police with a more powerful weapon with which to combat the nuisance associated with street prostitution.

In addition, the communicating law was designed to be gender neutral and apply equally to female prostitutes and male customers.\textsuperscript{46} However, a closer look at enforcement and conviction patterns reveals that gender disparity still exists. In 1995, females accounted for 55% of those charged with communicating and 64% of those charged with bawdy house offences. The pattern is reversed for procuring offences where 71% of individual charged were male.\textsuperscript{47} In terms of convictions, females received harsher sentences than males. In 1993-1994, of the women that obtained convictions for communicating, 39% were imprisoned, 22% were put on probation and the rest were fined. In contrast, of the men that obtained convictions, only 3% were imprisoned, while 13% were put on probation and 56% were fined.\textsuperscript{48}

\begin{flushleft}
\textsuperscript{45} Supra note 11 at 4.
\textsuperscript{46} The law was also meant to apply equally to male and transgendered prostitutes and female clients. However, they are a minority in the trade so the focus of many reports has been on female prostitutes and male clients.
\textsuperscript{47} Supra note 11 at 4 and 6.
\textsuperscript{48} Supra note 11 at 10.
\end{flushleft}
4 Effects of Prostitution Laws

While the initial legislative objective of the communicating law may have been to eliminate the associated social nuisance and protect vulnerable women, it has failed miserably both in the way it is enforced and the resulting consequences. As I have discussed above, many studies have been conducted in order to determine the effectiveness of the communicating law. The communicating law, in combination with the other prostitution-related offences, did not have the effect of reducing the level of street prostitution. It did force street prostitutes into isolated and dangerous areas making them more susceptible to violence. In addition, the prostitution laws are more often enforced against the prostitutes as opposed to the clients and prostitutes are often given harsher sentences. Therefore, the practical consequences of criminalizing prostitution has resulted in more, not less, harm to these women.

4.1 Violence

Many social scientists agree that the current criminal laws create situations which expose prostitutes to heightened degrees of vulnerability and leads to increased harm. As discussed above, Professor Lowman’s research into violence experienced by prostitutes in British Columbia revealed a sharp increase in murders in the mid-1980s. Professor Lowman attributes this to the enactment of the communicating law in 1985, which forced prostitutes to move to more isolated and dangerous locations.
The Federal Provincial Territorial Working Group on Prostitution, who commissioned studies on the violence experienced by prostitutes in Halifax, Montreal, Toronto, Calgary, Winnipeg and Vancouver, found that:

In Vancouver, researchers felt that the implementation of s. 213 had consolidated the criminal status of street prostitutes, forced them to work in more remote areas and pushed them into more adversarial relationships with police. This situation was believed to contribute to the murder of street prostitutes. In Calgary, prostitutes reported that the street had become a much more tense and fearful milieu. Yet increases in violent crimes against street prostitutes were mirrored by an increase in violent crimes against women in general. This provides a competing explanation. In Montreal, there was evidence that enforcement of s. 213 had resulted in prostitutes working in more remote areas, being less careful in choosing from a diminished number of customers and being further entrenched in drug use than had been reported in earlier studies.\(^{49}\)

Similarly, several studies conducted by the Department of Justice in Halifax, Montreal, Toronto, Calgary and Vancouver found that the communicating law modified the way in which prostitutes conducted their business. The communicating law caused:

- Street prostitutes to report more tense working conditions.
- A reduction in the number of clients due to police arrests, which caused prostitutes to become less choosy and accept potentially dangerous clients.
- Street prostitutes changed their hours of work to avoid police attention.
- Street prostitutes conducted more of their work in cars, which some clients drove to remote areas.
- Area restrictions caused street prostitutes to move to more remote areas.\(^{50}\)

\(^{49}\) Supra note 20 at 9.

\(^{50}\) Supra note 29 at 88.
The enforcement of the bawdy house laws has resulted in the closure of many establishments where indoor prostitution occurs. Prostitutes have been forced to work on the streets where they are exposed to more dangerous working conditions. A study conducted by the Pivot Legal Society Sex Work Subcommittee found that:

Sex workers stated that the bawdy-house provisions in the Criminal Code prohibit them from working in a safer indoor environment, thereby adding to the levels of harm they experience on the job. Sex workers repeatedly stated that working together in an indoor environment would allow them increased safety and protection from violent clients.51

The living on the avails laws have restricted prostitutes from hiring services that would increase their safety while on the job and prevented prostitutes from establishing a safe working environment. Eleanor Maticka-Tyndale, a professor at the University of Windsor, testified to the Subcommittee on Solicitation Laws that:

In our research we found that sharing known clients and having people you trust refer clients, people such as taxi drivers and hotel staff with whom you've established a relationship, both enhance security.

In addition, strategies used by sex workers are also used by workers who have similar work environments, such as when they work late at night or in areas of the city that are considered less safe. For them, having someone you know give you a ride to work enhances your security. However, when those who provide you with transportation are at risk of being arrested and charged because they are transporting you for the purposes of sex work, this form of security enhancement no longer works to the benefit of those involved.52

Street prostitutes have developed numerous strategies in order to improve their safety while on the job. Many work in teams so that they can assist each other in screening clients, exchange information with each other regarding “bad dates” and health concerns and record


52 Supra note 14 at 66.
the license plate number and description of each client. Extensive screening of the client and
the vehicle, which includes making sure there are no hidden passengers, checking for the
lock release buttons on car doors and negotiating the details of the transaction before
entering the vehicle, can also reduce the potential harm to street prostitutes. Finally,
prostitutes report that the location they meet clients in is an important criteria of safety.53

Despite the importance of these strategies, street prostitutes are reluctant to use them since
they may attract police attention and make them subject to criminal charges. Properly
screening a client requires assessing the situation and talking to the client which takes time.
The longer prostitutes talk to potential clients in public, the greater the risk they run that they
may be caught by the police for communicating in public for the purposes of engaging in
prostitution. Therefore, prostitutes are more likely to enter a client’s vehicle prematurely in
order to conclude negotiations quickly. In addition, enforcement of the communicating law
has caused prostitutes to move from residential areas to isolated industrial areas so as to
avoid police scrutiny. Street prostitutes are unable to obtain assistance in these isolated areas
since there is limited access to public transportation, restaurants and public telephones. It is
also more difficult for social service workers to find prostitutes in order to distribute
condoms, “bad date” lists and health information. Finally, fear of criminal charges has caused

53 O'Doherty, supra note 4 at 56-64; Supra note 13 at 22-23.
prostitutes to frequently change locations which separates them from friends, co-workers and regular customers.54

4.2 Stigmatization

The criminalization of prostitution-related activities reinforces the stigmatization of prostitution and pushes the prostitute to the fringes of society. It turns the prostitute into a criminal that is not worthy of legal protection and respect. Maria Nengeh Mensah, a professor at the Université du Québec à Montréal, testified to the Subcommittee on Solicitation Laws that:

The stigma associated with prostitution activity is a powerful social label that discredits and taints anyone to whom it is attached. It radically changes the way that person perceives himself/herself and is perceived as a person. Stigmatization exposes such people to various forms of violence, abuse and contempt. The stigma that sex workers feel or the fear of discrimination has a huge effect on their lives. As a result, they seldom trust government-run systems because they feel judged and categorized by those systems.55

This stigmatization has a number of negative consequences for the prostitute and the sex trade in general:

• Criminalization prevents prostitutes from wanting to approach the police when they are victims of violence and promotes the attitude that they get what they deserve.


55 Supra note 14 at 67.
• A criminal record makes it harder for prostitutes to exit the sex trade and pursue other avenues of work.

• Prostitutes are forced to increase their work to pay for fines and legal fees.

• Criminalization deprives prostitutes of the protection of the criminal laws and provincial laws dealing with labour and employment standards.

• Clients are able to justify violent behaviour towards prostitutes since they are seen as criminals and not deserving of respect.

• Clients may engage in violent behaviour and murder without fear of reprisal since prostitutes are fearful of approaching the police for assistance.

• Criminalization leaves prostitutes vulnerable to the influence of other criminal markets, such as the drug trade.

• A criminal record for a prostitution-related offence makes it difficult for prostitutes to obtain housing since a landlord can be convicted of keeping a bawdy house under section 210(4) of the Criminal Code.

• Criminalization isolates prostitutes from their friends and family both as a result of the stigmatization of prostitution and because association with a prostitute may result in living on the avails charges.

• The public may feel justified in harassing and humiliating prostitutes.  

Therefore, the criminalization of prostitution encourages the idea of the prostitute as a “throw away” individual who is not worthy of the same benefits and protections as the rest of society because they are engaging in criminal behaviour.

Due to all of the negative effects of the prostitution laws as I have outlined above, I believe that the only appropriate treatment for prostitution should be the repeal of the communicating, bawdy house, living on the avails and procuring provisions that deal with adult prostitution.57

57 I have refrained from analyzing youth prostitution and sex trafficking and therefore, have no comment on the criminalization of those aspects of the sex trade.
Chapter 4

Attempts at Decriminalization

1 Legislative Reform

Every since the Confederation of Canada, we have had criminal laws to deal with prostitution. Many of the laws relating to bawdy house offences and procuring have changed very little from those original laws. The vagrancy law remained in place until the 1970s when public debate about street prostitution was rekindled. At that time, there was public outcry from many feminist and civil libertarian groups calling for the repeal of the vagrancy law which applied only to women. A report by the Royal Commission on the Status of Women found that:

Problems raised by the law dealing with prostitutes deserve special attention. Prostitution itself is not a crime, and prostitutes are controlled by the vagrancy provisions of the Criminal Code. As the law now stands, prostitutes apprehended by the police are usually charged with having contravened section 164(1)(c) of the Criminal Code: “Every one commits vagrancy who, being a common prostitute or night-walker is found in a public place and does not, when required, give a good account of herself”. This provision of the Criminal Code applies only to women. While the existence of male prostitutes is now recognized, many people still apply the term only to a female. Even the Oxford Dictionary defines a prostitute as “a woman who...”. Thus the present law prohibits not prostitution but being unable, if found in a public place, to give a good account of oneself. Prostitutes are ordinarily charged with vagrancy, not prostitution, and men who accept the solicitation of a prostitute are not prosecuted. A man commits an offence under the law only if he is found in or keeps a bawdy-house; as a rule, the prostitute, not the client, is brought before Court...We are concerned about the use of vagrancy in the criminal law in order to regulate the activity of women prostitutes. Therefore, we recommend that section 164(1)(c) of the Criminal Code be repealed.58

58 Supra note 22 at 369 and 371.
Rather than decriminalize prostitution, the government enacted the soliciting law which criminalized the act of soliciting in a public place for the purposes of prostitution. The law corrected the discrimination of the vagrancy law by applying equally to men and women. Due to several controversies related to the application of the soliciting law, most notably the decision in *R. v. Hutt*, the government formed the Special Committee on Pornography and Prostitution to review the state of prostitution and the prostitution-related laws. In the course of its investigations, the Committee found that the contradictory nature of the *Criminal Code* provisions was the cause of the high levels of street prostitution and recommended partial decriminalization. However, as discussed above, the government ignored their recommendations and instead replaced the soliciting law with the communicating law.

Unfortunately, the communicating law was not without its own controversies. As I have outlined above, it failed to accomplish its primary goal of reducing street prostitution and was the cause of increased violence towards street prostitutes. Similar to the Special Committee on Pornography and Prostitution, the majority of the Subcommittee on Solicitation Laws recommended that adult prostitution should not be criminalized. The Subcommittee unanimously found that the status quo of prostitution laws is unacceptable since “[t]he social and legal framework pertaining to adult prostitution does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities.”59 In addition, many advocacy groups and social science researchers have conducted studies analyzing the harms caused by adult prostitution-related laws and petitioned the government on many occasions to repeal them.

59 *Supra* note 14 at 86.
Regardless of the many studies recommending the repeal of the communicating law, it has remained in place to this day.

Over the years, the government has ignored the advice of countless studies to decriminalize prostitution. This has resulted in many missed opportunities to reform the legislative treatment of prostitution that would lead to greater protection for all sex workers.

2 Judicial Reform

The question of whether the courts, as an unelected branch of the government, should be making decisions about the validity of legislation enacted by the elected branches is outside the scope of this paper. Rather, I begin from the assumption that courts are entitled to make these decisions and analyze whether these decisions are effective in creating social change.

In his book *The Hollow Hope*, Gerald Rosenberg analyzes the ability of courts to effectuate political and social change. Whether courts can or cannot create change is dependent upon whether the courts are constrained or dynamic. The Constrained Court view:

…holds that litigants asking courts for significant social reform are faced with powerful constraints. First, they must convince courts that the rights they are asserting are required by constitutional or statutory language. Given the limited nature of constitutional rights, the constraints of legal culture, and the general caution of the judiciary, this is no easy task. Second, courts are wary of stepping too far out of the political mainstream. Deferential to the federal government and potentially limited by congressional action, courts may be unwilling to take the heat generated by politically unpopular rulings. Third, if these two constraints are overcome and cases are decided favorably, litigants are faced with the task of implementing the decisions. Lacking powerful tools to force implementation, court decisions are often rendered useless given
much opposition. Even if litigators seeking significant social reform win major victories in court, in implementation they often turn out to be worth very little.\textsuperscript{60}

While, the Dynamic Court view:

…maintains that courts can be effective producers of significant social reform. Its basic thrust is that not only are courts not as limited as the Constrained Court view suggests, but also, in some cases, they can be more effective than other governmental institutions in producing significant social reform…[The] key to the Dynamic Court view is the belief that courts are free from electoral constraints and institutional arrangements that stymie change. Uniquely situated, courts have the capacity to act where other institutions are politically unwilling or structurally unable to proceed.\textsuperscript{61}

Rosenberg believes that the true state of the American court is somewhere in the middle of these two views. While the constraints of the courts limit the possibility for change, social reform can occur when there is political, social and economic support for the change.

Therefore, Rosenberg does not claim that the courts can never create social change but that rather social change is only possible if the courts can overcome the constraints outlined above. The courts can overcome these constraints by meeting certain conditions:

1. There is ample legal precedent for change; and
2. There is support for change from substantial numbers in Congress and from the executive; and
3. There is either support from some citizens, or at least low levels of opposition from all citizens; and
   (a) Positive incentives are offered to induce compliance; or
   (b) Costs are imposed to induce compliance; or
   (c) Court decisions allow for market implementation; or
   (d) Administrators and officials crucial for implementation are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind.\textsuperscript{62}

\textsuperscript{60} Gerald Rosenberg, \textit{The Hollow Hope} (Chicago: The University of Chicago Press, 2008) at 21.

\textsuperscript{61} \textit{Ibid.} at 22.

\textsuperscript{62} \textit{Ibid.} at 36.
Proponents of judicial activism often point to *Roe v. Wade*\(^\text{63}\) and *Brown v. Board of Education of Topeka*\(^\text{64}\) as important examples of courts effectuating significant social change. However, opponents of this view see these cases as reflections of social reforms that were already occurring at the time. At the time *Roe v. Wade* was being fought, strong public support for abortion was beginning to build. The largest increase in legal abortion in the United States occurred between 1970 and 1971, which was two years before the decision in *Roe v. Wade*.\(^\text{65}\) The decision in *Roe v. Wade* was merely reflecting social change that was already starting to occur.

Rosenberg further argues that there is a danger in relying on litigation to create the desired social change since courts lack the resources to enforce their decisions. Victories can often become merely symbolic with no substantive change occurring. Money and resources spent on litigation could have been used for lobbying efforts that may have produced political change. For example, in the ten years following *Brown v. Board of Education of Topeka*, only 1.2% of black children attended desegregated schools in the Southern states. It was not until Congress enacted the 1964 Civil Rights Act that social change occurred, with 91.3% of black children attending desegregated schools in 1972.\(^\text{66}\)

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\(^{65}\) *Supra* note 60 at 178.

\(^{66}\) *Ibid.* at 52.
In *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada*,

W. A. Bogart argues that Canadian courts contain many of the same constraints as Rosenberg’s American courts:

> With some exceptions, litigation in the name of reform has achieved little real change. What it frequently has done is act as a lure to deflect groups and their limited resources away from the political process where more deep and longlasting change might have been secured, though the fact that such resources were not spent on political activities also means that there can be no certainty about what would have happened outside the court.\(^{67}\)

Even if the courts make a landmark decision that creates social reform, there is no guarantee that the decision will lead to practical change. *R. v. Morgentaler*\(^{68}\) is an example of the court’s attempt to elicit social reform and the dangers of relying on judicial activism.

Following the striking down of section 251 of the *Criminal Code* by the Supreme Court of Canada, the federal government failed to enact new legislation dealing with abortion. In theory, this provided Canadian women with unrestricted access to abortions. However, many provincial governments sought to prevent this unlimited access by limiting provincial health care funding to abortions performed in hospitals or private clinics. In addition, hospitals are not required to provide abortion services. A 2003 study by the Canadian Abortion Rights Action League (CARAL) found that while two-thirds of abortions were performed in hospitals, only 17.8% of hospitals in Canada offer abortion services. Even in the hospitals that do perform abortions, they may have procedural requirements that act as barriers to access, including gestational limits, physician referral requirements, physician approval

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requirements, parental consent requirements and waiting periods.\textsuperscript{69} The practical effect of this is that many Canadian women do not have access to abortions.

The constitutionality of the prostitution laws have been before the Court on many occasions, including the \textit{Reference} case, \textit{R. v. Skinner}\textsuperscript{70} and \textit{R. v. Downey}, where there was either found to be no infringement of a constitutional right or the infringement was held to be justified under section 1. In his article “Chief Justice Lamer and some Myths about Judicial Activism”, Professor Kent Roach analyzes myths about judicial activism after the enactment of the \textit{Canadian Charter of Rights and Freedoms}\textsuperscript{71}. He argued that court decisions dealing with prostitution laws have discredited the myth that the \textit{Charter} replaced Parliamentary supremacy with judicial supremacy since the courts have been quick to show deference to the legislature.\textsuperscript{72}

In the \textit{Reference} case, a 4-3 majority held that section 195.1(1)(c) [now section 213(1)(c)] violated the right to freedom of expression under section 2(b) of the \textit{Charter}, while section 193 [now section 210] does not. However, the impugned provision was justified under section 1 of the \textit{Charter}. The Court also found that while sections 195.1(1)(c) and 193 infringed the right to liberty due to the possibility of imprisonment, it did so in accordance


with the principles of fundamental justice. In *R. v. Skinner*, which was heard together with the *Reference* case, the Court confirmed its decision regarding the constitutionality of section 195.1(1)(c). The Court also found that section 195.1(1)(c) did not infringe the right to freedom of association under section 2(d) of the *Charter*. In *R. v. Downey*, the accused challenged the reverse onus of section 195(2) [now section 212(3)]. Section 195(2) or the living on the avails provision states that “[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution…”. The Court held that section 195(2) infringed the presumption of innocence under section 11(d) of the *Charter* but was justified under section 1 of the *Charter* since it deals with the “cruel and pervasive social evil” of pimping.73 In all of the constitutional challenges to the prostitution-related laws to date, the Supreme Court of Canada has shown considerable deference to the legislature and been reluctant to strike down any of the provisions.

Two cases in the courts today are attacking the constitutionality of the prostitution-associated laws. In *Bedford, Lebovitch and Scott v. Attorney General of Canada*74, the essence of the *Charter* challenge is that the bawdy house and living on the avails provisions contravene section 7 of the *Charter*, while the communicating law also violates section 2(b) of the *Charter*. The Ontario Superior Court of Justice heard the case in October 2009, however, the judgment has not been released yet. Whatever the outcome is, it will likely be appealed to the Ontario Court of Appeal and further to the Supreme Court of Canada. Therefore, it will be

73 *Supra* note 70 at para. 60.

74 *Bedford, Lebovitch and Scott v. Attorney General of Canada*, 07-CV-329807PD1 [*Bedford*].
some time before we have a chance to see whether this case will have any impact on the prostitution-related criminal laws in Canada.

In *Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach v. Attorney General (Canada)*\(^{75}\), the plaintiffs claim that the prostitution-associated laws violate their right to life and security of the person, in addition to their section 2(d) and section 15 Charter rights. This case has been stalled since the Attorney General of Canada has successfully brought an application to have the action dismissed on the grounds that the Downtown Eastside Sex Workers United Against Violence Society lacks private or public interest standing. The plaintiffs have appealed this decision to the British Columbia Court of Appeal. Thus, it is yet to be seen whether this argument will even be allowed to reach the courtroom.

The government and the courts have been thus far unwilling to remove the impugned provisions despite mounting evidence that they not only fail prevent the nuisance associated with street prostitution but they also cause harm to sex workers. Some are optimistic that with this new social science evidence before the Court in the *Bedford* case, the provisions will be found unconstitutional. However, even if the provisions are found unconstitutional and declared of no force and effect, I believe that the government will be unwilling to allow this void in the criminal law to remain and will rush to enact new laws. This has been the pattern followed in the past where they have ignored the recommendations of countless

\(^{75}\) *Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach v. Attorney General (Canada)*, 2008 BCSC 1726.
studies, some of which they have commissioned themselves, and enacted tougher and
tougher criminal laws.

3 The Way Forward

Even if we are to adopt Rosenberg’s view that “only when political, social, and economic
forces have already pushed society far along the road to reform will courts have any
independent effect” 76, we do not have to give up the hope of achieving decriminalization of
prostitution. There is a discernible shift in the contemporary view of prostitution.

A new pro-prostitution movement is starting to emerge among social scientists and feminists,
which recognizes the decriminalization of prostitution as the appropriate solution to address
the harms associated with it. The majority of recent social science studies concerning the
impact of prostitution-related laws on the health, safety and wellbeing of prostitutes indicates
that criminalization jeopardizes the safety of prostitutes, as well as their access to health and
social services and recommends the decriminalization of the profession. Feminists such as
Frances Shaver, Deborah Brock and Sylvia Davis are beginning to listen to prostitutes’
demands and stand up for them.

In addition, there has been an increase in the number of prostitutes rights groups in recent
years, many of which have been founded by former prostitutes:

76 Supra note 60 at 6.
<table>
<thead>
<tr>
<th>Group</th>
<th>Mandate</th>
<th>Year Established</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alliance for the Safety of Prostitutes</td>
<td>Sex workers group that provides counselling and advocacy</td>
<td>1982</td>
</tr>
<tr>
<td>Canadian Organization for the Rights of Prostitutes</td>
<td>Sex workers group that campaigns for decriminalization</td>
<td>1983</td>
</tr>
<tr>
<td>WISH Drop-in Centre Society</td>
<td>Drop in centre for sex workers in Vancouver</td>
<td>1984</td>
</tr>
<tr>
<td>Maggie’s</td>
<td>Resource and self-help centre in Toronto</td>
<td>1986</td>
</tr>
<tr>
<td>Stepping Stone</td>
<td>Sex workers group that provides supportive programs and outreach</td>
<td>1987</td>
</tr>
<tr>
<td>Sex Workers Alliance of Toronto</td>
<td>Sex workers group that lobbies for rights to fair wages and safe working conditions</td>
<td>1992</td>
</tr>
<tr>
<td>Sex Workers Alliance of Vancouver</td>
<td>Sex workers group that lobbies for rights to fair wages and safe working conditions</td>
<td>1994</td>
</tr>
<tr>
<td>Pace Society</td>
<td>Sex workers group that provides support, education, outreach and health services in Vancouver</td>
<td>1994</td>
</tr>
<tr>
<td>Stella</td>
<td>Health and legal resource centre in Montreal</td>
<td>1995</td>
</tr>
<tr>
<td>Coalition for the Rights of Sex Workers</td>
<td>Sex workers group that lobbies for the legal recognition of sex work</td>
<td>1996</td>
</tr>
<tr>
<td>Pivot</td>
<td>Non-profit legal advocacy organization in Vancouver</td>
<td>2000</td>
</tr>
<tr>
<td>Sex Professionals of Canada</td>
<td>Sex workers group that campaigns for decriminalization through public education and legal challenges</td>
<td>2001</td>
</tr>
<tr>
<td>PEERS</td>
<td>Sex workers group that provides education and support</td>
<td>2001</td>
</tr>
</tbody>
</table>
It was not until the early 1980s that prostitution advocacy groups and resource centres began popping up. The majority of these organizations were formed after the major Supreme Court of Canada decisions upholding the constitutionality of the prostitution-related offences. The decisions of the Supreme Court of Canada may have been different if they had been able to hear testimonies from some of these organizations. Thankfully, these organizations are now able to provide sex workers with a legitimate voice and help them lobby for the decriminalization of adult prostitution.
Chapter 5

Conclusion

In this paper, I have analyzed the treatment of prostitution in Canada and attempted to determine whether decriminalization of adult prostitution is an achievable goal. Canada has adopted a quasi-criminal approach to prostitution, where the act of exchanging sex for money is legal but all prostitution-related activities are illegal. Prostitution-related activities are regulated under sections 210 to 213 of the *Criminal Code*, which cover offences related to keeping or using common bawdy houses, transporting a person to a bawdy house, procuring, living of the avails of prostitution and communicating for the purposes or prostitution. These laws have focused on the nuisance and exploitation aspects of prostitution and failed to take into account the varied nature of the sex trade in Canada.

While the government has been unequivocal in its criminalization of prostitution-related activities, it has failed to clarify whether prostitution should be abolished or kept hidden in the shadows. Instead, the government’s focus on nuisance and exploitation is a result of the lobbying efforts of radical feminists and neighbourhood groups who view prostitution as a social evil. The legislature and the courts have ignored the pleas of the sex workers themselves who have been asking for the decriminalization of adult prostitution. There have been many attempts to reform the prostitution-related laws. However, despite mounting evidence on the harms caused by the prostitution-related laws and the pleas of the sex workers, both the legislature and the judiciary have been unwilling to take the revolutionary step of repealing all adult prostitution laws.
The failure of the campaigns and litigation efforts to achieve decriminalization may have been a result of a lack of societal and political support for this type of change. Although, things may be starting to change. Since the 1980s, there has been a substantial increase in sex worker rights groups that have been lobbying for change and many prominent feminists have been supporting sex workers and embracing the sex-as-work doctrine. As stated by Janice Dickin McGinnis in “Whores and Worthies: Feminism and Prostitution”:

I am by no means alone in my call for a reassessment of the mainstream position on aspects of the sex trade. The first rifts opened over censorship of pornography. Now the focus is shifting to prostitution.77

Perhaps with the support of academics, activists and experts and the assistance of the courts, we will finally get that pot of gold at the end of the rainbow and achieve decriminalization of adult prostitution.

77 Supra note 5 at 109.
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