BCCLA Updated Position on Sex Work Laws

January 2005

I. Background

The mandate of the British Columbia Civil Liberties Association ("BCCLA" or the "Association") is to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada. The BCCLA has consistently held that criminal laws relating to prostitution create more social harm than they prevent. In 1982, the Association issued a position paper entitled *Prostitution, solicitation, bawdy houses and related matters*, in which it called for the repeal of the laws prohibiting solicitation and common bawdy-houses.

Two decades later, the regulation of Canada's sex trade remains a critical issue, particularly with the proliferation of violent crimes against street prostitutes and their struggles with poverty and substance abuse. The disappearance of over 60 women from Vancouver's Downtown Eastside since the early 1980's and the highly publicized Robert Pickton trial have drawn further attention to the situation of sex workers. It is clear that victimization does occur in the sex trade. However, our position is that the current laws do not serve to mitigate this victimization, and in some cases, actually contribute to the victimization.

The current *Criminal Code* offences concerning prostitution are:

- **Sections 210 and 211:** Section 210 prohibits maintaining, owning, or being an "inmate" of a common bawdy-house, while Section 211 prohibits knowingly transporting or directing a person to a bawdy-house [hereinafter "the bawdy-house law"].

- **Section 212(1) and (3):** Section 212(1) prohibits procuring, attempting to procure, or soliciting a person to have illicit sexual intercourse with another person; inveigling or enticing a person to a bawdy-house for the purpose of prostitution; and living on the avails of a prostitute. Section 212(3) places an evidential burden on an accused who lives with or is "habitually in the company of" a prostitute to prove that s/he is not living on the avails of prostitution [hereinafter "the procuring law"].
- **Section 213:** This section proscribes making offers to purchase or provide sexual services in a public place or in public view [hereinafter "the communicating law"].1[1]

Although the acts of buying and selling sex are legal on their face, these laws effectively create a crime of prostitution itself, as there is no place where prostitutes can lawfully carry out their chosen profession. Section 213 is meant to deter outdoor solicitation, while ss. 210 and 211 also prevent the private sale of sexual services in brothels. Under ss. 210-212, the landlords, tenants, agents, employers, and family members of prostitutes may be charged, which implies that even independent escort workers must operate in a clandestine manner.

Whereas other western governments have tended to move away from criminal sanctions for prostitution, Canada did the reverse in 1986, legislating a stricter anti-communication law to replace the former solicitation provision.2[2] As Justice Lamer notes in the Supreme Court of Canada reference *Re Prostitution*, "this rather odd situation wherein almost everything related to prostitution has been

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1[1] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 210, 211, 212(1), 212(3), 213.

2[2] Until 1972, the *Criminal Code* contained a "vagrancy" offence that specifically penalized women for "being a common prostitute or night walker… found in a public place and when required, fail[ing] to give a satisfactory account of herself": *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1)(c).

criminalized save for the act itself gives one reason to ponder why Parliament has not taken the logical step of criminalizing the act."3[3]

For the reasons outlined below, the BCCLA recommends the repeal of the bawdy-house laws, the communication law, and sections 212(1) and (3) of the procuring law (with the exception of subsections (f) and (g) – the provisions on international trafficking – which are not treated in this paper).

The BCCLA emphasizes that this paper deals only with relations between **adults** and **does not apply to children in the sex trade**. (In this context, "children" refers to persons under the age of 18.) The Association has consistently maintained that "child prostitution raises civil liberties concerns and… that prostitution involving children compromises and undermines the capacity for the development of autonomous individuals."4[4]

II. Principled arguments for repeal of the prostitution laws

The BCCLA holds the position that the *Criminal Code* should not be used to restrict individual liberty in cases where people's actions are not seriously harmful to others. We also claim that criminal sanctions should be both proportionate to activities and minimally impairing. Attempts to "legislate" the morality of others are incompatible with these principles, and adversely affect our capacity to form adequate social policies and laws governing sex work.

In a 1991 address to the Elizabeth Fry Society on so-called "feminine crimes," Madam Justice Beverley McLachlin of the Supreme Court of Canada stated that "more than a breach of morality is required to justify the stigma and infringement on liberty that flow from criminalization." To be deemed justifiably criminal, an individual's actions also require general societal condemnation, and must demonstrate considerable harm.5[5] The BCCLA argues that sex work in itself is neither deserving of condemnation nor inherently harmful.

In *Re Prostitution*, Justice Lamer equates sex work with exploitation and violence against women:

> Prostitution, in short, becomes an activity that is degrading to the individual dignity of the prostitute and which is a vehicle for pimps and customers to exploit the disadvantaged position of women in our society. In this regard, the impugned section aims at minimizing the public exposure of this degradation, especially to young runaways who seek refuge in the streets of major urban centres, and to those who are exposed to prostitution as a result of the location of their homes and schools in areas frequented by prostitutes and who may be initially attracted to the "glamourous" lifestyle as it is described to them by the pimps.6[6]

3[3] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1191 [*Re Prostitution*].

4[4] See BCCLA, "Report of the Secure Care Working Group" (1997), online: <http://www.bccla.org/positions/children/99securecare.html>.

5[5] The Honourable Madam Justice B. M. McLachlin, "Crime and Women – Feminine Equality and the Criminal Law" (1991) 25 U.B.C. L. Rev. 1-22 at para. 5.

6[6] *Supra* note 3 at 1194.

In contrast to this view, we argue that it is problematic to characterize all forms of prostitution as objectification of women at best, or as a mode of "female enslavement" at worst. The BCCLA holds that capable adults should exercise autonomy over their bodies. Many people – male, female and transgendered – choose to support themselves by selling sexual services, and these choices should not be criminalized. It must be acknowledged that "danger, coercion and lack of reciprocity are neither essential nor unique to sex work."7[7] We cannot assume that individuals would never elect to engage in prostitution; nor can we relegate all prostitutes to the role of victims.

The exchange of money for sex should be viewed as a private matter – a personal choice made by consenting adults – rather than a question of criminal law. Members of the world's oldest profession should not be punished for offending the moral values or aesthetics of the status quo. Canada's prostitution laws fail to address the most serious problems, such as poverty and addiction, stemming from the sex trade. Instead, they treat the sex industry as a "social nuisance" creating such concerns as street congestion, noise, and the solicitation of uninterested individuals.8[8]

Citing City Council reports, our earlier position paper states that the nuisance problems of 1980s Vancouver were occasioned by "customers and onlookers" rather than prostitutes.9[9] Regardless of its source, the BCCLA acknowledges that the presence of highly visible street prostitution in residential neighbourhoods can be a legitimate safety concern. The Association particularly acknowledges the serious harms suffered by many street-level sex workers, including physical assault, sexual assault, drug addiction and extortion. But surely turning the most vulnerable members of society into criminals is not the best, or even an acceptable remedy? Despite the gender-neutrality of the *Criminal Code*'s language, it is overwhelmingly female street prostitutes – not customers or pimps – who are being convicted under the communication and bawdy-house laws.10[10] As noted by Madam Justice McLachlin, these criminal laws have burdened marginalized women with "the legal stigma and penalties enacted by legislators seeking an easy solution to complex social and moral problems.11[11]

Moreover, the current laws have failed to discourage the sex trade, and instead have driven it further underground. As evidenced in Pivot Legal Society's comprehensive report on prostitution in Vancouver's Downtown Eastside, criminalization can increase the harms inflicted upon street-level sex workers by

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7[7] Francis Shaver, "The Regulation of Prostitution: Avoiding the Morality Traps" (1994) 9 C.J.L.S. 123 at 137 [Shaver].

8[8] See *supra* note 3 at 1129: "Section 195.1(1)(c) was not designed to criminalize prostitution per se or to stamp out all the ills and vices that flow from prostitution such as drug addiction or juvenile prostitution. The legislation was designed only to deal with the social nuisance arising from the public display of the sale of sex."

9[9] BCCLA, "Prostitution, solicitation, bawdy houses and related matters" (1982), online: <www.bccla.org/positions/privateoff/82prostitution.html>.

10[10] Federal/Provincial/Territorial Working Group of Attorneys General Officials on Gender Equality in the Canadian Justice System, "Gender Equality in the Canadian Justice System: Summary Document and Proposals for Action" (April 1992, Released July 5, 1993) at 7; Shaver, *supra* note 7 at 131; Janice Dickin McGinnis, "Whores and Worthies: Feminism and Prostitution" (1994) 9 C.J.L.S. 105 at 114.

11[11] *Supra* note 5 at para. 49.

eliminating their ability to work legally and safely.12[12] By significantly augmenting the dangerous conditions of the sex trade, the laws oppress the individuals they are meant to protect.

Rather, the abusive and exploitative aspects of prostitution should be addressed using existing *Criminal Code* provisions and social remedies. Extortion, battery, sexual assault, and juvenile prostitution are effectively prohibited by other sections of the *Code*. We agree with those who argue that some of these laws do not work very well, but in our view the problem is not with the laws but with their administration: many sex workers are unwilling to report violent incidents to police for fear of being stigmatized or prosecuted for prostitution-related offences.13[13]

Finally, a continuum of adequate social resources is required to meet the needs of prostitutes and mitigate the more hazardous aspects of the trade. This includes safe houses, drop-in centres, health and counseling services, legal aid services, and community education programs. By decriminalizing their means of making a living, prostitutes would be given more control over their working conditions and be more able to work safely and autonomously.

III. Charter-based arguments

The communication law, the bawdy-house law and the procuring law have all withstood *Charter* challenges in the Supreme Court of Canada. The BCCLA believes that these decisions should be re-examined.

The communication law

In *Re Prostitution*, the former solicitation law (now s. 213) was found to violate s. 2(b) of the *Charter of Rights and Freedoms*, but was saved under s. 1 because its objective of eliminating social nuisance was considered sufficiently important to justify a limit to freedom of expression.14[14] The Court further ruled in *R. v. Skinner* that the law does not infringe on freedom of association, as "its target… is expressive conduct [and] does not attack conduct of an associational nature."15[15]

Given our reservations about the disproportionate enforcement of the communication law, the BCCLA does not agree that nuisance presents an adequate rationale for stifling freedom of expression. We remain unconvinced of the dire harms that supposedly arise from the public display of the sale of sex, warranting criminalization. Since it is long established in Canada that free expression includes commercial expression,16[16] and as prostitution itself is not illegal, there is no valid reason for a prohibition on communicating for a lawful purpose.

In terms of the law's limitation of freedom of association, BCCLA takes the position of the dissent in *Skinner*, which states that the communication law's effect is to prohibit parties from associating with a view to pursuing a lawful common objective. Wilson J. points out that the law is overbroad and could

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12[12] See Pivot Legal Society Sex Work Subcommittee, "Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws," online: <http://www.pivotlegal.org/sextradereport/1short2.pdf>. The report is based on affidavits taken from 91 survival sex trade workers in the Downtown Eastside.

13[13] *Ibid*. at 18.

14[14] *Supra* note 3 at 1169.

15[15] *R. v. Skinner*, [1990] 1 S.C.R. 1235 at 1244.

16[16] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 716.

prevent a prostitute and potential customer from associating in a wide range of circumstances in which no nuisance will result from their meeting together.17[17]

The bawdy-house law

The majority of the Court in *Re Prostitution* found that the bawdy-house law infringes the right to liberty under s. 7 of the *Charter*, given the possibility of imprisonment it contemplates, but is nonetheless in accordance with the principles of fundamental justice.18[18]

The BCCLA holds that s. 210 and 211, in combination with the communication law, restrict prostitutes from creating lawful environments in which to work. As such, they constitute a violation of the right to liberty and security of the person. Given that public solicitation is outlawed for reasons of "social nuisance," there is no rational justification for also prohibiting discreet, private brothels – the obvious alternative to street prostitution. By rendering sex work illegal both on the streets and indoors, these laws affect the personal autonomy of prostitutes, their ability to exercise their professions, and their physical and economic integrity.

The procuring law

The BCCLA agrees with the dissenting opinion in *R. v. Downey*, in which s. 212(3) withstood a challenge under s. 11(d) of the *Charter*, the right to be presumed innocent. Section 212(3) presumes that a person who "lives with or is habitually in the company of a prostitute," or who lives in a common bawdy-house, is "living on the avails" of prostitution. However, as McLachlin J. (as she then was) states in the dissent, this law is overbroad because it also encompasses people who are in legitimate relationships with prostitutes, such as spouses, lovers, friends, parents and children. As well, the law places sex workers into the dangerous position of "being unable to associate with friends and family, or enter into arrangements which may alleviate some of the more pernicious aspects of their frequently dangerous and dehumanizing trade."19[19]

By restricting the ability of prostitutes to legally co-habit or form relationships with others, the procuring law places an excessive limit on freedom of association. Furthermore, although the law is designed to target pimps, it also captures activities and relationships that are not coercive.20[20] Language prohibiting the exercise of "control, direction or influence over the movements" of a prostitute, "for the purposes of gain," might also preclude valid forms of regulating prostitution (such as licensing or municipal bylaws).21[21] The BCCLA recommends that existing *Criminal Code* provisions, such as extortion, intimidation and assault, be used instead to deal with the problems of violent or coercive pimping.

IV. Alternatives to the criminal law

Having established that the criminalization of the sex trade is not an appropriate solution, there remains the question of alternative forms of regulation. Like panhandlers, religious groups, or any other type of

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17[17] *Supra* note 15 at 1255.

18[18] *Supra* note 3 at 1142.

19[19] *R. v. Downey*, [1992] 2 S.C.R. 10 at 47.

20[20] *Supra* note 12 at 30.

21[21] See *Criminal Code*, R.S.C. 1985, c. C-46, s. 212(1)(h).

canvasser, street-level sex workers should be required to solicit in a manner that does not obstruct traffic or compromise the safety of others. However, problems of aggressive or inappropriate solicitation – for any purposes – can be remedied by existing criminal laws on indecent exhibition and exposure, harassment, intimidation, loitering, and causing a disturbance. A criminal offence specifically targeting the purchase and sale of sex is redundant.

Two alternative legal regimes are generally recognized: legalization and full decriminalization. In the mid-1980s, a special review committee was set up by the federal government ("the Fraser Committee") to examine the impact of Canada's prostitution laws. The Fraser Committee supported "legalization" of some prostitution activity currently sanctioned by criminal law, suggesting that it should be subject to a regulatory framework.22[22] Advocates of decriminalization, which include most prostitutes' rights groups, argue that prostitution offences should be completely removed from the *Criminal Code*. Neither approach has been implemented in Canada to date.

In Australia, where criminal law is made by individual states and the prostitution legislation strongly parallels Canada's, two jurisdictions have undertaken ground-breaking experiments in legalization and decriminalization. Brothels were removed from Victoria's penal code in 1985, and a new *Town and Country Planning Act* enabled brothel licenses to be issued by municipal authorities, subject to special zoning requirements. However, as the number of available permits was very limited, only owners of large brothels were able to afford the inflated licensing prices and many prostitutes were forced back into "illegal" practice. New South Wales went even further, removing the legal restrictions on soliciting, consorting, or using premises for the purpose of prostitution in 1979. Lobbying from residents' groups and police eventually prompted the government to re-enact prohibitions on soliciting during the early 1980s. Nonetheless, this regime of "partial decriminialization" has served as a model of progressive commercial sex legislation for jurisdictions around the world.23[23]

Re-conceiving prostitution as a legitimate profession is another step toward addressing alternatives to criminalization. In the Netherlands, the advocacy group *Rode Draad* (Red Thread) is working toward establishing a professional society of sex workers, with the goal of joining the Netherlands' largest labour union.24[24] In Montreal, a similar group of sex workers and activists called the Committee and Guild for Erotic Labour is seeking support from the Canadian Union of Public Employees (CUPE) and the Canadian Labour Congress.25[25] Union representation would aid prostitutes in lobbying for sex trade law reform, the establishment of standardized contracts between brothel owners and workers, and improved health and safety legislation.

V. Conclusion

22[22] *Pornography and Prostitution in Canada* (Ottawa: Department of Supply and Services, 1985) (Chair: Fraser), cited in Federal/Provincial/Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* (Ottawa: Queen's Printer, 1998) at 63.

23[23] Roberta Perkins, *Working girls: prostitutes, their life and social control* (Canberra: Australian Institute of Criminology, 1991), online: Australian Institute of Criminology <http://www.aic.gov.au/publications/lcj/working/index.html>.

24[24] Roberta Cowan, "A Century of Sex Work" *Expatica* (30 June 2004), online: <http://www.expatica.com/source/site_article.asp?subchannel_id=64&story_id=88>.

25[25] Sarah Colgrove, "Montreal sex workers look to unionize" *The McGill Daily* (25 October 2004), online: <http://www.mcgilldaily.com>.

While recognizing the myriad social problems surrounding the sex trade today, the BCCLA continues to maintain that the criminalization of sex work is not the solution to these problems. By advocating for the repeal of the current prostitution laws, the Association does not condone coercive or violent pimping, trafficking for the purposes of prostitution, or juvenile prostitution. Rather than attempting to legislate moral standards, a regulatory system should aim to reduce harm against all citizens equally. Removing the sex trade from the ambit of the criminal law would properly recognize marginalized prostitutes' rights and allow them to reclaim the dignity, autonomy and safety that every citizen deserves.