

Op-Ed: The Supreme Court and sex workers

BY TYLER DAWSON, OTTAWA CITIZEN DECEMBER 17, 2013



Chris Mikula/Ottawa Citizen

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Police activity and calls for regulation in the past week provide a glimpse into the future of what sex work could look like, following the upcoming Supreme Court ruling on prostitution this Friday.

In Montreal, there is talk of a regulatory crackdown on massage parlours that offer sexual services. In Ottawa, police went on one of their “john sweeps,” where they arrest those searching for sexual services.

It smacks of a last-ditch effort to cause as many problems as possible for those working in the sex trade before the court rules. It also suggests that even once the ruling has been made — regardless of the outcome — there may be regulatory hurdles that sex workers will need to overcome if they want to work legally.

Licensing regimes, for example, could create major headaches for brothel operators. There could also be zoning issues that make it difficult for both street-based workers and those working indoors to establish businesses.

These challenges could cause problems: they could be too onerous and parts of the industry might just decide to stay underground to avoid the trouble of dealing with municipal governments. As sex workers themselves have pointed out, restrictive regulation could lead to large brothels where the workers

themselves have little control over management.

However, these are hurdles that can be overcome, assuming politicians care enough to actually make things safe and legal for sex workers — though that's a rather large assumption to make.

Moving forward, an even more pressing concern is the fate of a major Criminal Code provision that was part of the court challenge. If the Ontario Court of Appeal ruling is any indication, the communication provision, which essentially prevents soliciting or selling sex in public, could remain on the books.

If that's the case, the Supreme Court will have failed to actually make sex work in Canada substantially safer.

The Bedford case, which began back in 2009 in the Ontario Superior Court, challenged three provisions of the Criminal Code: living off the avails of prostitution, communicating for the purposes of prostitution and operating a bawdy house. Trial judge Susan Himel struck down all three of those provisions in a September 2010 ruling.

On appeal, the Ontario Court of Appeal disagreed and, in a split ruling, said that preventing communication for the purposes of prostitution was a legitimate legislative goal. The other two, the court ruled, were violations of the Charter right to security of the person.

All three of the provisions are critical to the safety of sex workers in Canada. If the appeal court ruling is upheld, sex workers will be able to legally hire drivers and security and work in secure premises indoors. The importance of that cannot be overstated.

However, the communicating prohibition, in many ways, is the provision to watch come Friday.

Since it applies almost exclusively to street-based sex workers, this provision has the most direct impact on the safety of the most marginalized people in the sex industry. Though they comprise a small portion of all sex workers — between five and 20 per cent — they are the victims of the vast majority of violence directed at sex workers.

The communication provision of the Criminal Code is in large part responsible for the dangers associated with street-based sex work because, in order to complete their transaction, both sex workers and clients need to avoid being caught by police and charged under this provision.

The result is that prostitutes work alone and in less lighted and populated parts of the city. This means a friend can't write down a licence plate number and the worker can't check for weapons, or check for drug or alcohol use.

In fact, the negotiations of sexual services and payment often happen once the worker is already in the client's car. By that point, it's too late to check and see if the car doors even have handles on the inside

to get out if something goes wrong.

All of this, by the way, is true whether or not police target only johns and not sex workers themselves. In a blistering dissent from the Ontario Court of Appeal ruling, judge James MacPherson wrote, “the communicating provision chokes off self-protection options for prostitutes who are already at enormous risk. The evidence in the record about the violence faced by street prostitutes across Canada is, in a word, overwhelming.”

Regardless of how the Supreme Court rules on the other provisions, very little will change for the most marginalized sex workers if the communication provision remains on the books. That is hugely problematic.

In the end, though, the pseudonymous sex work blogger Irony Butterfly put it best in a post from 2012 on the Court of Appeal ruling: “This is not, in the end, about whether it is easy to be a prostitute or how prostitutes prefer to work. They can totally make it hard to be a prostitute, so long as there is some option between ‘death’ and ‘jail.’”

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