



BEYOND DECRIMINALIZATION:

Sex Work, Human Rights and a New Framework
for Law Reform

Full Report





Danica Piche photo.

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To all the people who gave their time, energy and expertise to this important project. In particular, to the inspiring group of sex workers who courageously spoke out about the conditions of their work and their lives and contributed their knowledge, insight and vision for law and social reform.

Acknowledgements

All the staff at Pivot Legal Society, Asian Society for the Intervention of AIDS (ASIA), Boys 'R' Us, Downtown Eastside Women's Centre, Lifeskills Centre, ORCHID Project, Portland Hotel Society and the Potluck Cafe, Prostitutes Empowerment Education and Resource Society (PEERS), Prostitution Alternatives Counselling and Education Society (PACE), Sex Workers Action Network (SWAN), the Gathering Place, Women's Information and Safe House (WISH).

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June 2006

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ISBN: 0-9736445-2-4



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EXECUTIVE SUMMARY

Sex workers are entitled to the same human rights standards that are afforded to other members of Canadian society. However, as a result of the current criminal laws relating to adult prostitution, sex workers are forced to live and work in conditions where they experience systemic discrimination, exploitation and violence, and where their constitutional rights are infringed. Pivot's 2004 report, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws*, argued that sex workers' right to expression, life, liberty, security of the person, and equality, as enshrined in the *Canadian Charter of Rights and Freedoms*, are routinely violated.

Significant improvements to the working and living conditions of sex workers are not possible without the repeal of s.s 210, 211, 212(1), 212(3) and 213 of the *Criminal Code of Canada*. In anticipation that Canada will one day recognize and carry out this important legislative reform, this report moves beyond the issue of criminal law reform to examine areas of law that become relevant and applicable in a decriminalized context. The analyses and findings set out in *Beyond Decriminalization* are intended to encourage Canadians to consider how reform of other areas of law and policy can be used to end the violence, discrimination and other human rights violations faced by sex workers.

One example of an area of legislation that will be highly relevant if sex work is decriminalized is employment and labour law. This report examines how employment and labour standards can be used to provide rights and protections for workers in the sex industry. In addition to this key topic, this report considers other relevant areas of law, including: occupational health and safety, municipal, tax, immigration, human rights, family, company, and social welfare. The findings and analyses presented are grounded in the expert opinions and experiences of sex workers from various areas of the sex industry. Through individual and group discussions with workers and business owners from escort agencies, massage parlours, sole proprietorships and at street level, this report provides a comprehensive analysis of the ways in which many areas of law can be used to improve the safety and protect the rights of sex workers.

The report presents a wide-ranging list of recommendations proposed by sex workers in the course of this research. The following selection illustrates some key aspects of sex workers' call to action:

- Provide sex workers with full access to the rights and protections found in the *Employment Standards Act* and ensure the legislation explicitly protects a sex worker's right to maintain control over her or his contracts for the provision of sexual services.
- Respect the right of sex workers to unionize and provide resources and support to them throughout the process.
- Involve sex workers in a meaningful way in municipal governance issues, such as business licensing and city zoning, in order to meet the diverse needs of sex workers from various aspects of the industry as well as the interests of communities.
- Respect the right of sex workers to have fair and equal access to Workers' Compensation, Employment Insurance as well as other employment benefits.

- Enact a provision that ensures that refusal to work in the sex industry does not affect a person's entitlements to Employment Insurance or Income Assistance.
- Ensure the freedom of sex workers to choose from a range of business structures.
- Ensure that income earned through sex work is subject to fair and non-discriminatory taxation and that sex workers are not retroactively taxed once their work becomes recognized as a legal activity.
- Recognize that a parent's involvement in sex work does not automatically create grounds for the apprehension of a child or loss of custody, and take steps to ensure that sex workers are not subject to discrimination by the Courts or government.
- Ensure the right of sex workers to access the human rights complaint process and equal opportunities for social citizenship.
- Ensure that migrant sex workers are afforded the rights and protections found in the Canadian Charter of Rights and Freedoms.

This report is the beginning of an important social dialogue about the role that the law will play in governing the sex industry in Canada. Pivot has argued that criminal law reform is the first step towards a shift from the status quo, where sex workers are subject to extreme levels of violence and social marginalization, to a society where sex workers are empowered to create safe and dignified working conditions. Criminal law reform will be most effectively carried out if all levels of government consider the findings of this research and contemplate how areas of law that fall within their jurisdiction will play a role in creating a safe and legitimate sex industry.

This report also illustrates why sex workers must be provided with a prominent role in the process of law, policy and social reform. Sex workers have a unique insight and expertise regarding their industry, the role it plays in Canadian society, and the ways in which regulatory schemes will impact their business. Above all, law and policy makers should listen to sex workers in order to understand how the laws affect them, which is a necessary step in ensuring that Canada's laws comply with the guarantees and protections enshrined in the *Charter* and other human rights instruments.

PART 1: INTRODUCTION

What is the appropriate legal response to the complex phenomenon of prostitution in Canada? For the past 25 years, this question has occasioned a heated debate across the country. The most recent forum for this debate was the federal Parliamentary Subcommittee on Solicitation Laws (the “Subcommittee”) whose mandate was to examine the *Criminal Code*¹ provisions pertaining to prostitution. However, the calling of a federal election for January, 2006 meant that the Subcommittee’s report was shelved before it was finished. Nevertheless, the Subcommittee did complete its hearings in September, 2005 thus making the dozens of written and oral submissions it received part of the public record. A review of the evidence presented to the Subcommittee reveals an overwhelming consensus that Canada’s prostitution laws must be altered, with two main proposals for change.² The first involves decriminalizing prostitution. The second calls for adopting the “Swedish model.” In Sweden, the buying of sexual services, procuring, and living on the avails are all prohibited under criminal law, whereas the sale of sex is decriminalized.

For the reasons explained in *Voices of Dignity*, Pivot Legal Society advocates the decriminalization of adult prostitution. However, Pivot argues further that criminal law reform is not enough to secure the rights and safety of sex workers. If the criminal laws governing sex work are repealed, a whole range of civil laws, both provincial and municipal, will become applicable to the sex industry. The purpose of the ensuing report is to identify the types of civil law that will have relevance to the sex industry, and ask a self-selected sample of sex workers to discuss how, if at all, these various types of law should be applied to sex work.

The discussion of potential law reform is based on the expert opinions of sex workers and attempts to anticipate the post-criminalization relevance and impact of these areas of law. The report is intended to serve as a starting point for law and policy makers who may question whether other legislative changes are necessary in addition to criminal law reform.

Pivot’s sex work law reform project

For the past several years, Pivot has advocated the repeal of the *Criminal Code* provisions relating to adult prostitution (ss. 210, 211, parts of 212 and 213). This position arose from research carried out in the first phase of Pivot’s Sex Work Law Reform Project, which examined the views and opinions of street-level sex workers on Canada’s criminal laws relating to adult prostitution. The resulting report, *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws*, argued that the criminal laws violate the constitutional rights of sex workers, and should be repealed.

¹ *Criminal Code of Canada*, R.S. 1985, c. C-46 [*Criminal Code*].

² Subcommittee on Solicitation Laws, online: Subcommittee on Solicitation Laws <http://www.parl.gc.ca/Committee/CommitteeList.aspx?Lang=1&PARLSES=381&JNT=0&SELID=e21_&COM=9243>.

The second report, *Beyond Decriminalization: Sex Work, Human Rights, and a New Framework for Law Reform*, presents the research and analysis carried out in the second phase of Pivot's Sex Work Law Reform Project, and is based on the realization that, before decriminalization occurs, legislators should consider how laws of general application will affect the sex industry should it be decriminalized. In the course of our research, the following areas of law were identified as being particularly relevant:

- Municipal law;
- Employment and labour law;
- Employment Assistance and Employment Insurance;
- Income tax law;
- Company law;
- Human rights law;
- Immigration law;
- Family law; and
- Criminal law.

The objective of this project is to anticipate questions that lawmakers may have about the application of these areas of legislation. Further, this project hopes to inform law and policy makers so that they draft and apply civil and administrative laws in a way that meets the needs and concerns of sex workers.

Scope of this report

This report contains front-line accounts from individuals who have experience working in the sex industry under the current criminal-law regime. Participants include street-level sex workers, employees in outcall services (escort agency employees and independent outcall sex workers) and in-call services (employees in massage parlours and independent in-call sex workers). The report makes available the expertise and opinion of a diverse group of sex workers to law and policy makers in the hope that the views of the people most directly affected by any law reform initiative are taken into account. The following guiding principles for law reform are proposed:

- The opinions and experiences of sex workers should be given central and full consideration in any law reform initiative affecting the rights and working conditions of sex workers;
- Sex workers must be given the opportunity to participate in law reform in a meaningful way;
- Law and policy makers must ensure that current and future laws conform to the human, labour and employment rights guaranteed under Canadian law and international human rights instruments; and
- Policy analysis and law reform undertaken by the Canadian government must be gender-based, racially sensitive, and conscious of socio-economic variations in different components of the sex industry.

Pivot has opted to use the term “sex worker” to describe a consenting adult who provides in-person sexual services, including oral sex, intercourse, masturbation and other services most often (but not always) involving physical contact intended for sexual gratification in exchange for money to another consenting adult.

While many of Pivot’s participants said that they are more comfortable with the term “sex work” than “prostitution,” the term “sex work” includes many forms of intimate services and/or sexualized work such as, for example, stripping, lap dancing, and phone sex. Consequently, because the project focused solely on physical-contact sexual services, we use the term “prostitution” to distinguish this from other types of sex work.

The report comprises eleven parts and one appendix. Part one is divided into three sections which introduce the study. The first section provides a formal introduction and describes the project’s guiding principles. The second section presents the project’s methodology. The third section describes the conditions under which the sex-worker participants carry out their work as an essential precursor to the main body of the report, a discussion of how civil, criminal and administrative law currently applies to adult prostitution, and how various statutes should be reformed should adult prostitution be decriminalized.

Parts two through 10 describe the report’s key findings and recommendations on civil, criminal and administrative law reform. The legal analysis examines existing municipal, employment, labour, social welfare, tax, company, human rights, immigration, family and criminal laws in light of whether or not they currently meet the needs and concerns of sex workers, and whether or not these laws will meet the needs and concerns of sex workers in the event that prostitution is decriminalized. The analysis of each law concludes with a set of recommendations for law reform on the basis of the expert opinions of sex workers.

Part 11 presents a call to action. It proposes a series of actions based on economic, legal and social considerations that law and policy-makers should take when facilitating decriminalization and associated legal reforms.

Appendix 1 describes the division of legislative power between the federal government and provinces in order to show which civil and administrative laws will apply to adult prostitution should it be decriminalized.

Section 1: Pivot’s approach to law reform

This project proceeded on the principle that all persons are worthy of dignity and respect, and that their perspectives and experiences should form one cornerstone of any law reform that will disproportionately affect them. The dignity, empowerment and political participation of sex workers are central to Pivot’s work, and their opinions provide the foundation of this report. The sex workers who participated expressed critical and analytical opinions about the states of their lives and the laws affecting them. They asserted that, while they make difficult choices under constrained conditions, they nevertheless **do** make choices. Indeed, many of the sex workers who participated in this project wish to challenge the view they are not capable of making “real” choices. Sex workers are in the best position to describe what it is like to work and live under the current social and legal framework. Lawmakers and other citizens should acknowledge this expertise.

A second principle that project participants elaborated to guide this project is that consenting adult prostitution is a legitimate form of labour. While exploitation certainly occurs in the sex industry, as it does in many professions and service industries, most of the sex workers we talked to want to be recognized as legitimate workers. On this basis, we assert that sex workers should be entitled to the same labour and human rights protections as any other worker.

Section 2: Pivot's research methods

Project staff and volunteers

A criminology professor from Simon Fraser University served as the Principal Investigator for the discussion group and interview components of the research. The project steering committee hired four part-time co-coordinators to administer the project and conduct the research; two were current or former sex workers, one was a social justice activist, and one was a practicing lawyer. A working group was created to develop the methodology and carry out the project. The working group consisted of current and former sex workers, lawyers, law students, advocates, and researchers. Also, the steering committee recruited, on a volunteer basis, a group of lawyers and university professors from various faculties of law with expertise in labour, criminal, family, municipal, tax, immigration and social welfare law to oversee the legal research and analysis in each of their areas of expertise.

Methodology

Research objectives

The objective of this project was to gather the expert opinions of sex workers regarding issues relevant to labour, employment, municipal, tax, immigration, human rights, family, corporate, health and social welfare laws. The data would then form the basis for an analysis of the effects of existing legislation in these areas on prostitution, and to evaluate whether it facilitates working and living conditions consistent with the needs and interests of sex workers. This report will be presented to all levels of government and to the public.

Project personnel were selected with two objectives in mind: First, to ensure that all aspects of the project were led by sex workers so that the project methodology was empowering and respectful of sex workers; and second, to have a staff lawyer who could direct the various legal analyses. An attempt has been made to ground all legal analyses and recommendations in the expertise and lived experience of sex workers.

This project addresses the laws as they that relate to adult prostitution; the *Criminal Code* defines an adult as anyone who is 18 years of age and older. It was not designed to address the particular legal issues relating to sexually exploited children and youth.

The project considers how the following statutes would apply to prostitution in a decriminalized setting:

1. Municipal law:
 - a. *Local Government Act*, R.S.B.C. 1996, c. 323;
 - b. *Community Charter*, S.B.C. 2003, c. 26;
 - c. *Vancouver Charter*, S.B.C. 1953, c. 55;
 - d. City of Vancouver, By-Law No. 3575, *Zoning and Development By-law*;
 - e. City of Vancouver, By-law No. 4450, *License By-Law* (23 September 1969);
 - f. City of Vancouver, By-law No. 5156, *A By-law to prohibit the carrying on of sundry business, trades, professions and other occupations* (11 April 1978);
 - g. City of Vancouver, By-Law No. 4912, *Downtown Official Development Plan* (4 November 1975);
 - h. *City of Vancouver Downtown Official Development Plan* (Adopted by By-Law No.4912, November 4, 1975);
 - i. City of Calgary, By-law No. 32M98, *Business Licence Bylaw*;
 - j. City of Calgary, By-law 51M97, *Massage License Bylaw*;
 - k. City of Calgary, Bylaw 34M86, *Dating and Escort Bylaw*;
 - l. City of Edmonton, By-law No. 13138, *Business Licence Bylaw*; and
 - m. City of Edmonton, By-law 12452, *Escort Licensing Bylaw*.

2. Labour and Employment law:
 - a. *Employment Standards Act*, R.S.B.C. 1996, c. 113;
 - b. *Employment Standards Regulation*, B.C. Reg. 396/95;
 - c. *Labour Relations Code*, R.S.B.C. 1996, c. 244;
 - d. *Workers Compensation Act*, R.S.B.C. 1996, c. 492;
 - e. *Occupational Health and Safety Regulation*, B.C. Reg. 296/97;
 - f. *Health Act*, R.S.B.C. 1996, c. 179;
 - g. *Personal Services Establishments Regulation*, B.C. Reg. 202/83; and
 - h. *Communicable Disease Regulation*, B.C. Reg. 4/83.
3. Social welfare:
 - a. *Employment and Assistance Regulations*, B.C. Reg. 263/2002;
 - b. *Employment and Assistance Act*, S.B.C. 2002, c. 40; and
 - c. *Employment Insurance Act*, S.C. 1996, c. 23.
4. Income Tax law:
 - a. *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1.
5. Human Rights:
 - a. *Canadian Human Rights Act*, R.S. 1985, c. H-6; and
 - b. *Human Rights Code*, R.S.B.C. 1996, c. 210.
6. Criminal law:
 - a. *Criminal Code of Canada*, R.S. 1985, c. C-46.
7. Immigration law:
 - a. *Immigration and Refugee Protection Act*, S.C. 2000, c. 27.
8. Family law:
 - a. *Family Relations Act*, R.S.B.C. 1996, c. 128;
 - b. *Divorce Act*, R.S. 1985 (2nd Supp.), c. 3; and
 - c. *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.
9. Corporate law:
 - a. *Partnership Act*, R.S.B.C. 1996, c. 348, s. 2;
 - b. *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30;
 - c. *Canada Business Corporations Act*, R.S. 1985, c. C-44;
 - d. *Cooperative Associations Act*, S.B.C. 1999, c. 28; and
 - e. *Residential Tenancy Act*, S.B.C. 2002, c. 78.

Data collection

Sex workers were asked to participate in discussion groups of four or five people. Prior to each discussion group, sex workers' consent to be audio-taped was obtained. It was agreed that the audio-tapes of the discussion groups would be: i) strictly confidential; ii) used only for the purposes of transcription; and iii) destroyed after transcription. Participants in the discussion groups were encouraged to use an alias throughout the discussion. They were asked questions about issues related to the various laws examined, but not asked for demographic or other personal information. When participants revealed personal or identifying information during the discussion groups, that information was edited out of the transcripts. All project staff, volunteers and project participants signed confidentiality agreements. Audio-tapes were transcribed by project staff and volunteers. Transcripts were then stored in a secure location under lock and key. Project co-coordinators were provided with access to

the audio-tapes and transcripts. During the data analysis and report-writing stages volunteers were permitted to view the transcripts once all identifying information had been removed.

All discussion groups were co-facilitated by a sex worker and a person who had experience and/or knowledge regarding the legal issues discussed. Eight facilitators attended a facilitation training session that dealt with how to create a safe and comfortable environment for discussion, ask non-leading questions, and respect the confidentiality of participants.

Discussion groups were conducted in the following general groupings:

- Female street-level sex workers (self-identifying as female);
- Male street-level sex workers (self-identifying as male);
- Massage parlour workers and independent sex workers who mostly take “in-calls”; and
- Escorts working for agencies, and independent sex workers who mostly provide “out-calls.”

Three rounds of discussion groups were held. Each round contained two groups – one in the morning and one in the afternoon in each of the three categories of sex workers (i.e. in the case of male street-level sex workers, a discussion group of five male street sex workers in the morning, then a discussion group of five different male street-level sex workers in the afternoon comprised one round of discussion groups). The first round was introductory, with broad and general issues being discussed, while the second and third rounds explored specific legal issues more fully. To facilitate the second and third round discussions participants attending the first round were invited to attend two education sessions where they were provided with information about the specific laws under discussion. Where possible, we attempted to have the same individuals participate in all three rounds of discussions and both education sessions.

Table 1: Discussion group and education session structure

Round One	Introductory round in which all the legal issues were canvassed in a broad and general fashion. Opinions and feedback from sex workers during and after Round One were used to create the education sessions, and to draft the questions for Rounds Two and Three.
Legal education sessions	Two legal education sessions for participants
Round Two	In-depth discussion of issues regarding social welfare, family, tax, corporate and criminal law
Round Three	In-depth discussion of issues regarding employment, labour and municipal law

Participants received a \$25 honorarium for contributing to the project. Prior to each discussion group, participants were provided with the following information:

- background, purpose and objectives of the project;
- information about their participation being voluntary and their right to withdraw at any time;
- an assurance that audiotapes of discussion would be kept confidential and destroyed following transcription;
- as assurance that all personal or other identifying information would be removed from the transcript; and
- information about use of the data and the final report.

An opportunity for questions was provided following provision of the above information.

After being provided with the information, each sex worker was asked if he or she wished to participate in the project. Those who wished to participate were asked to sign a consent form. Participants were encouraged to use an alias in signing the consent form. All consent forms were kept strictly confidential.

Participants could respond to any of the questions posed during the discussion groups, could pass if they did not want to respond. Discussion group questions were formulated through collaboration with members of the working group, including current and former sex workers, lawyers, law students, and advocates.

Expertise of sex workers

A fundamental principle underlying this project is that sex workers are experts on the effects of the law on their work and their lives, and should be regarded as such in any law or policy decision-making process. It is our position that legislators and policy makers cannot understand the ways in which the laws affect sex workers, and nor can they carry out an effective analysis of laws affecting prostitution without this expertise. Effective law reform depends on the input and meaningful participation of sex workers.

Recruitment of project participants

The following means were used to contact street-level, escort and massage parlour workers to recruit them for participation in discussion groups:

- Placing fliers regarding discussion groups near massage parlours and escort agencies.
- Placing advertisements in the adult classified sections of the following newspapers: *Georgia Straight*, *Westender*, *Buy and Sell*; and *Xtra West* newspaper. These ads described the project and asked potential participants to call to receive more information regarding discussion groups.
- Contacting other non-profit organizations and service-providers, including those in which sex workers are involved, such as the Women's Information and Safe House (WISH), Prostitutes Empowerment Education Resources Society (PEERS), the Downtown Eastside Women's Centre (DEWC), Prostitution Alternatives Counselling Education (PACE), Boys 'R' Us and the Asian Society for the Intervention of AIDS project entitled the "ORCHID Project." Fliers were posted on the premises of businesses involved in the Orchid Project.
- Placing an ad on the website www.perv.ca.
- Discussing the project with other organizations and individuals.
- Previous contacts of project personnel.

In addition to the discussion groups a series of one-on-one interviews were conducted with five key informants who have worked extensively in the off-street prostitution trade, two of whom currently operate prostitution businesses.

Project participants

The project received ethics approval from the Simon Fraser University Ethics Review Board in December of 2004.

In order to protect the identity of project participants Pivot elected not to seek demographic or other personal information. As a result, participants were not asked to identify their race, age, education or other demographical information. Participants self selected which discussion group they

wanted to participate in: male street-level, female street-level, escort or massage parlour. The self-selection process resulted in the participation of 82 sex workers who self selected into the following categories:

- 23 female independent sex workers;
- 2 escort agency workers;
- 1 escort agency owner former sex worker;
- 7 massage parlour workers;
- 1 massage parlour owner, former sex worker;
- 24 male street-level sex workers; and
- 26 female street-level sex workers.

Although the off-street sex trade likely comprises more than 80 percent of Canada's prostitution business, it accounts for less than five percent of criminal convictions in Canada for prostitution-related offences, in contrast to the street trade, which accounts for more than 95 percent of prostitution related criminal convictions, but less than 20 percent of the business.

We interviewed two prostitution business owners – one owns a massage parlour, the other an escort service – partly because both of them had long careers as sex workers prior to owning a sex-work business, and also because their experience running these businesses provides valuable insight into how civil and administrative law is currently applied to off-street prostitution venues in Vancouver. The owner-employers provide a unique perspective on the enforcement of municipal bylaws governing business licenses, hiring practises, and workplace training.

Massage parlour workers and migrant workers

Accessing sex workers who are in Canada illegally and were willing to be interviewed proved to be very difficult because of the highly clandestine nature of their business.

Accessing massage parlour workers also proved to be difficult. After mostly failed attempts to recruit participants, several key informants suggested that massage parlour workers are, in general, not willing to participate in discussion groups, preferring to provide their opinions in one-on-one interviews.

The massage parlour workers and immigrant workers who did participate in this project did so in individual interviews. The same protocol regarding audio-taping, confidentiality and consent procedures was used for individual interviews, and the same question format was used. Because three of our off-street sex worker participants reside and work in Alberta, the interviews were conducted over the phone.

Data analysis

In describing the results of our consultation with sex workers, we attempted to identify the main themes that emerged, as identified by three researchers who read through the transcripts. These themes were used to develop a framework on which to base the broader analysis of civil and administrative laws that already are relevant to prostitution, or will become relevant should prostitution be decriminalized.

The discussion groups were held in English. Interpreters were available for individual interviews with participants who were not fluent in English, but they were not available for discussion groups.

Participants were not asked to disclose their gender. Discussion groups for persons who self-iden-

tify as trans-gendered were not organized. We do know that more than a dozen trans-gendered sex workers participated in this project, none of whom expressed or displayed discomfort with the discussion group set-up.

Time and budget constraints limited the number of discussion groups and individual interviews, and so we were unable to capture the voice of every person who was interested in contributing to the project.

Section 3: Current working conditions in various areas of the sex industry

There are no statistics to indicate how many people are currently employed as sex workers in Canada. Anecdotal evidence suggests that the vast majority of sex workers work for escort services, in massage parlours or independently using newspaper ads or contacts via the Internet. In many cities, such as Vancouver, it appears that as few as 20 percent work at the street level. One of the most profound lessons from this project was the extreme diversity among people working in prostitution. This report attempts to illustrate that diversity in a manner that is respectful of the range of opinions and concerns that participants voiced.

In order to appreciate the need for reform of the laws affecting sex workers, both in the event of the criminal laws being repealed and under the current system, it is important to understand the current working conditions of Canadian sex workers. The sex workers interviewed for this project come from a wide variety of backgrounds. They engage in prostitution in a wide range of contexts and in a variety of workplaces. Each participant brought a distinct perspective to the discussion, and conveyed a wide range of experiences and opinions. While our participants are not statistically representative of all Canadian sex workers, or even all Vancouver-area sex workers, their experiences shed light on current working conditions experienced by many sex workers in Canada.

The following discussion presents an overview of the current working conditions experienced by the sex workers who participated in this project. Because of the wide variety of contexts and workplaces in which participants engage in prostitution, this chapter is divided into three sections representing the three broad types of prostitution discussed in the report:

1. Street level: sex workers who work at the street level, either independently or work for others
2. Out-call/escort: sex workers who work independently or for escort agencies and meet their clients and provide services at locations outside of where they operate their business.
3. In-call/massage: sex workers who work independently or for massage parlours and their client's come to the sex worker's place of business to receive services.

Street-level sex work (women)

The most violent way to work would be street where it is entirely anonymous, you have no back-up and you're by yourself one-on-one with somebody in a car. There really is no recourse for you if you have a problem.

Street-level sex work makes up a small proportion of the sex industry overall, but it is generally the most visible aspect of the industry. Street-level sex workers meet clients in several Vancouver localities – or “strolls,” as they are known colloquially – and usually negotiate with clients on the street or in a vehicle.

Participants spoke generally about two types of street-level prostitution in Vancouver: “high track” and “low track.” These terms have many connotations, but generally are distinguished in terms of the amount a client can expect to pay for a date in a particular stroll; high track sex workers earn far more than their low track counterparts. Sex workers indicated that, in Vancouver, low-track strolls are

located in the Downtown Eastside or in certain blocks along Kingsway, while the high track is located on Seymour Street which is in the core downtown area. Franklin is sometimes referred to as a “mid-track” stroll. Sex workers reported that a large proportion of the sex workers on the high track strolls work under the control of a “pimp.”

Pimps may provide sex workers under their control with food, clothing and shelter. However, participants stated that pimps often use violence and abuse to control the workers, and demand all of a sex worker’s earnings, leaving the worker financially dependent on the pimp. Participants reported that it is often very difficult to get out of a pimp’s control because they tend to view sex workers as their property. Such workers are under-represented in our sample.

Currently, there is ample evidence to suggest that street-level sex workers in Vancouver face a disproportionate level of serious harm and violence as compared with sex workers in other sectors of the industry. This is especially true for workers in Vancouver’s Downtown Eastside, who face extreme poverty and homelessness. Issues of addiction, mental and physical health, disability and marginalization are common among this population of sex workers and, as a result, these workers have few options in order to make enough money to survive.

The account given in *Beyond Decriminalization* reiterates themes addressed in *Voices for Dignity*, but describes the working conditions of the street-level workers interviewed during the second phase of the Sex Work Law Reform Project, many of whom work in the Downtown Eastside.

Safety

Street-level sex workers reported extraordinarily high levels of violence, including rapes, beatings, and assaults. Many street-level sex workers expressed feelings of powerlessness and an inability to alter the conditions of their work in order to reduce the violence they experience. Nearly all street-level workers described an experience of violence at the hands of a client. Some described being beaten after requesting payment from a client. Others described being robbed by clients who would steal their purses, or run away without paying for their services. Many sex workers stated that they felt the client held the balance of power in the transaction, and they all stated that they felt they had no recourse when they experienced these kinds of abuse.

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. Street-level sex workers stated that they wanted sex workers to watch out for one another more often in order to improve safety. However, they also placed a high value on their independence and autonomy, and stated that they would work in an arrangement with others only if it meant they did not have to sacrifice these values.

Work areas

Many street-level workers characterized the places they work as isolated industrial areas and the high-crime areas of the city. They stated that it is often hard to get a date where they work because of the low volume of traffic and the impact of law enforcement on them and their clients. Street-level sex workers were almost unanimous in stating that they would prefer to work indoors where they felt they would be more protected and less visible to the general public. The workers who said they would prefer to continue working on the street stated that they would like a designated safe area or zone in which to work. Street-level workers emphasized that, if they were to continue working on the street, they would like to do so in highly populated and well lit areas such as core downtown locations, but they also felt strongly that such an area should be located away from children and families. Street-level workers suggested that, regardless of any social or legal reforms, there will always be a street-level sex industry because of its anonymity and convenience for some workers.

Law enforcement

Sex workers expressed scepticism that police officers would take their complaints about “bad dates” seriously or do anything to investigate their claims. Some also expressed fear of police due to previous violence they had experienced at the hands of police officers. Sex workers said that, because they feel that the police view them as criminals, they rarely seek police help even after suffering assaults. Many felt that they had no authority figures to turn to for protection.

Those street-level sex workers who described reporting bad dates and dangerous clients to police said they felt that police did little, if anything, in response. They reported that some police officers actively seek out information about bad dates, while they believe that other officers are more interested in harassing sex workers. Some street-level workers described seeing a dangerous client on the street after reporting him to police, or hearing that the same client had attacked a friend or colleague after being reported. Street-level sex workers stated dangerous clients are often known to many of the workers in the neighbourhood and to the police.

As street-level sex work is more visible than massage parlour or escort work, and is often deemed to be a public nuisance because of its visibility, a greater proportion of street workers reported being harassed by police officers than did the other types of sex workers we interviewed. Clearly, a more positive and trusting relationship between sex workers and police is necessary to ensure that sex workers are able to work under safe conditions, with the knowledge that police will take their complaints seriously and deal with them appropriately.

Marginalization

Street-level workers described having little faith in the government, and little faith that anything could be done to further the protection of their human and labour rights. They revealed a profound level of disillusionment. Street-level workers described their experiences of classism, and felt that their lives were considered to be worthless by the rest of citizenry. Street-level workers suggested that if any other group of people had been subjected to the tragedy that the missing women from the Downtown Eastside had been subjected to, a much more proactive response would have been taken much sooner. They all agreed that the disappearance of so many sex workers from the Downtown Eastside created an atmosphere of fear and worry, and many felt that they, too, were at risk of losing their lives.

Health

Many street-level sex workers stated that they felt condoms should be used with every transaction involving oral, vaginal or anal sex, and that they felt more service providers in their neighbourhood should provide condoms. They reported, however, that high-quality condoms were not readily available to them. Some workers described occasionally having received defective condoms from service providers.

Street-level workers described having little power in their interactions with clients. As a result, they felt that they had little ability to insist on condom use. One street-level worker described an incident where she was unaware that a client had removed a condom immediately prior to intercourse. There was a high level of reported condom use and awareness about sexually transmitted diseases (STDs). However, despite this general high level of awareness, a few participants stated that they were unaware that an STD could be contracted by engaging in oral sex without a condom. Many workers said that they wanted their clients tested for STDs before providing services to them, but felt this was not realistic, as clients would refuse.

Financial security

Many street-level participants felt that they have few ways to earn enough money to survive. Nevertheless, as with nearly all other sex workers interviewed, street-level workers stated that they

choose to engage in sex work, and that prostitution is a job that should be afforded the same respect and protections as other jobs. Some street-level sex workers value programs that assist street-involved women to gain education and alternative employment, and felt that there should be increased funding for such programs. Street-level workers described how welfare rates are too low to live on, and people are becoming more desperate as a result. They described how the prices for their services were being driven down by competition, sometimes as low as \$5 for sexual intercourse.

Street-level workers described having absolutely no access to any form of security for old age, such as a pension or a retirement savings plan. Many street-level sex workers said that they had no expectation of having any means to earn a living after the age of 55.

Street-level sex work (men)

Male participants described working conditions that have some similarities to those experienced by female street-level workers. Like their female counterparts, male sex workers described different levels of the trade, some more visible than others. While some male sex workers reported attracting clients by standing on the street, others conduct their business through a network of contacts.

Safety

Like the women we interviewed, male workers were very conscious of the dangers faced when working outdoors. Because of the criminal laws, they are secretive about their work. This secrecy and isolation increases the risk they face from predatory or violent clients. Male participants placed significant emphasis on their privacy and the privacy of their clients. Like the women, male workers stated that they felt their work would be safer if it were legal to work indoors.

One gender difference that emerged is that male workers described being able to rely on their physical strength to defend themselves against dangerous clients. Some male workers suggested that they encounter fewer violent clients than females because clients are aware that young men are more readily able to defend themselves. This reliance on physical strength led male sex workers to express less fear of clients.

Like female street-level workers, males experience frequent harassment and discrimination from other citizens. Male workers reported being called names and having items thrown at them while working on the street. Male workers reported that clients, too, have fears about stigma, and postulate that this would affect the willingness of clients to engage in preventative measures such as mandatory STD/HIV testing.

Services

Male sex workers reported that they did not feel the government would be able to assist them with their safety concerns. They said that it has become more difficult to obtain welfare, and that lack of access to social assistance has had adverse effects on them.

Male workers claim that services for men are less readily available than those for women. One worker pointed to the need for peer-based services targeted at male sex workers. Some male workers described the difficulties they face if they want to exit the sex industry. Options for those exiting prostitution were seen as limited. Male workers described a need for more training in a wider variety of skills and trades. One participant explained that many of those who try to exit prostitution often want to become peer or youth workers and work with those involved in the industry, because that is what they feel they know best.

Physical and mental health

Male participants reported that their work can be difficult. The challenges result partly from the risk of dangerous clients and dangerous conditions, and partly from the emotional and psychological difficulty of their work. One participant suggested that there should be publicly-funded counselling

for sex workers, and that it would be useful for sex workers to have access to extended health care that included psychological treatment.

Male participants indicated that under current conditions, some sex workers turn to drugs and alcohol as a means to cope with their situations. Consequently, participants suggested that greater access to exit options, to treatment and rehabilitation, and to social services is necessary to ensure that those who do not wish to engage in sex work have other options.

Many of the issues raised by male sex workers involve health and hygiene concerns. A primary worry of sex workers is the occupational hazard of sexually transmitted diseases. Male participants report that STD/HIV testing is available, and that public health nursing is accessible to them. Male sex workers report that they lose clients when they insist that the client uses a condom, and that many clients refuse to use condoms altogether.

A common experience of many street-level sex workers, male and female, is that they report living in or on the edge of poverty. Effectively, prostitution and welfare are seen as their only two means of survival. Generally, welfare payments are much lower than the income generated by working in the sex industry.

Out-call/escort

Two types of female out-call workers participated in this project: those who work independently, and “escorts” who work for an agency or call service. Independent workers described themselves as self-employed, working from a home office or some other location. They receive calls from clients and then meet the client at an agreed upon location. Many independent escorts advertise through the classified sections of the local newspapers, contact magazines, the Internet, or the phonebook.

A typical escort agency arrangement involves a call centre where the manager, owner or reception person will take calls from clients. The owner or manager will then call the workers and inform them where to meet the client. Sometimes the owner or manager who answers the phone negotiates the services provided and the fees. Sometimes the worker pays the owner or manager a set fee for each call, and sometimes the owner or manager will take a cut depending on the services provided. Escort agencies provide varying types of administrative support to their workers, including receiving calls and payments from clients, handling bookkeeping, licensing, and advertising, providing transportation for workers, and sometimes providing some security services for the workers.

The widely felt need for independence expressed by the majority of our participants was described as being fulfilled by working independently. However, the equally widely felt need for security was best met by an agency. Independent escorts generally described having a greater degree of control over the services offered and the types of clients accepted. However, escorts working for an agency described having a greater degree of security by virtue of working with other people. The other advantage of working for an agency is the client base is potentially much bigger.

Health

Many of the out-call worker participants commented that education about health and hygiene in their workplace was insufficient. While some education is available, and some of them had received training and information about their work, there is no mechanism for sex workers, whether working independently or for an agency, to be provided with up-to-date information about health and hygiene. Some external organizations and public health bodies have tried to address the paucity of health education among sex workers. However, some participants suggested that the appropriate educational format for sex workers has not been found, and attempts at education are often inappropriate or unsuccessful. In one example, a participant described how public health officials in Edmonton were reported to have given information about a gonorrhoea epidemic to the body that licenses escorts so that the licensing body could convey that information to sex workers. The licensing

body failed to pass on the information. Escort agencies do not always provide condoms for their workers' use. Often, as with independents, workers have to provide their own supplies.

Stress

Many participants described prostitution as being very stressful not only because of the conditions of the work, but also because of its unpredictable nature. Some days may be very busy, while others can entail long stretches without a client. The inability to control or predict the environment in which the work is carried out was cited as a key stress producer. One worker reported that the inconsistency and lack of security of the work, its availability and variability is psychologically very trying. Escorts described their social isolation and the stigmatization of prostitution as being stress-inducing, especially in a business environment where there is a great deal of competition and distrust.³

Harassment

A common complaint of outcall sex workers is that they are subject to various forms of harassment. Harassment by other citizens is fairly common. One escort reported that she was harassed after she was identified as an advocate for sex workers' rights. Some out-call workers commented that they exited the street trade because of police harassment of street-level workers.

A further form of harassment that escorts mentioned comes at the hands of managers and owners. Some out-call workers report having been required to have sex with the manager or owner as part of the hiring process; this was described as a form of "audition."

Safety

Out-call participants suggested that indoor work is much more humane in comparison to the degrading conditions often found at the street level. However, there are major concerns about safety in the out-call industry as well. As one participant reported, the danger lies predominantly in the uncertainty of an out-call date. When a worker arrives at a call, it is impossible for her to know for certain what kind of person is waiting for her, or whether he is going to be violent.

Many street-level sex workers stated that they viewed a move into independent outcall work as the most viable means of relocating to a safer work environment while still retaining their autonomy. Sex workers stated that the move from street-level prostitution to independent outcall work required the means to obtain a telephone and take out an advertisement in a local newspaper. Although there are no statistics to accurately assess the number of persons currently working as independent outcall workers, the prevalence of advertisements and websites offering such services in nearly all Canadian cities suggests that independent off-street work forms a much larger portion of the industry than is commonly acknowledged.

Some of the independent escorts interviewed described facing challenges on the job. These include having to work alone and make judgments about a client on the basis of a short telephone call. Some independent outcall workers described the difficulty of working alone when no one else knows your location or the identity of the client, and emphasized that it is safer to work with other women. Some of our participants alert other workers to their whereabouts when they are with a client, or have an "attendant" work with them. Such security measures are necessary given the potential for violence in the sex industry.

Nearly all the sex workers we interviewed, regardless of the style of work they engage in, reported experiencing pressure from client's to engage in sexual acts without a condom. Nearly all of them described having been offered more money to engage in riskier sexual acts. For many sex workers, of course, sexual services without a condom are not an option, and they consistently refuse these requests.

³ Escort X, "Create a Legal Brothel Zone? A Prostitute Says 'No!'," online: The Tyee <www.thetyee.ca>..

Sex workers described one of the main advantages of working for an escort agency or call service is that a third party knows who the worker is dating and where the interaction is occurring, thus making premeditated violence less likely.

Escort services may provide a range of safety measures. While some agencies do not offer any fallback protection for their employees, others are vigilant about taking names, hotel room numbers, and other identifying information. Sometimes agencies check that a client is actually where they say they are by calling back the phone number provided. Some agencies provide a driver who functions as both transportation and security for the worker, and who will check in on her during the date. One worker, concerned about physical safety suggested that agencies provide self-defence training for their employees.

Despite having some safety concerns, many of the outcall sex workers we interviewed described having a high level of satisfaction with their employment, and emphasized that, in general, working indoors is far safer than the outdoor trade. Independent sex workers emphasized the autonomy and anonymity they enjoyed while working on their own.

Management and services

An escort agency's management approach often determines the level of satisfaction escorts expressed with their working conditions. Participants expressed concern about the controls placed on workers and the requirements of some escort agencies. Several escort agency workers stated that they want more control over what services are provided and the fees that are set.

Participants reported that some owners tell workers what services they are required to perform with clients, and give the most business to the workers who are most compliant. When working for an agency, sometimes a worker will be reprimanded by the employer if she does not do what the client requests. As discussed in this report, the current laws of assault and sexual consent place control over the services performed with the worker (see Part 10 on Criminal Law).

Some escort agency workers described being unable to control the fees charged for particular services. In some cases, the agency charged a flat introduction fee, leaving the negotiation of the fee for sexual services to the escort. In other cases, the agency takes a cut of the worker's tips in exchange for providing them with clients. Also, they may charge the worker a nightly "booking fee," which must be paid to the agency before it provides the escort with client contacts. However, if the worker receives no clients that night, the booking fee is not refunded. Escorts described being subject to fines and penalties for minor infractions of house rules, such as being late, or not being able to see a client even if they had a valid reason. Payment mechanisms are discussed in more detail in the section entitled "Financial arrangements and wage structure" (see p. 29).

Some owners may require workers to have sex with them in exchange for clients. Several participants reported being forced to engage in sexual activity and endure sexual harassment from their employers in order to get or keep their job.

One owner/operator who used to work as a sex worker wished to counteract the misconception that all owners are male, exploitative, or driven purely by profit. She stated that her job as an owner entails, among other things, scheduling, administration, payroll, bookkeeping, and public relations work. She works 40-50 hours a week, and stated that she earns far less money as an owner than she did as a sex worker. She wished to correct the misconception that all employers make large amounts of money from the labour of others, while doing little or no work themselves. There are many employers who consider themselves fair to their workers, and who create a positive work environment. While some employers may make large profits by taking all or most of the money a worker earns, or by offering unsafe services for an exorbitant rate, this is not the case for all employers.

Licensing

Escort agencies in Vancouver must carry licenses, but independent sex workers are not required to obtain a license. In contrast, sex workers in Edmonton and Calgary described how they are subject to more restrictive by-laws controlling advertising and licensing, thereby discouraging street-level sex workers from moving into escort or independent outcall work. For instance, in Edmonton, a person who does not have a licence as an “independent escort” cannot place an entry in the sex advertising section of the local newspaper. One participant described how she had to apply for a prohibitively expensive licence, and had to have her criminal record cleared before could apply. She suggested that these by-laws keep women on the street who would otherwise move to safer indoor work. Edmonton police are currently searching for a serial killer who is thought to have claimed the lives of at least ten street-level sex workers.

In-call/massage

In-call workers are those whose work takes place at a place of business where the clients attend and receive services on site. The distinction between in-call and outcall services is not necessarily clear cut, as some in-call venues also provide some outcall services. In instances where mainly in-call venues offer limited outcall services, we focus on the in-call component of the business.

While not all massage parlours and health enhancement centers are fronts for prostitution, they are among the most common venues for in-call work. Some sex workers operate independently from their homes and handle all matters related to their business, including administration, marketing, health and safety issues, and clientele.

Most of the workers who participated in this project work for an employer in a licensed massage parlour. Our participants described a wide range of conditions in the parlours they work. Many work as “independent contractors,” and were not aware of the possibility that the courts could grant them the full legal protection and benefits afforded to employees. Massage parlour workers reported encountering various financial problems with their employers. Workers reported sometimes not receiving the pay they were promised, being required to give their employers a share of their tips in order to receive clients, and being subject to fines and penalties for minor infractions of house rules, such as being late or failing to answer their telephone. Also, there were concerns about safety and security. Some massage parlour workers reported being assaulted by clients and receiving little or no help or support from their employers.

In some parlours, workers receive wages only for the clients they see. This means that a massage parlour worker could spend a full shift at the workplace waiting for clients, not get any and, as a result, receive no pay for the time they were at work. Some workers reported that their employers require them to perform various tasks during these times, such as cleaning the bathrooms, again without compensation.

Management and working conditions

The conditions for in-call workers vary greatly, based on the kind of management that is in place at a particular massage parlour. Payment for services and the employer/employee relationship will be discussed below in the section entitled “Financial arrangements and wage structure” (see p. 29).

Major concerns for massage parlour sex workers relate to the kind of services they are expected to provide, and whether they can decline to perform a service. Participants described a variety of arrangements. Some establishments provide their workers with a degree of freedom – they can decline to perform a service with a client without repercussions from the manager or owner. The client is passed on to another worker. Some workers reported that they get to determine themselves what services are offered. One described working in a massage parlour as a positive experience because health and safety measures were in place, as well as benefits, privacy, autonomy, and consistent remuneration.

At many other establishments, however, owners and managers maintain more control over what kind of services are provided, and how the worker will be compensated. Several participants explained that at the establishment where they work, the owner determines what services are provided, and for what fee. One massage parlour worker reported that some owners literally ‘buy’ illegal immigrant workers who then have to perform all the services the owner requires of them. Several workers reported situations where workers are pimped by a live-in boyfriend or a person who provides them with drugs. In these situations, the worker gives all or most of their massage parlour earnings to the “pimp.” The legality of these various types of working arrangements will be discussed throughout this report.

Participants described an array of types of ownership and management. Participants said that the most common form of massage parlour or escort agency management involves an owner-operated business.

Some participants reported that most massage parlours in Vancouver are owned by women. Others said there are male and female owners, and that the gender of the owner does not make a difference in management style or conditions, although it appears that workers are less likely to experience sexual harassment by female owner-operators. Some massage parlour owners have past experience as sex workers. One participant stated that organized crime and biker gangs are trying to take hold of the sex industry in Edmonton, and are doing so by buying massage parlours and strip clubs. None of our participants reported working for gang-owned parlours.

Participants reported that the business-related duties expected of workers vary, depending on the massage parlour. Some reported that they were expected to perform cleaning duties, including bathrooms and toilets, while in other parlours laundry and cleaning were done by other staff. Many massage parlour workers stated that they are not provided with proper on-site hygiene facilities, such as a shower. Several reported that their employers do not provide them with work-related supplies, such as condoms, rubber gloves and lubricant.

Participants voiced several concerns about hiring and firing practices. Some employers require job applicants to undertake a traditional interview in which the applicant is questioned about their relevant experience. Some massage parlours require prospective employees to submit to a “try out” by providing unpaid sexual services to the owner or manager. All massage parlour owners and workers alike reported that physical attractiveness is a prerequisite of the job. Several workers reported that they are not able to get jobs at the higher-paying establishments because they do not meet the standards for physical attractiveness. Some owners reported that they require waist and breast measurements from job applicants prior to hiring.

When it comes to keeping their job, participants reported that there are relatively few safeguards to protect massage parlour employees from wrongful termination. One participant reported that her only complaint about working in massage parlours is that workers are often fired for no apparent reason.

Complaints

Massage parlour employees reported that there is no one to complain to about working conditions and that, generally, managers and owners are not receptive to complaints. An example was given of an owner who would turn off the heat in the winter despite the protests of employees.

One worker reported that there is a sense of isolation working in a massage parlour. Where street-level workers have access to services, massage parlour employees work behind closed doors. As a result they have fewer opportunities to access available services. The one exception participants mentioned was the ORCHID project, which is an outreach and research project being carried out by the Asian Society for the Intervention of AIDS, which travels to massage parlours in Vancouver and the Lower Mainland providing free condoms and sexual-health information.

Safety

Safety concerns were paramount for all in-call participants. Violence, harassment and abuse are common experiences of many sex workers, and the ability to work in an environment that provides protection from the harms related to “bad dates” was seen as a priority. Some massage parlour workers reported that their safety needs are met. Others expressed concerns and made suggestions as to how safety could be improved.

Participants described Vancouver massage parlours as workplaces with a relatively high standard for personal safety as compared with street-level work. Nevertheless, some workers described being beaten and assaulted in massage parlours. Many participants reported that workers will help one another in the event of a violent client, but that some managers and owners do nothing to prevent bad dates, and ignore them when they occur. Some participants recounted situations where they had physically attacked a client who was assaulting another worker. Other participants described working in parlours where they did get help from other workers or managers if they encountered trouble, and felt that their safety was well protected. One of our participants said that a well-known violent client frequents many of the massage parlours in Vancouver and the Lower Mainland without criminal charges being brought against him. Some establishments have banned this man, but others, despite knowing about his violent proclivities, still allow him to receive services.

One participant explained that when she has to collect payment directly from the client, altercations are more likely to occur. Nearly all participants stated that violence is not reported to the police. Because they are susceptible to prosecution for bawdy-house, living on the avails and procuring offences, workers and managers alike fear the involvement of police. The sex workers who would report violence to police said that they are discouraged from doing so by managers and owners.

One participant reported that, in her experience, many more bad dates patronize street-level workers than visit massage parlours. The fact that many massage parlours have security cameras, and all of them have on-site management adds to the safety and security of massage parlour work. Further, all of the massage parlours we visited are laid out so that rooms are close to one another. A woman working on her own, especially on the street, cannot always defend herself against an aggressive male client. This danger is exacerbated when there are no available safeguards. Workers report that there is less anonymity in the massage parlour context than in out-call work situations. Potentially violent clients are well aware that in massage parlours they are usually outnumbered, and are much less likely to attempt violence if someone else is around to witness it, or physically intervene.

Health

Another concern for in-call sex workers are health and hygiene standards in the workplace. Because there are no standardised occupational health and safety measures for sex work, there is a wide range of practices in massage parlours.

Participants reported that in some massage parlours there are strict rules for hygiene and protection against sexually transmitted diseases. One participant explained that in the parlour she works health standards are adequate, training is in place, and there are repercussions when employees fail to follow the required standards.

Participants reported that, depending on the establishment and the management, massage parlours could be very clean or very unsanitary. Some have a mandatory condom use policy, and some also provide condoms, though many of the participants reported that they are required to provide all of their own supplies including condoms, and that the only equipment provided is clean towels and laundry. Several participants thought that condom use should be mandatory, and others stated that they should be provided at no charge by the parlour.

While some massage parlours require all sex acts to be safe and hygienic, others require workers to engage in extremely unsafe sexual practices. Some locations offer what is known as a “Girlfriend Expe-

rience,” which involves clients paying more money for unsafe sexual services, such as unprotected oral sex. Like some escort services, some massage parlour employers require that workers provide certain services, and give more clients to the workers who are most compliant. Several participants reported feeling compelled to perform services that they are uncomfortable with because their employer had promised those services to the client.

Privacy

Current by-laws require massage parlours and escort agencies to keep records of employees. Participants did not have a particular objection to this rule. However one participant was concerned that this requirement creates potential violations of privacy because there may be insufficient security protecting such records. She felt that these records should be kept under lock and key and not be available to clients and other workers.

Work and income

Massage parlour workers made some general observations about the difficulty of the work they do. They emphasized that it is stressful, and that sex workers should be entitled to breaks and vacations. Further, participants said the work they do should count towards welfare entitlements.

Massage parlour participants suggested that in-call workers had relatively more control over their working conditions than other sex workers. In general they have more ability to choose where and how the work is done, and what kind of services they provide. However, they noted that there are some limits to these choices. A sex worker’s degree of choice may reflect her physical assets. Participants saw physical characteristics as directly linked to the amount of bargaining power a worker possesses. As they get older, they may experience less demand for their services, in which case they may be able to exercise less choice over their working conditions.

Some massage parlour participants saw their work as a long-term career, although they reported that they would no longer be hired by a massage parlour once they are in their late thirties. Other participants saw sex work as a means to a more immediate end, such as financing an education to make them eligible for a different career.

Participants reported that in-call workers can earn a fairly reasonable income. Income varies based on the age of the worker and her physical attractiveness. Some massage parlour workers declare their income for taxation purposes, others do not. One reason to declare income is to allow the worker to pay into a RRSP or RESP; if they do not declare any income, they are not eligible for either. One participant explained that many sex workers do not declare their whole income, and feel this justified because they are not able to claim expenses in the same way that other workers can.

Law enforcement

Several participants reported that, in Vancouver, criminal and civil laws are rarely enforced against in-call venues. One in-call worker explained that, in comparison to other cities she has worked, Vancouver police rarely enforce laws against massage parlours. One worker reported that sometimes police visit massage parlours to check identification for citizenship, at which point illegal immigrant workers make themselves scarce.

In contrast, a participant from Calgary reported that there was a large-scale enforcement sweep of local massage parlours at least once a year.

Forced labour

Some sex workers are engaged in prostitution against their will and in difficult and sometimes dangerous circumstances. Some are disempowered by pimps, who may use coercion and violence to exploit their labour. Some project participants described working under the control of a pimp

or pimps. In one case, a pimp gained control of a participant because of her addiction to drugs; in another case, the control was achieved by violence and intimidation.

Some sex workers are trafficked into Canada, often through coercion and manipulation, and face arrest and deportation if they come forward. Also, if they talk to police, they may suffer reprisals from the traffickers who brought them into the country. The needs of these workers extend far beyond improved working conditions. Their desire to exit the sex industry and gain protection from those exploiting them can be facilitated by increasing their ability to seek police assistance and by more humanitarian treatment under Canada's immigration and refugee laws.

Immigrant sex workers, many of whom work in massage parlours, face several legal challenges. Women and girls trafficked into Canada illegally must endure profound isolation and restrictions on their freedoms. They cannot disclose their true identities to other workers, and their employers sometimes prevent them from even leaving the massage parlour. Because of their status as illegal immigrants, they are unable to access police when they face violence and exploitation for fear of being arrested and deported. The problems faced by immigrant sex workers are discussed in more detail in Part 8 on Immigration Law.

Financial arrangements and wage structure

Many sex workers felt they do not have adequate power when negotiating their wages. Our participants identified four types of pay structure in escort agencies and massage parlours: financial exploitation/sexual slavery; fee splitting; hourly wages; and tips only.

1. Financial exploitation and sexual slavery

Currently, some sex workers face extreme financial exploitation by people who seek to control them and exploit their labour. This type of exploitation was reported by street-level sex workers, escorts, and massage parlour workers, including those legally residing in Canada and those illegally in the country. Sometimes the reported exploitation stemmed from physical or emotional domination and control. Sometimes the exploitation stemmed from a person's addiction to drugs.

Some sex workers pay all of their earnings to another person who does not pay them a liveable wage or, in some cases, any wage at all. This person is commonly referred to as a "pimp." The pimp may provide the worker with room and board and pay for other living expenses, but does not pay them a consistent wage. One massage parlour worker described being completely under the control of her employer who supplied room, board, clothing and drugs.

Such a situation would, depending on the circumstances, be found to contravene the criminal laws prohibiting procuring and extortion. Further, if prostitution were to be decriminalized, this financial arrangement would be found to contravene various sections of the *Employment Standards Act* (the "ESA"), including the guaranteed minimum wage. Serious forms of exploitation can be dealt with using several kinds of law.

2. Fee splitting

There are several structures whereby fees paid by clients are split between the worker and employer. The two most common described by participants in this project were: i) a base fee for a massage with the worker keeping all "tips" for sexual services; ii) or a percentage breakdown of fees between worker and owner.

i. Worker receives a base amount per client and all tips

In some businesses, the client pays a basic fee to have an appointment with an escort or a massage parlour worker. Part of that fee goes to the business and part goes to the worker. In addition to

receiving part of the base fee, the worker is able to negotiate a “tip” with the client by offering sexual services at various prices. In many cases, the worker keeps the entire “tip.”

ii. Fees for both the introduction and the sexual services are split between worker and owner on a percentage basis

The business owner charges an all-inclusive flat rate for a period of time with an escort that includes payment for sexual services. At the outset, the client is informed of the services being offered. All-inclusive fees negate the need for any kind of negotiation between the worker and the client. Usually the fee is split evenly between the business and the sex worker. In this pay structure the worker’s earnings are proportionate to the number of clients that they see.

An owner who participated in this study described the fee-split arrangement as a straightforward financial arrangement between owner and worker. In her establishment, the split was 50-50. She saw the 50 percent fee to the establishment as necessary to cover the work infrastructure she provides, including phone answering, screening of clients on the phone, protection of anonymity, advertising, etc.

In describing the disadvantages of this payment structure, one participant said that it reduced her autonomy by making it more difficult to control the types of services she provides, her flexibility in terms of rates charged for different services, and her overall earnings.

3. Hourly wage

The “all-inclusive” structure described above pay an hourly wage to the worker, but only for the time the worker spends with clients. In this system, a sex worker can spend a great deal of time waiting for clients without being paid. However, there was little support among our participants for the idea of implementing an hourly wage. Many sex workers enjoy being able to control their work, and they sense that they can make more money by setting their own fees. For example, when asked whether they would prefer an hourly rate, one escort explained that she would not, because it would be hard to determine the hourly rate; she prefers to be able to tailor the fee to the particular service provided, and the time spent with each client. She would limit the employer’s role to provision of a safe workplace.

Another former sex worker suggested that a wage implies a loss of control, and that she would prefer paying a small fee to an employer, determining herself what to charge the client. She did, however, believe that an hourly wage would benefit older women who have less bargaining power than their younger competitors.

One massage parlour worker reported being paid an hourly wage. As well as providing massages and sexual services, she was required to clean the premises. As a massage attendant, she reported being eligible for WCB, paying into CPP and EI, and earning B.C.’s minimum wage, even if there were no customers.

4. Tips only

In some businesses, the workers earn only the amount that the client pays above and beyond the initial introduction fee paid to the establishment. The client pays an initial fee for the massage or for the appointment with the escort, and then the worker negotiates the sexual services that will be provided for a “tip.” This means that if a client does not want any services above and beyond what they paid for at the outset, the worker does not earn anything.

Several sex workers reported that, in their experience, they generally make more money under the tips-only system. However, the reality is that they can go to work and not earn anything if they do not get any clients. Further, if they have to pay fees to their employer while they are on the job, such as a booking-on fee, they may find themselves in a deficit. Nevertheless, many sex workers reported that they appreciate having control over the financial aspects of their work.

When asked about these different types of financial arrangements, one business owner stated that the all-inclusive system is, on balance, the best for everyone. She explained that there are very high overhead costs for establishments like hers, and that the room fee has to cover those. She reported that generally, when workers determine their own fees, they are happy with the income levels they achieve overall, even if on some days they do not take home any income.

The legalities of all of these types of financial arrangement will be discussed throughout this report.

PART 2: MUNICIPAL LAW

Licensing and sex work: In Canada, thousands of sex workers operate within licensed massage parlours, body rub parlours and escort services. In many towns and cities, these businesses are licensed under municipal by-laws. However, due to the current criminal laws that prohibit procuring, living on the avails of prostitution, and providing sexual services in “bawdy houses,”¹ these businesses are susceptible to criminal prosecution. They are licensed to provide massage, escort services, or other types of services, but not to sell sexual services. Nevertheless, it is common knowledge that sexual services are provided by many of Canada’s escort services,² massage parlours and some exotic dance establishments.

If the provisions of the *Criminal Code* relating to adult prostitution were repealed, the provinces would have jurisdiction over the regulation of many aspects of prostitution. All provincial governments in Canada have delegated control over certain local matters to municipal governments. Specifically, the licensing of businesses and municipal land use (zoning) are currently delegated to municipal governments. These are areas of regulation that would become particularly relevant to the sex industry in the event of decriminalization. In countries that have undergone legal reform, such as New Zealand, battles regarding where and how many legal brothels may be established are being fought at the municipal level. Similarly in Canada, if prostitution were to be decriminalized, municipal governments would control the location and nature of prostitution establishments. During the course of this project, sex workers in three major Western Canadian cities – Vancouver, Calgary and Edmonton were interviewed about their experiences with current municipal regulations. In this chapter, we discuss municipal laws in these three cities, with a focus on Vancouver.

Laws governing municipal powers in B.C. and Alberta

The laws governing municipal powers contain important provisions that will bear directly on the ability for persons to set up and maintain sex industry businesses within a province in a decriminalized setting. For example, a municipality has the discretion to refuse a certain type of business license in the interest of limiting the number of such businesses operating in its jurisdiction. A municipality has the discretion to set licensing fees so high that it will be difficult or impossible for some sex workers to do business. The power of a municipality to revoke and grant a business license, inspect businesses, set license fees and draft by-laws are all set out in the laws governing municipal powers. Provisions for challenging these powers are also set out in these laws. Municipalities have a say in how all business is conducted within their boundaries, and there will likely be no exception should the criminal laws surrounding prostitution be repealed. Because of the significant impact that municipalities will likely have on the sex trade, it is imperative that they consult with sex workers extensively prior to imposing any by-laws on sex work.

B.C. and Alberta both have provincial statutes that delegate control over local matters, such as licensing of businesses and zoning, to local governments. The B.C. *Local Government Act* (the “LGA”)

¹ *Criminal Code*, R.S.C. 2005, s.210, s.212.

² See e.g. *R. v. Hrabchak* [1999] M. J. No. 554 (Manitoba Prov Ct.) at p. 7.

sets out those matters over which municipalities in B.C. may exercise jurisdiction.³ The B.C. *Community Charter* (the “*Community Charter*”), sets out additional laws with respect to municipal and regional district governance.⁴ Generally, municipal governments in B.C. create and pass by-laws in accordance with these statutes. One exception is the City of Vancouver, where the *Vancouver Charter* replaces much of the law set out in the *LGA* and the *Community Charter*.⁵

B.C.’s *LGA* is very similar in purpose and scope to the Alberta *Municipal Government Act* (the “*MGA*”).⁶ In Alberta, municipalities create and pass by-laws in accordance with the *MGA*. The *MGA* has similar features to the *LGA*.

B.C.’s Local Government Act

The main purposes of the *LGA* are to provide a legal framework for the establishment and continuation of local governments, and to set out the powers, duties and functions of local governments, including municipalities and regional districts.⁷ The *LGA* states that municipal governments have authority within towns and districts, while regional districts have authority outside of towns and cities. The *LGA* describes the ways in which municipal by-laws may be challenged under the law; under s. 262 of the *LGA* an elector of a municipality may apply to the Supreme Court to set aside all or part of a by-law for illegality.⁸ The court may award costs for or against the municipality according to the result of the application.

The *LGA* contains specific provisions regarding the licensing of businesses⁹ and bestows on local government the authority to charge fees for license applications and inspections. The *LGA* states that no other fees may be charged besides those set out in s. 931.¹⁰ The section contains a provision that safeguards against exorbitant municipal fees. Subsection 931(2) states that a fee must not exceed the estimated average costs of processing, inspection, advertising and administration, or other matters to which the fee relates.

Do the LGA and Community Charter apply in Vancouver?

The *LGA* and the *Community Charter* apply throughout B.C. except where particular sections of these two acts have been specifically superseded by another act of the legislature such as the *Vancouver Charter*. The *Vancouver Charter* specifies which sections of the *LGA* and the *Community Charter* are still in force within the City of Vancouver.¹¹ The *Vancouver Charter* cannot be changed by City Council but, rather, requires an act of Provincial government to amend it. The *Vancouver Charter* states that only a handful of provisions of the *LGA* relating to such matters as the transfer of provincial tax dollars and fire and security alarm systems continue to apply within the City of Vancouver.¹² The only *LGA* provision relevant to prostitution that continues to apply in Vancouver is s. 931(6) that relates to fees the municipality charges for applications and inspections.

Further, the *Vancouver Charter* stipulates that the only provisions of the *Community Charter* that continue to apply within Vancouver are those related to interest calculation, exemptions under regulations and dispute resolution, and governmental relations.¹³ Thus, the vast majority of municipal powers applicable in Vancouver are set out in the *Vancouver Charter*.

³ *Local Government Act*, R.S.B.C. 1996, c. 323 [*LGA*].

⁴ *Community Charter*, S.B.C. 2003, c. 26.

⁵ *Vancouver Charter*, S.B.C. 1953, c. 55.

⁶ *Alberta Municipal Government Act*, R.S.A. 2000, c. M-26.

⁷ *Supra* note 3 at s.1.

⁸ *Supra* note 3 at s. 262.

⁹ *Supra* note 3 at part 26.

¹⁰ *Supra* note 3 at s. 931.

¹¹ *Supra* note 5 at s. 2.1.

¹² *Supra* note 5 at s. 2.1.

¹³ *Supra* note 5 at s. 2.1.

Discretion to grant and refuse business licenses in Vancouver

The *Vancouver Charter* sets out a broad power under s. 275 to grant and refuse business licenses.¹⁴ The section states that the revocation or suspension of a licence shall be deemed to be in the discretion of Vancouver City Council, and the Council may grant, refuse, revoke, or suspend a licence without stating any reason, save in respect of a licensee who, despite reasonable efforts, cannot be found. The section also provides that a license holder must be given a hearing prior to having their license revoked. In considering s. 275, the courts have held that the section confers a broad discretion on Council with respect to granting, revoking and suspending business licences. In the exercise of that discretion, the Council is entitled to concern itself with such matters as the safety and well being of the general public, including crime occurring on premises that is attributable, in part, to poor management by a licensee.¹⁵

In the case of *D & H Holdings Ltd. v. City of Vancouver and Kenneth Armstrong, Chief License Inspector*, (A850871, Vancouver Registry, July 3, 1985), the petitioner sought a declaration that s. 275 of the *Vancouver Charter* was without force and effect because it contravenes s. 7 of the *Charter of Rights and Freedoms*, the right to life, liberty and security of the person. The court struck out the provision that states that Council need not provide reasons for revoking or suspending a license. On this point the Court stated:

...the section does, on its face, permit Council to decline to give reasons and that, in my view, is contrary to fundamental justice. How can a citizen properly challenge Council's decision if no reasons are given. Section 52(1) of the Charter of Rights provides that "The Constitution of Canada is the Supreme Law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect" (my emphasis). The objectionable words "without stating any reason" therefore are declared inoperative and of no force or effect.

As the result of this decision, Vancouver City Council no longer has the authority to revoke a business license, such as the license of an escort agency or massage parlour, without providing reasons for the revocation. The discretion conferred on the City in granting licenses under the *Vancouver Charter* will be examined in more detail later in the report.

Under s. 272 of the *Vancouver Charter*, City Council may make by-laws providing for the licensing of any person carrying on any business, trade, profession, or other occupation, and for revoking or suspending any licence, the section states:¹⁶

- 272 (1) The Council may from time to time make by-laws
- (a) for providing for the licensing of any person carrying on any business, trade, profession, or other occupation;
 - (b) for fixing the fee for the granting of any permit or of any licence, which may be in the nature of a tax for the privilege conferred by it;
 - (c) for providing for enforcing payment of any licence fee, and for prohibiting any person from carrying on any business, trade, profession, or other occupation without first being licensed therefore;
 - (f) for regulating every person required to be licensed under this Part, except to the extent that he is subject to regulation by some other Statute.

The power to regulate under s. 272(f) has been interpreted broadly by the courts, and includes the definition of "regulating" set out in s. 2 of the *Vancouver Charter* as authorizing, controlling, limiting,

¹⁴ *Supra* note 5 at s. 275.

¹⁵ See *Sunrise Hotel Ltd. v. City of Vancouver* (No. X5393 - Vancouver Registry - December 21, 1973); *Sunrise Hotel Ltd. v. City of Vancouver* (No. 36099/74 - Vancouver Registry - May 30, 1975); *Kim v. City of Vancouver* [1985] B.C.J. No. 686; and *D & H Holdings Ltd. v. City of Vancouver and Kenneth Armstrong, Chief License Inspector*, (A850871, Vancouver Registry, July 3, 1985).

¹⁶ *Supra* note 5 at s. 272.

inspecting, restricting, and prohibiting. However, in a challenge to the validity of what was then s. 24(6) of Vancouver business licensing by-law No. 4450 – a provision aimed at licensing Social Escort Services – the B.C. Superior Court held that the power to regulate in s. 272(f) does not include the power to require Social Escort Services to maintain a record of all client requests to provide a Social Escort and to provide such record upon request, and make such list and records available for inspection by the Inspector or the Chief Constable.¹⁷ In that case, the court held that, to survive a challenge, the power to regulate under s. 272(f) must be linked to a valid municipal regulatory purpose.

The *Vancouver Charter* stipulates that City Council may set the term of a license for any period up to two years, and that a person who maintains a business, trade or occupation at more than one location must hold a license with respect to each place of business.¹⁸ The *Vancouver Charter* grants the Chief License Inspector the power to summarily suspend any license if the license holder has been convicted of an offence under any federal or provincial statute, or under any by-law of the city.¹⁹ In the case of by-law convictions, they must be by-law offences related to the business, trade, profession, or other occupation for which the license is held.

Further, the Chief License Inspector may suspend a license if, in her opinion, the license holder has been guilty of “such gross misconduct in or with respect to the licensed premises as to warrant the suspension of his license.”²⁰ Additionally, the Chief License Inspector may suspend a license if, in her opinion, the license holder has conducted his business in a manner, performed a service in a manner, or sold, offered for sale, displayed for sale, or distributed to a person actually or apparently under the age of 16 years any thing that may be harmful or dangerous to the health or safety of that person.²¹ A person whose license has been suspended under s. 277 may appeal to City Council under the same provision. The Chief License Inspector may “in any case” recommend to Council in writing the suspension or revocation of any license, setting out the reason for such a recommendation.²² The Council shall not suspend or revoke the license without previous notice and the license holder must be given an opportunity to be heard.

The *Vancouver Charter* provides for the fixing of fees for the granting of any permit or license. Section 272(1)(b) states that the fees may be in the nature of a tax for the privilege of holding the permit or license.²³ The *Vancouver Charter* also confers the authority of City Council to enforce the payment of licensing fees and to prohibit any person from carrying on any business, trade, profession or other occupation without first being licensed for it. These provisions will be examined in more detail in the following discussion.

Inspections by the City

The *Vancouver Charter* conveys the authority for regulating business licenses on City Council. Under s. 269, authority is given to the Chief Licence Inspector to make, or cause all necessary inspections to be made, to ascertain whether the provisions of any statute, regulation, or by-law assigning powers or duties to him or his staff are being carried out in the city.²⁴ Section 271 confers a duty on an owner and occupier of any real property in the city to give to the Chief Licence Inspector such access at any reasonable hour to such real property, and such information as may be reasonably required to enable an inspection to be made.²⁵

¹⁷ *International Escort Services Inc. v. Vancouver (City)* [1988] B.C.J. No. 2475.

¹⁸ *Supra* note 5 at ss. 273, 276.

¹⁹ *Supra* note 5 at s. 277.

²⁰ *Supra* note 5 at s. 277(c).

²¹ *Supra* note 5 at s. 277(d).

²² *Supra* note 5 at s. 278.

²³ *Supra* note 5 at s. 272(1)(b).

²⁴ *Supra* note 5 at s. 269.

²⁵ *Supra* note 5 at s. 271.

The *Vancouver Charter* contains specific provisions limiting the ability to challenge the validity of city by-laws. Section 148 states that a by-law or resolution duly passed by the Council in the exercise of its powers, and in good faith, shall not be open to question in any Court, or be quashed, set aside, or declared invalid on account of the unreasonableness of its provisions.²⁶ Section 149 of the *Vancouver Charter* states that any by-law or resolution passed by the Council shall be absolutely valid and binding upon all parties concerned, and can only be questioned in Court within one month after its final passing.²⁷

Municipal governance over businesses that provide sexual services in Vancouver, Calgary and Edmonton

Municipal licensing by-laws exist in all Canadian cities. These by-laws set out the types of restrictions that different businesses have to meet in order to obtain a license. In general, business licenses are a way for municipalities to control the number and nature of businesses within their boundaries, ensure compliance with health and safety guidelines, and collect licensing fees for city revenue.

Most Canadian cities currently license businesses that are similar, if not identical to Vancouver's escort agencies, massage parlour services, health enhancement centres or steam baths and, in many cases, but not all, these types of businesses offer sexual services. Vancouver's health enhancement centre license provides a clear example of one that is held by both businesses providing non-sexual services, such as therapeutic massage, and those providing sexual services. Vancouver's Body Rub Parlour license is an example of a license that is almost exclusively held by establishments that offer sexual services. Some of these operating businesses may be described as quasi-legal: some of the services they provide are legal, such as massage or escort services, while others, by providing sexual services, offend the bawdy house or procuring provisions of the *Criminal Code*.²⁸

Prostitution that is commonly not carried out under the auspices of a license, such as street and independent escort work, could also become subject to municipal licensing laws in the event of legal reform. The potential for licensing of these types of prostitution will be discussed later in this report.

Most Canadian by-laws regulating the types of businesses that often provide sexual services contain restrictive provisions that can only be interpreted as an attempt to control the provision of sexual services while not banning prostitution outright. Municipalities in Canada do not have the authority to explicitly prohibit street-level prostitution.²⁹ Under the Canadian Constitution, municipalities do not have the authority to impose prohibitions for a "moral" purpose but they may regulate matters within their jurisdiction, such as local land use and the licensing of local businesses. In *Westendorp v. The Queen*, a Supreme Court of Canada decision that applies to all of Canada, the Court held that a by-law may be found to be unconstitutional where it creates an offence that is an attempt to control or punish street prostitution. *Westendorp* involved a provision with a stated purpose of prohibiting street prostitution. The by-law stated: "Being a By-law of The City of Calgary to Amend By-law Number 9022 to Prohibit Use of City Streets by those Approaching or being Approached by Others for the Purpose of Prostitution." Further, the by-law at issue in *Westendorp* explicitly created an offence relating to prostitution:

- (2) No person shall be or remain on a street for the purpose of prostitution.
- (3) No person shall approach another person on a street for the purpose of prostitution.
- (4) Any person contravening the provisions of this section is guilty of an offence and is liable on summary conviction.³⁰

²⁶ *Supra* note 5 at s. 148.

²⁷ *Supra* note 5 at s. 149

²⁸ *Supra* note 1.

²⁹ *Westendorp v. The Queen*, [1983] 1 S.C.R. 43 (QL) [*Westendorp*].

³⁰ *Ibid.*

While the precedent set in *Westendorp* protects sex workers from municipal attempts to ban street-level sex work, municipalities have still been allowed a significant degree of control over street-level prostitution.

The by-laws in Vancouver, Calgary and Edmonton are enforced differently and place different types of restrictions on sex workers, some more onerous than others. This raises different issues for the sex workers operating within such licensing schemes. These by-laws and their impact on sex workers are examined in more detail below.

Vancouver's licensing by-laws

Any person carrying on a business, trade, profession or other occupation must have a valid business license under the *Vancouver Charter*.³¹ The terms “business,” “trade,” “profession,” and “occupation” are not defined in the *Vancouver Charter* but, in practice, they are applied very broadly to encompass everything from sole proprietorships operated out of the home, to street vendors, to persons operating web businesses, to persons operating large-scale enterprises. Clearly, this provision would encompass all forms of prostitution if it were to be fully decriminalized.

In Vancouver, a by-law breach normally results in a fine as punishment. Fines can range between \$100 and \$2,000.

The licensing of businesses in Vancouver is governed by one central by-law called the *Vancouver License By-law, No. 4450* (the “*Vancouver By-law*”).³² The *Vancouver By-law* sets out the requirements and fees to obtain a license for various types of businesses, including those commonly held by sex industry employers, and sets out restrictions on various types of business.

To obtain a business license, business owners and operators must fill out an application for a license, submit it in person at City Hall, and pay an annual licensing fee.³³ All Vancouver business licenses expire on December 31 of each year and, therefore, must be renewed annually.³⁴ Employees do not have to obtain a business license; rather, only the owner or operator of the business must obtain the license. The license application requires the applicant to provide their name, address, a description of the business, and property address of the proposed business as set out in the *Vancouver By-law*.³⁵ All persons applying for licenses are automatically subject to a criminal record check by the City Inspector.³⁶ The Inspector can refuse to grant a license to a person because of their criminal record. A person applying for a business license must present at City Hall a valid B.C. identification or Canadian passport in order to obtain a license.

Businesses that provide sexual services commonly hold Body Rub Parlour, Dating Service, Health Enhancement Centre, Social Escort Service, Steam Bath, and Massage Parlour business licenses; however, not all massage parlours, health enhancement centres and steam baths are fronts for prostitution. During the course of the project we interviewed sex workers operating in businesses holding Health Enhancement Centre, Social Escort Service and Dating Service licenses under the *Vancouver By-law*. Given that each of these categories may provide fronts for prostitution, sex workers commented on all five types of licenses. Many of these licensing provisions contain a wide range of restrictions. In the event that the criminal laws related to prostitution are repealed, it is likely that municipalities would revise or even eliminate such restrictions.

³¹ *Supra* note 5 at s. 272(1)(a).

³² City of Vancouver, By-law No. 4450, *License By-Law* (23 September 1969) [*Vancouver By-Law*]

³³ *Supra* note 32 at s. 3(2).

³⁴ *Supra* note 32 at s. 3(2).

³⁵ *Supra* note 32 at s. 4(3).

³⁶ *Supra* note 32 at s. 4(2).

Vancouver's business prohibition by-law

Vancouver's municipal by-laws directly prohibit certain types of businesses. By-law No. 5156, the *Business Prohibition By-law*, prohibits any person from carrying on a business that involves a "nude encounter" (i.e. a discussion session engaged in for which a fee is paid and either one or both parties are unclothed, or any activities substantially similar), an "out-call body massage service" (i.e. the offering of a body-rub at any premises other than a licensed body-rub parlour), or an "erotic telephone call" (i.e. the offering or providing of a discussion of sex over the telephone for a fee in an erotic or lewd manner).³⁷ By-law No. 5156 imposes a \$2,000 fine on anyone violating this by-law. When asked about this by-law, sex workers stated unanimously that it was vague and unfair.

Body rub parlours

The term "Body Rub Parlour" is defined in the *Vancouver By-law* as any premises where a body-rub is performed, offered or solicited.³⁸ The *By-law* defines "Body rub" as "the manipulating, touching or stimulating by any means, of a person's body or part thereof, not including medical, therapeutic or cosmetic massage treatment given by a person duly licensed or registered under any statute of the Province of B.C. or a therapeutic touch technique."³⁹

The *Vancouver By-law* states that every applicant for a license to operate a body rub parlour shall supply the Chief Constable of the Vancouver Police Department and the City License Inspector with the name, age, address and sex of all persons that the applicant employs.⁴⁰ The provisions state that no person carrying on the business of a Body-Rub Parlour shall employ a person under the age of 19 years, nor shall a person under the age of 19 years be permitted on the premises, in which case clients must be over 19 or older.⁴¹ The by-law requires that all rooms used for body-rub shall not be less than 2.4 metres by 2.4 metres, shall not be equipped with any locking device on any door other than the entrance to the premises, shall not have any means by which any person may view the interior of the premises – such as a window – and shall be equipped with lighting of at least 50 candle power which shall remain "on" when the door closed.⁴²

The Body Rub provisions hold that no person who carries on the business of operating a body-rub parlour shall:

- permit any person to enter or remain on the premises between the hours of 12 midnight and 8 a.m.;⁴³
- practice or permit the practice of a therapeutic touch technique or advertise in any way that a therapeutic touch technique is available on the premises;⁴⁴
- exhibit herself nor permit other persons to exhibit themselves, in any window on or about the premises, or exhibit or permit to be exhibited any sign outside of the premises showing any nude male or female body nor any printed words that might indicate that the licensed premises is a place that offers any form of sexual or nude entertainment.⁴⁵

The by-law requires that the person performing the body-rub wears clean, washable, non-transparent outer garments covering his or her body between the neck and the top of the knee, the sleeves of which

³⁷ City of Vancouver, By-law No. 5156, *A By-law to prohibit the carrying on of sundry business, trades, professions and other occupations* (11 April 1978).

³⁸ *Supra* note 32 at s. 2.

³⁹ *Supra* note 32 at s. 2.

⁴⁰ *Supra* note 32 at s. 11.5.

⁴¹ *Supra* note 32 at s. 11.5(3).

⁴² *Supra* note 32 at s. 11.5(5).

⁴³ *Supra* note 32 at s. 11.5(6).

⁴⁴ *Supra* note 32 at s. 11.5(9).

⁴⁵ *Supra* note 32 at s. 11.5(8).

do not reach below the elbows.⁴⁶

When asked about these provisions, sex workers stated they felt they are unnecessary and intrusive:

Q. What is your opinion of the law surrounding body rub parlours? . . . We talked about it. [Rooms must be] two-by-two metres, you needed to have the outfits between the neck and the knees.

A. We said that it wasn't applicable to sex trade workers, that it needed definitely to be changed.

- female street-level sex worker

Restrictions, targeting such minutiae as the type and length of clothing that must be worn, the precise size and lighting of the rooms, and requirement that there be no locks on the rooms are very different from the types of licensing requirements imposed on other types of businesses.⁴⁷ Such restrictions impose a higher degree of control over, and intrusion into, the workplaces of sex workers. Nearly all sex workers felt some or all of these requirements were unfair.

One sex worker described the breach of privacy created by the requirement in her workplace that she keep her door unlocked:

A. I don't think that it's fair that I have to keep my door unlocked.

Q. Do you currently have to keep the door unlocked?

A. Yup, I do . . . I get people walking in all the time.

- female off-street in-call sex worker

One former sex worker and current business owner stated she felt the specific lighting requirement was nonsensical:

A. But there are no windows on the rooms. But another thing that it does specify is the brightness of the lights. Which I could never understand – what the hell is a six foot candle?

- female massage parlour owner, former sex worker

One sex worker suggested that the requirements are overly restrictive:

A. Like I mean, c'mon, 10 candles. I mean – I mean, I think it should be a darker lighting, if you want.

- female off-street in-call sex worker

Nearly all sex workers felt that these provisions are overly intrusive. Some even remarked that they were outdated and should be revised to better protect the safety and interests of sex workers.

Dating services

The *Vancouver By-law* defines a dating service as any person carrying on the business of providing information to persons wanting to meet other persons for the purposes of social outings.⁴⁸ The by-law requires that every person carrying on the business of a dating service shall supply the City License Inspector with the name, age, address and description of every person employed in the said business, shall notify the Inspector within 72 hours of any change in the personnel employed in the business, and shall maintain a written record of all customers.⁴⁹ There is no requirement to supply information about employees in the case of the escort service by-law.

⁴⁶ *Supra* note 32 at s. 11.5(7).

⁴⁷ For example, many licensing provisions contain restrictions on hours of operation only.

⁴⁸ *Supra* note 32 at s. 2.

⁴⁹ *Supra* note 32 at s. 13.1.

Health enhancement centres

The *Vancouver By-law* defines a Health Enhancement Centre as a building or premises used for the enhancement of health and well-being through one or more therapeutic touch techniques.⁵⁰ The by-law also states that every person carrying on the business of a health enhancement centre shall ensure that all persons hired to administer a therapeutic touch technique are qualified and, unlike the Body Rub by-law, requires that they have not been convicted under s. 212 of the *Criminal Code*, the provision prohibiting procuring, or s. 213, the section prohibiting communicating for the purposes of prostitution.⁵¹ The by-law requires that a health enhancement centre shall not remain open between the hours of midnight and 8 a.m., and that no person carrying on the business of a health enhancement centre shall allow a person on the premises to engage in an act of prostitution.

This provision is an example of a by-law that prohibits prostitution in one kind of licensed establishment, but facilitates it in another, because no similar provision is included in the Body Rub by-law. This implies that body rub parlours are designed to be prostitution establishments. Indeed, the vastly different fees for the various types of establishments – \$193 for a Health Enhancement Center and \$208 for a Massage Parlour, as compared to \$7,891 for a Body Rub Parlour – reinforce this impression. In fact, a Body Rub license is the third most expensive in Vancouver, exceeded by only the Pacific National Exhibition and the Race Track.

Sex workers pointed out the Health Enhancement Centre provision prohibiting persons with convictions under s.s 212 and 213 of the *Criminal Code* from working in Health Enhancement Centres has the effect of preventing persons wishing to exit prostitution for employment in a range of therapies.

One sex worker and owner stated that she felt it was nonsensical having to ensure that staff are certified to practice therapies they do not offer:

A. Because I don't live up to a lot of what I need to live up to. But I am not offering fucking Reiki. Okay? It's not what I am offering. But it's what have – I have to pretend to be offering to get my business license. So, y'know, to – to have to meet the licensing requirements of a business I don't offer, is certainly odd. I can't think of another business that has to have their staff certified in something they're not offering But being certified in some sort of knowledge, of what you are offering, would sure make a lot more fucking sense than being certified in reflexology to give a blowjob.

- female off-street in-call sex worker

Social escort service

The *Vancouver By-law* states that a “Social Escort Service” means any person who carries on the business of providing, or offering to provide, the services or the names of persons to act as escorts for other persons.⁵² The *Vancouver By-law* also states that any person carrying on the business of a social escort shall maintain on the premises a list of all current employees and all customers; and upon request make such list available for inspection by the City Inspector or the Chief Constable.⁵³ This requirement does not protect the privacy of who is working at and who is frequenting social escort services.

⁵⁰ *Supra* note 32 at s. 2.

⁵¹ *Supra* note 32 at s. 17.1.

⁵² *Supra* note 32 at s. 2.

⁵³ *Supra* note 32 at s. 25.3.

Massage parlours and steam baths

The *Vancouver By-law* addresses Massage Parlours and Steam Baths within the same licensing provision.⁵⁴ The *Vancouver By-law* does not define a ‘Massage Parlour.’ It defines a Steam Bath as any premises wherein a fee is paid for a sauna or steam-bath.⁵⁵ The by-law states attendants in steam baths and massage parlours must not treat or attend members of the opposite sex.⁵⁶ The operator must keep a written record of all persons using the premises, including their name, address and time and date of use. No person shall operate a premise in which members of the opposite sex use the same steam-bath, and that the interior of the premises must be illuminated to a minimum of ten candles in every part of the premises.⁵⁷

Sex workers felt the licensing provisions related to Steam Baths and Massage Parlours were unfair, discriminatory, and based on outdated moral beliefs. Sex workers noted that no similar requirement regarding members of the opposite sex exists for other professions that involve bodily contact between service provider and client.⁵⁸ Sex workers indicated that they feel this restriction rests on a stereotype that persons working in and frequenting steam baths and massage parlours are all heterosexual. One sex worker said:

A. It's natural to go into a steam bath with the opposite sex . . . What I was just saying is I think a lot of this illuminated that. I think a lot of these rules were written a loooong time ago.

- female street-level sex worker

One escort summarized her criticism of these provisions in the following manner:

A. That's ridiculous . . . I imagine that this law dates back to a time before . . . people even thought about gay sex . . . But I think that if you – if you want to be in a designated room, that should be – for both sexes, then that's fine. But I think that also a same-sex only room should be available.

- female off-street out-call sex worker

Licensing fees

Schedule “A” of the *Vancouver By-law* sets out the fees that a license holder must pay on an annual basis to the City:⁵⁹

- Dating services \$128 per year
- Health enhancement centres \$198 per year
- Body rub parlours \$8,108 per year
- Steam baths and massage parlours \$214 per year
- Social escort services \$958 per year.

These licensing fees can be compared to fees for the following non-sex industry business licensing fees under the *Vancouver By-law*:

⁵⁴ *Supra* note 32 at s. 25.6.

⁵⁵ *Supra* note 32 at s. 2.

⁵⁶ *Supra* note 32 at s. 25.6.

⁵⁷ *Supra* note 32 at s. 25.6.

⁵⁸ For example, massage therapists, escorts, and gynaecologists

⁵⁹ *Supra* note 32 at Schedule A.

- Bowling alley \$197 per year
- Auto dealer \$128 per year
- Arcade \$266 per year
- Late night dance event \$232 - \$929 per year⁶⁰

Given the enormous discrepancy in these fees, it would appear that the city of Vancouver is attempting to channel prostitution services into escort services and body rub parlours, and away from dating services, massage parlours, steam baths and health enhancement centres.

The licensing provisions like those applicable to body rub parlours as well as the nature of the businesses holding such licenses make it obvious that the City is well aware it is licensing prostitution. Thus, just as the federal government has created a contradiction in the law with respect to prostitution – making it legal but almost impossible to carry out in a legal manner – so, too, have municipal governments, by creating provisions that allow for the licensing of businesses in which sexual services are offered while at the same time heavily restricting and confining those businesses in a way that can be construed as denying that prostitution occurs in licensed premises.

Challenging high licensing fees and restrictive by-laws

In several Canadian cases, applicants have argued against disproportionately high licensing fees for escort services and massage parlours on the basis that they are: a) discriminatory; and b) on the basis that the high fees may have the effect of prohibiting such businesses. In several cases, applicants have argued that such restrictive licensing by-law provisions constitute an unlawful prohibition. However, few such cases have been successful.⁶¹ In the case of *Re City of Vancouver License By-Law 4957*, the Vancouver by-law dealing with body-rub parlours, body painting and model studios was challenged in B.C. Supreme Court. Among other things, the by-law prohibited nude attendants in body-rub parlours, restricted hours of operation to before midnight, and imposed an annual license fee substantially higher than that extracted from other businesses. There was no evidence presented as to the economic effect of the by-law on the business of body-rub parlours generally, and there was no evidence presented as to what motivated City Council to enact the by-law in the first place. In delivering the judgment of the Court of Appeal, Taggart, J.A., summarized the three grounds for the plaintiff's case against the by-law as follows:

- (1) Its purpose and effect was to prohibit and not merely to regulate the business of the appellants.
- (2) Council in enacting the by-law did not act in good faith but in an unfair, oppressive and discriminatory manner.
- (3) Council exceeded its authority in enacting the by-law in that it purported to regulate public and private morality.⁶²

With respect to the evidence on the first ground of appeal, Taggart J.A. stated:

While the economic effects of a by-law on those affected by it may be a relevant consideration in determining whether the by-law is prohibitory or merely regulatory, I think the evidence in the case at Bar does not support its application because the evidence is limited to expressions of opinion by officers of the two appellant companies as to the effects of the impugned by-law on the appellants alone, and there is no evidence as to what the economic effects of the by-law may be on the class of business known as body-rub parlours.⁶³

⁶⁰ Licensing fees cited are for annual license renewal, not fees for first-time license-holders which are higher.

⁶¹ See *Re City of Vancouver*, [1976] B.C.J. No. 330 (B.C.S.C.) (QL) [*Re Vancouver*]; *International Escort Services Inc. v. Vancouver (City)*, [1988] B.C.J. No. 2475 (B.C.S.C.) (QL) [*International Services*]

⁶² *Re Try-San International Ltd. and City of Vancouver* (1978), 83 D.L.R. (3d) 236 (QL).

⁶³ *Ibid.*

The court held that the by-law was not prohibitory, but merely regulated the manner in which body-rub parlour business could be conducted. Turning to the other grounds of appeal, Taggart J.A. reasoned:

Grounds 2 and 3 may conveniently be considered together for the appellant's submission on Ground 2 as to bad faith is bound up with the contention that council purported to regulate public and private morality. In relation to Grounds 2 and 3 counsel for the appellant again encountered difficulties because there was no evidence to indicate what considerations motivated council in enacting the impugned by-law.

Here, in the absence of evidence it seems to me impossible to say that council acted to regulate public and private morality. In saying that I do not wish to be taken as saying that council may not in appropriate circumstances consider moral issues when acting under the powers conferred on the council by the City Charter to regulate how businesses may be conducted. I merely say that here there is no evidence of any consideration of moral issues by council.⁶⁴

This decision suggests that a challenge to discriminatorily high licensing fees for sex industry businesses may be successful with the appropriate evidence. There is no question that licensing fees for businesses offering sexual services are higher than those for non-sex industry businesses. We will return to the subject of licensing fees in more detail later in this report.

Body rub parlour licenses in Vancouver

Sex workers indicated that there is currently only one Body Rub Parlour license held in Vancouver, and that the City is not issuing any more licenses beyond this one. The City confirmed that there is, indeed, only one Body Rub Parlour license at present. There was no confirmation that other persons have applied for and been denied Body Rub Parlour licenses. The exercise of discretion by the licensing authority to deny licenses in this fashion will be discussed below under the heading "Discretion of Licensing Body" on page 62.

Vancouver area sex workers suggested that as a result of higher licensing fees for Body Rub Parlours and the apparent lack of new licenses, many establishments providing sexual services are operating under Health Enhancement Centre and Massage Parlour licenses.

One sex worker and owner/operator commented on the difference in licensing fees and requirements in body rub parlour and health enhancement centres:

- A. And if you decide – and two of them switched over to a Health Enhancement Centre because it's so much cheaper. It's a regular business license fee, whereas the body rub license was nearly seven grand. Seven grand, okay? So yeah, when you could pay five hundred dollars versus seven grand – then you have to go, Okay well there is 40 health enhancement centres in Vancouver, that are all doing the same thing that I am. Why should I be paying this fee? They switched over.*
- Q. So why do people [apply for Body Rub Parlour licenses], I guess so they don't have to maintain so much y'know, secrecy with what they are doing, they have a little bit more leeway with what they do, or?*
- A. Well it – y'know, you still end up paying for it, because you are allowed things with the body rub license that you are not allowed with the health enhancement centre license. With the body rub license, none of the staff have to be certified in anything. So that's a huge bonus. [An] establishment with [a] body rub license doesn't ever have to worry about city hall coming in and saying, "Can I see your staff certification?" I do. So it is a means by which the city can effectively close down every place in Vancouver, except one, overnight – if they wanted to. It's a very simple way. Eventu-*

⁶⁴ *Ibid.*

ally, people would find a way around, but if they wanted to shut everybody down for a couple of months, they could. And then people would just have to fork over the \$500 [for a fee for certification] and go get certified in something. And there'd be the pressure to do that quickly, whereas right now there's not. And even with my own staff, y'know to tell people they'd have to go get certified, they would be like, when was the last time that anyone checked? It doesn't matter that it was four years ago, it could happen tomorrow.

- female off-street in-call sex worker

Body rub parlour licenses in Edmonton and Calgary

The licensing fees for businesses in Vancouver are similar to those in Calgary and Edmonton. The Calgary By-Law No. 32M98 governs business licensing fees.⁶⁵ A Body Rub Studio license costs \$3,600 and a Dating and Escort Service license costs \$3,600, while a Motor Vehicle Dealer license costs \$110.00. In Edmonton, Business License By-Law No. 13138 sets out business licensing fees, including \$4,092 annually to license an Escort Agency, \$1,535 for an Independent Escort license, \$154 for a Vehicle Dealership and \$512 for a Nightclub.⁶⁶

Sex workers commented that they felt having much higher licensing fees for sex industry businesses was unfair, discriminatory and prohibitive:

- Q. So, what is your opinion about licensing fees for individual sex workers, and about licensing fees for sex work businesses?*
- A. They should be on par with everything else. Not like there's such a jump, in that eight thousand, that's ridiculous. Between the body rub and what was it?*
- A. Escort services. Like one's 800 and one's 8,000 [dollars?]. They should definitely be on par with each other basis. That's legitimate. Not just some government.*
- A. Yeah.*
- A. I mean some of the services are exactly the same – as a brothel house and a massage parlour.*
- A. Exactly. So they should be on par with the licensing too.*

- female street-level sex workers

A sex worker in Edmonton described how she felt the high fees for independent escorts made it difficult, if not impossible, for some women to move from the street into independent escort work:

- A. The cost is \$4,000 if you want an agency license in Edmonton where you would employ people as opposed to 15 hundred dollars for somebody who is independent. And that brings me pretty much up to today.*
- Q. What do you think of that particular arrangement right now?*
- A. Well, I find it workable, probably because I have been around for long, and I'm aware of it, and for what it's for, think it's very prohibitive for anybody to just walk into, into the independent part of the business and work without any, any agency help because it's so, I mean it's not even just \$1,500. It's another hundred dollars and it's an added insult because you first have the \$1,500 of the independent agency license but you still have to employ yourself even though you can't employ anyone else and that's a hundred dollars, and then because that's the nature of the beast you have to have a home business license which is another \$35, and now I hear it's up two percent from that. So, you know, it's a lot of money and the upstart is, is so expen-*

⁶⁵ City of Calgary, By-law No. 32M98, *Business Licence Bylaw*.

⁶⁶ City of Edmonton, By-law No. 13138, *Business Licence Bylaw*.

sive because now you've got this license in your hands – assuming you've managed to scrape that kind of money together. . . . So what about women that want to get off the street? What does this by-law do to them? The escort by-law makes it impossible. It really, almost makes it impossible. Yes, they could go work for pimps, and I suppose if they've already been working for a street pimp and they find themselves out of that situation, needing work, they probably wouldn't find themselves uncomfortable working for an inside pimp. But for the independent, you know the independent girl, on the street, which is what I used to be, it costs her nothing. There's the condom wagon, so she doesn't even have to pay for that. She gets herself out of bed in the morning, walks to the curb, there's her advertising costs, nothing, her transportation costs he provides, they either go back to her place or his place or do it in the car, that costs nothing extra. And she's got money in her pocket. How can you convince somebody, drug addicted or not drug addicted, that they'd be better off inside, except for of course the fact that there are these serial killers running around, anybody who's out on the street that's younger might not be so much addicted, but when you're younger you're invincible and of course that guy's not coming for you right? People that are older and are still stuck on the street, they might have mental problems, or maybe they're just desperate for the moment and they don't do it full time anyway. But that's the thing. I mean if you're on welfare or something and you're just not making ends meet, and you're just out there once a week, what would compel a person to go indoors at those prices? Or what would compel, I can't even imagine what would compel me to go work for a massage agency for instance, when I'm only going to work once in a blue moon and they would take more than the money I would make.

- female off-street out-call sex worker

The fact that sex workers who want to move from street work into escort work are prevented from doing so by the high escort licensing fees reveals the way that such provisions directly affect the safety of sex workers. In Edmonton, where this impact was reported, a serial killer is currently suspected of causing the deaths of several street-level sex workers. The Edmonton council should consider lowering the licensing fees and restrictions it applies to independent escorts.

Sex workers in Calgary and Edmonton similarly criticized the municipal by-laws relating to sex work under which they are forced to operate. In Calgary, there are two relevant by-laws: the 1988 By-law to License, Regulate and Control Massage Practitioners and Massage Studios, and the 1986 By-law to License, Regulate and Control Body Painting Studios, Encounter Studios, Dating and Escort Services and Model Studios.⁶⁷ The by-laws set out licensing requirements and restrictions, fees, penalties for non-compliance, and revocation of a license. These by-laws prohibit the aforementioned adult businesses from operating in residential districts.

In Edmonton, both escort agencies and escorts are governed by the *Escort Licensing By-law* #12452.⁶⁸ This by-law sets out how licenses are obtained, restrictions on who can apply for a license, licensing fees, the duration of the license, and fines for non-compliance.

In all cases, sex workers stated they felt the number and type of restrictions, and the licensing fees for sex industry businesses should be equivalent to those for other businesses.

Views on the “quasi-legal” status of sex industry businesses

The status of licensed sex industry businesses as simultaneously legal and illegal creates an uncertain situation for sex workers. They described the experience of working for a business that provides

⁶⁷ City of Calgary, Bylaw 51M97, *Massage License Bylaw*; City of Calgary, Bylaw 34M86, *Dating and Escort Bylaw*.

⁶⁸ City of Edmonton, By-law 12452, *Escort Licensing Bylaw*.

both legal and illegal services as one of constant fear of reprisal by City Officials who can penalize them at any time for engaging in prostitution. Also they stated that they are unable to seek protection of their legal rights. One sex worker stated:

A. Yet y'know, we jump through the hoops that we have to jump through, to – to keep it all there. And it all could all be pulled out from underneath me.

- female off-street in-call sex worker

Some sex workers felt intimidated by the threat of officials enforcing municipal licensing schemes. When asked about how she felt about the by-laws, one sex worker said:

A. Well mostly fear and intimidation, I mean you constantly feel like you're being watched. And I don't know, I'm not all that prone to paranoia, but there just seems to be [sighs], oh dear. That, that's the biggest thing, I think people are always worried, when are they going to be the next target, and it's uncomfortable to say the very least. And it's also, you know, there are some people that are you know, pretty, pretty upfront with their families about what they do, and they still wouldn't want to go and stick their neck out and say anything to the media, lest they be the next target. And it's kind of an ongoing thing . . .

- female off-street out-call sex worker

All sex workers operating in licensed businesses felt they had fewer rights than other workers, and were less able than other workers to seek protection of their rights:

- A. But as we don't still have the same civil rights that you do, as any other business owner. Yes, it used to be very confrontational, and they would come do ID checks.*
- A. Yeah, so I mean, it's – it's a house of cards, I am always, I realize the frailty of the licensing system, from which I work. It can be revoked at any time. And I really – I really don't have a lot of rights.*

- female off-street in-call sex workers

One owner/sex worker talked about how seldom people working in the sex industry will mobilize and speak out against abuses:

A. They're not the type of stuff – the type of stuff that takes people over the edge – is the type of the stuff that happened in [name omitted] where your – y'know, where you have to let the owner go perform oral sex on you on a regular basis, to hold your job. And – and y'know, he's just nasty, dirty, degrading, disgusting, piece of shit human being that's the type of thing to – to get people in this industry to mobilize.

- female massage parlour owner, former sex worker

Such a system allows municipalities to control and profit from sex industry businesses while simultaneously maintaining the façade that they do not know what takes place inside them.

All sex workers who work in licensed establishments described the way that they must pretend they are not providing sexual services even though they are certain the municipality knows that they are. Sex workers believed that municipal authorities are well aware that they license and profit from prostitution. Indeed, some sex workers suggested that municipalities are living on the avails of prostitution contrary to s. 212 of the *Criminal Code*.⁶⁹ The opinions of sex workers clearly showed that the need to conceal their real work creates barriers to their accessing health, safety, civil and human rights protections while they work. Several sex workers commented:

⁶⁹ *Supra* note 1.

- A. *Well, basically the city says that they don't license the act, they only license the introduction And that's their pretext and that's what they are going on.*
- A. *They're turning a blind eye to what's going on*
- A. *They're allowing . . . agencies to book the calls and send the girls to the calls, but they refuse to admit that they're actually turning tricks or doing prostitution*
- A. *They think we are going to the opera I don't think I've been taken to the opera, but hey.*
- female off-street out-call sex workers

Some sex workers said that they are put in the position of being solely responsible for what occurs on the job because their work is illegal. As a result, they felt they had little recourse when they are assaulted during the course of their work. Many sex workers stated that on-site management personnel offer no protection or help:

- A. *The management doesn't help out much here though or at all when a guy is rough. I have to go back into the room or I am not getting paid even if the guy is too rough with me.*
- female off-street in-call sex worker
- A. *You know I am really disappointed because the boss when you are in the room you are on your own. You can scream or whatever. You know. Well, whatever. He is so strong, he is so big how can I. You know, I was screaming but nobody hear That's why I left there.*
- female off-street in-call sex worker

Also, the sex workers we interviewed said that they would rarely, if ever, report violence to police. Sex workers asserted that the current licensing scheme does nothing to enhance their safety and security. One sex worker challenged the idea that the current licensing scheme is designed to protect sex workers, and felt that it is not fulfilling that objective:

- A. *I don't think it [licensing] adds to your safety any. I mean, I've never known any girl that had a license and phoned the police and said "Oh my God, there's a stalker guy after me . . . or this guy tried to beat me up" or something . . . they just basically laugh at you and say, you know, "Who cares?. That's the line of work you're in. Too bad." But then they sit there and put your name in the database and say "yeah, we should arrest her soon, you know." I'm sorry if I see it in kind of a one-sided light but the way they treat the women here, it's bad. No one deserves to be killed, and no one . . . you know, you should be able to go to the police for help. You shouldn't have to hide and fear the police all the time because they're the enemy and not the client, you know, because they're the ones who are going to say "too bad if we find your body . . . your type of people . . . in dumpsters all the time"*
- female off-street out-call sex worker

Sex workers suggested that the current licensing requirement that employers maintain extensive records of who works for them is an invasion of privacy:

- Q. *What about maintaining records? Some of the by-laws say that in a massage parlour the massage parlour has to maintain records of all their employees with their name .*
- A. *Yeah, they have that now, and I don't like it. I thought of going in there and snatching my record out of there Yeah, I don't like that right now. Because it's so intrusive. All my information it's in there. My social security number, where I live. I don't trust like the girls that I work with, they can get to that information. I have*

seen them be friends with managers before. They go get information about where she lives and phone numbers. If they are going to have that information, they should really keep it under lock and key.

- female off-street in-call sex worker

Talking about Edmonton's by-laws, one woman described the way that the current licensing prohibition of telephone call-forwarding prevents sex workers from working independently:

A. Unfortunately, when the licensing came into place in the city of Edmonton, I found myself basically having to work in these seedy offices and I went out . . . I borrowed some money and went out on my own and I got an agency license . . . How much they made, or how many calls they did, I didn't care. But again, with the city licensing, the way it was I ended up subjecting myself to a lot of fines. Basically, the by-law states that the office door has to be open during business hours and somebody had to be there. So by doing that, if I booked myself a call, and I wasn't in the office . . . I locked the door and went to turn the trick, I got a \$2,500 fine if they were banging on my door while I was out working . . .

Q. Hmm . . . okay so if you could imagine this . . . sorry? There was a call forwarding thing, right? They wouldn't allow call forwarding, initially.

A. Right. To the cell phones.

Q. Right. Do they allow that now?

A. No, again that was . . . the agency owners that actually went to city hall and said that they were worried about our safety and that our kids were answering the phones and these types of things, by allowing the call forwarding.

Q. Oh, I see.

A. The pimps were trying to get the call forwarding taken away and eliminated.

Q. So they could keep control of the calls.

A. Exactly. So they could eliminate us and that we would all have to go back and work for them.

- female off-street out-call sex worker

Such restrictions take control away from the worker, enabling employers to dictate the terms and conditions of sex work. A sex worker described the discrimination produced under the current licensing scheme:

A. Well, I've got one girl here . . . this is sad . . . she was going to go to San Diego with a couple of girlfriends of hers, just for a couple of weeks just to take some time off, and she had her escort license on her. And U.S. Customs stopped her and went through her bag, found her escort license and she's been banned to go to the United States for 10 years . . . So, I mean, I can't see this doing any good. I mean, a lot of girls . . . they have kids. They don't want the kids knowing what they do. Or their parents knowing what they do. These types of things. You know, because we're so stereotyped that a lot of women are hiding so nobody finds out what they do.

- female off-street out-call sex worker

In sum, sex workers found that the combined effect of the quasi-legal status of their work together with restrictive licensing requirements gives more control to the employer, invades their privacy, grants them fewer rights than other workers, and makes them less able to protect their rights and personal security. In future, licensing by-laws should be re-written so as to enhance the health and safety of sex workers.

Licensing restrictions – criminal record

Sex workers stated that licensing by-laws that prohibit persons with criminal records from working in off-street sex work venues may prevent many workers from leaving the street.⁷⁰ All applicants for business licenses in Vancouver can be subject to criminal record screening under the *Vancouver Charter*,⁷¹ and no person may be employed in a Health Enhancement Centre who has a conviction under s.s 213 or 212 of the *Criminal Code*.⁷² In Edmonton, applicants seeking escort licenses are carefully screened, with sometimes even minor offences barring them from obtaining a license.⁷³ One escort describes her tenuous position when renewing her escort license:

Q. So what other things are you involved with passing the clearance?

A. Basically the clearance is done by the Edmonton City Police, they say that it's to keep the criminal element out of the sex trade. Ah, basically say that you have been charged with prostitution related charges, drug offences or something like that, they won't allow you to be cleared . . . Well, I mean I don't know too many prostitutes that have totally clear records. Well, I mean, myself I have an offence that dates back 13 years. Every year I have to go in there to beg to get a clearance so I can get my license or I am back out on the street.

- female off-street out-call sex worker

Sex workers stated that a person should be prohibited from working indoors only as a way to enhance workplace safety, in which case only those persons convicted of crimes of violence should be barred. Further, they felt that if such requirements are to be put in place, they should apply equally to all work places, not just sex industry businesses. A former worker/owner stated the case this way:

Q. What do you think about this . . . [by-law] about the convictions for procuring or communicating for the purpose of prostitution?

A. Well I guess, on the face of it, I would have to say that I disagree with it. I mean I can see why you would need to not have a criminal record maybe, to work in a bank. But for what we are offering, if someone has some type of prostitution related criminal record – I don't think it should be illegal in the first place – so how could I object to someone having a criminal record for it? I mean, if someone had a criminal record with armed robbery, maybe I would want to know. But wouldn't every employer?

- female massage parlour owner, former sex worker

In sum, sex workers felt that criminal record prohibitions prevent workers from moving off the street to indoor venues. They suggested that if there are to be criminal record prohibitions, they should be designed to facilitate workplace safety, and should apply equally to all businesses.

Do sex workers want to participate in a licensing system?

Sex workers were asked whether or not they wanted to participate in a licensing scheme at all. Those workers who did were asked whether or not they felt sex workers should be licensed individually, or whether licensing should be restricted to businesses employing more than one sex worker.

The sex workers who participated in the project were divided as to whether businesses that employed more than one person should be licensed. In general, those sex workers who felt that such

⁷⁰ Many sex workers reported that they felt working indoors would provide a safer work environment than the streets. See also *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* in which street sex workers voiced the opinion that they felt working indoors would allow them increased security and safety from violent clients.

⁷¹ *Supra* note 5 at s. 277.

⁷² *Supra* note 32 at s. 17.1(2).

⁷³ *Supra* note 68 at s. 22.

businesses should be licensed felt that licensing provisions should match those of non-sex industry businesses in terms of the types of requirements and level of restrictiveness; sex industry businesses should not be subject to more restrictive licensing requirements or levels of enforcement than other businesses. Sex workers agreed that by-laws imposing harsher restrictions on sex industry businesses should be repealed.

With the exception of two participants, sex workers were opposed to licensing individual street sex workers and independent escorts. The vast majority of our participants felt that individual licensing was impractical, and would reduce the autonomy of independent sex workers.

Sex workers argued that municipal by-laws should promote the autonomy of individual sex workers, and enable them to control their own working conditions. They felt that consultation with sex workers was the crucial first step to any reform of municipal by-laws affecting their work. They want to be able to work out of their homes on an independent basis without having to be licensed. As home-based work in Vancouver is regulated by zoning by-laws, this issue is discussed in more detail in the section on Zoning on page 65.

Individual licensing – street workers

Most Canadian cities regulate street commerce by requiring that street vendors obtain licenses. Because s. 213 of the *Criminal Code* prohibits street-level prostitution,⁷⁴ it cannot be licensed. In the event of the repeal of criminal laws related to prostitution, street-level sex workers would require a license, because the *Vancouver Charter* requires that all businesses be licensed.⁷⁵

Sex workers were unanimous in their opposition to licenses for street-level workers. Street-level sex workers are diverse. An unknown proportion of the population are sex workers who engage in prostitution in order to meet their most basic subsistence needs, and do not necessarily engage in prostitution on an ongoing basis but do so only when they are in a state of financial need. The impracticality of licensing street-level sex workers and the imposition of by-laws, the breach of which would require payment of fines, were reasons cited for rejecting individual licensing. As one sex worker said:

Q. Do you think it's the individual sex workers that should have to have a license?

A. No.

Q. And why or why not?

A. . . . they're working in different . . . they haven't got a set establishment, they haven't all the stuff to secure, they haven't got all the benefits . . . they're [non-sex workers] not having to worry about getting shot or raped or you know. No licensing for street workers. Not now. Not ever.

- female street-level sex worker

A group of sex workers pointed out that individual licensing was not practical for street-level prostitution:

Q. If there were licenses do you think most people would get them? Most people that work in the trade do you think they'd get them?

A. It depends how hard it is.

A. I wouldn't want one.

A. I don't know.

A. I wouldn't want one either.

A. Nope.

A. [sarcastic why is this here?] I'm a hooker.

A. I got my certificate saying I'm a hooker, as if.

- male street-level sex workers

⁷⁴ *Supra* note 1 at s. 213.

⁷⁵ *Supra* note 5 at s. 276.

Some sex workers argued that the imposition of license fees would further impoverish already impoverished sex workers:

- A. Having to get a license to become a prostitute would kind of divert the meaning, you know what I mean?*
- Q. What do you mean?*
- A. Cause then you would need money to get a license and how would you get the money to get a license so on and so forth. It's like street busking. It's the same problems that street buskers have right? Right?*
- A. You get someone backing you up, no problem, you have a lot of money.*
- male street-level sex workers

Some sex workers pointed out that licensing could lead to punishment of street-level sex workers for non-compliance, and could have the same negative impacts as criminalization:

- A. But in a way it would still be kind of illegal, you know what I mean if you didn't have the license it would still be illegal, so there's no way we're gonna win here.*
- male street-level sex worker

Legislators in countries that have decriminalized prostitution appear to share these same concerns, as none of them have instituted licensing for street-level sex workers.

Individual licensing – escorts

On its face, the Vancouver licensing provision related to social escort services applies to both independent escorts and those employed in an escort business.⁷⁶ However, we know of no Vancouver case where an independent sex worker has been prosecuted for working without an escort license. In contrast, both Calgary and Edmonton require independent escorts to obtain licenses, and prosecute them when they do not.

Vancouver's relaxed by-law enforcement against independent escorts appears to have allowed sex workers increased choice in the manner in which they carry out their work. In contrast, sex workers in Edmonton indicated that strict enforcement of licensing for independent escorts leads to limited choices and a loss of autonomy:

- A. It's peculiar at least in my mind in the way that Edmonton's doing things. The escort license is prohibitive . . . \$1,500 for an independent escort license . . . which is really out for reach for a lot of girls out there, a lot of them are single parents and we are doing this part time. So I mean it's either they can get a license or they are back on the street out there and they are also subject to what you call a security clearance. If a girl has been charged with prostitution related charges or drug attempts, she can't get a clearance with the Edmonton City Police. So, therefore she's not allowed to come inside and work. She's forced back on the street and left out there for bait.*
- female off-street out-call sex worker

Sex workers described how the municipality uses independent escort licenses to control sex workers. Some sex workers felt that individual licensing schemes were coercive and that independent escorts should not have to obtain licenses:

- A. So if you decided to just do a couple of tricks you should not have to have a license.*
- A. Yes.*
- A. It shouldn't – You shouldn't need a license – I am just saying that you should be able to use that as like, a benefit. Y'know, as far as I am a licensed sex worker.*

⁷⁶ *Supra* note 32 at s. 25.3.

- A. *As a marketable business, you could say that you are a licensed business.*
- A. *Yes.*
- Q. *Right.*
- A. *But not a regulation.*
- A. *Right.*
- A. *You can't nail down human sexuality. You can't nail it down you know.*
- A. *you can't put it in a box.*
- A. *Yeab.*
- A. *Y'know, I mean, the girls that do it, aren't; Oh I pay my rent. Oh, you did [name deleted] or whatever. Okay sure! Or take me for dinner, or buy me some clothes. Or whatever, I mean, what are they going to have to become licensed as well? These things are the same as sex work. I mean, you know.*
- A. *It is the same thing as giving sex for these things. The women are just not as up front about it. They're just a bit sneakier. If you don't need a license to do that why would you need a license for sex work? They should not require licenses. Yeah.*
- female off-street out-call sex workers

One worker explained how the casual nature of some independent escort work makes it unsuitable for licensing, and again suggested that licensing limits the freedom of sex workers:

- A. *I just think this – It's really – Earlier when you guys were talking about independent contract regulations because You were saying there's no limit on sex right I mean there is no time limit and there is just no boundary on it . . . I mean I could be a sex worker, and not have an ad, and I could just occasionally see somebody. Y'know what I mean? So it doesn't really fall into that kind of category that can be forced to comply with by-laws. It is very difficult to control or enforce.*
- female off-street out-call sex worker

As one sex industry business owner and former worker noted, licensing of independents is impractical because of the ephemeral nature of much sex work:

- A. *So that's the same way I deal with my ladies, as if they are, just on a contract basis, you know each date is a separate transaction kind of thing because I may have one girl who's doing six dates in a week and another one who's only doing one every two weeks or something like that, so yeah, the frequency of employment can really vary immensely. And I also look at it and this speaks to why I don't get them to have a license either – they may come to work for me one time and then I never hear from them again, or I decide it's not really working, or they don't suit my circumstances very well.*
- female escort agency owner, former sex worker

Against the general consensus, two sex workers supported individual licensing because it would create a vehicle for health initiatives, such as disease testing and improved sexual-health education. One former sex worker/owner described her idea for mandatory sex worker certification as follows:

- A. *Maybe it's not a licensing system, where you are actually recorded and monitored, and what we think of when we hear licensing system, you think of this very repressive regime. Maybe you have to attend some type of a seminar – certificate. Ah, yeah. You have to be certified in Sex Worker Health and Safety. And perhaps you don't even have to give your name to do that. But you have a certificate that has your photo or something on it that identifies you as the person that took that course and passed.*

Maybe something like that is what's needed.

- female massage parlour owner, former sex worker

In Vancouver, the social escort by-law apparently applies to both independent escorts and those working in a larger business.⁷⁷ A business license is required for any person carrying on a business, trade, or profession in the City.⁷⁸ In the event that the criminal laws related to adult prostitution are repealed, under the existing licensing scheme in Vancouver, business licenses would be required for all sex workers operating independently on the street or indoors, and for those working independently indoors via advertisements. Thus, on the basis of the expert opinions of sex workers, we recommend that the current licensing scheme be reformed to exempt independent indoor sex workers and individual street-level sex workers in the event that prostitution is decriminalized.

Individual escort licensing in Edmonton

The escort licensing by-law in Edmonton offers an example of how a highly restrictive and strictly enforced by-law for “independent escorts” can leave sex workers with few options, and force them to work in dangerous environments.⁷⁹

Many of the sex workers stated that they prefer to work independently rather than for an employer. Working for an employer means that they lose control over their work. Sex workers repeatedly stated that autonomy and control are two of the most important factors affecting workplace safety and job satisfaction.

Because of some of the exploitative and unfair practises in many sex industry businesses, many sex workers want to work independently. Sex workers also mentioned frustration with the barriers to employment in many off-street sex industry businesses, such as the need to conform to certain age and beauty criteria to be eligible for employment. Several sex workers commented that they were able to work successfully as independent escorts even though they could not obtain jobs working in off-street establishments. Working as an independent is one of the most attainable options for persons looking to move out of street prostitution.

Edmonton's independent escort license requires every sex worker operating on his or her own to apply to the City for a license.⁸⁰ Sex workers explained how, prior to enacting the by-law, Edmonton had completely outlawed what it subsequently came to define as “independent escort work.” Initially, for this reason, sex workers celebrated the new independent escort by-law. However, Edmonton's current escort by-law contains a narrow and stringently enforced prohibition on persons with a criminal record from obtaining a license, a disproportionately high licensing fee, and advertising restrictions that require each worker to show their escort license at local newspapers prior to placing an advertisement.⁸¹

Sex workers in Edmonton reported being prevented from obtaining a license on the basis of even minor and very old criminal convictions. Also, they reported stringent enforcement of the licensing by-law, including stings, to ensure that independent escorts comply with the licensing provision. One sex worker recounted her experiences under the by-law this way:

A. Anybody who has any kind of criminal record, whether it's prostitution related or anything else, it may be an ancient drug charge, or even a drunk driving charge, uh, will automatically get a rejection, you won't pass the clearance. And that usually is enough to scare most people, that they don't realize, and certainly nobody goes out of their way to tell them, is that, if they basically beg or if they, they you know, push the

⁷⁷ *Supra* note 32 at s. 25.3.

⁷⁸ *Supra* note 32 at s. 3(1).

⁷⁹ *Supra* note 68.

⁸⁰ *Supra* note 68 at s. 4.

⁸¹ *Supra* note 68 at ss. 22, 36, 37, Schedule A.

point, they can quite often get an escort license. I know one gal who had a dangerous driving conviction, and she has to go each year and she has to supply a thumbprint actually, and even though they know exactly who she is because she is a very vocal advocate, they make her put her thumbprint on it every year to match it with the one they have in Ottawa or wherever the main databank is . . . I'm fairly convinced there's a sting about every, I'd say on an average, every six to eight weeks. And they're usually about three days long, and they try to be quite creative, so they'll target different types of potential, breaches of the by-law

- female off-street out-call sex worker

Such strict enforcement stands in stark contrast to Vancouver, where sex workers stated that by-laws are rarely enforced. Sex workers stated that the Edmonton requirement that independent escorts have to show their license in order to place an advertisement has the effect of severely limiting the employment options of sex workers seeking to leave street work if they have a criminal record and/or cannot afford the license fee.

- Q. So, just to go back to the licensing stuff. The independent licenses . . . do they want every single individual on the street to have one of those licenses?*
- A. If a girl could pass the [criminal record] clearance. And then she would be allowed to actually put an ad in the newspaper Yeah, the way they have it now, if you don't have a license, you can't put an ad in any of the local newspapers.*
- Q. Okay. And that becomes the newspaper's policy?*
- A. Well, the newspapers actually cut a deal with the city of Edmonton*
- Q. And is it true that you need to have a license to put in an ad?*
- A. Yes absolutely. You cannot, you cannot put in. The only place you can put an ad right now, in Edmonton, is Vue Weekly. And uh, interestingly enough, they somehow, this happened and it's really rather recent, maybe in the last eight weeks they've got a heading that says "Sex Trade Workers," and anybody can put an ad under that whether they be escort or massage, or I guess even strippers, because it all would fit under that heading. Because they've changed the headings and they're not using semantics of escort or massage, the people putting the ads in aren't using their licensed name necessarily, they're certainly not putting their license numbers in and they can use any phone number they want. So far I haven't seen any repercussions and I think in some ways they're right because nowhere in my escort by-law does it say that I can or might or could sell sex, it's not in there. So even though the other publications oblige me to have one in order to sell sex Vue Weekly would let me have an ad with or without a license.*
- Q. Do you actually have to show your license when you go to place an ad?*
- A. Once a year I have to show it at Edmonton Sun.*

- female off-street out-call sex worker

Some sex workers linked Edmonton's strictly enforced licensing by-law for individual escorts to the rising death toll of street sex workers in Edmonton:⁸²

- A. Yeah, that's how all agencies are run here in Edmonton. It's appalling . . . it's gross. Women are being abused. And, I mean, what they've done is . . . by putting this licensing in place, they've driven a wedge between the street-level sex trade workers and the girls that are inside . . .*

⁸² *Supra* note 68.

- A. *You know, I mean the girls that are outside, they don't have a fighting chance to come in . . . they'd have to pass the security clearance.*
- A. *And if they can't pass that, they're left out there for bait. And like I said, 13 years ago I was charged, and every year I have to go in and beg to be cleared. And if I can't get cleared, I'm back out in the street. I mean, this morning, they saw . . . or yesterday, sorry, they found another girl floating down the river here.*
- Q. *That's in addition to the woman that you sent me the article on four days ago?*
- A. *Yeah. I mean, the pace is picking up here, you know. And by driving this wedge between us, I mean it's . . . God forbid, we're turning into Vancouver.*
- Q. *Do we know that both of these women were involved in the biz?*
- A. *As far as I know so far . . . yeah. They haven't made it public yet, but from what I'm told, yeah.*
- Q. *So how many call girls are we talking about now?*
- A. *Well . . . you know, since licensing . . . in 1990, when the licensing came into place, there's been an average of two to three per year, and the pace is picking up . . . I think there's four this year . . . four or five this year . . . Since licensing came into place, and I've tried to tell them that, like . . . look, you know, these women are showing up dead because of the licensing, and they just won't do anything about it.*
- female off-street out-call sex worker

One Edmonton sex worker who distributes her card to women wanting to leave the street and work independently indoors believes that more than one of the women found murdered had attempted to work indoors prior to getting killed:

- A. *I mean one of the girls, well . . . I know more than one, but they will only admit to one. One of the girls had my business card, not really, just a print off the computer and just basically my nick-name "[name omitted]" and my cell number. And the girl, some of the girls that are showing up dead have my card found on their body and to me that only means one thing; and that is they wanted to come inside but they weren't allowed to, for some reason they don't pass the [criminal record] clearance or the city doesn't deem them as we call them "condom worthy."*
- female off-street out-call sex worker

The strictly enforced Edmonton independent escort licensing by-law provides a clear example of how heavy restrictions on attaining an individual escort license entrenches women in more dangerous work on the street.

Business licenses for establishments consisting of more than one sex worker

Sex workers were divided as to whether or not sex industry businesses consisting of more than one person should be required to obtain a business license. In general, sex workers stated that if licensing is applied, by-laws should be no more restrictive than licenses for non-sex industry businesses, and they should be subject to equal levels of enforcement. Some sex workers stated they felt such businesses should not be required to hold licenses, while others thought it was a way for such businesses to achieve legitimacy, so long as they were not treated differently than other businesses. One sex worker commented:

- A. *I am really not too sure. Y'know, it's – it's something of a thinker. I mean theoretically, I am against licensing, per se. But then, the more practical side of me says, well everyone else has to get some sort of license. Whether they are an electrician, or plumber. So even though I am – well, there's a huge part of me, the worker part of*

me that is hugely opposed to that type of legislation. It just seems so invasive. To have to be licensed. And I have a gag reflex to that. But at the same time. That – how else do you – I don't know. I really don't know. There, I am sure there's other ways to deal with that, that I have just not wrapped my brain around yet. People need to be informed. And in the employer-employee relationship, that part is pretty obvious. I can see how that plays out, because that is how I play it out now And I am making all the employers to be these evil, y'know, people. Unfortunately, it's – it's – there's more shades of gray than that. What you tend to have is a fair bunch of decent people – in the middle, I'm – I think that I am the only person at my end of the spectrum, that takes all of the training this seriously.

- female off-street in-call sex worker

One sex worker felt licenses should not be used to keep track of sex workers so that police could harass them:

A. They're saying they're making tons of money and that there's no . . . okay maybe you should have a license, so that you do pay your taxes and do try to do your best, but as long as it's not used to arrest you or harass you.

- female off-street out-call sex worker

Given that licenses are currently required for all businesses in Vancouver, exempting sex industry businesses from licensing laws would mean a fundamental reform of existing laws. In the New Zealand *Prostitution Reference Act 2003*, provision is made to allow for the establishment of small owner-operated sex industry businesses comprising no more than four people without having to obtain a license.⁸³ The intent of this provision is to allow a more flexible and less rigorous procedure for sex workers to obtain employment in small businesses. Generally the sex workers we interviewed would support this sort of provision, because it a less restrictive approach to the establishment of sex industry businesses than the ones currently regulating the sex industry in B.C. and Alberta.

Privacy

Sex workers voiced concerns about the types of information that must be disclosed when applying for a municipal business license. In general, the type of business, the name, address and age of the applicant must be supplied upon application for a City of Vancouver business license.⁸⁴ This information is available to any member of the public upon request at Vancouver City Hall, including the name of the license holder, the type of license and the date the license was granted. However, the City does not disclose the home mailing address and phone number of license holders. Sex workers were concerned that they would be publicly identified as such as a result of holding a sex industry license – such publicity could be negative on both a personal and a business level.

Sex workers repeatedly emphasized the need to have their privacy respected:

A. Oh sure. You might get married one day and you don't want that coming back to haunt you, someone finding out. Yeah No matter where you do it there's gonna be ups and downs, it doesn't matter where it's gonna be . . . it's because, you know same thing with the license thing if we can go back to that, the thing with the license is there's a way that the government can actually keep track of it – of the who's the prostitutes and who's not and that's – they can kind of put you in a book I would say. You know what I

⁸³ *Prostitution Reform Act 2003* (N.Z.), 2003/28.

⁸⁴ City of Vancouver Business License Application Form, available from City of Vancouver Community Services Group, Licenses & Inspection, License Department.

mean. They always put . . . already now they put drug dealers in this book where they, you know, know the local drug dealers that do the local you know acts and stuff. With relations like that they can also keep track of prostitutes and that might help . . .

- A. *It's a thing with privacy I think, y'know, like not everybody wants to be know as a hooker, you know . . . it's, like, confidential, and that's the thing about having a license, it's not, you don't have that confidentiality to . . . y'know.*

- female off-street out-call sex worker

One escort agency owner-operator operates without a license to protect her privacy and privacy of the women who work for her:

- A. *I've never gone for one of those [a license], and one of the strong reasons, I guess the main, maybe one of the main reasons is that a client once told me, he said, well you know people can walk into the government office up at City Hall that is and see everything about who's applied for business licenses. So they can find out your phone number, and your address, and everything about you. It's public record and it's open, and so I thought well, who'd want to do that and what the heck do you get in return for it. You don't get anything, you're just being watched or controlled if somebody knows where you are, so I wasn't gonna go for that. I have had business licenses in different years, but I didn't see any point to that either cause then you're also just being regulated in terms of you know who can come to your home and how often and so on and so forth and so as far as my involvement with other levels of government like the income tax people, I don't need to fall into line with the city by-laws particularly, so I just leave that alone.*

One sex industry business owner/worker described how privacy is vital to her business. For example, many clients will only frequent sex work businesses if their privacy is protected:

- A. *The fact that we have the veneer of being a "spa", I think, really helps . . . Yeah I mean, if it came up as, y'know, the ABC Fuck'n'Suck on their Visa statement, that is a lot more, blatant than, y'know, such'n'such management services charge. Even if it got traced to the ABC Men's Spa, a guy always has an out. It was Johnny's bachelor party, I just, y'know, had to stay anyway. I had a massage and, y'know, he could giggle and chuckle, and say he was offered extras and he did not take them up on it. There is still always that out. If you are busted, or, y'know, if someone sees you going in. You can just say that you were going in on a lark. There is still always an out. And half our clients do pay by credit card.*

- female massage parlour owner, former sex worker

Sex workers stated that they valued privacy in order to preserve their anonymity, to avoid the stigmatization that would occur if other people became aware of their occupation, and to ensure that their clients would be comfortable utilizing their services. Even if the criminal laws relating to prostitution were to be repealed, the stigma associated with sex work will likely remain. Consequently, sex workers fear becoming more visible in a social climate where prostitution is not socially acceptable. Based on the opinions of sex workers, we recommend that increased privacy protections be put in place for all forms of licensed sex work.

Business hours

In all Canadian municipalities there are restrictions on the hours of business operation. The most restrictive hours are imposed on businesses engaging in prostitution, and those that serve alcohol. The licensing provisions for many sex industry businesses contain specific restrictions on hours of opera-

tion. For example, Vancouver by-laws prohibit health enhancement centres and body-rub parlours from operating between 12 midnight and 8 a.m.⁸⁵ Street, out-call and in-call sex workers were divided as to whether or not sex workers should be subject to such restrictions.

Some sex workers stated that they did not want any restrictions on their hours of work, while others had no problem accepting municipally established business hours:

- A. *No, if they're working in a – if they are in a zone – or they are zoned to a certain area than – and – and if they are zoned in a certain area around the edges of the residential, maybe street workers. There the municipality of that certain area should have some say maybe in – in hours*
- A. *There should be no restrictions.*
- A. *No restrictions.*
- female street-level sex workers

Some in-call establishment sex workers stated that the limited business hours actually helped protect sex workers, in which case they recommended that by-law restrictions on times of business operation be kept as they are:

- Q. *So let's talk about these – these by-laws then for the Health Enhancement Centre. What do you think about them? About the hours of operation?*
- A. *The hours of operation are okay. We don't really want the after bar crowd, okay? But if we were allowed to, we would have to stay open so that we could compete on that level. Because if we closed at 12, and other places were open 'til two, like it is right now, because we all close at 12, every prospective client in Vancouver, knows that they have to get in the door by 12.*
- A. *So we are all on a level playing field that way. Unless – given that he is a massage parlour client, if he is an escort client, he doesn't have to, they are 24 hours. And if he is an independent working client, then he obviously, can find someone 24 hours.*
- A. *But if it is a client, who likes our type of service, which means you walk into a room, and you get to meet everybody and choose who you like, that style of service is only available until 12 midnight. Okay?*
- A. *If you call an escort agency, you have to go give up something yourself. Either you have to go pay for a hotel room, or you have to have someone over to your home. A lot of men don't want to do that. A lot of men don't like to see an independent because they have to give their real name, and a girl – y'know, she'll screen calls.*
- A. *So what remains attractive about our form of business is that you don't need an appointment, and you can walk in and pick who you like, in person, and go from there. And if that is your thing, you can only do that until midnight in Vancouver. And I am glad for that.*
- A. *Because we don't – I could see our business getting really ugly if we were – The only problems we ever have is from someone who is drunk, who can't make the judgment call. Like I said, we don't get a misogynist or a violent person, because if they want to go pick on a woman, they are not going to go into a place where there are a whole group of us and the geography is not set up to their benefit.*
- A. *But people who are not making the proper judgment calls, don't think those things through. And drunks are – I guess there are very happy drunks out there – but usually, we will turn away drunks. We don't say that we won't help you because you are drunk. We will just say, we are sorry but we are all booked up right now.*

⁸⁵ *Supra* note 32 at ss. 11.5(6), 17.1(4).

- A. *Is usually how we handle drunks. But it – a lot of drunks are, they are sleeper drunks – you don't realize they are drunk.*
- A. *Yeah. Y'know, doing the door, presentation. I do the door a lot when I am there. But that's, y'know, part of it. We know the least – we take happy drunks, but we do not take falling down drunks. And we don't take miserable drunks, and we don't pick a fight with a drunk.*
- A. *Y'know, we – we train people in sort of confrontation management that way. It's rather than saying, Sorry we can't help you, you are drunk. That's very confrontational. You just say, I am really sorry, we are all booked up right now. Do you want to come back in about an hour?*
- A. *No one is going to come back in an hour.*
- female off-street in-call sex workers

Other sex workers stated that there should be no restriction on business hours whatsoever:

- Q. *And what about business hours? Do you think there should be any restrictions regarding business hours for establishments?*
- A. *No, I don't. Like, here in Edmonton, they make massage parlours shut down at 11:00 and I really can't see why.*
- female off-street out-call sex worker

Other participants stated that restrictions on the hours of operation of sex industry businesses should be no different than any other kind of business, such as establishments serving alcohol:

- A. *I think that it should be like drinking establishments that have set hours when they are serving alcohol. I don't think it should be specialized to sex work and they should have their own restricted hours.*
- female off-street out-call sex worker

In sum, sex workers were divided as to whether or not business hours for sex industry businesses should be restricted.

Advertising by-laws

It is common for municipal sex industry by laws to restrict advertising. Most often such provisions prohibit nudity and depictions of sexual activity in advertisements.⁸⁶ Sex workers were divided as to whether or not there should be restrictions on the content of advertising. Sex workers stated that the most damaging restrictions on advertising are the sort imposed in Edmonton where independent escorts must show their license in order to place an ad.⁸⁷ For independent escorts in particular, advertising is usually the most important method of contacting clients.

Two sex workers agreed with restrictions on advertising content, stating that ads should be tasteful, and that children should not be exposed to explicit advertising:

- A. *I don't think nudity is needed in an advertisement. I don't see it necessary for anything, perhaps nice, tasteful, clothed shots of people, maybe the size . . . I don't want to look at a full-page ad of Barbie and her friends or something. Just something small, something simple. I mean, you don't have to put it out there, clients know what's what anyways, so it doesn't need to be big.*
- female off-street out-call sex worker

⁸⁶ *Supra* note 32 at s. 11.5(8).

⁸⁷ *Supra* note 68 at s. 36, 37.

- A. *I think it [advertising] should be restricted in its content, content and meaning. Because if it is going to be viewed by children then you need to be more discrete with advertising. If you are going to be advertising in an adult only area then that is different and the ads should be more free.*

- female off-street in-call sex worker

Others favoured a more liberal approach:

- A. *No restrictions . . . yeah I can see that. I mean, if you want to run a classy house, you are going to run a classy ad. If you're going to run a anything goes type of house, you are going to have a good thing going, y'know?*

Q. *Where should you be allowed to advertise, though?*

- A. *Any place that'll take your money.*

- female street-level sex worker

By-law enforcement

While there is ample evidence that enforcement of criminal laws pertaining to prostitution creates harmful and dangerous working conditions for street-level sex workers, many of our research participants believed that enforcement of municipal by-laws can have harmful effects as well.⁸⁸

Usually the penalty for breaching a municipal by-law is a fine. However, if fines are not paid, a person can be charged with contempt of court, and face imprisonment.

Sex workers in Alberta reported that they were subject to by-law enforcement sting operations, and much more likely to be prosecuted for by-law infractions than other types of business. They felt threatened and intimidated by these stings:

- A. *. . . they've been coming around like crazy in the last two weeks. They haven't been here to my place yet because I'm hardly ever, ever open but they've gone to almost every place. And I guess they were saying the by-law were saying that the vice-cops don't have enough resources anymore to come and inspect and do all that they used to do. So what they're doing is they're coming out and giving fines. I know one place that got \$5,000 worth of fines, and it was . . . like things like dress code, if your blouse is a little too low-cut . . . or if your . . . let's say your skirt is knee-length, or it's not below the knees, they'll fine you for that. Or, if you don't have your license on you . . . on the premises at that moment, they'll fine you for that. Or if you haven't written in the customer and the time properly, they'll fine you. So they can really "ka-ching, ka-ching" out of lots of fines . . . The city of Calgary by-law inspector . . . they just hired about twelve more by-law inspectors and... What they do now too, is they come in and they pretend they're just a regular guy and they have a massage and they pay you for it. And at the end they'll say, you know . . . can I have any extra services? And if you say yes, they'll go over and they have their badge underneath, and then they pull your license. And you gotta go through a great rigmarole to try and get it back, and they close you down and . . . yeah.*

Q. *So this has been happening recently in Calgary, or is it something that has always happened?*

- A. *No, this is fairly new. They never used to do that before. As far as I know, the ball never used to come down on massage; it was the undercover cop that used to come*

⁸⁸ Pivot Legal Society Sex Work Subcommittee, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws*, (Vancouver: Pivot Legal Society, 2004); J. Lowman and L. Fraser, *Violence Against Persons Who Prostitute: The Experience in B.C.* (Ottawa: Department of Justice Research, Statistics and Evaluation Directorate Policy Sector, 1995).

and they used to lay criminal charges. Now, they're only laying criminal charges, I think, if they have enough fines. But you know, there might be a big sweep coming up. The way everyone I talk to says that there's a sweep coming up. I mean, the by-law could just be laying the groundwork, is what we think. And then they're gonna come in and do such a big shut-down, put it all over the news, you know. "Massage Place is Busted" "Women Offering Prostitution" . . . blab, blab, blab. What happens is, you see, when these women get busted, they lose their licenses and then they all end up working the streets at Forest Lawn, right. But this is what happens, because now you can't work safely inside, you cannot get a city of Calgary license. So now you have to go work on the street and there's all these crazies out on the street and women are being murdered all the time. And so the law forces you into an unsafe situation. It's bad, it's just not a safe law And I thought, what a pathetic life you live. Like, this is your big thing in life, these are the big criminals, you're catching a bunch of women who are just trying to make a living and pay for their food and stuff? It's sick.

- female off-street out-call sex worker

Sex workers reported that enforcement patterns vary widely in different cities. In Vancouver, for example, there is very little enforcement of massage, body rub, escort service, and health enhancement centre by laws. When enforcement does occur, it is largely complaint driven. Two in-call workers recounted their experiences this way:

- Q. And do you have any trouble with enforcement? Do the police ever come around sniffing or questioning or anything like that?*
- A. Well if they have they haven't announced who they are. No one has come around in a uniform and asked me anything or banged on my door or anything, so if they've come around posing as a client I have no idea. There's been the odd time when I've interviewed someone and I've kind of felt, "I wonder," but, could have been just paranoia.*
- A. Yes, Vice is a complaint driven department. Or it is at this point in time. The only way you are really going to go down at this point of time in Vancouver, is if someone takes a complaint to Vice. Whether it be a client that is a client that's unhappy – a competitor that wants to stage some type of problem floating – a religious, or fundamental right-wing group that wants to catch you up, and take that to their attention.*

- female off-street in-call sex workers

This more relaxed, complaint-driven approach to by-law enforcement was believed to increase choices for off-street workers by allowing for the development of less oppressive work environments, and a more trusting relationship with police. One sex worker suggested that this more trusting relationship meant that police were more willing to protect workers from violent clients:

- A. Everything that has been achieved over the last 10 years, in the system, would fall apart. If they cracked down, first of all, women in this business wouldn't trust the police anymore.*

- female off-street in-call sex worker

Some sex workers felt that some progress has been made in terms of their ability to report violent clients and, because of police tolerance of the off-street prostitution trade, female off-street sex workers are now making more reports than ever before.

- A. Y'know, 10 years ago I would have never picked up the phone and said, We have an aggressive client, I need help. But I would now. And that is a by-product of a liberal*

police force and selective enforcement of complaint driven force. That doesn't bug us unless we do something blatantly wrong, which we don't . . . Why could I not go work independently? Because at the time, I would be arrested. I didn't have choices therefore I was forced to work in environments that were repressive, or downright degrading, or unsafe. And, a crackdown, would only lead to that type of working environment. And it's not something that happens overnight. And fixing it, didn't happen overnight. It's taken a lot of years of this level of tolerance, in Vancouver, to lead to this situation that we have now.

- female off-street in-call sex worker

On the basis of these opinions, police should be given more education about sex work. Even if the criminal laws are repealed, stigma and restrictive provincial and municipal laws may continue to bring sex workers into conflict with law enforcement officials. Consequently, it is imperative that law enforcement officials employ sensitive practises that do not result in the harassment or intimidation of sex workers.

Discretion of licensing body

Attempts to control, or even phase out sex industry businesses by refusing to grant new licenses have been reported in Canada and in other countries. In the Netherlands the problem of municipalities refusing to grant new licenses for brothels has been raised.⁸⁹ The discretion conferred on City Council to determine whether or not to grant licenses under the *Vancouver Charter* is fairly broad, but there are restrictions on municipal authority to refuse a business license.

In the Supreme Court of Canada case of *Roncarelli v. Duplessis* the court held that there is a limit on the level of discretion exercisable by a public official, and stated that discretion must be exercised in the good faith:

Discretion necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption.⁹⁰

The precedent set in *Roncarelli v. Duplessis* means that City Council's discretion cannot be exercised arbitrarily, capriciously, or for reasons unrelated to carrying into effect the intent and purpose of the *Vancouver Charter* or the *Vancouver By-law*.

There is ample case authority to suggest that the City's discretionary power pursuant to the *Vancouver Charter* must be exercised in an objective and judicious manner.⁹¹ The courts have held that a municipality's decision to refuse a business license solely on the basis of land use considerations is not a valid exercise of the municipal authority to regulate business. In *Council of the City of New Westminster v. Davis Industries Ltd.*, and in *City of Prince George v. Payne*, it was held that a refusal to grant a licence based solely upon zoning considerations would not be a judicious exercise of discretion.⁹² A municipality's decision to refuse a business license can be challenged under the *Canadian Charter of Rights and Freedoms*, and under the precedent set in *Roncarelli*.⁹³

⁸⁹ See A.L. Daalder, *Lifting the ban on brothels; prostitution in 2000-2001* (The Hague, The Netherlands: The Netherlands' Ministry of Justice, 2004), 7.

⁹⁰ *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (QL).

⁹¹ See the following cases: *Celebrity Enterprises Limited v. The Corporation of the City of Vancouver*, (1978), 7 B.C.L.R. 20 (B.C.S.C. Verchere, J.); *Active Trading v. City of New Westminster* (1974), 5 W.W.R. 354; *Shell Canada Ltd. v. Vancouver (City)*, [1982] B.C.J. No. 1449 (B.C.S.C.) (QL).

⁹² *Council of the City of New Westminster v. Davis Industries Ltd.*, [1975] 3 W.W.R. 73; *City of Prince George v. Payne* [1977] 4 W.W.R. 275 (S.C.C.).

⁹³ *Supra* note 90.

The viewpoints expressed by sex workers show that, when discretion is exercised without careful safeguards, moral and discriminatory attitudes can influence regulatory decisions. Sex workers described how, at present, such discretionary decisions are made often by a municipal employee who has no expertise with respect to the lived experiences of sex workers – without regard to protecting the health, safety and well being of sex workers. The impact on sex workers of such “blind” decision-making is often negative.

Sex workers suggested that, if they must be licensed, licensing bodies should be sensitive to sex workers’ needs, and have some experience or training regarding the particular challenges that sex workers face:

- A. *There’s a lady here I don’t speak to much anymore, but she’s very well educated and she’s also outspoken. And here . . . I’ve asked the city of Edmonton . . . the by-law officer that gives us our licenses; he’s actually just a bus driver. I mean, I don’t think the guy has given anybody sex in his life, or paid for it, I don’t know. But I wanted that job . . . his job should have went to an active sex-trade worker, or one who wants to retire. And I don’t know if I’ve got her number on my computer, but her name is [name omitted], and she has also done a lot of work, like fighting for this, too. And to me, somebody like her . . . like I don’t want the job personally, because I can make more noise on the outside than on the inside . . . but somebody like her can get in there for the licensing and the education because she’s worked street-level, and she’s worked like all different areas of the sex trade. You know, and somebody like that should be handing out the licenses and educating the women because they have a little bit more understanding of what really goes on.*

- female off-street out-call sex worker

Sex workers argued that licensing bodies should be guided by clear objectives that place protection of sex workers at the forefront, as these two Calgary sex workers explained:

- A. *I don’t think it adds to your safety any. I mean, I’ve never known any girl that had a license and phoned the police and said “Oh my God, there’s a stalker guy after me . . . or this guy tried to beat me up” or something . . . they just basically laugh at you and say, you know, “who cares? That’s the line of work you’re in. Too bad”. But then they sit there and put your name in the database and say “yeah, we should arrest her soon, you know.” I’m sorry if I see it in kind of a one-sided light but the way they treat the women here, it’s bad. No one deserves to be killed, and no one . . . you know, you should be able to go to the police for help. You shouldn’t have to hide and fear the police all the time because they’re the enemy and not the client, you know, because they’re the ones who are going to say “too bad if we find your body . . . your type of people . . . in dumpsters all the time.”*

- female off-street out-call sex worker

- A. *If it was a way of keeping a head-count, you know, who’s involved in the business so that we can better enhance your safety and care about you But it’s never used for those purposes. The only reason they want to license you is so they can bust you later. Really, that’s what I found out.*

- female off-street out-call sex worker

The discretion of City Council to grant or refuse business licenses under the *Vancouver Charter* is very broad. However, discretion must be exercised in good faith and in accordance with a valid regulatory purpose. It is important that municipal officials delegated the authority to process and approve business licenses are sensitive to the needs and issues that sex workers face. Decision-makers at the municipal level should be given sensitivity training with respect to appropriate treatment of sex workers.

Licensing schemes must promote choice

Sex workers repeatedly stated that the ability to choose where and how they work is a matter of central importance to their health, livelihood and well-being. Sex workers stated that municipal restrictions on their ability to choose where to work should be minimized or eliminated:

A. The only way I can think of is basically leave us the hell alone. You know, get out of the licensing business, allow us to advertise, allow us to work out of our home safely, you know. Personally, myself, where I live I don't bring my tricks here. This is my safe zone. This is my sanctuary. You know, probably more likely would, along with another girls – I'm not saying I'm doing this – but I'd rent an apartment, split the rent with a girlfriend, and that's where we'd do our in-calls.

- female off-street out-call sex worker

Sex workers suggested that the ability to choose where to work is the most important factor affecting their personal safety.

Consultation with sex workers

Sex workers believe that they should be given a voice in any law reform process, including reform at the municipal level – they were unanimous in asserting their right to a meaningful role in all law reform that relates to their work.

Municipal law and sex work recommendations

1. Repeal ss. 210, 211, 212(1), 212(3) and 213 of the *Criminal Code* and then, if municipalities require sex work businesses to be licensed, create a licensing scheme for sex work businesses that recognizes them as such.
2. Amend all municipal legislation, including the *Vancouver Charter*, in a way which ensures that all future business licensing legislation contains an exemption for individual street-level sex workers, independent escorts and “small owner-operated” sex work businesses.
3. Repeal all municipal by-laws that impose disproportionately high and prohibitive licensing fees, and ensure that any licensing requirements and fees apply to sex workers and their businesses in a manner that is fair and on a par with other businesses.
4. A conviction under ss. 210, 211, 212(1), 212(3), 213 should not preclude an individual from being granted a license, unless the conviction under s. 212(1) or s. 212(3) was one involving violence, exploitation or coercion, in which case discretion should be exercised by the licensing authority.
5. Create a funded task force of sex workers to provide direction on important issues, such as restrictions on business hours, advertising, and the creation of guidelines for by-law enforcement.
6. Provide law enforcement personnel with education and sensitivity training with respect to the issues facing sex workers, and ensure that enforcement practices are consistent with this training.
7. Provide education and sensitivity training for municipal employees who make decisions affecting sex work businesses.
8. Consult with sex workers in the process of amend existing municipal licensing provisions affecting sex workers so as to promote choice for persons in the sex industry, provide for their health and safety, and ensure that any licensing scheme is not overly restrictive or intrusive.
9. Ensure that all municipal by-laws are respectful of the privacy and autonomy of sex workers.

10. Ensure increased privacy protections for information that is recorded by the licensing authority in relation to the licenses of sex work businesses.
11. Ensure that sex workers have access to legal remedies where it is felt that City Council is making licensing decisions that are not in good faith or in accordance with a valid regulatory purpose.

Zoning and sex work

Zoning is one of the more controversial issues in the national discussion concerning the repeal of the criminal laws relating to prostitution. Zoning by-laws affect where and how prostitution can be carried out in any municipality. In a decriminalized environment, the municipal power to zone prostitution will be one of the principle mechanisms that local governments use to control prostitution. In jurisdictions where prostitution has been legalized or decriminalized, sex workers and sex industry business owners are still fighting some of the hardest battles at the municipal level over land use governance.⁹⁴

The ensuing discussion describes sex workers' opinions about zoning. This chapter is merely the beginning of the discussion that needs to take place in each municipality that will be confronted with this issue should the criminal laws relating to adult prostitution be repealed. The significant diversity in opinions and the concerns raised by sex workers indicates the complexity of the zoning issue. Therefore, it is critical that lawmakers engage in comprehensive consultations with sex workers and involve them in decision making before any zoning requirements are imposed. Without the adequate involvement of sex workers, municipalities will be unable to create a system that addresses the various needs of sex workers.

Although some of the participants were from Calgary and Edmonton, the discussion of zoning laws has been limited to the Vancouver experience in the interest of keeping the discussion clear and concise.

Zoning laws

Municipal zoning laws govern the areas where specified businesses may be conducted. The authority to enact land use by-laws is set out in B.C.'s *Local Government Act*.⁹⁵ The exception to this is the City of Vancouver, where the *Vancouver Charter* establishes authority over zoning.⁹⁶ Under the *LGA*, local governments, such as city councils, may enact by-laws and regulations that divide all or part of a municipality into zones.⁹⁷ The *LGA* authorizes municipal governments to regulate what happens in each zone in terms of use of the land, and the location and density of buildings and structures. Local governments are empowered to prohibit a zone from being used for a particular purpose.

The *Vancouver Charter* grants authority to the City of Vancouver to govern construction, use and occupancy of buildings and zones, and to set a maximum population density within zones.⁹⁸

The issue of municipal zoning has important implications for the sex industry should the criminal laws surrounding adult prostitution be repealed. For example, where will street prostitution take place? Where will brothels be located? What type of zoning scheme will address the interests of sex workers, and the interests of neighbourhoods and communities? These questions make municipal zoning laws a particularly important and difficult law reform issue.

⁹⁴ See *Willowford Family Trust and Terry Rex Brown v. Christchurch City Council*, High Court of New Zealand, Christchurch Registry, July 29, 2005, CIV-2004-409-002299, the first court decision under the New Zealand *Prostitution Reform Act* regarding a local municipality's attempt to restrict the location of sex industry businesses.

⁹⁵ *Supra* note 3.

⁹⁶ *Supra* note 5.

⁹⁷ *Supra* note 3 at s. 903.

⁹⁸ *Supra* note 5 at s. 565.

Vancouver's zoning by-law

This analysis is focused on *Vancouver's Zoning and Development By-Law No. 3575* (the “By-Law”), which designates different geographical areas within the city, known as zoning districts, for particular uses.⁹⁹ The *By-Law* is a collection of regulations that govern how development may occur in the various zones in Vancouver. Each zone type has distinct requirements for development, although similarities occur in related types of zones. For example, only within designated “industrial districts” may one operate a chemical manufacturing plant. Similarly, only within designated “commercial districts” may one operate a hair salon. The City of Vancouver is currently divided into 71 zoning districts. The district zoning schedules are grouped into “R” for “residential zones,” “C” for “commercial zones,” “M” and “I” for “industrial zones,” “HA” for “historical areas,” and “CD” for “comprehensive development schedules.”¹⁰⁰ The consequences for breaching the *By-Law* are payment of a fine not exceeding \$2000, or imprisonment not exceeding two months.¹⁰¹ The City can levy a fine of up to \$50 for each day a person remains in violation of the *By-Law*.¹⁰²

Of particular relevance to this discussion are the following types of zoning districts: Vancouver’s “Downtown District;” “commercial districts;” and residential districts (referred to as “dwelling districts” in the *By-Law*). Every establishment in Vancouver including residences, businesses, and other types of establishments must be built or maintained in accordance with the appropriate zoning district under the *By-Law*.¹⁰³

Among the 71 zoning districts, the *By-Law* identifies eight ‘general’ zoning districts: Limited Agriculture; One-Family Dwelling; Two-Family Dwelling; Multiple Dwelling; Commercial; Industrial; Historic Area; and Comprehensive Development.¹⁰⁴ These eight general zoning districts are further divided into smaller districts that have specific rules about what can be built or maintained

⁹⁹ City of Vancouver, *By-Law No. 3575, Zoning and Development By-Law [By-Law]*.

¹⁰⁰ *By-Law No. 3575, Zoning and Development By-Law* establishes the following zones:

Limited Agriculture District: The Limited Agriculture District provides for nurseries, field crops, greenhouses and fruit farms, and their associated retail businesses, as well as stables, golf courses, parks, one-family dwellings, seniors housing, bed and breakfast businesses and special needs residential facilities.

One-Family Dwelling District: A One-Family Dwelling is a “building containing only one dwelling unit” A Family is defined as “one or more individuals all related to one another by blood, marriage, or adoption or a maximum of three unrelated individuals living together as a household.” This District is broken-up into many zones; different zones within this District allow for the establishment of schools, libraries, churches, hospitals, golf courses, parks, grocery stores and other necessary community institutions.

Two-Family Dwelling District: A Two-Family Dwelling is defined as “a building containing only two dwelling units.” Again, different zones within this district permit the establishment of various community institutions.

Multiple Dwelling District: A Multiple Dwelling is defined as “a building containing only three or more dwelling units.” Each zone within this District allows for various types of establishments, such as apartment buildings, rooming houses, community centers, special needs facilities, laundromats, hotels, museums, liquor stores, pharmacies, health enhancement centers and restaurants.

Commercial District: While the outright approval uses of Commercial Districts throughout Vancouver are retail and service shops, such as grocery stores, beauty salons, photography studios, bowling alleys and the like, the conditional uses of Commercial Districts include dwellings, schools, theatres, zoos, as well as some light manufacturing services such as jewellery manufacturing and printing.

Industrial District: Industrial zoning districts within Greater Vancouver provide space for the manufacture of goods, retail/wholesale of goods, transportation and storage of goods, services such as motor vehicle repair shops and communications(Live/Work and Work/Live: Vancouver overview including strategic directions; City of Vancouver Land Use and Development Policies and Guidelines.

June 13, 1996. <http://vancouver.ca/commsvc/Guidelines/L002.pdf>). Industrial zoning districts also allow for dwellings, community services (such as schools) and retail businesses (such as gas stations)).

Historical Area District: Chinatown, Yaletown and Gastown comprise Vancouver’s Historical Area District. These “towns” are zoned to allow for a variety of types of establishment, including residential, commercial and industrial activities.

Comprehensive Development Districts: Each area zoned as a Comprehensive Development zoning district is guided by its own by-law which sets out what kinds of establishments will and will not be permitted in that area. For our purposes, the most important of all of the Comprehensive Development zoning districts is the Downtown District, which is regulated by the Downtown District Official Development Plan (Downtown Official Development Plan (Adopted by By-Law No.4912, November 4, 1975)).

¹⁰¹ *Supra* note 99 at s. 8.2.

¹⁰² *Supra* note 99 at s. 8.3.

¹⁰³ *Supra* note 99 at s. 9.

¹⁰⁴ *Supra* note 99 at s. 9.

within that zone, along with its own specific building regulations.¹⁰⁵ Some zoning districts pertain to a specific neighbourhood – such as the zoning district referred to as “FC-1,” which applies to the East False Creek area of Vancouver – whereas others, such as the zoning district referred to as “C-1,” apply to a number of different neighbourhoods that have this designation.¹⁰⁶

Regulating zoning districts

Each zoning district has either a “district schedule” or an “official development plan” that sets out the intent, uses and regulations of that district, and what kinds of businesses can be established there.¹⁰⁷ While the district schedules are part of the *By-Law*, the City Council approves official development plan by-laws for each zoning district.

Each one of the 71 zoning districts has a two-tiered system for establishing what kinds of business activities may occur there. First, “outright approval uses” are permitted within the district provided all regulations and provisions of the *By-Law* are met. The City commonly issues business licenses and/or development permits for outright approval uses.

Second, “conditional approval uses” are secondary activities that may be carried out within the zoning district. Conditional approval uses are those that the City identifies as having a potential impact on the community. To be approved, conditional approval uses must be considered by the City in terms of the intent of the by-laws, any applicable plans, policies or guidelines, the recommendations of any advisory groups for the area, and the responses of adjacent property owners and residents who may have been notified. Permits and business licenses are usually more difficult to obtain for conditional uses.

By way of example, under the Limited Agriculture District Schedule, the District is used primarily for nurseries, field crops, fruit farms, one-family dwellings and special needs residential facilities. The conditional uses include golf courses and marinas.¹⁰⁸ Because the City exercises more discretion over the issuance of permits or licenses for conditional uses than it does for outright approval uses, a person wanting to establish a fruit farm in a Limited Agriculture District would likely have few problems obtaining a license or permit, whereas a person wanting to establish a golf course in the same District might face opposition from residents or workers who could convince the City not to issue the requested license or permit.

Under the *By-Law*, a zone can be designated for one or more of 12 possible uses: agricultural uses; cultural and recreational uses; dwelling uses; institutional uses; manufacturing uses; office uses; parking uses; retail uses; service uses; transportation and storage uses; utility and communication uses; and wholesale uses.¹⁰⁹ The list of businesses and type of buildings that can be established under each designated use are set out in the *By-Law*.¹¹⁰ For example, “cultural and recreational uses” include artist studios, bingo halls, libraries, parks and theatres; ‘retail uses’ include farmers markets, gas stations and car dealerships.

There is a myriad of “mixed-use” zones throughout the City of Vancouver. The primary purpose of mixed-use zones is to allow dwelling uses to be in close proximity to any of the other designated uses. The classification of “type of use” may vary from district to district. For example, one zoning district may list “manufacturing” as an outright approval use and “dwelling” as a conditional approval use, while another zoning district may list “dwelling” as an outright approval use and “manufacturing” as a conditional approval use. Different types of businesses in the same category of use may also be listed

¹⁰⁵ See District Schedules for all zones, attached to the *By-Law*, *supra* note 99.

¹⁰⁶ See the Commercial District Schedules, attached to the *By-Law*, *supra* note 99.

¹⁰⁷ For example, see City of Vancouver, By-Law No. 4912, *Downtown Official Development Plan* (4 November 1975).

¹⁰⁸ *Supra* note 99 at RA-1 District Schedule (Limited Agriculture).

¹⁰⁹ *Supra* note 99 at s. 2.

¹¹⁰ *Supra* note 99 at s. 2.

as both outright approval uses and conditional approval uses in the same zoning district. For example, in the FC-1 zoning district “service uses,” such as laundromats and vocational schools, are listed as outright approval uses, while “service uses,” such as cabarets and photography laboratories, are listed as conditional approval uses.¹¹¹ Through the establishment of zoning requirements, municipalities maintain tight control over what types of activities are carried out in each area of the City.

The current situation for sex workers

The City of Vancouver currently issues licenses for body rub parlours, health enhancement centers, social escort services, dating services, steam baths, and strip clubs.¹¹² Some businesses holding these types of license are in the business of providing sexual services. These businesses are quasi-legal, because they engage in activities that are not permitted under the licenses issued to these various types of business. Further, when these businesses provide sexual services, they are in violation of the provisions of the *Criminal Code of Canada* relating to prostitution such as s. 212, the “procuring” law, and s. 210, the “bawdy house” law.¹¹³ Nevertheless, these quasi-legal, licensed sex industry businesses continue to operate under the current licensing scheme, and do so within Vancouver’s existing zoning scheme. Street prostitution is not currently licensed or subject to zoning, because s. 213 of the *Criminal Code*, the “communicating law,” outlaws street prostitution.¹¹⁴

Body rub parlours, health enhancement centers, social escort services, dating services, steam baths and strip clubs are permitted to operate in certain zones in Vancouver. It is important to recognize that not all businesses carrying these licenses also provide sexual services, but the data from sex workers who participated in this project indicates that many of them do, indeed, offer sexual services.

Licensed body rub parlours are confined to the Downtown District, which is part of Vancouver’s Comprehensive Development District. This district’s Official Development Plan permits body rub parlours to be zoned in this District under the category “Other Commercial” use, meaning “any other commercial use not being “retail” or “office.”¹¹⁵ Under s. 2 of the *By-law* a body rub parlour is listed as a business under “service use.”¹¹⁶

Businesses that are licensed for exotic dancing and stripping can be located in most types of zoning districts throughout Vancouver, including Commercial, Industrial, Historic Area, and Comprehensive Development.¹¹⁷ Exotic Dancing and Stripping Businesses are regulated in accordance with the regulations for restaurants and cabarets, which are categorized as types of “service uses” under s. 2 of the *By-law*.¹¹⁸ Currently, the majority of Vancouver’s Exotic Dancers and Strip Businesses are concentrated in the Downtown District.¹¹⁹

Businesses that hold a Social Escort Service license are not confined to any particular zone under the *By-law*. However, other Vancouver by-laws, by-law amendments, and official development plans specify where Social Escort Services may not be established. For example, the Downtown District Official Development Plan states that a Social Escort Service may not operate from a “General Office Live-Work” space in the Downtown District.¹²⁰ This means that a Social Escort Service may not be located in those spaces where an owner/occupier uses the space as both a residence and a place of busi-

¹¹¹ *Supra* note 106.

¹¹² *Supra* note 32.

¹¹³ *Supra* note 1 at ss. 210, 212.

¹¹⁴ *Supra* note 1 at s. 213.

¹¹⁵ City of Vancouver, By-Law No. 4912, *Downtown Official Development Plan* (4 November 1975).

¹¹⁶ *Supra* note 99 at s. 2.

¹¹⁷ See the District Schedules for these zones.

¹¹⁸ *Supra* note 99 at s. 2.

¹¹⁹ The Downtown District includes the area between Cardero Street and Abbott Street (West to East) and Cordova Street to Beach (North to South).

¹²⁰ *Supra* note 115 in the Definitions section.

ness within the Downtown District. For more information about Live-Work spaces, see the section on “Working from Home” below.

Under the *By-law*, Health Enhancement Centres may be established in Multiple Dwelling, Commercial, Industrial and Historic Area zoning districts.¹²¹ Health Enhancement Centres are categorized as an “office use.” Like Social Escort Services, Health Enhancement Centres may not operate from a General Office Live-Work space in the Downtown District.¹²²

Dating Services are not restricted to any particular zoning district under the *By-Law*. The term Dating Service does not fall under any of the “use” headings described above. However, as with Social Escort Services and Health Enhancement Centres, a Dating Service may not operate from a General Office Live-Work Space in the Downtown District.¹²³

There are no zoning regulations regarding steam baths.

Sex workers views on zoning

Sex workers were divided as to whether there should be any restrictions on where they may establish their business or carry out their work. Some sex workers were opposed to zoning laws that place limitations on independent workers:

A. The only way I can think of is basically leave us the hell alone. You know, get out of the licensing business, allow us to advertise, allow us to work out of our home safely, you know.

- female off-street out-call sex worker

Some sex workers were expressed concern about limiting where street workers can operate:

A. I think you can't zone, you can't tell people that they can't stand on a freaking street corner.

- female street-level sex worker

Other sex workers, like the one quoted below, felt that creating zones for prostitution would drive sex workers further underground, presumably because some sex workers may not be able to, or willing to, operate under the rules set out by the city:

A. Well, that's the thing, though, you see. Once you start zoning and say “you can only operate in this area”, what happens is then . . . like you've really labelled people and, I don't know, I think you'll drive it further underground.

- female off-street out-call sex worker

Some sex workers felt that sex industry businesses should not be subject to any new zoning by-laws targeting prostitution, and should be integrated into the existing zoning scheme in Vancouver:

A. I'm opposed to zoning for prostitutes. I don't think we should zone for prostitutes. Again its one of those things that if you can make it apply to another business let it apply to [sex work] as to another business.

- female off-street out-call sex worker

Against these views, some sex workers suggested that the City should create new prostitution zones:

A. Well there needs to be like an acknowledged little party plaza. Say. Y'know, like an adult party plaza and then another kind, right? Where you got your nightclubs.

- female street-level sex worker

¹²¹ See the District Schedules for these zones.

¹²² *Supra* note 115 in the Definitions section.

¹²³ *Supra* note 115 in the Definitions section.

- A. *So, I mean maybe if there was areas that they had designated areas for the girls that are outside, like in, certain areas, y'know, like one downtown or this is the area of Burnaby or these – or certain areas of streets, y'know, that could be, so that was allowed in that district, that was red light district and maybe that would be away from the homes and stuff like that. I think that it should be put somewhere, but an organized kind of somewhere.*

- female street-level sex worker

The significant diversity in opinions and the concerns raised by sex workers is an indication of the complexity of the zoning issue.

Some sex workers stated that they do not want involvement in any zoning scheme whatsoever. This opinion should guide lawmakers and stakeholders examining the issue of the location of prostitution. What follows is a more detailed discussion and analysis of those opinions expressed that favour sex-work zoning laws.

Incorporating sex industry businesses into the existing zoning scheme

Sex workers from various sectors of the industry suggested that sex industry businesses should be incorporated into the existing zoning districts rather than create a single zone for such businesses. Several sex workers were opposed to setting up a “red light district.” The following sex workers who expressed this view were unanimous that their preferred location for work would be the business and commercial areas in downtown Vancouver:

- A. *[I would like to work] well down near Davie and Granville – down near Celebrities and stuff like that.*

- male street-level sex worker

Several sex workers felt strongly that prostitution should not be located in areas where children are frequently present:

- A. *I definitely think it would be in business areas. And not in neighbourhoods, y'know, of course, with children and stuff. The zoning would be, yeah, more business areas.*

- female street-level sex worker

Some sex workers made specific references to popular landmarks in the Downtown District as areas providing good business and relative safety for sex workers:

- A. *[I would like to work] Around the Bentalls . . . outside Hotel Vancouver. Expo Boulevard . . . The Wall Centre . . . Plaza of Nations . . . around the Pan Pacific . . . down by the Bayshore.*

- female street-level sex worker

Several sex workers agreed that sex industry businesses, such as brothels, would best fit “commercial” or “industrial” districts:

- A. *I mean if we're talking a larger, larger, brothel then it should be in a commercial zone, centrally located.*

- female off-street in-call sex worker

- A. *And then maybe in those commercial industrial areas there could be . . . let's just say that if it were all legal . . . maybe there could be like a massage parlour with five rooms or six rooms and these girls could come and rent the room by the hour.*

- female off-street out-call sex worker

Sex workers preferred to work in the commercial and business areas of downtown Vancouver for many reasons. One was that some prostitution already takes place in the downtown area, including street, in-call and out-call business. This makes the downtown area familiar and comfortable for some sex workers, and easily accessible. Sex workers noted that they prefer the downtown area because it is heavily populated and a popular tourist location, and provides them with a readily-available clientele. One of the primary reasons that sex workers from all groups said they preferred the downtown area was because they felt it is safer. Some sex workers mentioned the higher population density, lighting, and availability of phones as features in the downtown that increased their security.

Street workers felt that working in more populated and secure downtown areas would allow for increased safety as compared to isolated industrial sites, empty alleyways and high-crime neighbourhoods. Few sex workers identified the Downtown Eastside of Vancouver as a place where they wanted to work, preferring areas in the downtown core, such as Davie Street, Granville Street, the areas around the Sheraton Wall Centre, the Bentall Centres on Burrard Street, and the Plaza of Nations on Pacific Boulevard. All types of sex workers were adamant that prostitution take place in an “adult oriented” neighbourhood, meaning an area used for adult activity not frequented by children. The Downtown District, already home to strip clubs, nightclubs, bars, lounges and body rub parlours, was felt to be most fitting for prostitution.

If the criminal laws surrounding adult prostitution are repealed and prostitution becomes integrated into the existing zoning scheme in Vancouver, the city will have to determine which zoning districts are appropriate for sex industry businesses, and what “use” category they are best suited to. Prostitution could potentially be integrated into a number of existing uses, including: “Commercial” use, “Other Commercial” use (i.e. commercial use that is not “retail commercial” or “office commercial” use) or “Service” use. In order to integrate prostitution into the existing zoning scheme, a municipality would first have to designate a use category for prostitution, and then designate prostitution as either an “outright approval” or “conditional approval” use in a district schedule or official development plan with respect to applicable zones.

Prostitution as a distinct “use”

One option for integrating prostitution into the existing zoning scheme is to create a specific “prostitution use” rather than subsuming it into existing uses. Accommodating prostitution in this manner would mean that the City determines which zoning districts would accept sex industry businesses. However, giving prostitution its own new and separate use category (i.e. a ‘prostitution’ use) would allow greater opportunity for these businesses to be treated differently than others, since municipalities would have greater control over where they are located.

Sex workers expressed concern about having a specific “prostitution use” because they want their business to be treated as any other and not subject to specialized rules. Therefore, they believe that prostitution should be classified as part of a common existing use, such as a “commercial” or “service” use. Further, because the City has more discretion over activities classified as conditional approval uses, it may not be advantageous to have prostitution subsumed within a use designation that is likely to be a conditional approval use, rather than an outright approval use.

A specific “prostitution use” could also lead to a situation where local groups who are opposed to the presence of sex industry businesses may more easily identify and contest their proposed locations. With greater discretion over where to locate prostitution, the City could react by severely restrict prostitution by, for example, designating very few zones for “prostitution” use, and by designating prostitution as a conditional approval use.

Classifying which existing designated use is most appropriate for prostitution is a complex issue that, if embarked upon, should be undertaken by lawmakers with careful attention to the needs and concerns of sex workers. If prostitution is integrated into the existing zoning system, it is through the

“use” classification that the City will be able to exercise control of the location of sex industry businesses. This is an unsettled issue that, in the event of decriminalization, will have to be examined carefully with input from sex workers.

Designated prostitution zones

Many sex workers advocated establishing specific sex industry zones:

- A. *I still like the red light district where each person has there own house and your just kind of in the window kind of and whoever’s interested would come up to the door. It’s all indoors, it’s all private. It’d be a lot easier.*
- female off-street out-call sex worker
- A. *Like in the European countries. You have a block or a district. A red light district.*
- female off-street out-call sex worker
- A. *I personally think yes there should be like a red light district because number one you’ve got that safety thing of it and number two if there’s a problem it’s kinda in one area and it’s easy to get rid of it.*
- female street-level sex worker

In discussing zones specifically designated for prostitution, many sex workers used the term “red light district.” This term has many meanings. Generally, it describes an area where brothels are located, regardless of whether prostitution is illegal or legal. Well-known examples in countries where prostitution has not been legalized include the Pigalle district of Paris, France, and the Patpong district of Bangkok, Thailand. Perhaps the best-known “red light district” internationally is the De Wallen in Amsterdam, the Netherlands, where prostitution is legal.

Because the term “red light district” is vague and uncertain, and applied to both legal and illegal regimes, we do not use it. Instead we use the term “designated prostitution zone” to identify an area specifically zoned for prostitution use. Under the current zoning scheme, where there are various zoning districts with designated uses, the setting aside of an area for prostitution would require that “prostitution” be designated its own zoning district category, similar to “Limited Agriculture,” “One Family Dwelling,” “Commercial” and “Comprehensive Development.”

The one thing most sex workers agreed on was that a single small area in Vancouver designated for prostitution would be inadequate. Even those sex workers who were supportive of designated areas for prostitution felt that there should be multiple areas located throughout the city:

- A. *Well, I guess if you’re saying off the street then you’re talking about a red-light district type of scenario I think you could very well have a red-light district, but it seems to me that that would almost be like having an amusement park district or something where you have a bunch of establishment in one area. That shouldn’t mean that if you’re in that kind of business you have to be in that zone, because you know it would be ridiculous, if say there was a zone like that in Gastown for instance and someone wanted to get laid in Burnaby or Coquitlam, they’re not necessarily going to want to come all that way to perform a sort of a domestic kind of transaction. And so yeah, you could have a zone that is geared for that but that couldn’t be the only zone or you’d have to have other zones all over the place.*
- female off-street in-call sex worker

Proponents of designated prostitution zones agreed that not only would zoning increase the safety of sex workers, but also it might provide a safer way for sex workers to transition out of the industry, and might even help decrease the rate and extent of illness among sex workers. Nevertheless, the need to value

autonomy and privacy was the most prevalent theme of all opinions on zoning. Further, sex workers believe workers and clients need to conduct business in areas in which they feel comfortable, be that in their own neighbourhood or in an area of Vancouver that is some distance from where they reside.

Home-based sex industry businesses

The *By-law* allows for some forms of work to take place in a person's home. Under the homecraft provision, the *By-law* allows one person per family to engage in a craft or occupation at home.¹²⁴ However, the principal use of the building must be as a residence. Generally, the term "homecraft" refers to businesses like bookkeeping and accounting. Under s.11.6 of the *By-law*, no products or materials may be sold from a residence, and there is a restriction against any "objectionable effect[s]" being created by the residential business.¹²⁵ A business run from the home cannot employ other persons or allow customers into the home.¹²⁶ Given all of these factors, the homecraft provision of the *By-law* would not allow sex workers to receive in-calls at their place of residence. However, they could arrange outcalls from home. In addition to the fact that no customers are allowed into the home, the provision that no "other objectionable effect" be produced by the business is a very broad criterion, and may be used to prevent prostitution from being conducted in a sex worker's residence. No offensive noise, odour, vibration, smoke, heat or other objectionable effect shall be produced in a homecraft.¹²⁷ Additional examples of objectionable impacts that may be relevant in the context of prostitution include issues of security and availability of parking.¹²⁸

In order to operate a business under the homecraft provision a business license must be obtained, but a development permit is not necessary. These business licenses can carry various restrictions. For example, a City of Vancouver staff person advised that a person working from home can be required to renew the license at an interval designated by the City, which allows the City to review the effects of the business on the neighbourhood and determine whether to renew the license.

Both male and female sex workers of all types reported that they would like the ability to work in a residential setting; many of them would like to be able to work at home with one or more other sex workers, but this is not permitted under the rules of the homecraft provision:

A. You know, probably more likely would, along with another girls – I'm not saying I'm doing this – but I'd rent an apartment, split the rent with a girlfriend, and that's where we'd do our in-calls.

- female off-street out-call sex worker

A. I don't think a big place is good. I think allowing two to three women to work in small, little bawdy-houses all throughout the city [is a good idea].

- female off-street out-call sex worker

A. I think that it [sex work] would successfully operate invisibly if there's not an area [specific zone for sex work] because there could be very small houses with just one or a few workers.

- male street-level sex worker

¹²⁴ *Supra* note 99 at s. 11.6.1

¹²⁵ *Supra* note 99 at s. 11.6.5.

¹²⁶ P. Mondor & J. Madden, "Policy Report: Urban Structure" (29 July 2003), online: Vancouver City Council <<http://vancouver.ca/cityclerk/cclerk/20030910/ph2.htm>>.

¹²⁷ *Supra* note 99 s. 11.6.5.

¹²⁸ City of Vancouver, Community Services, "Live/Work and Work/Live: Vancouver Overview Including Strategic Directions" (May 2001), online: <<http://www.city.vancouver.bc.ca/commsvcs/guidelines/L002.pdf>>.

The Official Development Plan for the Downtown District provides for “general office live-work” space within that District.¹²⁹ General office live-work space allows a person to conduct “general office” work from their home. General office work is defined as:

the use of premises for any office use, including Information Technology and desktop publishing, but does not include Financial Institution, Health Care Office or Health Enhancement Centre.¹³⁰

The Downtown District Official Development Plan places further restrictions on the use of a home as a general office, restricting the ability of persons to use their home as a place of business for a “dating service, entertainment service, exotic dancer business, social escort service or other similar business.”¹³¹ A person wishing to operate a business from a General Office Live-Work space requires a development permit from the City.

In August 2004, a Vancouver-area activist for sex workers’ rights challenged this limitation. She proposed that, given that independent escorts are licensed under the General Office category, they also should be allowed to operate their business out of General Office Live-Work spaces. The proposal was initially supported by a vote at city council, but was later overturned.¹³²

Given many sex workers’ preference to work from home, the repeal of the criminal laws relating to adult prostitution should call for a re-vamping of the *Zoning and Development By-law* provisions in order to permit sex workers to take in-calls at home and work in conjunction with two to three other workers in a home-based business.

In addition to the views expressed by sex workers regarding specific zoning laws, four other concerns emerged from our discussion of zoning, which we describe next.

Other concerns relating to the issue of zoning

The four concerns that emerged from sex workers’ discussions of zoning regulations concerned safety, privacy, autonomy, and children.

Safety

The sex workers we interviewed all agreed that any by-laws restricting prostitution to certain zones must prioritize the safety of sex workers. Sex workers described a variety of unsafe situations: street work in industrial areas or places having dim or no lighting; providing sexual services in cars; and working in any kind of isolated areas where sex workers have no access to other persons or aid in case of an emergency:¹³³

A. As soon as you stick women in an industrial area, the problem is safety.

- female off-street out-call sex worker

A. I feel violated . . . I feel violated because the area where we work in, just because of the security, because of the police, because of the crime, because of the drugs and all that kind of stuff goes on around the area. It is kind of hard to actually . . . actually get a date because of all the crime that is going on around my surroundings. So that it’s kind of one of the . . . you know, big . . . main concerns for me and my safety, is

¹²⁹ *Supra* note 115.

¹³⁰ *Supra* note 99 at s. 2.

¹³¹ *Supra* note 115 in the Definitions section.

¹³² City of Vancouver, Special Council Meeting Minutes (10 September 2003), online: <<http://www.city.vancouver.bc.ca/ctyclerk/cclerk/20030910/phmin.htm>>

David Carrigg, “Council decision delights sex trade activist” *The Vancouver Courier*, online: *The Vancouver Courier* <<http://www.vancouver.com/issues03/093103/news/093103nn8.html>>.

¹³³ Pivot Legal Society Sex Work Subcommittee, *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws*, (Vancouver: Pivot Legal Society, 2004) at 16, 17.

because of all the crime that is going on around.

- female street-level sex worker

There is a wealth of evidence that working in isolated areas – industrial parks, cars and wooded areas – adds to the harm that sex workers experience on the job.¹³⁴ The current conditions of much of the street sex work that occurs in Canadian cities provide ample evidence of just how dangerous working in isolated and dimly lit areas can be. From this deadly experience – somewhere between 200 and 300 street sex workers have been murdered over the past 25 years in Canada – a very clear lesson can be drawn with respect to zoning of prostitution: certain kinds of zoning will likely perpetuate this pattern if prostitution is restricted to dimly lit industrial areas.

There was general consensus amongst all participants that working in isolated locations made working conditions unsafe:

- A. *[S]o it's very difficult to impose any kind of, I would think, safety measures when you know people don't know who they're going with and where, whether they're going to do the transaction in the car, or in the woods, or what. So, yeah, I don't think it's a safe environment, the street situation, and I would like to see it all go indoors.*
- A. *So it really is, the most violent way to work would be street where it is entirely anonymous, you have no back-up and you're by yourself one-on-one with somebody in a car. There really is no recourse for you if you have a problem.*
- A. *Further, the fact that working indoors allows for increased safety suggests that allowance for indoor sex work must be incorporated in any zoning by-law applicable to sex work. An independent sex worker and an escort stressed the safety of indoor sex work:*
- A. *I think you're safest indoors, you're safest when they come in to see you. But like I say, you need to have like a buddy you can work with or someone you can work alongside with and you're safe.*
- A. *So, yeah, I don't think it's a safe environment, the street situation, and I would like to see it all go indoors.*

- female off-street out-call sex worker

The sex workers we interviewed made it clear that any zoning by-law must allow sex workers to work in populated, well-lit, secure and central locations. Protecting the safety of sex workers must be given priority in any decision about where to locate prostitution.

Autonomy

While some sex workers believed that sex industry businesses should be zoned, others thought that the decision about where to work should be left entirely to the sex worker. While their greatest emphasis was placed on empowering sex workers, others suggested that clients should be able to choose where they go to receive sexual services. The following excerpts illustrate the different perspectives.

- A. *It's okay to have a zone but let it come from the workers. Don't like say you have to go here.*

- female street-level sex worker

¹³⁴ John Lowman, "Violence and the Outlaw Status of (Street) Prostitution" (2000) 6(9) *Violence Against Women* 987; John Lowman & Laura Fraser, "Violence Against Persons Who Prostitute: The Experience in B.C.," Technical Report No. TR1996-14e. (Ottawa: Department of Justice Canada, 1996); Cecilia Benoit & Alison Millar, "Dispelling myths and understanding realities: Working conditions, health status and exiting experiences of sex workers" (Victoria: PEERS, 2001), online: University of Victoria website <<http://web.uvic.ca/~cbenoit/papers/DispMyths.pdf>> ; S, Currie, N. Laliberte, S. Bird, N. Rosa & S. Sprung, *Assessing the Violence Against Street-Involved Women in the Downtown Eastside/Strathcona Community* (Vancouver: Mimeo, 1995); Leonard Cler-Cunningham & Christine Christensen, "Violence against women in Vancouver's street-level sex trade and the police response" (Vancouver: Pace Society, 2003).

- A. *[C]ertainly a massage parlour is the safest place to work because there's safety in numbers. Given that though, I think people should have the choice to be self-employed and assess that risk on their own . . . no one . . . needs that paternalistic, 'this is safer for you' approach and be told where or how to work.*
- A. *I mean, realistically, some people are still going to go outside, no matter what.*
- female off-street in-call sex worker
- A. *Well, maybe it could be that there would be sort of a Low Track area where the drugies and all that hang out and I don't know . . . the only thing that maybe, if there were a closed radius to some dumpy, cheap hotels they could work out of there and their friends could watch out for them.*
- female off-street out-call sex worker
- A. *That shouldn't mean that if you're in that kind of [sex work] business you have to be in that [one] zone, because you know it would be ridiculous, if say there was a [sex work] zone like that in Gastown for instance and someone wanted to get laid in Burnaby or Coquitlam, they're [the client is] not necessarily going to want to come all that way to perform a sort of a domestic kind of transaction. And so yeah, you could have a zone that is geared for that but that couldn't be the only zone or you'd have to have other zones all over the place.*
- female off-street in-call sex worker

Privacy

Generally sex workers emphasized the need for privacy for workers, clients and the industry as a whole. Some sex workers stated that they felt a zone for prostitution would make them more visible, which could make them susceptible to stigmatization and discrimination. Both escorts and female street sex workers emphasized the need for privacy:

- A. *Once you start zoning and say "you can only operate in this area", what happens is then...like you've really labelled people and, I don't know, I think you'll drive it further underground. Some people will stand up and say, "yeah, I'm gonna work in this area", but then I don't know Nobody really wants to stand up and say "I'm a sex-trade worker". I don't know a lot of people who would want to admit it, you know?*
female street-level sex worker
- A. *I was very discreet about it. I mean, the thing is, if you let people know what you do, then you're opening yourself up to eggs being thrown at you, or whatever the heck, people screeching at you, who knows, maybe people trying to make you move out of your home or at least making you feel so uncomfortable that you move out on your own volition. So, it really pays not to tell people what you do.*
- female off-street out-call sex worker
- A. *I think that it would successfully operate invisibly if there's not an area because there could be very small houses with just one or a few workers and like you said people could come and go unnoticed, if you like, whereas if it's all ghettoized into a certain red light district then people are you know . . . you're only there for one reason. You lose privacy.*
- female off-street out-call sex worker

Sex workers insisted that their safety and their ability to conduct business both depend on the privacy and autonomy of workers and their clients. For them, privacy and autonomy are important considerations when contemplating how to design prostitution zoning laws.

Sensitivity to children

Almost all sex workers agreed that sex industry businesses should not be located near children's gathering places, such as schools:

A. One thing is definitely in regards to schools no matter what it should not be anywhere close to an elementary school as far as I'm concerned and there's enough areas throughout the lower mainland that they could put a red light district and there is no schools, elementary schools.

- female street-level sex worker

Comments such as this reinforce the proposal that the Downtown District is the most appropriate location for prostitution, particularly because it should be kept out of the sight of children.

Zoning and sex work recommendations

1. Consult extensively with sex workers regarding where sex work should be located, and involve sex workers in any decision-making process concerning zoning laws.
2. Explore the benefits and disadvantages of various zoning schemes, including specific zones for sex-work businesses and street-level sex workers. The general view was that a single area designated for sex work would not meet the needs of different kinds of sex workers. Many sex workers were opposed to establishing "designated prostitution zones"; sex work should be treated like any other business that is classified as a "commercial" or "service" industry.
3. Given the preference of sex workers to work from the home, the *Zoning and Development By-law* provisions that place restrictions on home-based business should be revised to permit two sex workers to take in-calls at a single residential location.
4. Ensure that zoning regulations do not prohibit street prostitution entirely.
5. Ensure that sex-work businesses are not located near schools or children's playgrounds.
6. Consult with sex workers to develop zoning regulations that enhance the safety, privacy and autonomy of sex workers.

PART 3: EMPLOYMENT AND LABOUR LAW

B.C.'s employment and labour legislation creates important rights and protections for workers. However, despite the existence of this legislation, the most fundamental labour and employment rights of sex workers are being violated, and they are unable to access the legal protections available to other workers. This chapter outlines the steps that should be taken to provide sex workers with equal access to the employment rights and protections provided under existing B.C. law, and examines whether the existing legislation adequately serves the needs of workers in the sex industry.

The repeal of the criminal laws pertaining to adult prostitution is a critical step towards providing sex workers with equal access to workers' protection. Under the current legal framework, although prostitution itself is legal in Canada, the criminal laws relating to prostitution create restrictions on employment in the sex industry. For example, being an "employer" of a sex worker is effectively prohibited by s. 212(1)(a) of the *Criminal Code of Canada* (the "*Criminal Code*"). The "procuring law" makes it a criminal offence to procure or solicit a person to have sexual intercourse with another person. As a consequence of this section, any person who employs sex workers is likely to be in violation of this section of the *Criminal Code* and may also be infringing the criminal law prohibiting "living on the avails of prostitution." Living on the avails of prostitution is a criminal offence if the relationship between the employer and sex worker is judged to be "parasitic." Courts have applied the term "parasitic" in a way that renders wage sharing by sex workers and employers susceptible to prosecution under Criminal Code s. 212(j). As the Ontario Court of Appeal in *R. v. Barrow* stated, "[t]he element of parasitism was found in the fact that she was in the business of rendering services to prostitutes because they were prostitutes."¹

Despite the existence of these criminal laws, many sex workers currently work for "employers," and often do so in licensed businesses. For example, sexual services are often provided under the guise of massage and escort businesses. These businesses can, therefore, be characterized as operating in a "quasi-legal" way, because they are licensed to provide massage and escort services, but in addition to those services, many businesses that hold these licenses also offer sexual services. The true nature of these services is commonly known but, particularly in Vancouver, city council and police tend to turn a blind eye to the criminal offences that such businesses commit.²

Sex workers are in an extremely disempowered position as a result of the current criminal laws. They have little or no opportunity to avail themselves of the administrative laws that provide benefits and protections to other workers. There are a number of reasons for this problem. When asked whether they would consider seeking assistance from the government on employment related issues,

¹ *Criminal Code*, R.S.C. 1985, c. C-34, s. 212 (j) [CCC]. In *R. v. Barrow* (2001), 54 O.R. (3d) 417 (Ont. C.A.) at para 29, the accused ran an escort agency, arranging "dates" between male clients and female escorts employed by the agency and even though her relationship with her escorts was supportive and friendly rather than exploitive, her occupation was found to be "parasitic" in that she was in the business of rendering prostitution services. The court held that the offence of living on the avails of prostitution does not require proof of coercion.

² Daniel Wood, "House Rules" *Vancouver Magazine* (April 2004).

sex workers stated that they fear the stigma and discrimination that could result from disclosure of their employment in the sex industry. Likewise, filing a claim under the *Employment Standards Act* or the *Workers Compensation Act* means disclosure of one's type of work and identity to a government-affiliated body. Sex workers stated that they fear the possibility of criminal sanctions if they reveal that their business practices violate criminal law. Complaining about working conditions could expose an employer to severe consequences, such as loss of a business license or criminal sanctions, and could lead to retaliation against the worker, or termination of the business itself – in which case the worker would lose her job. Given their inability to access employment protections, sex workers are extremely vulnerable to exploitation by employers.

Few sex workers seek the labour and employment protections available to other workers. None of the participants in this project reported filing a claim under the *Employment Standards Act* or the *Workers Compensation Act*, and decisions rendered under these statutes show that few such claims have ever been made in B.C. Further, we found that lack of awareness and understanding of their legal rights was a serious problem among the sex workers who contributed to this project. If the employment and labour rights of sex workers are to be respected, basic education about their legal rights is an important first step.

Part of the barrier in discussing prostitution as a labour and employment issue is the commonly held stereotype that any sex industry “employer” is an exploitative and controlling “pimp.” While that type of exploitative situation exists, it cannot be applied to all employers in the sex industry. The type of employment issues that sex workers face varies greatly, depending on the type of sex work. Sex workers struggle with many of the same employment issues that would arise in the “straight” world pertaining to wages and working conditions. At its most extreme, the exploitation that some sex workers experience is a form of sexual slavery:

- A. *He said I can live there and he will buy me clothes. He won't charge me clothes; he won't charge me food, and stuff like that. I can stay there. All I have to do is working. I live there and he supplies drugs for me With two girls and he buys all the clothes, he pays the rent, and all you have to do is work for him. And he charge those guys around \$180. But same thing. Like he will make a list of how many drugs I do because I have some drugs like, um, he makes sure I have drugs every day like even though I have to make money he would put it on the list. So everybody is doing heroin. And what happened, it's like he introducing me to rock [crack cocaine]. Cause like what happened it's like I do not really know how to do cocaine at the time. I do not really know that. But I starting to find out what rock is and this is how he control us. Cause rock is really addictive. What happened is at the time; I started to know some girls from him. Like I know a girl . . . she is not supposed to be [in Canada] and she travel all over the place and making money with prostitution . . . and what happened is she told me two kinds of girls. Two kinds. One kind like her, is free like her, which means she knows those dealers for sex . . . the bigger dealers. Right, and because she got money in Malaysia so she can pay for her own passport. Fake passport money. And she can pay for the ticket - airplane ticket. And that's why she is free so she chooses who she work for. And she told me there is a different one. The different one is the . . . I met later on at the massage parlour. Which means they do not have freedom. They have to stay in certain places. They cannot walk out, they cannot talk to people. They cannot tell people their real name and stuff like that because like those dealers, those people dealers they pay for the passport and for the airplane and ticket and stuff like that. Usually those girls coming from Thailand or Malaysia around those countries between those countries.*

- female off-street in-call sex worker

The commonly held stereotype about “pimps” holds true in some instances, but it should not be seen as representative of all current employer-employee relationships in the sex industry. In this project, sex workers stated that, even under the current laws, there are good employers in the industry. However, it was agreed that sex workers would be able to benefit from better relationships with their employers if the criminal laws were to be repealed.

Before moving further into this discussion, it is important to acknowledge that improving employment protections for sex workers is only one of the steps that must be taken to protect the human rights of sex workers. Too many sex workers are engaged in prostitution against their will and work under very dangerous circumstances. Some sex workers are extremely disempowered by individuals who use violence and intimidation to exploit their labour. Some sex workers are coercively trafficked into Canada, and face the prospect of arrest and deportation if they speak out. For workers in those circumstances, their needs extend far beyond improved working conditions. Their desire to exit the trade and access protection from those who are exploiting them is the more important consideration. For them the remedy lies in their ability to access police protection, and protection under humanitarian immigration laws. These issues are addressed in other chapters of this report.

For workers who choose to engage in sex work, the focus on employment protections is a vitally important one. Their right to work in a safe work environment should be legally protected. Even for those sex workers who intend to exit the industry, providing a safe work environment while they remain in the industry both reduces the potential for harm to the worker and may facilitate his or her transition out of prostitution.³

Sex workers were asked to consider the types of employment protections and benefits that they would like to see if they were operating in a decriminalized work environment. Sex workers from all sectors of the industry were unanimous in their opinion that their working conditions must improve. The following chapter provides an overview of sex workers’ views on employment benefits and protections, and an analysis of whether the existing legislation provides adequate protection for the sex worker.

Section 1: Employment standards and protections

This chapter will refer to a number of statutes, but will focus on the B.C. *Employment Standards Act*,⁴ the *Labour Relations Code*⁵ and the *Workers Compensation Act*.⁶

- The *Employment Standards Act* (the “*ESA*”) sets out the minimum workplace standards for most employees in B.C., including such things as minimum wage, protection of wage payment and prevention of exploitation by employers. The *ESA* applies to both unionized and non-unionized employees. The *ESA* sets out both general workplace standards and specialized standards for particular industries.
- The *Labour Relations Code* (the “*LRC*”) is also relevant to this discussion because it sets out the law in relation to unionization and the relationship between unions and employers. The ability to enjoy the protections that union membership offers is set out in the *LRC*. In order to be a part of a union, you have to be an “employee.”
- The *Workers Compensation Act* (the “*WCA*”) contains a provincial compensation scheme through which employers pay into a compensation fund. When a worker is injured on the job, he or she

³ “Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws” (March 2004), online: Pivot Legal Society <www.pivotlegal.org> [Voices].

⁴ *Employment Standards Act*, R.S.B.C. 1996, c. 113 [ESA].

⁵ *Labour Relations Code*, R.S.B.C. 1996, c. 244 [LRC].

⁶ *Workers Compensation Act*, R.S.B.C. 1996, c. 492 [WCA].

may make a claim for compensation under the Act that includes compensation for lost wages due to the injury and compensation for medical costs.

- The *WCA* has an associated set of regulations called the *Occupational Health and Safety Regulation*⁷ (the “*OHSR*”). The *OHSR* sets out the minimum requirements for health and safety standards in the workplace enforced by the Board in all industries covered by the *WCA*.⁸

When discussing employment and labour protections for sex workers, it is important to understand the distinction between workers who are “employees” and workers who are “independent contractors” or “self-employed.” The *ESA* standards and the right to unionize under the *LRC* are only available to “employees” and not to “independent contractors” (for a more detailed discussion, see page 81). This means that only sex workers who fit the definition of “employee” will be able to access these rights and protections.

Section 1 of the *ESA* sets out a general definition of the term “employee.” The section says that an employee is someone who works for another person and is entitled to receive wages. However, establishing who is an employee is complicated. To determine whether someone is an employee for the purposes of employment protection, the Supreme Court of Canada has ruled:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker’s activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker’s opportunity for profit in the performance of his or her tasks.⁹

In short, the more control that the hirer has over the worker, the greater the chance that the relationship will be categorized as an employer-employee relationship, and thereby qualify the worker and the hirer to protection under the *ESA*. Finally, an employee can work on a part-time, full-time, temporary or permanent basis without it affecting his or her legal status.

Sex workers as employees and independent contractors

Current conditions in the sex industry

Participants who work for an employer were asked about their employment status. All those who responded to this question stated that owners or managers have told them that they are “independent contractors.” Therefore, the data indicates that there is a trend among employers in the sex industry to classify their workers as independent contractors. This is partly an effect of criminal sanctions against procuring; employers distance themselves from acts of prostitution by arguing that it is up to the independent contractor to decide whether their work crosses the line from massage or “escorting” into sale of sexual services. Also, it is consistent with the increasing trend in many other industries, including “exotic dancing,” to define workers as independent contractors, because it relieves the employer of the responsibilities set out in the *ESA*. What many workers do not realize is that, even if their employer tells them they are independent contractors, depending on the individual circumstances of the employment relationship, the courts may not agree. This means that many workers who believe they are independent contractors may be, in the eyes of the law, employees entitled to full protection under the *ESA*. This common misunderstanding further emphasizes the need for increased legal education for workers.

⁷ *Occupational Health and Safety Regulation*, B.C. Reg. 296/97 [*OHSR*].

⁸ *Ibid.* s. 2.1.

⁹ *67122 Ontario v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, 2001 SCC 59.

The Law Commission of Canada has studied the evolution of the Canadian workforce and states that there has been an overall shift towards “non-standard” workers, a grouping that includes independent contractors. In most circumstances, this is disadvantageous for workers:

Some non-standard workers combine flexibility with adequate to excellent financial remuneration and work conditions. However, there is growing evidence that many others are not faring as well. Among the problems associated with non-standard work are the following: poor pay, little job security, a lack of access to important statutory benefits and protections (such as Employment Insurance, employment standards protections, workers’ compensation, the right to collective bargaining) and a lack of access to employer-provided benefits such as dental, life and disability insurance. Although the phenomenon of non-standard work has been growing for many years, labour and employment legislation, originally designed to provide conventional employees with a minimum of social protection, has not been updated to reflect these new realities.¹⁰

Nevertheless, an employer’s decision to label a worker as an independent contractor is not binding on a court or tribunal. It is only by looking at the factors set out on page 81 that one can establish whether a worker fits the legal definition of “employee.” Based on the information they provided about their workplaces, it would seem that many sex workers in this project meet the legal definition of “employee.” Even so, the bottom line will always be that no one can compel a sex worker to engage in any particular sex act, in which case a third party hiring a sex worker can not control actual sex work.

What aspects of sex work will be under an employers’ control? If the sex industry is completely decriminalized, a third party or employer will be able to control the circumstances in which the work takes place. Presently, even this degree of control is not possible given the criminalization of any third party involvement in prostitution through the various bawdy house, procuring and living on the avails sections of the *Criminal Code*. As a result, sex workers are denied the right to claim any of the benefits and protection that employee status would bring under the *ESA*.

Sex workers as employees

All sex workers interviewed – including street-level workers, independent escorts and those who already work for an employer in escort agencies and massage parlours – were asked whether they would consider working for an employer, or would chose to continue working for an employer if the industry was decriminalized. There was significant variation among sex workers’ responses. Some were clear that they did not want to work for employers, and were only interested in operating as self-employed sole proprietors. Others were interested in working for an employer, but varied in terms of the degree to which they wanted an employer to control the terms and conditions of their work.

A particularly predominant view among male sex-worker participants was that they wanted to operate independently as sole proprietors. Both male and female sex workers expressed the following reasons for preferring to work independently. First, many sex workers said that they did not want to pay any part of their earnings to another person. Second, many stated that they want to enjoy as much flexibility and independence as possible, and did not want to be constrained by anyone else’s rules.

Q. If you’re working in the sex trade, would you prefer to work independently, or work for an employer?

A. Definitely independently.

A. Independently.

A. Independently

10 Canada, Law Commission of Canada, *Discussion Paper - Is Work Working? Work Laws that Do a Better Job*, (Ottawa: Law Commission of Canada, 2004) at 5 [*Is Work Working?*].

- A. *I'd rather work independently . . . be in charge of GST and that kinda stuff because that way it's contributing to society.*
- A. *Less competition.*
- A. *Keep your own hours.*
- A. *Being your own boss, you determine, it's up to you what happens and like safety concerns and so forth, plus money wise, I don't know about you guys but I wouldn't want to have to stand on a corner like some of these ladies have to and make money for somebody else. And therein the whole risk, if I'm going to have that type of risk.*
- male street-level sex workers

Remaining independent and in control of how prostitution is carried out was very important for many sex workers, and some believed that this could not be done in an employment relationship:

- Q. *So I take it from what you're saying so far that you would prefer to work independently rather than for an employer.*
- A. *Yes.*
- Q. *OK. And why is that?*
- A. *I like my own money.*
- Q. *Any other reasons?*
- A. *Oh, I already have problems with the fact that the city tries to control me, and you know, our government is in our face regardless of what I'm doing, it doesn't really matter there, things are Big Brother enough. To add to that a pimp that watches over my every move? I can't even imagine. It makes me itch.*
- female off-street out-call sex worker

Some sex workers felt that safety issues could be addressed by working in collaboration with other sex workers while still maintaining their self-employment status:

- A. *Well, I think I prefer to work independently, but I would prefer to work with another girl for safety reasons. Just somebody . . . you know . . . the two of us could work together, we could kind of watch each other's back kind of thing. And the guy would also know that you aren't there by yourself; but the way it is now, they know we're here by ourselves . . . so you know, it's dangerous . . . Well, I . . . you know, it's like I say, just someone could sort of be here while I'm here, you know. We can make sure that each other are safe, the guy isn't beating you up and . . . vice-versa, and you know, we could close together, walk out together at night, walk each other to our cars. It would be much safer, and plus, they know there's somebody else here so they won't likely try something. When they know you're by yourself, they'll try anything.*
- female off-street out-call sex worker

In contrast to this view, many sex workers felt that with adequate standards and protections in place, working for an employer could be very beneficial. Sex workers felt that working for an employer provides greater potential for a workplace that is free from violent clients. Safety was a particularly significant factor for female sex workers:

- A. *Me? Well I prefer to work for somebody. Because I mean – I know from past experience working from – for myself, right? I got raped, I got beaten up, I got shot at, and it's like that if I had an employer, right? . . . I would feel protected.*

Some sex workers thought that working for an employer created the possibility for better health and safety standards and access to benefits, such as the Canada Pension Plan:

- A. *I think that it would be good to work for somebody, who is a good employer, who has health issues, all the proper things and security for the girls that are working for them. I think that it would be good to work for somebody that has – that would protect them.*
- Q. *What are some of the qualities that you would look for in an employer?*
- A. *They're caring about health issues, about security. And the conditions of where you are working. And, understanding.*
- A. *Yeah, I would – I would like to add. If I had the option of being by myself, which is good but if you worked for an employer they might have things like CCP and pension plans. God knows we've never had a pension plan, things like CCP*
- Q. *So what are – what do you think some of the conditions, you would look for, before accepting to work for someone else?*
- A. *. . . how much money that you are going to make.*
- A. *I would make sure that I was in a place that was, like, clean, and that it was licensed before jumping up and going ahead and being employed by them.*
- female street-level sex workers

Some sex workers felt that working for an employer would be beneficial if it meant that workers were provided access to benefits:

- A. *Yeah I would pay into [benefits] . . . that's the only reason that I would go to a house versus working by myself would be to get that kind of protection, would be to get a pension. You have to pull into account, hey they want this legalized, they wanna help us out, they want to make this a legal thing? The government wants a piece of the pie? Fine. Tax us. Pension us. Everything else like a regular job It also gives you maternity leave, it also gives you paid leave, workers' compensation, in case you get hurt on the job.*
- female off-street out-call sex worker

Several sex workers felt that working in a larger business with other employees would create a situation where a variety of services could be offered without each worker having to provide every type of service.

Some sex workers stated that they would only work for an employer if the workers were able to maintain control over how they conducted business:

- Q. *Yeah. Okay. So, if you would work for an employer, like, we're trying to think of an ideal world where the criminal laws are repealed. So if you would work for an employer, under what conditions would you do that or would you not do that no matter what the conditions were? Or what sort of qualities would you want in an employer?*
- A. *I think that basically want to, you know, be able to control how I conduct my business. I don't want to be told I have to pay all sorts of money to work there. I don't mind to, you know, pay a certain fee for the room rental, whatever, as long as it's not, you know, astronomical. I don't want to have to perform sexual services for the owner because frequently in a lot of places, that's what they do. You can't get a job there unless you do them. What else? You know, you can pick and choose your time and hours of when you want, you can do your own advertising, you can basically set up your own client base and if they're portable, you can take them with you, have your own cell phone, make your own arrangements. Basically I guess it would be a space to use, a safe space to use. Somebody might be on the premises that would just sort of be there for your safety*

purposes, but pretty much you could function independently.

- female off-street out-call sex worker

Many of these considerations will be discussed in more detail in the sections to follow. The opinions expressed show that sex workers have varied needs and interests, in which case law reforms must allow for various kinds of sex work organization, and extend employment protections to those who choose to work in some form of employer-employee relationship.

Not only is there a great deal of variation among workers' views of the type of work arrangement they prefer, but also it is apparent that many workers move in and out of different sectors of the industry. Several sex workers described how they would change the location and type of venue they worked in depending on their circumstances at the time. Several participants had worked at the street level, as independent escorts, and as employees in massage parlours and escort agencies at different times. Many described this flexibility as contributing to their sense of autonomy and control over their work. One business owner and former sex worker remarked that it is important to have a range of organizational models so that sex workers are given options and choices.

A. I think if you had a system, where you aren't forced to work in a particular model, you will see what works, because you'll see – people will gravitate to the most equitable form of working. Like the system that you have in Vancouver, people go where it works best for them. In some trades it does work like that. I mean, you can work as a carpenter, you can work independently, you can start your own business, you can go and work for a restoration company that deals with buyers. . . . You can go and attach yourself to Home Depot. Right?

- female massage parlour owner, former sex worker

The following discussion of employment and labour standards will be set out in two parts. First, based on the data which shows that many sex workers wish to have legal “employee” status, the analysis will look at the various statutory benefits and protections set out in the *ESA* and *LRC*, and whether these protections would adequately serve the needs of sex workers. The second part of the discussion considers the circumstances of sex workers who wish to remain as independent contractors and what protections are available to them in that context.

Employees and employment standards

Hiring employees

When asked about hiring practices, sex workers raised a number of concerns. The *ESA* contains several provisions that aim to protect workers in the hiring process. Sex workers were asked what kind of employment protections they would like.

Hiring practices

The *ESA* contains several provisions that pertain to hiring practices. Section 8 states that an employer must not make false representations in order to induce, influence, or persuade a person to become an employee. Section 10 prohibits charging a fee for hiring or providing information to someone about the nature of the employment.

Sex workers described facing particular challenges when applying for jobs in the sex industry. Employers who described their own hiring practices, some of which appear to constitute clear breaches of human rights and employment standards, provided further evidence of the challenges faced by sex workers and their employers. The following escort business owner described her hiring process and the fact that being physically “appealing” is an occupational requirement:

Q. What kinds of hiring practices do you think are fair and reasonable for this profession?

- A. *As an employer, like, if I was hiring someone for any kind of work, I'd want to think that they were people who were clean, responsible, and able to be on time, and someone who is capable of getting themselves where they've got to go to see the client Who has something of a wardrobe to use, or their get-togethers, even if it's just one or two outfits that they can get by on until they've made some money to get some more, there is a certain need for attractiveness in this business, and in that way it is different than a lot of other businesses, but you know, if you went to an office and you couldn't dress properly for it, I'm sure people would get tired of that.*
- Q. *So what would you ask someone? You interview people I assume when you hire them?*
- A. *Yeah . . .*
- Q. *And what kind of questions do you ask them, like, have you done this [sex work] before?*
- A. *Yes I would.*
- Q. *Do you take measurements?*
- A. *Well I don't stand there and take them, I just ask them what their measurements are, yeah, I need to convey that to my client. I would want to retain the right to say "I don't think I'm gonna be able to get many clients for you given this, this, or this" you know, I don't have to refuse them completely but I can say you know "your chances may not be very good." I was thinking of someone just the other day I'd done that with last year. She just wasn't appealing enough relative to the rest of the people I have on offer, that she would have gotten any work or much work. So there's that angle. They have to be in shape to a degree and it seems like the age factor is another factor, although of course you don't, I don't want to employ anybody too young. I prefer that they're 20 or older, so there's that angle as well.*
- female escort agency owner, former sex worker

There were differences of opinion over the use of physical attributes as a criterion in the hiring process. Several escorts felt that the physical beauty requirements imposed by many employers were unfortunate, but they thought that it is a reality of the sex-work profession. Sex workers described how clients' demands for particular physical attributes drive the hiring process and the retention of workers:

- Q. *What about any sort of rules with respect to hiring employees?*
- A. *I guess that's up to the employer because if every kind wants a different girl, different tastes, ya, so it's up to the employer-what kind of girl she wants to hire or he wants to hire.*
- A. *Do you mean how do you prevent discrimination in hiring and stuff like that? That's tough.*
- Q. *Ya like only the pretty girls with big boobs gets hired.*
- A. *But you know what, that's what happens in restaurants. Hooters. And who controls it? Nobody.*
- A. *So regardless . . . It's going to happen and I don't think there's nothin' that can be done about it either.*
- A. *That's the way the world is.*
- Q. *If the law could do something about it though do you think there should be laws about it?*
- A. *What are there now?*
- Q. *Basically you could bring an action for discrimination or a complaint to one of these bodies. Whether or not it will be successful probably depends on how blatant it was.*
- A. *Different men like different body types.*

- A. *Ya there is, for sure.*
- A. *Well, it's attrition. In the massage parlours it's attrition. If you're not making money you leave, right? You don't have to sit there for eight hours if you're not making money. They don't even have to get rid of you, you just go.*
- female off-street out-call sex workers

Other workers stated that the particular personal appearance that many employers require means that sex workers who do not fit the mainstream beauty norm often have to work independently:

- A. *Not every woman in this business is that blatantly attractive, and I've worked with girls who are all shapes and sizes and I've seen places like in Vancouver, you know, like [name of business omitted] . . . if you're not like completely plastic-surgery clean, you don't get picked so you don't make any money. So they're not going to stick around very long and they'll end up . . . what? Going to work on their own, I mean, that's just what would happen.*
- female off-street out-call sex worker

Sex workers and business owners were asked about the types of information that employers should share with job applicants in the hiring process. The *ESA* states that an employer must not make false representations in order to induce, influence or persuade a person to become an employee.¹¹ One escort business owner described the importance of describing the nature of the services that are provided at her establishment in order to ensure that any person who was hired was willing to provide these services:

- A. *Well, when we interview, when I sit down with them at the very beginning, I get some idea, I have a form that I fill out, like an employment form, and I ask them you know what their rules are on this that and the other kind of thing, if they have certain rules. And I may say to them well, you know the way you want business or the way you're used to it from somewhere else probably isn't going to fit with my style. My business is known for offering what they call "girlfriend experience" and that tends to be a more relaxed, open, kind of encounter that a man may have with a girlfriend or mistress, and so there would be, you know, kissing and affection, and a lot of things that some services might think was taboo.*
- female escort agency owner, former sex worker

The requirement that employers provide full information about the nature and conditions of employment is central to the ability of both the employer and the worker to enter into a binding employment contract under contract law. In order for the terms and conditions in the employment contract to be enforceable, an employee must be fully informed as to the details of their contractual arrangement. The statutory protection found in s. 8 of the *ESA* reinforces this obligation.

For many escort agencies or massage parlours, the job application process involves an interview where an applicant is asked questions about themselves, their experience in prostitution and, in some circumstances, about their physical measurements. Some sex workers described the particularly offensive and apparently widespread practice of male employers requiring job applicants to have sex with the owner or manager as part of the "interview" process:

- A. *Okay, when I went around looking for a job or to become an escort . . . I mean, every one of those guys that interviewed me, I had to have sex with them. Like that, to me, is sexual harassment. The escort owners want to try you out. I don't know of any*

¹¹ *ESA*, *supra* note 4, s. 8.

other profession that, when you go in to be a secretary, you have to give your boss a blow-job. You know, that is a form of harassment. You know . . . and it's no different from escort to massage and so forth . . . it's all the same. And I don't think that's ever going to change.

- female off-street out-call sex worker

Another sex worker described having a similar experience:

A. No, I tell you something. This is pretty disgusting, but this is happens to every single one. I mean every massage parlour that have it. I am pretty certain, hundred percent sure. 'Cause I have been some like you know three different massage parlours. I did not really work for the first one. What happens is the first thing when you go for interview And they will ask you do you know how to do massage? They will want you to get into the room. And like you know they will asking you to wear dress, skirt usually. What happens is they say, you know I am the test. And the test is you have to have sex with the guy [the owner] With the manager. Usually, what happens is some of them, they have managers. They say manager but I think that's just a pimp. Usually we call them dealers because they do not treat the girl as a person. They just called dealers. Doing the deal.

Q. Right. So they make you have sex with the dealer?

A. That's right. Because like some bigger massage parlours they have two dealers. They put them A or B. You know what I mean?

Q. And with the dealer or with the owner that you have to have sex with, do you use a condom with them?

A. Well, usually yes if you know. Because before I go, [name omitted] gave me tips. You can ask for it, but if you do not ask for it, they make you do it without a condom.

- female off-street in-call sex worker

The requirement that job applicants have sex with the business owner or manager as part of the hiring process could lead to criminal charges against the employer/manager. They could be charged with sexual assault on the grounds that consent was obtained by an abuse of their position of authority.¹² Such conduct could also be prosecuted as extortion under the *Criminal Code* if a court accepted the argument that there was a “threat not to hire” if the worker did not consent.¹³

The data gathered from this group of sex workers reinforces the importance of the protections provided in the *ESA* for job applicants. The existing *ESA* provision relating to full and honest disclosure about the nature of the employment is important for sex workers who need to be clear about the nature of the establishment and the expectations once they are on the job. Also these interviews suggest that people involved in the sex industry need a much better understanding of criminal sexual assault laws. Both employers and workers must be educated to understand that requiring job applicants to have sex with a manager or owner as a condition of hiring is a criminal offence. Police should be educated about the existence of such practices and be given the mandate to provide the same protection to sex workers as other victims of sexual assault.

Age of workers

Many sex workers expressed concern about the involvement of children and youth in prostitution. For example, the following project participant described her concern that if sex work becomes more socially acceptable, it may have the unintended consequence of making it more acceptable for children and youth to be involved.

¹² *CCC*, *supra* note 1, s. 273.1(2)(c).

¹³ See *R. v. Davis*, [1999] 3 S.C.R. 759, 179 D.L.R. (4th) 385.

A. *That's a fear of mine though too, that if things are decriminalized, that, y'know, people are going to, is the attitude going to be – oh it's been decriminalized, it can't be that bad? And there are still a lot of not good things about it. Yes there are women who do it, women and men who do it, because that is what they want to do and they make good money and dah, dah, dah. That's fine, because that's their choice. But there is still a lot of people that are sold into the trade from different countries, who are recruited from malls and youth centres. Who are 12, 13 and 14 years old.*

- female off-street out-call sex worker

In terms of employment standards and the hiring of youth and children, the *ESA* says that a person must not employ a child less than 15 years of age unless the person has obtained the written consent of the child's parent or guardian.¹⁴ However, the *Criminal Code* supersedes this legislation.¹⁵ Pivot's report *Voices for Dignity*¹⁶ called for the preservation of s. 212(2) of the *Criminal Code*, which prohibits procuring a person who is under 18 years of age, and s. 212(4) which prohibits obtaining or attempting to obtain for consideration the sexual services of a person who is under the age of 18 years.¹⁷ As long as these *Criminal Code* sections remain in force, the minimum age for hiring a person to work in prostitution will be 18 years. Jurisdictions such as New Zealand and the State of Victoria in Australia that have decriminalized or legalized sex work have also set the legal age for employment in sex work at 18 years.

Nature of employment

Employment contracts

As a result of the current criminal laws, sex workers are limited in their ability to enter into written employment contracts that disclose their true professional responsibilities. For example, sex workers in massage parlours do not normally have contracts that state they will engage in sex work. This deprives sex workers of bargaining power and control over their working conditions. If sex work is decriminalized, employment contracts could detail the full terms and conditions of the job – apart from the actual sexual services they perform, a consequence of the *Criminal Code* provisions regarding sexual consent.

Employers and employees in the sex industry ought to be able to make clear and transparent employment contracts that establish hours of work, wages, benefits, workplace conditions, and duties to be performed. However, employers cannot bind their employees to contractual obligations regarding the types of sexual services they will provide to individual clients because all sexual activity has to be consented to by both parties on a case-by-case basis, and can be withdrawn at any time. Therefore, employers and sex workers can enter contractual arrangements regarding many aspects of the job, but cannot create a binding contractual obligation to offer certain sexual services to any or all clients in the future. In accordance with the fundamental right to sexual self-determination, sex workers must always maintain the ability to withdraw consent and maintain control over their sexual activities.

New Zealand specifically addresses this issue in the *Prostitution Reform Act 2003* (the "PRA").¹⁸ Section 7 permits contracts for provision of commercial sexual services:

s. 7 No contract for the provision of, or arranging the provision of, commercial sexual services is illegal or void on public policy or other similar grounds.

However, S. 17 states that a person may, at any time, refuse to provide commercial sexual services, even if they entered into a contract to provide those services:

¹⁴ *ESA*, *supra* note 4, s. 9 (1).

¹⁵ *CCC*, *supra* note 1, ss. 212(2), 212(2.1), 212(4).

¹⁶ *Voices*, *supra* note 3.

¹⁷ *CCC*, *supra* note 1, ss. 212(4).

¹⁸ *Prostitution Reform Act 2003* (N.Z.), 2003/28 [PRA]. Available online: <www.legislation.govt.nz>.

- s. 17 (1) Despite anything in a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person.
- (2) The fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service.
- (3) However, nothing in this section affects a right (if any) to rescind or cancel, or to recover damages for, a contract for the provision of commercial sexual services that is not performed.

Many sex workers supported this type of provision, reasoning that individual workers must dictate what sexual services are provided, and to which clients. The New Zealand *PRA* provision set out above would be an appropriate addition to the *ESA* or to other provincial statutes that may be enacted to regulate prostitution once the criminal laws have been repealed.

Control over services provided

Canada's criminal law explicitly protects an individual's right to determine whether they wish to engage in sexual activity. Section 271 of the *Criminal Code* defines engaging in sexual activity with another person without their consent as sexual assault. Section 273.1(2)(c) states that consent must be received from the person who will be engaging in the sexual activity; consent is not received where a person is induced through abuse of trust, power or authority. Where an employer "induces" an employee to provide a particular sexual service, or threatens an employee who refuses to provide services, the employer could be prosecuted for violating the criminal law.

Section 273.1(a) states that sexual consent is not obtained when the agreement is made by the words or conduct of a third party. Consequently, an employer cannot provide consent on behalf of a sex worker. Because of these provisions of the *Criminal Code*, all sex workers have the right to withdraw consent at all times. It is, therefore, imperative that employers respect the worker's right to withdraw consent to perform sexual services. To be consistent with the *Criminal Code*, this respect must be observed in workplace policies and practices.

Sex workers felt that individual workers should have complete control over the services that they provide to clients. However, there are many situations where they are deprived of this control. First, many employers do try to dictate what services are offered to individual clients, although they clearly do not understand that this practice is illegal. Second, because of their circumstances – fear of violence, their vulnerable immigration status, or their poverty – many sex workers are unable to control the types of services they provide.

With respect to employer's asserting control over the sexual services their staff provide one sex-work business owner described the following logic:

- A. *You really have to break it down, into what's allowed and what's not allowed, so you don't have all the different shades of grey. So it just comes down to the sort of fairness and equality, and it's – it's not about – I mean, okay, you want to talk about nipples? Some women have very sensitive nipples. Some women don't. Some women have said to me, "Absolutely not, I just absolutely would not be able to stand that." But then I have to say, "Well, I'm sorry, you can't work here." Because I can't say to 30 other girls, that you are better than they are. Um – so I mean, some things again on the face of it, can seem really unfair. Well, if that really bothers a woman, why do you make her do that? Why? Because I can't tell thirty or forty others, that they have to, and not her. Can I tell them all they don't have to? Well, no. Because there's very little we allow a client to do in that room, and we've decided that the sucking of a breast, is not a health risk. So therefore it goes. Given our competition that is offering bareback blowjobs, am I asking too much of you to allow a client to suck on your breast? Um*

– so . . . Would I enjoy a client sucking on my breast? No. For the amount of money I charged? Did I let it go? Yes. Given the alternatives and the other ways to make a living. So, one of the things that I take really important, is the consistency of rules and their consistent application amongst all staff. And it can sound really crass, to start saying how you write it down. And that's just one example of that, I guess it is just a little bit funny at the same time, to put it so bluntly. But, the alternative is to have all different rules for different people. Well, the really, really fucking pretty girls they don't have to give up quite as much of themselves in the room. 'Cuz they don't really have to, they can just lay there and look good.

- female massage parlour owner, former sex worker

The same business owner described how there are more extreme cases in which other business owners require their workers to provide services that they do not want to perform, and under unsafe circumstances:

- A. *At the other end of the spectrum, you have some very, very evil employers. Like the one I am describing. Where they'll y'know, tell their staff this is – this is what you need – you need to do to work here. But yeah, there's this other big grey area, where they don't actually tell their staff that they have to do these things. But it's pretty obvious who risks their health for clients. And who gets the bulk of business. So they will allocate their business to the girls that are giving up the most. 'Cause that's what's making the clients happiest. Or there's the other people who don't condone it and don't openly say, no I don't want you to do that here. But at the same time, they are like well, the girl is going to be offering that anyway, she may as well be doing that on my – my watch. Or, well she is going to offer it anyway, that is her choice. And she just happens to work for me. Or, y'know, there's a very sort of just ambivalent attitude towards it? Y'know, like I can't save the world type of attitude. Well, it's like, yes you can! If – if everyone employs standards of what is acceptable and what isn't acceptable, then it would even the playing field for – for all sex workers. But for the ones that want to operate safely, it's really hard to compete with those who don't. And then you end up with people who want to operate safely but they end up not or taking chances, or maybe extending their boundaries a little bit. Maybe not offering everything that I gave you on the previous list, but maybe saying, well god, a client thought I was really cold and clinical, maybe I should neck with my clients and okay, maybe I will just let them put their fingers in me, then. Or y'know, thinking well maybe I could just give up some of my boundaries so that I could get return business or repeat business. And that's – that's where I see the problem – is all these shades of grey.*

- female massage parlour owner, former sex worker

Currently, some establishments specify that they offer particular services to every client, such as a “Girl Friend Experience” or “GFE.” This industry term indicates that more intimate sexual services are offered, such as kissing. One employer described how her workers must be willing to provide a GFE to clients in order for her to employ them:

- A. *When we interview, when I sit down with them at the very beginning, I get some idea, I have a form that I fill out, like an employment form, and I ask them you know what their rules are on this that and the other kind of thing, if they have certain rules. And I may say to them well, you know the way you want to business or the way you're used to it from somewhere else probably isn't going to fit with my style. My business is known for offering what they call “girlfriend experience” and that tends to be a more relaxed, open kind of encounter that a man may have with a*

girlfriend or mistress, and so there would be, you know, kissing and affection, and a lot of things that some services might think was taboo. But I don't want my clients to feel processed, I don't want them to feel like "eww, you probably got something yucky and we don't want to touch you." I want it to be a great exchange for both people, and have a minimum amount of paranoia. It's probably a metaphysical point of view of mine but it seems to me that if there's no bad energy coming from either side, then how much can go wrong, and that goes with the health as well.

Q. What kind of process do you think an employer should have for, if for example, a worker works for you for five years and there's no problem in terms of services and then one day you sort of hear either through the client or, I guess it would have to be through the client, or maybe the worker, that she refused to do a particular aspect of the service? How do you think an employer should deal with that, if at all?

A. . . . I mean for myself, I would try and find out what was going on, why that happened, was it this particular individual, was there something about them that you know, raised a red flag, or made some objection. I mean people have said, you know I would normally kiss but this one was really kind of disgusting or didn't smell so good or something like that. Uh, you know, if someone, if the lady's being reasonable, I have no quarrel with that.

- female escort agency owner, former sex worker

Some employers may even expect GFE services to involve oral sex or sexual intercourse without a condom.

Some employers offer a set "menu" of sexual services available at their establishment, and all workers in the establishment are obliged to offer the services on the menu, even where the worker does not wish to. This practice has the potential to violate the sexual assault provisions of the Criminal Code. Upon accepting the job, workers may have agreed to provide a range of services to any client, but under current law, consent must be obtained for each sexual encounter, and can be revoked at any time. Therefore, sex workers must not be placed in the situation of consenting to engage in sexual activity as a result of inducements, pressure or under duress.

In the following excerpt, a project participant discussed sexual assault and the importance of the sex worker's consent:

A. Okay, from the point of an employer I think yes, they are the ones that take advantage, they're the ones that believe in free sampling of the wares. You know? You'd be surprised. The only time I have a potential problem with a client is if he wants service I don't provide and he's sort of on the drunk side. And then he can be belligerent and keep asking and keep nagging, and it's like, you know what I do? I'm a big girl and I look at him and I go if you do that one more time you're not going to get the time you expected from me because I'm going to leave and you're going to be left to your own resources. And that usually straightens them right up. And if it doesn't, on one of those occasions when it doesn't, I just climb into my clothes and I leave and I go maybe next time you'll have a better grip. And, you know, you'll grab a brain and you won't do that again. There's no room for sexual harassment charges with clients. There is room though for sexual assault charges. That is to say that if a girl doesn't provide a particular service, and he doesn't care and goes ahead and takes advantage of her that way, then of course. I mean, there's tons and tons of girls in this industry for instance that don't provide anal sex. Occasionally, some client will come along and say well I paid for it, I should have it and those, those sorts of things, those should be prosecuted. I mean nobody should get away with doing that to another

person against their will.

- female off-street out-call sex worker

Given Canada's sexual assault laws, sex workers will always be legally entitled to maintain control over the sexual services they provide in any given transaction. This right cannot be overridden by contractual obligations or workplace rules. Sex workers will always have the right to refuse sexual activity, regardless of any prior arrangements with an employer or with a client.

Even though this protection is in place, the reality is that sex workers who are living in poverty may feel compelled to engage in sexual activities that they do not feel comfortable with in order to retain a client or earn more money in a single transaction.¹⁹ Many sex workers reported that some customers offer higher fees for unsafe sexual acts. The practice of clients offering to pay more for risky sexual acts was a recurring theme. Sex workers who are in greater financial need may be at more risk of being compelled to engage in unsafe practises. One sex worker described receiving more money for providing oral sex without a condom:

Q. Now did they give you condoms there?

A. No, you have to have your own condoms

Q. So, were you using condoms?

A. Yes, I did.

Q. All used or . . .

A. All used.

Q. Did customers ever offer you not to use a condom?

A. Oh, yeah.

Q. And did they offer you more money not to use a condom?

A. I take the offer when it's blow job. I do not take the offer when it's having sex.

- female off-street in-call sex worker

Some sex workers are pressured to engage in unsafe activities in order to generate enough income to pay escort agency fees, such as transportation, security, administrative services and other work-related expenses:

Q. Should [sex workers] determine what services are provided?

A. Oh, definitely. Some girls that work for the agencies, they go on these calls and one girl says well . . . the guy wanted Greek but I won't take it up the ass. And he says well you do what you're supposed to do because that's what you are. You know, they're . . . I'm just so frustrated . . . You're just forced to do unsafe things to pay [the escort agency's] fee.

- female off-street out-call sex worker

To a certain extent, these financial concerns can be addressed by providing sex workers with wage protection (see the discussion of wage protections in the section "Financial arrangements and wage structure" on page 29).

Several workers described how in certain massage parlours, only "Canadian" sex workers are able to exercise control over the services they provide. Several sex workers, including the massage parlour worker below, said that workers who do not have Canadian residency status have much less power and control over their work:

A. I do feel unsafe, but it's not that bad. The guy did not raped [sic] me. He just, you know, he was trying to, like, having sex with me . . . He was trying to have sex with

¹⁹ *Voices, supra* note 3.

me without a condom. I said no. And then he trying to grab me. Starting to grab me really hard, trying to forcing [sic] me to do it. Like he want to rape me . . . so, I was screaming. And my friend, that is my friend was just passing by and she knocked on the door. Like, knock, knock, go, go. That's why I was lucky. That's why I was away. And . . .

Q. So she rattled on the door and he got scared?

A. Yeah, and then he stopped. I went out and I said, I do not want to do him. Cause I am . . . This is the difference when you are Canadian; you have a choice to say I do not want to do this guy. In all those massage parlours if you are not, like you cannot say no. And that's what I want to talk about. It's so unfair.

Q. Did you talk to the owner? What did the owner do?

A. The owner trying to offer him a different girl, that's all.

- female off-street in-call sex worker

Differential treatment of employees on the basis of race, ethnicity or place of origin is prohibited by the B.C. *Human Rights Code*.²⁰ Accordingly, these workers could file a complaint with the Human Rights Tribunal. In the event it sustained a complaint, the Tribunal could order the employer to cease the discriminatory treatment, and could award the worker compensation for any lost income, and damages for the injury to their dignity and self-respect.

Some sex workers described losing control over the services they provide because of their vulnerability to violence in the workplace, and because there is no protection from “bad dates.” The above passage, which describes an employer who continued to offer services to a client he knew was violent, exemplifies the lack of protection in some workplaces.

One project participant, a foreign national, described her lack of control over her work and the violence that she endures in the workplace:

A. . . . there is something I have to say. This is makes very disappointed. It's not too, too bad in the Kingsway one, but I have been in one before that one. I have been in one massage place and actually, Kingsway is not much different than that one, a little bit better. What happens is that they do not really care about your safe. This is makes me very disappointed. I am going to say about it. I am going to talk about it. One time at the older one, like the one before Kingsway. In that massage parlour. One time, I get in and it's so dark. The customer, they can control the light. If they want to put it darker and I got raped. Two times and it was a big guy . . . He is so big. I have no way to run away and I was screaming. I just screaming. I am pretty sure I am screaming, and actually, I remember there was a lady passing by. She backed that way, but nobody coming for me.

Q. Was the door open or closed?

A. It's closed.

Q. But there was like a window or something?

A. Yeah, a window, usually there is a window.

Q. So, she could see you.

A. Yeah, but she did not do anything. I mean like, I was so like . . . I was crying; I was so disappointed. And when coming out, I getting so mad and I talk to the owner. And you know what he said. Hey girl, well, abh you have to know that when you get in the room you are on your own. You have to take responsibility for your own safe. Well, we cannot do anything. The customer is gone and we cannot do anything. And

²⁰ *Human Rights Code*, R.S.B.C. 1996, c. 210 [HRC].

I do not want to call cops. They won't do anything.

- female off-street in-call sex worker

Violence in the workplace is a serious issue that is dealt with at length in the section on Occupational Health and Safety (see page 121). Reducing violence in the workplace is central to protecting the basic human rights of sex workers and increasing the degree to which they control the services they offer.

Since each sex worker has the legal right to control what services she or he provides, employers in the sex industry are not entitled to control this fundamental aspect of their business. This issue is unique to the sex industry and creates challenges for employers who want to define their business. Sex workers were clear that, ultimately, they should maintain the right to decide what services they provide. However, some workers suggested that the employer should have a role in determining the overall nature of their business, and this may mean enabling them to be specific about the types of sexual services that are offered. These workers felt that once the worker is aware of the nature of the services that the establishment purports to offer, he or she can determine whether they want to work there. Nevertheless, for the reasons set out above, even if the worker is aware of the types of services that are supposed to be on offer, the establishment cannot guarantee that each staff person will provide every service on the “menu.” A sex worker maintains the legal right to withdraw consent to perform a particular service in the context of an individual transaction. Neither sex workers nor owners demonstrated an awareness of the worker’s rights in this respect.

Q. So let's talk about provision of services. Who should decide which services are available to clients?

A. Oh the women, the working women.

A. The working women, yeah.

Q. So if it was a situation where there is an employer, should the employer have any role in deciding what services are available?

A. Yeah, what they are comfortable . . . with too.

A. The employer will be saying, I am going to be have a house that is doing bondage and discipline. And that's all I am doing . . . that's all. And non-sexual. That's fetish, only fetishes. And then another house would say I am doing everything.

A. Yeah, yeah. And I think that then you – the bosses and the girls – everybody could work where they feel comfortable.

- female escort agency owner, former sex worker

A number of escorts discussed the issue of control over services and illustrated the complexity of this issue for both workers and employers.

Q. If you do work for an employer who should decide what services you provide?

A. Well, that again I think if the industry were right open then an establishment would be known for what it provides and not all establishments would provide that service.

A. It would be that sort of, simple.

Q. So who should be the one to decide what services are provided?

A. The employer. The employer could say that. If it was all on the up and up they could say if you don't do that well then you can't work here. I don't think that's any discrimination or anything.

A. I think it has to be between both because certain girls do certain things and also it actually kind of depends with me, if he's willing to pay the outrageous price, sure I'll go for it, I'll do it. So I think it's up to both parties actually and also . . .

A. But if you are the business person you have to have a consistent standard. You can't have you know, just . . .

- Q. And why is that? Why do you have a consistent standard?*
- A. Because it's a business and you have to . . . the clients have to trust that they'll get what they want.*
- A. And they have to know their limitations also and how far they can go.*
- A. So if you are going to run it like a job I think what the employer should do is find certain services that these clients are asking for and find certain girls who will do them, who will fulfill their fantasies, who will fulfill what these guys want and what they're paying for.*
- A. So it depends on the employer. Say this employer provides this service and this employer provides maybe bondage and stuff like that so it depends on your employer like where you want to go.*
- A. For myself . . . that's where my limits would be. As far as I want to go would be up to me because it's my body, it's my health, it's my everything that I'm sacrificing, it's not them.*
- female off-street out-call sex workers

Ultimately, all those involved in the sex industry must understand and respect the legal principle of consent that puts the decision about what sexual services to provide in the hands of the sex worker. Clearly this principle places limits on employers that may seem unreasonable from their point of view, but given the nature of prostitution and the law of consent, the control must rest with the worker in order to protect their right to control their sexuality and physical autonomy. Existing legislation may not adequately protect sex workers from retaliation by employers who find workers refusing to provide a full range of services. Termination or other punishment on this basis could be grounds for workers to bring legal actions for wrongful dismissal, either in court or before the Employment Standards Branch.²¹

Financial arrangements and wage structure

Financial arrangements

This section provides an overview of the various pay arrangements that sex workers described. It focuses on the arrangement between employers and employees with respect to wages, setting pay rates for different services, paying for work-related expenses, and distribution of profits.

Independent escorts and many street-level sex workers are self-employed. They set their own fees, retain all of their wages, and pay all business-related expenses. But a significant proportion of sex workers work for employers, either at the street level, in massage parlours, or in the escort industry. These employment relationships vary considerably when it comes to how much they respect the worker's rights. Many sex workers face an imbalance of power when negotiating terms with their employers. Providing sex workers with negotiating rights is an important way to empower them as workers.

Sex workers described five different kinds of payment arrangements between employers and sex workers (for further detail, see page 29 of this report):

1. "Sexual exploitation and sexual slavery": An illegal arrangement where sex workers are subject to total control by their employers, and their wages are either inconsistent or nonexistent. Sometimes worker is given room and board, but very little salary. Sometimes they are given a salary, but then have to pay various debts, in which case they are effectively held in debt bondage, a form of sexual slavery.
2. "Basic wage plus commission": the worker receives a fixed amount per client and then negotiates a "tip" for sexual services, which they keep.

²¹ *Stolle v. Daishinpan (Canada) Inc.* (1998), 37 C.C.E.L. (2d) 18, 98 CLLC (B.C.S.C.), para 210.

3. “100 percent commission”: the worker keeps only the “tip,” and is not paid a fixed amount per client.
4. “Shared commission”: the client’s flat fee is split on a percentage basis between the worker and the business.
5. “Hourly wage”: in some cases, workers are provided an hourly wage for all of the time that they are at work, regardless of whether or not they are with a client.

What types of wage protections do sex workers want?

Generally, sex workers want freedom to enter into a range of financial arrangements with their employers and have formal bargaining power. Decriminalization is an important first step towards this goal, because sex workers would be able to create clear contractual arrangements with their employers setting out the nature and conditions of their employment, including pay. The ability to enter into legal employment contracts would be an important first step to increasing protection of sex workers employment rights. With legally binding contracts, sex workers would be able to seek legal recourse if an employer violated their statutory and contractual obligations.

Sex workers entering into a strict commission structure would be characterized independent contractors, thereby making them ineligible for most labour and employment protections.

When determining whether a worker is an employee or an independent contractor, one factor to consider is whether the person has a chance of profit and a risk of loss. If they do, they are more likely to be considered an independent contractor. While many people who work on commission are still considered employees under the *ESA*, one factor that enters the equation is how much risk they face in conducting their work. Therefore a worker who does not receive any guaranteed minimum wage per client and only earns that which is paid to her in the form of a “tip” will likely be considered an independent contractor, since the worker bears the entire risk for the vagaries of business, whereas an employer must pay an employee, or make them redundant on grounds of financial exigency.

Many sex workers supported the idea of a minimum wage, but the actual rate in B.C., \$8 per hour at the time of writing,²² was thought to be so low that it was not particularly helpful to sex workers. One project participant stated that a minimum wage would be appropriate, but it would have to be set at a much higher rate for sex workers:

Q. Should there be rules about wages like should there be a minimum wage or . . .

A. Oh definitely. If you're working for somebody the ultimate thing is the employer's making money off of you. I just keep using this escort as you'd see, the internet, they charge 200 bucks an hour and out of that you get . . . I just remembered the actual price it was \$97.15 an hour and it's all legal. They still have to make their money but there should be a minimum wage and their minimum wage is 97 bucks an hour so I think that's fair.

- male street-level sex worker

Even with a guaranteed minimum hourly wage, workers would be free to negotiate higher hourly wages or a base salary, and would still be able to operate on a commission basis. At least a guaranteed minimum hourly wage would provide an important protection when work is slow or when clients fail to give adequate tips.

The application of the *ESA* minimum hourly wage would mean that sex workers would be paid for all work, including the non-prostitution related tasks that they perform (e.g. straight massages and escorting, receptionist work, cleaning, and administrative tasks). As one worker stated, it is important that, even if you do not get any clients, you get paid something for your time at work. In

²² *Employment Standards Regulation*, B.C. Reg. 396/95, s. 15(1).

most arrangements, sex workers are not paid for time they spend at work waiting for clients – which can be the majority of the time. Several workers described having to clean and do secretarial work without compensation while waiting for clients. This common practice is a clear breach of s. 34 of the *ESA*, which states that if an employer requires an employee to report for work on any given day, the employer must pay the employee for a minimum of two hours at the regular wage whether or not the employee starts the actual work they are being paid to perform. Workers who not only attend work but also spend time performing any service required by the employer must be compensated for all of their time spent working, and, at a minimum, for two hours. For example, this means that a worker who shows up and is told to go home without starting work gets paid for two hours, a worker who shows up and does 10 minutes of cleaning and then leaves work is paid for two hours, and a worker who shows up and spends six hours cleaning, and then leaves work is paid for six hours. An escort states that these same benefits should apply to prostitution.

A. But you should still get paid for showing up. Like, even if you have one date. If you are scheduled for one date, you should still get paid for the minimum, whatever the standard is. I think it is two hours, to show up.

- female off-street out-call sex worker

Sex workers raised several other work-related financial issues. One important issue was the employer practice of making workers pay for supplies related to occupational health and safety. For example, some massage parlours and escort agencies expect workers to pay for their own condoms and lubricants. Some sex workers felt that the employer should pay for these work-related supplies. In some cases, workers pay for transportation, security, administrative services, and other work-related costs. The result is that a worker who does not have a very profitable shift at work can end up owing money to the employer.

Sex workers would benefit from the application of s. 21(2) of the *ESA*, which provides that an employer cannot require an employee to pay any of the employer's business costs unless authorized by the regulations. Thus some of these charges – notably administrative services, transportation and security – are likely contrary to the *ESA*.

Some workers complained that they were subject to fines or penalties by their employers for calling in sick, or not responding to a client call:

A. So that they [the government] know who is running them [sex work businesses] and to have control over the organizations that are having these girls, making sure what kind of environment it's in, how they are being treated, what kind of fees that these people are charging. I mean, all that stuff, needs to be regulated. Because it jumps around from one agency to the next agency, then that agency decides, "oh! I am going to charge you for this!" So next thing you know you have got fines on your board, hundreds and hundreds of fines. So there's no control over what they can do of taking that money, that girl's money, when she is working for them. And, that gets ridiculous. I've seen some places go up into the hundreds.

- female off-street out-call sex worker

Under the *ESA*, such fines are illegal. Section 21(1) says that unless authorized by legislation, no employer can deduct or withhold all or part of an employee's wages. In this sense, many sex industry employers are currently breaching their employees' rights under the *ESA*.

Hours of work, overtime, statutory holidays, vacation time and sick days

The *ESA* states that an employee must have at least 32 hours in a row each week that they do not work. If an employee works during this period, it is considered overtime, payable at a rate of time-and-a-half. Also, an employee is entitled to have eight hours off between shifts.

Sex workers were asked about the length of their shifts and what they felt was a reasonable number of hours for a shift. One project participant described how she currently works five-hour shifts seven days a week:

- Q. Were you working everyday?*
A. Yeah.
Q. And how many hours in a day?
A. Well, you have to show around eight or nine o'clock at night at least and sometimes around six at night and you have to leaving at least one or two o'clock at least.
Q. Okay, and how many customers could you see say between eight at night between till one in the morning? So that's five hours how many how many guys would you see?
A. Sometimes you could see 10 – 15 guys. Sometimes. Sometimes, you could see like four or five. Sometimes, when it's busy you can see 10 or 15.
Q. So is there a limit the amount of time a man can stay with you?
A. I do not know.
Q. And who is keeping track of that?
A. The boss.
Q. Okay, so they would, what? Come and knock on the door or what?
A. Yes, 45 minutes usually. And if they want more hours, they have to pay right away.
 - female off-street in-call sex worker

One business owner suggested that working for an employer is advantageous because, as an independent, work is much more sporadic. Regularity of business is necessary to make a living wage. Working for an employer means that work takes place during designated shifts and there is time off in between.

- Q. What do you see as some of the advantages and disadvantages of working in sex work, where you have an employer? As opposed to working in sex work totally independently?*
A. Well, now that's where it depends upon the individual dynamic of the person. Because it depends what your special skills are. And what they sell or not. So if you are going to work independently, you – you need to be willing to answer your phone or your pager all day long. Which means either you have no privacy or you have no life. Because it is pretty obvious when your phone keeps ringing, and you have to keep leaving the room – that people are suspicious. Because you can't sit with your friends and say, "Well I charge this much an hour, and I am going to do this and that and I have lots –" Y'know you can't do that. So you are either have to stay home all the time, or turn your phone off. And if you turn your phone off, you are not going to make any money. So working independently is a big commitment in that sense, because you – in order to offer any level of service, you have to be constantly available.
 - female massage parlour owner, former sex worker

Sex workers' opinions varied as to how long shifts should be. Some felt that shifts should be four hours; others felt that 12 hours are acceptable if a worker wishes to work that long:

- Q. What about hours of work? The standard work-week right now is eight hours a day five days a week.*
A. Well these days prostitution is 24-7.
Q. What do you think of limitations? Do you think there should be limitations?
A. Ya, I think there should be limitations.
A. No. No.
A. Because there's other employees that work 24-7 like call centres.

A. *But I think you're talking more – can they make you work for 12 hours straight?*

A. *Oh, okay.*

A. *No. I think it should be different shifts.*

A. *Different shifts, ya.*

A. *On call?*

A. *Eight-hour shifts.*

A. *That would be fair for everyone.*

- female off-street out-call sex workers

A. *Yeah, but I would make it our own . . . like, eight hours is a long time to be doing work on the street or whatever right. So, I mean, the hours would have to be different. I mean, some girls like to work that long. Me, I like to two or three hours and I am finished. I don't want to be spreading my legs for eight hours a day. It is way too long for me.*

- female street-level sex worker

Several other project participants said that when working for an employer, it is important to be protected from unreasonably long workdays. If self-employed workers wish to work longer hours, they should be able to, without any constraints, as this discussion illustrated:

Q. *What about hours of work and overtime? So say you're working for somebody should there be a maximum number of hours that you should be required to work and if you work past a certain number of hours . . .*

A. *Not when it comes to the sex trade, no.*

A. *24 hours on call.*

A. *I don't think in the sex trade, I don't think a person should have to work more than 12 hours a day. If you have to work more than 12 hours a day then your employer seriously needs to be changed. But if you're working for yourself that's a 24-hour job and you can work the 24 hours if you want to. That's your choice.*

A. *Due to the fact that it is a very short life span in terms of jobs and careers it should be able to be worked 24 hours. We shouldn't have to be restricted to eight hours because you know, eight hours, people got eight hours for 30 years and we got what, eight hours for five, six years, whatever. We should be able to work you know . . .*

A. *. . . I think that you don't want sweatshops developing.*

- male street-level sex workers

According to these opinions, sex workers would be permitted to work lengthy shifts under the *ESA* as long as they do not work “excessive hours.” The *ESA* prohibits employers from requiring or allowing employees to work excessive hours, or hours harmful to their health or safety.²³

If defined as employees, sex workers also would be entitled to overtime pay. The *ESA* states that after working eight hours in a single day, an employee must be paid time-and-a-half for the next four hours worked, and double-time for all hours worked in excess of 12 hours in a day. An employee who works more than 40 hours in a week must be paid time-and-a-half after 40 hours. The *ESA* would permit sex workers to negotiate with employers the number of hours worked per week. Employers and employees can enter into “Averaging Agreements” that permit hours of work to be averaged over one, two, three or four weeks, thereby enabling employers to avoid paying for overtime.²⁴

Sex workers favoured the idea of having a day off on a statutory holiday while still earning an average day's pay:

²³ *ESA*, *supra* note 4, s. 39.

²⁴ *Ibid.*, s. 37.

- Q. Okay now what about statutory holidays?*
- A. That's where payment should be doubled. I've worked Christmas Day and I've made good money on Christmas Day but that's the time when you should actually be spending with your family. Well if you're going to be working on that you should be getting paid extra. Those are special days.*
- A. Granted it may look unfair to the John that they have to pay double even though they don't have anybody to be with on Christmas it's still a matter of it's Christmas and let's be honest we have friends we'd much rather spend Christmas with than go out and make money in a lot of circumstances.*
- Q. Any other comments about statutory holidays?*
- A. It's a hard one, it truly is because I find I make my best money on statutory holidays especially around Valentine's and it's not a statutory holiday so . . .*
- male street-level sex workers

Given that statutory holidays tend to be especially lucrative for sex workers, they would benefit from the protection that an eligible employee who works on a statutory holiday is entitled to: time-and-a-half for the first 12 hours worked, and double-time for any work over 12 hours.

With respect to vacation time, the *ESA* sets out that after completing one year of employment, an employee is entitled to two weeks vacation. After five years, an employee is entitled to three weeks vacation. Sex workers liked the idea of having a paid vacation.

- Q. Do you think there should be vacation time that kind of thing, overtime and regular hours?*
- A. Yup, definitely, it's a stressful job and jobs that stressful should have vacation time. A lot of the time we get asked to stay double shifts, it's a long day and we should get the return of having the benefit of overtime.*
- female off-street in-call sex worker

Employers are required to provide a number of unpaid leaves, including pregnancy leave, parental leave, family responsibility leave, bereavement leave, leave for jury duty and sick leave. With respect to sick days, Part 6 of the *ESA* provides for unpaid leaves. Consequently, employees can take time off due to illness and not be fired for being absent. Fines for missing days of work are illegal under s. 21(1) of the *ESA*.

Currently, sex worker employees are not entitled to paid leaves, statutory holiday pay, overtime pay, or sick time. Sex workers felt that this entitlement would make a positive change to their working conditions:

- Q. Okay, next question. Say you're working for an employer, you're not independent, should you be able to get leave from work if someone in your family dies.*
- A. Yes, definitely.*
- A. Grievance pay.*
- Q. Okay and what about vacation time?*
- A. Four percent of your earnings.*
- Q. Okay so you guys already know.*
- A. Is it not six?*
- A. It depends on your employer. I think four minimum.*
- Q. So you guys think that the same rules that are normally out there should be . . .*
- A. Oh ya it's the only way to make us feel part of the working world without judgment right?*
- male street-level sex workers

Work-related supplies, expenses and clothing

Many business expenses have to be paid to operate the sex industry. For example, escort agency expenses include office administration, reception and dispatch, advertising, transportation, security, and clothing. One escort agency owner described the types of expenses she pays to run her agency:

A. The ladies should buy and carry protection with them at all times, meaning condoms, and . . . if I wind up supplying those things then . . . when they go out to a hotel, they're not used to having them on. As far as I'm concerned, they should be responsible for their own personal safety that way . . . sometimes people arrive without them and I give them some. I do provide, like a very safe and discreet location to get together with people in and that's very homey and very clean, and has showers and you know, whatever you need in terms of comforts, music, lighting, etcetera. And lately I've gotten a hold of a guy who does driving so that when ladies don't have a method of transportation of their own to get places he can do that for a reasonable cost. And sometimes I leave that completely up to the lady to pay for and sometimes I split it with her, and that's sometimes a bit of a . . . I guess a security measure as well, knowing that he's waiting for her and not far away.

- female escort agency owner, former sex worker

Many street-level sex workers rely on condom distribution by local social service organizations:

Q. Do we need more organizations to supply street-level girls?

A. Yes.

Q. Condoms?

A. Definitely, needed.

A. Yes.

A. The more, the better.

- female street-level sex workers

Several sex workers reported that some massage parlours do not provide any supplies other than clean towels and a physical space in which to provide sexual services. Several workers stated that, in many workplaces, they disagreed with the requirement that workers provide their own condoms. There is little question that in the context of prostitution, condoms are an important form of “protective equipment.” As discussed in the section on Occupational Health and Safety, the *WCA* and the *OHSR* require employers to provide protective equipment:

Q. Now did they give you condoms there?

A. No, you have to have your own condoms.

Q. So, were you using condoms?

A. Yes, I did.

- female off-street in-call sex worker

Some sex workers felt that massage parlour owners also should provide security services:

A. So, if its in a brothel, or something, if the boss is paying the electricity, the hydro, making sure that there are condoms, lube, making sure that all . . . everything is supplied. That there is no extra cost to the sex trade worker. All she has to do is show up. If everything is taken care of. Realistically, it is very expensive to be a sex trade worker. Like it's not a cheap business. So if the boss is taking care of everything, not forcing her, the woman, into the trade. Y'know, being scheduled, do you know what I mean? If it is run like a legitimate business, then all the woman is doing is coming . . . And everything is supplied then, [the employer] should get part of [the earnings].

- female off-street out-call sex worker

One sex work business owner suggested that independent sex workers have a hard time covering their business expenses:

A. You take a higher security risk . . . when you are [working independently] Y'know a lot of girls will pay a driver to sit outside and wait for them – but that again, cuts into your bottom line. So financially, it isn't always feasible, unless you are a very well paid person in this industry, it may not be worth the financial commitment to pay a driver, to sit outside for an hour. Or half an hour, whatever the length of time the call is . . . Um – those are sort of the downsides. You have to pay all your own expenses when you work independently. You have to pay your advertising costs, you have to pay for all your supplies.

- female escort agency owner, former sex worker

Other project participants felt that sex workers should provide some of their own work-related supplies:

Q. Do you think there is anything an employer should have to provide, and if so, then what sorts of supplies?

A. Well, I think we don't have to go too far. I think, if we're all adults and we agree that it's decriminalized, then the employer could relax and say ok well now that it's cool. By all means, he should definitely provide, you know, the condoms, but when it comes to other things, each girl would probably carve out her own niche. One would maybe do massage, another one might do some spanking. And I think at that point, it's, it's like a welder. Welder has to come in and provide all his own tools and his own toolbox but he uses the company logo, so, you know, you use the company condoms, but when it comes to your little specialties, yes, it costs to provide that, and it doesn't mean that you as a worker wouldn't be well compensated because you would charge extra for those little things that you provide anyway that are different from somebody else.

- female off-street out-call sex workers

The repeal of the criminal laws surrounding prostitution could increase the bargaining power of sex workers to negotiate better contractual terms relating to the provision of supplies. Also, it would provide sex workers the benefit of the protections found in the *ESA* requiring that the employer cover certain “business costs.” Section 21(1) of the *ESA* states that an employer must not require an employee to pay any of the employer’s business costs except as permitted by the regulations. This could mean that, unless an employer was able to argue that transportation, security, and supplies were not business costs, the *ESA* would require that the employer pay for those costs, and it would be illegal to make deductions from an employee’s wages on that basis.

The *ESA* provides that an employer who requires an employee to wear special clothing must, without charge to the employee, provide the special clothing, clean it, and maintain it in a good state of repair. This means that if employers require sex workers to wear special clothing, the employer will be responsible for providing it. It remains to be decided whether this might include items of clothing, such as lingerie, rubber gloves and fetish wear.

Training

The *ESA* states that the employer is required to pay for any meetings or training that they direct their employees to attend.²⁵ Where an employer requires an employee’s attendance on the employee’s regular day off, the employee may be eligible for overtime, minimum daily pay, or other entitlements under the *ESA*.

²⁵ A Guide to the Employment Standards Act, online: Employment Standards Branch <<http://www.labour.gov.bc.ca/esb/esaguide/faqs.htm>>.

Sex workers supported job training as a vehicle for providing sexual-health education. A sex work business owner described the training that takes place for her staff:

- A. *It [training] should be huge. I mean – when we hire people and we tell them, y’know, we book them to come in for training, they laugh at us. It’s like, for training? What do you mean? They are thinking, I have done this before, what are you possibly going to tell me to do? And they – they laugh at us. But it – we like to sit down and go through everything. A lot of it is just administrative stuff. Well, y’know, this is what you need to clean in a room, when you are finished, and this is what you need to replace. And this is y’know, where the laundry goes. A lot of it’s just administrative stuff. But we spend a huge amount of time talking about hygiene. And what goes on in a room. Because what goes on before a girl goes into the room, and what goes on when a girl comes out of the room, we see. All of that. So if there’s things we want someone to do differently, or need them to do – Oh no, we don’t put that there, we do that there. And oh yeah, you have hand prints all over the mirror, you need to go in there and clean that. Y’know that’s stuff that we see. We could correct it, and everyone eventually will – will fall into place. But what goes on in that room for an hour, we don’t see. And if someone is jeopardizing their health, you don’t want to find about it a month later. So you need to be pro-active and y’know we – our training probably, is only three hours long – but you can’t make it any longer than that. People don’t have the attention span, they are not hearing you anymore, they are not listening to you anymore. So, we really need to sit down and tell people what is a health risk. We get a lot of people who have worked for a very long time, and they already know these things. A lot of people that have worked a long time and don’t know these things. We get a lot of people who have never worked before and they are very naive, very mouldable. Very vulnerable. And you could tell them to do anything and they would do it. And it’s – it’s horrible because there’s many places that do.*

- female massage parlour owner, former sex worker

It was commonly felt that the employer should be responsible for providing and covering the cost of the training, and that training should be mandatory:

- Q. *And what about training on the job? What sorts of training should an employer provide?*
- A. *Well, now, see, I’m not sure that it’s an employer that should provide the training. I think that before somebody is hired, it should be compulsory, regardless, I mean, this goes all the way back to whatever level we’re talking, I don’t care if you find somebody out on the street and the first time say sorry before we see you on the streets the next time we want a certificate that says you did this training, and, and it’s mandatory and if you don’t do it, we’ll make you sit through class . . . and it doesn’t even have to be class, it can be on a videotape, so there’s no real good excuse to say, somebody’s working, um, for six weeks without taking this course, it’s like sit down and watch this video. Um, and then, you know, come out tomorrow and work. But, but, I mean, it should be, it should be multi, multi-faceted. I mean, sure you’ve got your sexually transmitted diseases, and how to prevent them. Unwanted pregnancies they should have, as uh. Personal safety too, all the possible scenarios. They’ve got them on TV, these things are easy to tape, to put a compilation together. They shouldn’t go further than that though, they should teach people about good health, uh, where they can go for drug addictions and counselling, and twelve step programs and ADAC and things like that, and other resources, shelters. All the things that people need to*

know as a foundation, so that if they ever want to change their course they can, and then it should be realistic enough to say that some people will never change their course so let's give them something to aim for.

- female off-street out-call sex worker

Many sex workers stressed that training should cover occupational health and safety. Sex workers described how this type of training is currently taking place in some workplaces:

A. We have policy there and we go through training and if anyone is caught doing anything without protection, they are going to get fired. But nobody knows what goes on behind closed doors right? So . . . I noticed that in the massage parlour everybody is very careful and nobody wants to do anything that puts their health at risk.

- female off-street in-call sex worker

In addition to health and safety training, some sex workers felt that the employer should provide training on specialized types of sex work, such as bondage. Project participants stated that sex workers should help to develop such training programs:

Q. Should there be training for sex workers on how to do their job?

A. Yes.

Q. If so who should provide it? If so what sort of training?

A. The employer.

A. The employer.

A. The employer so if there's a "bondage and discipline house" who's going to provide all the training, have certain little classes.

A. Training classes.

A. Because they need to be trained.

Q. What should the training be? Let's talk a bit about what a training session would entail. It's kinda interesting.

A. You learn things I think as you work and those are the kinds of things you wish someone had told you. Right? Does anyone have any of those?

A. Oh ya, I do.

Q. So what should it include?

A. Like a client comes in maybe at a discounted price and the trainee sits and watches in the corner I guess.

A. They could also have like a couple of transformation dates when they want to be transformed into a woman. We call those transformation dates.

A. Cross dressing.

A. Ya, cross dressing dates so they have those also.

Q. Training people on how to do that?

A. It could be non sexual too.

A. What about oral? You have to train a girl how to give head.

Q. What kind of stuff on safety?

A. For example a lot of the kits that they're handing out on the street will advocate putting lube on a condom. It's not really an idea if you're working because it slips off.

A. Uh huh, it slips off.

A. It's good for head. It's not good for sex. That's an important mistake that I made so you know I wouldn't want to see girls making that mistake.

Q. What else? What about something like self defence or protection from . . .

A. Oh definitely.

A. Yes.

- Q. For street-level or for . . .*
A. For both.
Q. What else? What other kind of training?
A. How to diffuse a client. How to know when a client is going to blow his top. Like knowing what are things that I can notice and then how do I diffuse the situation.
A. What are the precautions.
A. How to handle like additional services because I know when I worked for an out call agency they have no interest in teaching you how to handle when a guy wants more than what he's paying for already. Do you know what I mean? If you go in there and do everything for 200 bucks then they get known as the agency with the girl who does everything.
A. So basically I'm kinda looking at how teaching the girls how to handle oh, okay, so that would be this much then.
Q. Who should develop the training program?
A. Sex workers.
 - female off-street out-call sex workers

The *ESA*, particularly in combination with the *OHSR*, can provide important protections for sex workers, not only in terms of emphasizing to employers the importance of training but also in requiring employers to pay for certain types of training programs.

Employer record keeping

Any form of regulation of the sex industry raises serious privacy issues in an industry where many of the workers and clients have an interest in remaining anonymous. Sex workers pointed out that one advantage of allowing the industry to continue to operate as it currently does, as a “quasi-legal” entity, is that it affords a relatively high degree of confidentiality. A disadvantage of gaining access to the protections that employment regulation may have to offer is that it may make workers and clients more visible to government authorities.

The level to which employers are expected to maintain records of their employees and staff under the *ESA* and *WCA* is an example of such a privacy issue. When an employer registers with the Workers' Compensation Board and is considered to be an employer under the *ESA*, he or she is obligated to maintain records of his or her employees, including: the employee's name; date of birth; occupation; telephone number; residential address; each employee's wage rate; hours worked by each employee on each day and a number of other facts. By contrast, in a quasi-legal environment, business can be carried out with little or no record of the worker's name or record of transactions. Project participants were concerned that such records might be disclosed to government or to the public:

- Q. What about maintaining records regarding employees?*
A. Probably not, no.
A. No.
Q. What should they be? And who should maintain them? Who should enforce them?
A. No, no, no, no, no.
A. . . . there'd have to be a record if the government got involved just like any government agency.
A. Yeah, the regular stuff; name, age, yada yada.
Q. What should be kept on record then?
A. SIN Card. SIN.
A. Just your basic personal information.
A. And your medical.
A. Yeah, that's it.

- A. *Your name, who cares how old you are? I mean, come on.*
- A. *Nothing more than any other agency, like work.*
- A. *Exactly.*
- female street-level sex workers

Several sex workers felt that businesses in the sex industry should be subject to the same rules that apply to other workplaces, but not any additional or special government monitoring:

- Q. *And then we talked about the dating service. And, how we have to give the name, address and description of everyone employed in the business, to the inspector. And what do people think about that?*
- A. *And we said – We said something about giving out that information on the employees and not the clients.*
- A. *Why – Why does it have to be so uniquely arranged? Like if I am an employer and I list all my employees, why do I have to supply that to the inspector? Why do I have to supply that to do sex work? Like – Like I have this disease?*
- A. *With your Social Insurance Number, that should be covered.*
- A. *Exactly. They can find out everything that they need to find out, by your social insurance number. The inspector could find you that way if he wanted to.*
- A. *Oh, how would they? The list of employees, though. Why should they have to submit a list of the employees, other businesses do not have to.*
- A. *Right, yeah. Like, that is what I am saying that it is not just a disclosure and they come in to check you out, you have to submit and you have to keep it up-to-date. You have to tell them, Oh we have hired this girl and she is blonde. The police can come in and check that out.*
- A. *And this is how she looked like; blonde hair, blue eyes . . .*
- A. *It's for the safety of the staff. Like I did not understand that it was disclosure. I thought that it was information that was available upon request.*
- A. *Oh.*
- A. *I think that's an accurate way to look at it. Not disclosure but the information should be just available on file at the workplace.*
- female off-street out-call sex workers

Some project participants felt that maintaining a record of employees and clients was an important safety measure:

- Q. *Okay and what about the social escort service and maintaining the list of offered employees and customers?*
- A. *Yes.*
- A. *Definitely should, for the safety of the women.*
- female street-level sex workers

Some project participants felt that any records that are maintained by an employer should be confidential:

- Q. *Should there be rules about what the employer can do with that information?*
- A. *It would all be confidential.*
- A. *Ya and kept confidential. Only the employer and the employee need to know.*
- male street-level sex workers

Ensuring that any new legislation does not require business owners to maintain a record of client names will be necessary to protect the integrity of the industry. This is also an important consider-

ation in the enactment of any municipal legislation relating to the sex industry. B.C.'s *Personal Information Protection Act* currently protects the identities of the clients of all businesses. Under the *PIPA*, a business cannot collect information about an individual or disclose information about an individual without their consent.²⁶

In terms of protecting the anonymity of employees, participation in any government-regulated programs, such as workers' compensation or employment insurance, will inevitably result in a loss of privacy. Government records are confidential to a certain extent, but ultimately sex workers will lose some degree of anonymity if they want access to employment benefits and protections.

Termination of employment

The *ESA* permits employers to terminate employees with or without cause. However, the *ESA* does provide certain protections to employees who are terminated without just cause. Employees who are terminated without just cause must receive adequate advance notice of their termination or must be compensated based on length of service. Sex workers pointed out that they could benefit from the protection available under these provisions. Project participants noted that being terminated without cause was a common occurrence in the sex industry:

A. The only thing that upset me about the massage parlours here is that you would get fired for no reason.

A. Yeah.

A. You get fired – like, literally one girl I saw got fired because they didn't like the sound of her voice and she talked too much.

A. It's so unstable here, or even in Toronto. Some of the bigger cities have less regulations and it's so, unstable, like. Like here, our eggs are in one basket, and they can just blow up at any time. Like this place, they ask you, they want you to keep quotas, they keep tabs with your clients to make sure that you are polite, if you are rude, if y'know – go somewhere else. Well there's a demerits point towards you, you get warnings, just like any other job, you get written up, and then eventually, you can get fired. If you are absolutely terrible, y'know.

- female off-street out-call sex workers

Due to the lack of consistency across the industry, a sex work business owner indicated that it would benefit sex workers to have an understanding of what type of conduct could constitute just cause for termination:

A. It depends on the establishment. The place I work at is quite strict, there are a lot of rules, and actually one of your earlier questions was, could you take clients? Well if you were caught with a client's phone number or giving out your phone number of course you'd be fired, which I guess is a legitimate concern for any business owner if they are paying all the expenses. Lots, lots of rules at the place I work at as far as . . . showing up to work on time and missing shifts, and if you're going to be late, and . . . it is a place that has, is fairly well established and it's quite busy and they have a high calibre of staff. . .

- female off-street in-call sex worker

At present, sex workers have little or no recourse if they are subject to termination without cause and they do not receive notice or compensation. The application of the *ESA* to sex workers would provide access to the Employment Standards Branch complaints mechanism or allow a civil suit against an employer for wrongful dismissal.

²⁶ *Personal Information Protection Act*, S.B.C. 2003, c. 63, ss. 6, 7.

Section 2: Workers' compensation and occupational health and safety

Workers Compensation Act

The B.C. *Workers Compensation Act* (the *WCA*) applies to most people working in B.C. regardless of whether they are working full-time or part-time, or as employees or independent contractors. In the event that the criminal laws related to adult prostitution are repealed, sex workers should be able to avail themselves of B.C.'s workers' compensation scheme where they satisfy the criteria governing any other worker in the province.

The *WCA* has two main components: provisions to prevent injuries to workers, and provisions to provide compensation benefits for injuries and diseases incurred in the course of employment. The Workers' Compensation Board (the "Board") is responsible for overseeing the workers' compensation scheme. Employers pay into a compensation fund. If a worker is injured on the job, he or she may make a claim for compensation under the *WCA*. Because the system is employer funded and not tax or general revenue funded, employers are assessed on their payroll at a percentage that reflects the injury, disease and death rates that occur in the industry, as well as the cost of claims for that specific employer. Compensation can include payment for lost wages due to an injury or illness incurred on the job, and compensation for medical costs.²⁷ Workers will be covered even if an employer has failed to register with the Board, but this means that employers who are difficult to identify or locate drive the costs up for employers who are registered and assessed by the Board.

Once a worker files a claim, a Board representative assesses it to determine whether or not the worker qualifies for compensation. To be eligible for compensation a worker must have sustained a personal injury or disease that arose out of and during the course of their employment. In the case where a worker contracts a disease, the work or the work environment must cause the contraction of the disease. In the case of an injury, the worker must have been working when the injury was sustained, and the injury must have been caused by something to do with the job in order to be compensable. In New Zealand, where prostitution has been decriminalized pursuant to the *PRA*,²⁸ sex workers performing commercial sexual services are considered at work²⁹ for the purposes of their equivalent legislation, the *Health and Safety in Employment Act*.³⁰

All employers who hire one or more workers and pay them on a full-time, part-time, casual or contract basis must register with the Board, and comply with the *WCA* and regulations. Under the law, employers must also pay their premiums and submit their payroll to the Board. The employer pays these premiums in addition to the wages paid to the employee, and is not permitted to deduct money from a worker's wages or salary to put towards premiums. The most important duty placed on employers by the *WCA* is the duty to provide a safe workplace and to protect the health and safety of workers. Employers have an obligation to report injuries and diseases within three days. Under the *WCA* an employer can have their business shut down for failure to ensure safe and healthy working conditions for workers.

The main duties placed on the worker under the *WCA* are to report injuries and to seek medical attention when injured. Workers have the right to report a claim when injured and an employer cannot prevent or try to prevent a worker from doing so. If, at the time of injury, a worker requires an ambulance or transportation from his or her workplace to the doctor's office or the hospital, the employer is required to pay the cost.

²⁷ Wage-loss payments will usually be 90% of the claimant's average net earnings at the time of injury. In determining the claimant's average net earnings, the Board will deduct probable Canada Pension Plan contributions, Employment Insurance premiums and federal and provincial income taxes. Average earnings may not exceed the maximum wage rate. The minimum and maximum wage rates are adjusted every year.

²⁸ *PRA*, *supra* note 18.

²⁹ *Ibid.*, s. 10(1).

³⁰ *Health and Safety in Employment Act 1992* (N.Z.), 1992/96.

Once a worker’s claim is accepted and they are receiving benefits, the benefits can be suspended if: the worker does not attend or co-operate in a medical examination or program arranged by the Board; fails to participate in any activity that might delay their recovery; refuse treatment recommended by the Board; or they are found to have made a fraudulent claim.

Sex workers and workers’ compensation

Many sex workers supported becoming part of a workers’ compensation scheme:

- A. Yeah, you should have to pay in a certain amount every month towards a Workers’ compensation package, and then if you’re injured on the job you should be able to collect just like everyone else.*

- female off-street out-call sex worker

One sex worker suggested that access to workers’ compensation would assist in dispelling the notion that sex workers deserve the harm they experience on the job:

- A. To me, that’s the flawed thinking that goes around prostitution – because you are doing it, or because you choose to do it, or whatever. That you deserve the repercussions of that.*

- female off-street out-call sex worker

The *WCA* would apply in situations where sex workers meet the definition of “workers” under the *WCA*.³¹ This is a broad definition that includes both employees and independent contractors where admitted by the Board under s. 2(2) of the *WCA*.

Sex workers in massage parlours, steam baths and in the escort service industry are currently covered under the *WCA*. However, many such establishments are currently working under the notion that their workers are independent contractors when, in fact, they would not be viewed as such under the law. Thus, it is unclear at present how many employers are currently paying premiums to ensure coverage for their workers, and how many are neglecting to pay for coverage, thereby violating the *WCA*. Service Sector employees in these industries are classified under the category “accommodation, food, and leisure services.”³² In 2005, employers in this industry group, which also includes tanning salons and hair styling workers, had to pay 79 cents per \$100 of the assessable payroll, to a maximum annual wage per worker of \$61,300. By way of comparison, in the Service Sector “business services” group, the employers of clerical workers paid 58 cents per \$100 of the assessable payroll,³³ while in the “construction industry” group employers of building demolition workers paid \$5.91 per \$100 in 2005.³⁴ Thus, the premiums that sex industry employers currently pay are higher than those for some other businesses.

Persons working independently and without an employer, such as most street-level sex workers and many escorts, have to be admitted for coverage by the Board under s. 2(2) of the *WCA*³⁵ in order

³¹ **Worker** means (a) a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise; (b) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry within the scope of Part 1 for the purpose of undergoing training or probationary work specified or stipulated by the employer as a preliminary to employment; or (f) an independent operator admitted by the Board under s. 2(2). *WCA*, supra note 6, s. 1.

³² WorkSafeBC, Classification Unit No. 761021 (Classification Unit Description), online: WorkSafe BC <http://www.worksafebc.com/for%5Femployers/premiums/2005_rates/Assets/Applications/Classifications/pdf/2005_761021.pdf>.

³³ WorkSafeBC, Classification Unit No.762010 (Classifications Unit Description), online: WorkSafeBC <http://www.worksafebc.com/for%5Femployers/premiums/2005_rates/Assets/Applications/Classifications/pdf/2005_762010.pdf>.

³⁴ WorkSafeBC, Classification Unit No.721005 (Classifications Unit Description), online: WorkSafeBC <http://www.worksafebc.com/for%5Femployers/premiums/2005_rates/Assets/Applications/Classifications/pdf/2005_721005.pdf>.

³⁵ *WCA*, supra note 6, s. 2 (2): The Board may direct that this Part applies on the terms specified in the Board’s direction: (a) to an independent operator who is neither an employer nor a worker as though the independent operator was a worker, or (b) to an employer as though the employer was a worker.

to participate in the compensation scheme. Section 2(2) allows for optional protection coverage for “independent operators.” The concept of the “independent operator” under the *WCA* differs from the concept of the “independent contractor” under the *ESA*.

The Board defines an independent operator as an individual who is neither an employer nor a worker to whom the Board has deemed that coverage applies, as if the independent operator is a worker. An independent operator performs work under a contract, but has a business existence independent of the person or entity for whom that work is performed. An independent operator is an “independent firm.”³⁶ This feature of the *WCA* is significant for the large number of sex workers who indicated that they would prefer to work independently without an employer. In B.C., such self-employed workers and other individuals not expressly covered by the *WCA* currently have the option of purchasing Personal Optional Protection (POP). POP is paid into by the independent operator himself or herself. Under this scheme, self-employed workers can be covered for wage loss and medical and rehabilitation services should they be injured during the course of employment.³⁷ In general, POP coverage costs the independent operator more than the premiums paid by employers on behalf of workers.

Under s. 2(1) of the *WCA*, the Board does have the discretion to exempt certain classes of workers from coverage. For example, in 1994 the Board formally exempted professional sports competitors from the workers’ compensation scheme.³⁸ The Board justified its decision by reasoning that its inability to regulate the safety and health of sport participants is incompatible with the purposes of the *WCA*. Given that the Board already recognizes escort and massage parlour work as a viable form of employment eligible for coverage, presumably it should cover sex workers too, should prostitution be decriminalized. In that event, the Board should consult with sex workers about coverage options.

A similar scheme to protect self-employed sex workers also exists in New Zealand. There, independent workers are covered through New Zealand’s equivalent workers’ compensation scheme, the Accident Compensation Corporation. New Zealand has managed to make coverage for independent workers affordable and practical. While employers of sex workers in New Zealand had to pay 56 cents per \$100 of liable earnings in 2003-2004, self-employed sex workers were able to pay a comparable 57 cents per \$100 of their earnings in order to obtain coverage.³⁹

Types of compensation for sex workers

Street workers, escorts, and massage parlour workers all expressed support for obtaining coverage under the *WCA* for injuries that occur in the course of employment. Sex workers described the risk of contracting sexually transmitted diseases, as well as physical injuries from common workplace accidents or violence:

A. Well, if they are going to be legal, then they are going to be given the same rights as any other – they are going to have to follow labour laws, they are going to be taxed. They are going to have these things. So they might as well take the benefits. Its not just STDs, some women get beaten up and they can’t work. Some women sprain their ankles from walking down the stroll. Y’know, a lot of different things happen on the job.

- female off-street out-call sex worker

³⁶ Workers Compensation Board of B.C., Assessment Manual (B.C. Workers Compensation Board, 2003) at AP 1-1-6.

³⁷ WorkSafeBC, Apply for Personal Optional Protection (WorkSafeBC Online Services), online: WorkSafeBC <http://www.worksafebc.com/online_services/pop/default.asp>.

³⁸ B.C., *Workers’ Compensation Reporter, Decision of the Governors*, vol. 10(2) (B.C. Workers’ Compensation Board, 1994) at 174.

³⁹ “New Zealand Fully Decriminalized in 2003, but Street Hookers a Problem,” online: Decriminalize Sex Work Now Coalition <<http://www.sexwork.com/coalition/NewZealand.html>>.

Under the *WCA*, workers might also be eligible for compensation for mental stress.⁴⁰ However, compensable psychological disability must be acute, and be diagnosed by a physician or psychologist, and it must go beyond clinical depression, addiction and anxiety disorders. Such compensation is therefore rare and extremely difficult to obtain.

Many sex workers described the psychological stresses associated with their work:

- A. *There should be a similar system with sex work. For sex trade workers, they suffer from post-traumatic stress disorder. Tons of them do. I do . . . Or when they are in the trade still. I mean, excessive nightmares, anxiety attacks. It's all part of post traumatic stress disorder. A lot of that makes it very hard for someone to find work, like, legitimate non-sex work, work.*

- female off-street out-call sex worker

Project participants also mentioned that employee benefits, such as workers' compensation, could provide an incentive to work for an employer, rather than work on their own:

- A. *Yeah I would pay into that. That's – that's like that's what I was saying – like the only reason that I would go to a house versus working by myself would be to get that kind of protection, would be to get a Pension. You have to pull into account, hey they want this legalized, they wanna help us out, they want to make this a legal thing? The government wants a piece of the pie? Fine. Tax us. Pension us. Everything else like a regular job job. It also gives you maternity leave, it also gives you paid leave, workers' compensation, in case you get hurt on the job, god knows you could get lock jaw.*

- female street-level sex workers

Section 6(1) of the *WCA* provides compensation for occupational diseases.⁴¹ For example, Hepatitis A and Herpes Simplex are covered at present. However, the *Occupational Disease Recognition Regulation*⁴² does not recognize HIV/AIDS as an occupational disease. Sections 6(4.1) and 6(4.2) give authority to the Board to add to the occupational diseases set out in Schedule B of the *Regulation*.⁴³

Although it is commonly believed that sex workers are “vectors” of disease, Canadian health research indicates that the majority of sex trade workers who acquire HIV through sexual contact contracted it through unprotected sex with a male intravenous drug user who was an intimate partner, not through a client.⁴⁴ The vast majority of sex workers who contributed to this project reported being extremely vigilant and careful about condom use on the job. Nevertheless, there may be cases of accidental exposure. Sex workers suggested that the schedule should be revised to include HIV/AIDS so that workers in all industries who may be vulnerable to HIV exposure have access to workers' compensation:

⁴⁰ *WCA*, *supra* note 6, s. 5.1.

⁴¹ **Occupational disease** means (a) a worker suffers from an occupational disease and is thereby disabled from earning full wages at the work at which the worker was employed or the death of a worker is caused by an occupational disease; and (b) the disease is due to the nature of any employment in which the worker was employed, whether under one or more employments. *WCA*, *supra* note 6, s. 6(1).

⁴² *Occupational Disease Recognition Regulation*, B.C. Reg. 71/99.

⁴³ *WCA*, *supra* note 6, s. 6(4.1): The Board may, by regulation, (a) add to or delete from Schedule B a disease that, in the opinion of the Board, is an occupational disease, (b) add to or delete from Schedule B a process or an industry, and (c) set terms, conditions and limitations for the purposes of paragraphs (a) and (b). Section 6(4.2): Despite subsection (4.1), the Board may designate or recognize a disease as being a disease that is peculiar to or characteristic of a particular process, trade or occupation on the terms and conditions and with the limitations set by the Board.

⁴⁴ See, for example: K. Bastow “Prostitution and HIV/AIDS” (1995) HIV/AIDS Policy & Law Newsletter 2(2), online: Canadian HIV/AIDS Legal Network Homepage <<http://www.aidslaw.ca/Maincontent/otherdocs/Newsletter/January1996/10bastowE.html>>; L. Jackson & A. Highcrest “Female Prostitutes in North America. What are their Risks of HIV Infection?” in L. Sheer, C. Hankins and L. Bennett eds., *AIDS as a Gender Issue* (London: Taylor and Francis, 1996); P.M. Spittal, K.J.P. Craib, E. Wood, N. Laliberte, K. Li, M.W. Tyndall, M.V. O'Shaughnessey & M.T. Schechter “Risk factors for elevated HIV incidence rates among female injection drug users in Vancouver” (2002) *Canadian Medical Association Journal* 166(7).

A. Police and nurses, and medical people. Aren't they covered for catching HIV?

A. HIV should be in the statute.

A. I think it should be.

Since blood-borne illnesses are not formally recognized under schedule B, workers in other industries such as paramedics and physicians who are exposed to these pathogens and file a worker's compensation claim – are currently left to the interpretations made by Board adjudicators on a case-by-case basis. According to the guiding provisions of the Board's *Rehabilitation Claims Services Manual* (the "RCSM"),⁴⁵ the authority granted to the Board under s. 6(4.1)(b) gives it "substantial flexibility in its designation or recognition of an occupational disease other than by listing it in Schedule B."⁴⁶

Transmission of HIV/AIDS is extremely rare in lawful occupational settings in Canada. For example, as of 2001, there had only been two probable cases of transmission of HIV to laboratory workers while on the job, and one case of transmission to a health care worker on the job.⁴⁷ While there is little Canadian case law surrounding this issue, the Association of Workers' Compensation Boards of Canada reported seven cases in 1998 of compensated lost time due to occupational HIV infection or suspected infection.⁴⁸ While all of these cases involved health care professionals, they establish that HIV/AIDS has been recognized as an occupationally transmitted disease, and such recognition could be extended to prostitution. Sex workers recommended HIV/AIDS be added to the list of compensable diseases in Schedule B.

There are also problematic issues of proof to consider. In their determination of a claim, Board adjudicators will assess whether the occupational exposure satisfies the requirements necessary to be defined as an occupational disease (RCSM #13.10).⁴⁹ RCSM #25 states that HIV/AIDS and other sexually transmitted diseases should be covered when they are contracted on the job. In adjudicating claims, "determining the extent to which a worker's employment had in producing the disease becomes a critical or central issue."⁵⁰ The difficulty of proving such a claim will be discussed under "Evidentiary Issues" below.

In terms of what is specifically covered under the *WCA*, compensation can include lost wages and health care expenses, such as medical care and medications,⁵¹ for injuries sustained in the course of employment. In the context of HIV and Hepatitis infection, this could mean that workers' compensation would cover post-exposure prophylaxis (PEP) drugs in the event of accidental exposure. PEP drugs can help reduce the risk of disease transmission where a worker has been exposed to either Hepatitis B or HIV, if taken shortly after the exposure. Under RCSM#32.60 Board pays for reasonable health care benefits, and the manual cites the example of covering drugs to reduce the risk of contracting blood borne illness in the instance of "a lab technician who in the course of employment cuts a finger on the sharp edge of a broken specimen bottle." This interpretation suggests that the Board could extend the same drug coverage to prostitution.

Regarding HIV and other sexually transmitted diseases that do not physically prevent sex workers from working, under s. 6(1)(b) of the *WCA*, "a health care benefit may be paid although the worker

45 B.C., *Rehabilitation Claims Services Manual*, vol. 2 (B.C. Workers Compensation Board, 2002) [RCSM].

46 *Ibid.*, at 4-4.

47 "Testing of Persons Believed to be the Source of an Occupational Exposure to HBV, HCV, or HIV: A Backgrounder," online: HIV/AIDS Legal Network <http://www.aidslaw.ca/Maincontent/issues/testing/e-compulsorytesting/occupationalexposure.htm#_edn-ref21>.

48 Canada, *Canada Communicable Disease Report*, vol. 28S1 (Ottawa: Health Canada, 2002) at 166, online: <<http://www.phac-aspc.gc.ca/publicat/ccdr-rmtc/02pdf/28s1e.pdf>> as reported in the Association of Workers' Compensation Boards of Canada. *National work injury statistics program* — 1998 (Toronto, 2000).

49 RCSM, *supra* note 45 at 3-1: The following are examples of disorders classified as DISEASES: an infection (except when it is incidental to a compensable injury, when it is treated as part of the injury) and contagious diseases. Only diseases which are occupational diseases are compensable.

50 RCSM, *supra* note 45 at 4-1.

51 *WCA*, *supra* note 6, s. 21(1).

is not disabled from earning full wages at the work at which he or she was employed.” However, according to RCSM #26.30, no compensation beyond health care benefits, such as compensation for lost wages, are payable to a worker who suffers from an occupational disease, unless the worker is disabled from earning full wages at the work at which they are employed. According to this logic, sex workers infected with HIV on the job should receive compensation for their health care costs. In addition to such compensation, the B.C. *Human Rights Code*⁵² would protect sex workers from being fired or prevented from working because of their HIV-positive status. The continued employment of HIV-positive workers is a highly contentious issue that will be addressed later in this section. The Board will only award compensation if it believes that the worker took precautions to prevent the transmission of disease, and this will also be discussed below.

The current compensation scheme under the WCA does not include compensation for pregnancy. Despite widespread condom use reported among sex workers, pregnancy remains a job-related risk. While New Zealand allows compensation for sex workers contracting sexually transmitted diseases on the job where they meet the test set out in the *Injury Prevention, Rehabilitation, and Compensation Act 2001*,⁵³ it does not recognize pregnancy as a compensable injury for the purposes of workers’ compensation. However, pregnancy clearly effects a woman’s ability to work, creates healthcare costs and, depending on the circumstances, child rearing costs. Because of the criminalization of their work and their treatment as independent contractors by employers, sex workers do not generally enjoy the benefits of paid maternity leave. One project participant described the impact of an unplanned pregnancy on her work in the following terms:

A. So, when they find out that they are pregnant, and no one ever really plans a pregnancy, unless they have money saved. So, let's say most people haven't planned their pregnancy, and they find out they are pregnant, they realistically have four more months to make enough money, to last another year – which is virtually impossible. And this is where you see people, um, taking a lot of chances. This is – these are the girls that will steal from clients, these are the girls that will steal from each other, these are the girls that are all of a sudden – they are desperate. Because no matter what, by about the five month mark, they can't hide it anymore . . . Where do you go? Where do you go get a job at five months pregnant and for what kind of money?

- female off-street in-call sex worker

In the event of decriminalization, pregnancy is a workplace risk that should be accommodated as part of worker compensation if sex workers are, like other workers, to be given benefits that match the level of risk associated with their work. Increasing coverage to include HIV transmission and pregnancy on the job will have the added effect of increasing the vigilance of employers with respect to sexual-health and safety in the workplace. This may, in turn, drive down the incentive for employers to offer more risky services at their establishments. The issue of compensation for pregnancy, injuries and particularly for sexually transmitted diseases in the context of prostitution raises special issues of proof that are examined next.

Evidentiary issues

When a claim is filed under the WCA, a Board representative conducts an investigation to determine whether or not the facts of the claim can be substantiated and whether the claim meets the

⁵² HRC, *supra* note 20. Section 13 (1) A person must not: (a) refuse to employ or refuse to continue to employ a person, or (b) discriminate against a person regarding employment or any term or condition of employment because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

⁵³ *Injury Prevention, Rehabilitation, and Compensation Act 2001* (N.Z.), 2001/49, s. 30.

requirements set out under the *WCA*. In the course of such an investigation, a Board representative will talk to any witnesses, review any medical evidence, and review the record of employment and income earned by the claimant. Under the current scheme, the following sections are applied with respect to proving a claim:

- 5(3) Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.
- 5(4) In cases where the injury is caused by accident, where the accident arose out of the employment, unless the contrary is shown, it must be presumed that it occurred in the course of the employment; and where the accident occurred in the course of the employment, unless the contrary is shown, it must be presumed that it arose out of the employment.

Serious or wilful misconduct

Where the injury is attributable solely to the serious and wilful misconduct of the worker, compensation is not payable unless the injury results in death or serious or permanent disablement.⁵⁴ Because of the absence of precedents with respect to sex worker claims for workers' compensation, it is unclear whether or not the Board would consider failure to wear a condom as serious and wilful misconduct, thereby precluding compensation, as set out in s. 5(3). According to the RSCM #16.60, wilful misconduct is determined by asking "whether the claimant had pre-knowledge or voluntarily elected to break a rule." In other words, the claimant must be aware of a workplace rule and knowingly elect to break it.

Proving whether or not the worker or the client is at fault in the failure to wear a condom could be difficult depending on the particular circumstances of the transaction. Some sex workers reported that they sometimes feel they have little control over whether or not a client will wear a condom. One sex worker reported that a client removed a condom prior to intercourse without her knowledge. Further, in instances of violence or sexual assault, it is clear that the worker may not always be in control of whether or not a client uses a condom. Educating sex workers about their rights, making employers liable for workplace health and safety, and increasing the power and choice that sex workers have over the terms of their work are important steps to increasing a worker's ability to insist on condom use.

Because coverage is only available under the *WCA* where precautions have been taken, condom use would likely become a mandatory element of prostitution within the workers' compensation scheme. Where it can be proven that a sex worker is aware of the rule and knowingly fails to use a condom and contracts an illness as a result, compensation may not be available.

Under s. 5(3) failure to follow a workplace rule is irrelevant if "death or serious disablement" occurs. This provision is commonly applied to instances where a worker has a serious accident on the job resulting in death or disablement. Although it is not commonly applied to such instances, this provision may apply to HIV infection if it results in death or serious disablement. This would mean that, even where it can be proven that the worker willingly failed to wear a condom, if death or serious disablement resulted then compensation is still available to the worker. However, in the case of sexually transmitted diseases for which there are known and readily available cures, it is unlikely that they would satisfy the standard of "death or serious disablement."

Section 5(3) places an obligation on employees to act responsibly in order to improve their chances of making a successful compensation claim. In addition, when s. 5(3) is combined with the sections of the *WCA* that set out general worker duties and responsibilities – including wearing protective equipment⁵⁵ and taking reasonable care to protect the health and safety of others who may be affected by their actions⁵⁶ – sex workers may be obliged to protect their health, and their clients' health, by using protective equipment.

⁵⁴ *WCA*, *supra* note 6, s. 5(3).

⁵⁵ *Ibid.*, s. 116(2)(b).

⁵⁶ *Ibid.*, s. 116(1)(a).

Condom use and “wilful misconduct”: the New Zealand approach

Would a sex worker who consents to not using a condom during a sexual encounter in the workplace be engaging in serious and wilful misconduct thereby making compensation not payable under s. 5(3) if she or he contracts a disease? Given the lack of cases where sex workers have made claims under Workers’ Compensation, this question has never been tested. Should mandatory condom use be included in the legislation relating to workplace safety? One example of legislation dealing with this issue is New Zealand’s *PRA*.

Section 9 of New Zealand’s *PRA* states that all sex workers and their clients **must** adopt safer sex practices; they must take all reasonable steps to ensure that a condom or other appropriate barrier is used for all activities that create a risk of sexually transmitting a disease.⁵⁷ Contravention of these provisions can result in liability on summary conviction to a fine of up to \$2,000.⁵⁸

Sex workers were in favour of workplace rules requiring the use of condoms. One project participant suggested that with the benefit of compensation comes the responsibility of using condoms:

- A. When a sex trade worker gets an STD, if it’s in that time frame when she was not using a condom, no worker’s compensation for you honey. You should be fined and you should not be able to work. That’s a huge breach.*

- female off-street out-call sex worker

One former massage parlour worker who now owns her own business stated that sex workers should practise safer sex, just as non-sex workers should, and that if a sex worker does not practise safer sex and contracts a disease, it is his or her own fault:

- A. Or just like anyone in the whole population, if you are going to practice unsafe sex, and you catch an STD, then you live with the repercussions of that, for making a bad choice. Maybe it was uninformed choice, but you made a bad choice.*

- female massage parlour owner, former sex worker

Another sex worker stated that employers should be held responsible where a sex worker has contracted an illness from their failure to wear a condom:

- A. On one hand it’s the personal choice to risk everything. Everyone knows that condoms are ninety-nine percent effective. So to choose that line of work, like, how do you put an employer, like, like, they [the employer] have to pay for that abuse if you risk your own body, sort of thing.*

- female off-street out-call sex worker

However, sex workers frequently argued that it would be very difficult to enforce a law relating to mandatory condom use, and that currently it is often not the worker’s choice whether or not to use condoms. Project participants reiterated that sex workers living at or below the poverty line, especially when they have a serious substance addiction, may be so desperate for the extra money offered to provide services without a condom that they fail to consider the potential repercussions. They have very little bargaining power.

- A. No [there is no way to regulate the use of condoms] and especially, no, because I mean – they of course, would offer more money, and if the girl needing that money, and in this case, not thinking what she might get. And depending what drugs or whatever, puts her to risk and more easily, agreeable to say yes. And, that’s unfortunate; you can’t do anything about it, right? But it is between them too. So, they are*

⁵⁷ *PRA*, *supra* note 18, s. 9(1).

⁵⁸ *Ibid.*, s. 9(4).

breaking – I don't know, they are putting themselves at risk. But you can't regulate it, it's not like you can take a picture.

- female off-street out-call sex worker

Another project participant described the desperation that some sex workers experience:

A. I don't think a lot of it's gonna work. I mean, if the girl's drug addicted or very desperate . . . and you're in the truck's car and haven't eaten for two days, and the guy says, "here, I'll give you an extra \$50 if you give me a blow-job without a condom," a lot of those girls are that desperate they'll do it.

- female street-level sex worker

While it would be impossible to enforce mandatory condom use, setting out a similar requirement to New Zealand's "all reasonable steps" provision in future Canadian legislation could help resolve the contentious issue of how to regulate HIV-positive sex workers, or workers infected with other sexually transmitted diseases. Further, for those sex workers living below the poverty line, increased provision of condoms by non-profit organizations and government-funded organizations is imperative. Increased rights protections and increased education for sex workers are also important steps in promoting condom use.

HIV-positive workers and "wilful misconduct": the Nevada approach

Nevada provides a different approach to disease control than the one developed in New Zealand. Under the *Nevada Administrative Code*, condom use is required for any sexual touching.⁵⁹ Sex workers in Nevada are subject to mandatory disease testing for HIV, syphilis, gonorrhoea and Chlamydia.⁶⁰ Pap smears are administered weekly, and blood tests are conducted monthly. If found infected with anything other than HIV, a sex worker cannot return to work until they test negative. If a worker is infected with HIV, it is illegal for them to be employed as a sex worker.⁶¹ Because HIV-positive workers are terminated immediately – and with no assistance, such as workers' compensation – they may continue to work illegally to support themselves.⁶² Not only does this raise the issue of discrimination against infected workers, but also it tends to encourage the development of an underground market where grave health and safety concerns arise. Legislation like Nevada's, which prevents HIV-positive workers from working, may create a false sense of security among clients who are led to believe that there is less of a risk because "no one is infected." In turn, this false sense of security may lead to increased risky behaviours, such as failure to wear a condom. Preventing a person from earning a living because they are HIV positive is discriminatory, and would contravene Canadian human rights codes. The Nevada approach has the effect of taking power and control away from the worker. Systems that reduce the autonomy of the worker may encourage exploitative practises in the workplace, and deter workers from demanding protection of their basic rights.

In contrast to Nevada, the New Zealand legislation has no specific provision for treatment of HIV-positive sex workers. In fact, the New Zealand *PRA* states that a person who is either providing or receiving sexual services must not state or imply that a medical examination means that he or she is not infected or likely to be infected with a sexually transmitted disease.⁶³ This provision prevents the false sense of security that may be created by the Nevada model. All sex workers and clients are required and expected to use protective equipment in order to minimize disease transmission. In

⁵⁹ *Nevada Administrative Code* 441A.805 (2003), online: Nevada Legislature <<http://www.leg.state.nv.us/nac/NAC-441A.html>>.

⁶⁰ *Ibid.*

⁶¹ *Nevada Revised Statutes* 201.358 (1995), online: Nevada Legislature <<http://www.leg.state.nv.us/nrs/NRS-201.html#NRS201Sec358>>.

States that engaging in sex work while knowingly infected with HIV is a felony with a minimum two year sentence.

⁶² Carole A. Campbell, "Prostitution, AIDS, and Preventive Health Behaviour" (1991) 32 *Social Science and Medicine* at 1372.

⁶³ *PRA*, *supra* note 18, s. 9(2).

theory, universal use of precautions and safer sex should eliminate the pressure for mandatory testing of sex workers in a decriminalized setting. Mandatory testing is another contentious issue, as the next section illustrates.

Disclosure of HIV-positive status

Mandatory condom use could also help circumvent the difficult issue of forcing sex workers to disclose HIV infection. Under current Canadian law, an employer cannot legally compel a worker to reveal that he or she is infected with HIV. It is imperative that a worker's right to keep his or her medical health private and confidential be respected. Because of a 1998 Supreme Court of Canada decision,⁶⁴ a worker's right to keep his or her HIV-positive status confidential from clients would be protected only when condoms are used.

In *R. v. Cuerrier*, the Supreme Court of Canada created a positive duty to inform sexual partners of HIV-positive status. The Court held that failure to disclose one's HIV-positive status prior to unprotected sexual activity amounts to aggravated assault, because it constitutes a significant risk of serious bodily harm. The court held that this logic could extend to "other sexually transmitted diseases that constitute a significant risk of serious harm."⁶⁵

Regarding the degree of risk of serious bodily harm, the court suggested that, in some circumstances, the risk of harm is not great enough to require disclosure:

To have intercourse with a person who is HIV-positive will always present risks. Absolutely safe sex may be impossible. Yet the careful use of condoms might be found to so reduce the risk of harm that it could no longer be considered significant . . . To repeat, in circumstances such as those presented in this case, there must be a serious risk of bodily harm before the section can be satisfied. In the absence of those criteria, the duty to disclose will not arise.⁶⁶

According to this logic, if condoms are used, HIV-positive sex workers or HIV-positive clients would not be held criminally liable for failing to disclose their status. Some sex workers voiced their support for disclosure even when condoms are used:

- A. *Someone who knows they have it, they knowingly have it and they sleep with someone who doesn't, they should be charged, they should be automatically charged.*
 - Q. *So what if we have a sex worker who has AIDS, um but is really careful, he wears a condom always and . . .*
 - A. *He should give forewarning.*
 - A. *You should know what you're getting yourself into.*
 - Q. *So that's one aspect that should be made criminal?*
 - A. *Oh for sure, well if you're going out deliberately . . . Destroying a healthy man's life, or a woman's life.*
- male street-level sex workers

Generally, the Court's ruling in *Cuerrier* provides more support for the practice of mandatory condom use in the workplace.

Accident

Section 5(4) of the *WCA* creates a presumption that a work-related injury arising out of employment occurs during the course of employment unless the contrary can be shown. While this presumption lowers the burden of proof on the worker, sex workers still expressed concern about the difficulty

⁶⁴ *R. v. Cuerrier*, [1998] 2 S.C.R. 371, 162 D.L.R. (4th) 513 [*Cuerrier* cited to S.C.R.].

⁶⁵ *Ibid.*, at 137, Cory J.

⁶⁶ *Ibid.*, at 129, Cory J.

in proving that an injury did actually occur in the course of employment, particularly with respect to sexually transmitted diseases:

A. That would be too hard, I would think. That – that would be too hard to – to –. Number one, the client would refuse to – he wouldn't say he saw you. Right away, with any WCB thing, you have to have a witness. Who's that, your john? Your john is going to run with his tail between his legs.

- female street-level sex worker]

A project participant supported the workers' compensation scheme, but was concerned that it would be too difficult to prove, for example, that a sexually transmitted disease was contracted on the job, rather than from a boyfriend while off the job:

A. Um, in an ideal world, yes, but I, I don't think it would be workable . . . they don't know what happened in that bedroom. And again, once the door's closed, and, yes, maybe a client gave it to me. Which client? And, and if a client were pinpointed, he should be the one liable in any case for having given it to me. And his insurance should be the one that's covering my costs, not workers' comp. I mean, to me, it's far more likely that I slip on a tile in the bathroom because a client didn't wipe up the floor and I did the splits and I broke my kneecap. Now that's, that's something that could happen and almost happened about a week ago, and, and, that sort of, that's the kind of injury I can kind of see going to workers' comp. and saying hey I can't work because my knee's in a cast for six weeks [laughs], and I wouldn't mind some compensation while I'm out. That, I can see happening far more likely, or, you know the headboard fell on my forehead and conked me [laughs]. That's happened too. Because that's the kind of work injury that I see, but no, I can't see it being workable if it's an STD related thing, because who gave it to me? . . . I don't know. To me it doesn't seem like it would be a workable thing. It just doesn't. Cause my boyfriend could have given it to me.

- female off-street out-call sex worker

It may be useful for sex workers seeking compensation for illnesses contracted on the job to demonstrate that they were not infected with the disease prior to the alleged date of infection. Ensuring proof in the event of such claims could lead to more pressure for legislated mandatory disease testing in the workplace. Similarly, depending on the circumstances of a particular claim, a client would likely have to prove that he contracted a disease in a particular commercial sexual encounter, and not as the result of some other source of infection.

Mandatory disease testing

Some sex workers supported mandatory disease testing:

Q. Okay. Now this is a hard one. What about testing?

A. Every six months.

Q. Should it be mandatory? Should it be optional?

A. Mandatory. Every six months.

- male street-level sex workers

Against this view, many other workers opposed mandatory disease testing on several grounds: mandatory testing erroneously reinforces the notion that sex workers are vectors of disease; in the case of a recent infection, it may be too early for a test to detect it, in which case mandatory testing may create a false sense of security, potentially leading to unsafe practices and reckless behaviour; mandatory

testing is intrusive and raises privacy issues. One massage parlour owner succinctly summarized these concerns this way:

A. Yeah, I just – I just don't see mandatory testing working . . . I just don't see how workers' compensation for STD could function in practice. I mean there is other problems with tests, if it's once every month. You could actually, just, contract something immediately after the test. Become contagious before the next – y'know. And as soon as you have a system of testing, it gives a false sense of security to clientele. Y'know, people say that all the time. I don't even know where to start with it. When a client says to me, Well, are your girls tested? . . . The only reason you should be concerned if she has something, is if you want to have an unsafe practice with her. So why are you even asking? And if she has been tested, the incentive to do the unsafe practice becomes that much greater. Because well, everybody's clean . . . Any type of, of testing. Even like down in Nevada, they, they test their staff at these brothels. And it's just sickening. Like, how can you sit there and tell your clientele, All our girls are tested weekly. Tested for what? And why? Why – what are you testing them for? Because you are expecting them to have unsafe sex? Or you're basically telling your clientele that well if you force her to have unsafe sex – either physically, or offer her more money, she's going to be safe. So feel good about that. Go for it.

- female massage parlour owner, former sex worker

Nevertheless, sound sexual-health practices should be encouraged, an issue that will be addressed more in the section “Occupational Health and Safety Regulations” on page 121. Sexual-health practices should involve education and training, as well as voluntary disease testing, which is the approach taken in New Zealand. The *Guide to Occupational Health and Safety in the New Zealand Sex Industry*⁶⁷ recommends that sex workers receive comprehensive sexual-health examinations at least bi-annually, although it is ultimately up to sex workers to determine the frequency of such tests.⁶⁸ The guide also suggests that, in the case of condom breakage or slippage, tests be undertaken within 10 to 14 days.⁶⁹ Regarding privacy concerns, the New Zealand guide recommends that employers may ask to see certificates showing regular testing; however, certificates should not disclose test results, and nor should they be displayed in the workplace. Test results remain the property of the employee.⁷⁰

In the context of workers' compensation claims, regular voluntary testing would help bolster claimants' cases that they acquired sexually transmitted illnesses during the course of employment. Sex workers who could show they were free of illness prior to the date of alleged contraction would probably have a better chance of establishing their entitlement to compensation.

Privacy concerns

Disease testing, as well as the process of filing a workers' compensation claim itself, raises potential privacy issues. A Board representative conducts an investigation once a claim is filed. The investigation can involve interviewing witnesses, and reviewing medical and employment records. In addition, the *WCA* requires that both workers⁷¹ and employers⁷² fulfil a number of obligations in reporting injuries, including the provision of the name and address of the affected worker.

⁶⁷ Occupational Safety and Health Service, Department of Labour, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (Wellington, Department of Labour, 2004) online: <<http://www.osh.govt.nz/order/catalogue/pdf/sexindustry.pdf>>.

⁶⁸ *Ibid.*, at 34.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *WCA*, *supra* note 6, s. 53(1).

⁷² *Ibid.*, s. 54(1).

Understandably, many sex workers expressed apprehension about revealing their highly stigmatized line of work:

A. See that's – that's one of the issues that comes up. Is that in order to access a lot of this, you do have to out yourself. Like, to get worker's compensation, you have to make a claim, then they investigate the claim, and in investigating the claim they go through your medical records, they go through everything that happened. They interview all potential witnesses.

- female off-street out-call sex worker

Another project participant described her anxiety at the prospect of being labelled a sex worker:

A. Well just the label. I am just wondering how they will label it once you put it on your income tax . . . And that once you have been a sex worker, you are a sex worker for the rest of your life. You just carry it around like an anchor – I was 20 years old and I worked as a sex worker – woahhhhhhhhhh, it said it on your income tax, little girl. Meanwhile you are 60. So that's just my issue.

- female off-street out-call sex worker

However, provisions within the *WCA* make it clear that the Board should treat claim files as confidential, and not accessible to third parties upon their request.⁷³ Similarly, medical reports should not be disclosed, except for the purposes of administering the *WCA* and regulations.⁷⁴

Occupational Health and Safety Regulations

The *WCA* has an associated set of regulations, the *Occupational Health and Safety Regulations*⁷⁵ (the "*OHSR*"), which sets out the minimum requirements for health and safety standards in industries covered by the *WCA*.⁷⁶

Under the New Zealand *PRA* all sex workers, regardless of their employment or contractual status, are under a duty to follow health and safety standards.

The *WCA*⁷⁷ and the *OHSR* sets out general duties for employers to ensure the health and safety of all workers and others in the workplace by remedying unsafe conditions, informing workers of their rights, and ensuring that employers provide and maintain proper protective equipment. Also, the *WCA* requires employers to establish an occupational health and safety program. Generally, such a program would place responsibilities on employers and workers to ensure that all work is carried out without undue risk of occupational disease or injury to any person.⁷⁸ Duties include regular inspections of the workplace and work practices, instruction and supervisions of workers, investigations into any unsafe occurrences, and the maintenance of records, all with an eye to preventing the development of unsafe working conditions.⁷⁹ Under the *OHSR*, employers are accountable to the Board, and the Board maintains the authority to enact health and safety regulations as it sees fit.⁸⁰

The majority of sex workers stated that they would support the application of the *OHSR* to sex work, and the resulting increased obligations for employers to ensure workplace health and safety. One massage parlour owner explained that the onus should fall on the employer because sex workers are often not in a position where they are able to protect their health and safety:

⁷³ *Ibid.*, s. 95.

⁷⁴ *Ibid.*, s. 156(1)(a).

⁷⁵ *OHSR*, *supra* note 7.

⁷⁶ *Ibid.*, s. 2.1.

⁷⁷ *WCA*, *supra* note 6, s. 115.

⁷⁸ *OHSR*, *supra* note 7, s. 2.2.

⁷⁹ *Ibid.*, s. 3.3.

⁸⁰ *WCA*, *supra* note 6, s. 225.

- A. *Oh I am so for it. Mandatory. Mandatory. And – and not just – but I don't think the law should target the sex workers. They should target the employers and the clients. 'Cuz they're the ones that are ultimately responsible. The sex worker does not have the balance of power. In the negotiation process for the fee, the sex worker does not have the balance of power physically with the client. They – they're nothing in that transaction. The employer has an obligation to ensure that – that not only his or her staff know the risks and – and should be fully informed, but they have an obligation to ensure that it is being carried out. And clients are the ones that want unsafe sex, not the sex workers. So I think that – that sex workers should not be the targets of any legislation. It's the employers and the user groups.*

- female massage parlour owner, former sex worker

New Zealand's *PRA* places similar requirements on operators and businesses of prostitution to adopt and promote safer sex practices.⁸¹ One sex worker who has been both an employee and a business owner expressed support for this emphasis in the New Zealand legislation:

- A. *The legislation that's come out in New Zealand I thought was very revolutionary where they really put a, they really shift the, the responsibility to owners and employers um to oversee and regulate this, and I found that very interesting, and saw that as quite innovative.*

Training

Many sex workers felt that one major benefit of the application of the *WCA* and the *OHSR* would be the provision of occupational health and safety training to workers. One former sex worker and current sex work business owner described such training as a crucial preventative measure against contracting sexually transmitted diseases:

- A. *So I see the problem as not how to band aid it afterwards, it's – it's proactive. It's how to stop people from getting a disease in the first place. Whether it's a fatal one or just something that you would carry for life. Like herpes, or hepatitis, there's a lot of horrible ones out there.*

- female massage parlour owner, former sex worker

Many sex workers said there is a lack of education and knowledge about transmission of sexually transmitted diseases:

- A. *A lot of girls think, still to this day, even the girls inside, think that going down on a guy, giving him a blow-job without a condom is safe, and in reality it's not. They don't understand that some free-cum, whatever, could be . . . you could have Hep C, or have AIDS . . . they just don't understand that. They think that by doing oral sex that it's safe, and there's a lot of education that needs to be done.*

- female off-street out-call sex worker

A recurring opinion was that proper education could almost entirely prevent the transmission of sexually transmitted diseases:

- A. *I really feel that if you basically use a condom, and you're very careful about what you do and don't do, you really should never catch anything from a client. I mean, most of the girls that I've known have not caught it through a client. They've caught*

⁸¹ *PRA*, *supra* note 18, s. 8.

it through boyfriends, using drugs . . . you know. Stuff like that. So if you're careful at work you really probably shouldn't catch it. This is my feeling . . .

- female off-street out-call sex worker

One massage parlour sex worker explained that proper education enabled her to work for years without ever contracting a sexually transmitted disease:

A. I am not an exception. I've never had a cold sore. And yet, I have been very successful in this industry. With lots of regular clients, made lots of money and been very good at what I did, without risking my health. Like it is possible. Girls don't have to risk their health, to make lots of money. And I know dozens and dozens and dozens, like myself, who've never had an STD. And people who, I don't say they've just worked a year or two, I mean people that who had a whole career of it, had never had an STD.

- female off-street in-call sex worker

Returning to the issue of enforcing mandatory condom use, one escort suggested that education would be the best way to encourage safe practices, even in the face of economic need:

A. Once I shut the door, if I didn't use it, who would know? I mean, how can you regulate something like that? I mean, to me, I can't imagine having sex without one. If I'm, I'm, on the street, I need a quick fix and the guy offers me \$20 extra I can kind of appreciate the desperation that some people are in, and how can you bylaw something like that, or how can you regulate? You can't. You can only supply them and hope for the best.

Q. So the theme is education as opposed to regulation?

A. Exactly.

- female off-street out-call sex worker

All sex workers – male and female, street-level, off-street in-call and out-call – wanted training, be it in the form of videos, lectures or courses. Some of them supported the idea of a licensing or certification program for individual workers. One escort explained that education should include access to medical professionals:

A. I think that um – I like to see health care, somewhere that a doctor knows I am coming in, a doctor or healthcare for sex trade workers . . . that is what I would look for the most a doctor who knows this is who I am, and that I am coming in what my risks are and this is what they need to do, to be informed about . . . And and if we were having, y'know, Addiction Services, and what will you do if you actually caught up with an STD or something like that, and how you're going to deal with it, and how you intend to do your work if you can or if you can't, or whatever and how to keep your clients safe. There needs to be education and services to address all of this.

- female off-street out-call sex worker

Improved education would give sex workers an increased awareness of their right to a safe, violence-free workplace.

Safe workplaces and violence prevention

Currently, many sex workers operate in a range of unsafe or harmful conditions, which include being forced to engage in unsafe practices – such as unprotected sex – and being subjected to physical, sexual or psychological violence. The *WCA* and *OHSR* contain several provisions that oblige employers to ensure safe physical working conditions. Generally, the workplace safety scheme in

the *WCA* places the ultimate responsibility for safety on the employer. For example, s. 3.10 of the *OHSR* states that employees must immediately report any unsafe working conditions or acts to their employer, who, in turn must investigate the condition and make sure that the problem is corrected. The Board has the authority to intervene and order that work be cancelled where it has reasonable grounds to believe that an immediate danger exists that would likely result in serious injury, illness or death of a worker.⁸² The Board can impose penalties on non-compliant employers.⁸³

The *WCA* and the *OHSR* apply to all workplaces. A “workplace” is defined as “any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work.”⁸⁴ Therefore, this legislation would apply to any location where an employer expects employees to carry out work, whether the business offers “in-calls” (sex workers meeting with clients at the place of business) or “out-calls” (sex workers meeting with clients in off-site locations such as private residences, hotel rooms, or vehicles).

Prostitution can be dangerous because it sometimes involves working in isolation. The *OHSR* obliges employers to check on employees who work alone or in isolation at regular intervals, and at the end of their shift. Employers also have to have a plan of action should workers find themselves in trouble.⁸⁵ The provision requires that these procedures be set up in consultation with workers.

Many sex workers, particularly female sex workers in massage parlours, voiced their concern about being alone when an abusive client confronts them:

A. You know I am really disappointed because . . . when you are in the room you are on your own. You can scream or whatever. You know. Well, whatever. He is so strong, he is so big how can I? You know, I was screaming but nobody hear . . . That’s why I left there.

- female off-street in-call sex worker

One owner of an escort agency suggested that a system of supervision would help ensure worker safety:

A. Well, I guess, you know for me, in my business and for the ladies who work for me it’s me being there and or my assistant or other assistants I’ve had in the past, that somebody knows where you’re going, where you’re supposed to be, and when you’re supposed to be out of there, kind of thing. There’s, you know, there’s very few people who are gonna mess with somebody who has somebody watching over them.

- female escort agency owner, former sex worker

Many workers agreed that they would want someone to know where they are, when they expect to return, and whom they are with:

Q. Okay, how do you make it a safe place, what kind of rules do you have in place to make it safe?

A. Well the first thing you’re going to have in place is making sure your home is secure, like if you’re working for somebody, the employer knows that you have a client at seven o’clock at your place and there’s somebody there to ensure that if anything does go wrong, that you have backup. You have to know who the date is, and somebody off-site or somebody other than yourself knows who they are. And they know that they are known.

- male street-level sex worker

⁸² *WCA*, *supra* note 6, s. 191(1)(a).

⁸³ *Ibid.*, s. 196(1).

⁸⁴ *Ibid.*, s. 106.

⁸⁵ *OHSR*, *supra* note 7, s. 4.21.

Although the *OHSR* places the onus to protect the safety of workers on employers, alarmingly, some sex workers reported that their employer condoned or even facilitated workplace violence:

A. Oh, yeah, and the scariest thing is like you are totally on your own, the owner say. Cause I mean, he won't protect you. Like I mean he won't do anything. He even say it's my fault. Like the way he is trying to tell me. It's my own responsibility. Oh, my God. I said like what can I do? Like a big guy, taller than me, like I am not even up to his shoulder. And I was screaming until my voice gone. And you know, pretty sure that somebody is around, you know. He should help . . . the owners it's terrible. They got a lot of rules. You have to follow the rules . . . like in the massage [parlours] you feel totally got cut off from everything. It's like they are trying to cut you off from outside. Like that's totally like feels like isolated, feels like you got cut from connection to the world. I mean like the feeling is so terrible. Like when you got raped in the massage parlour and the owner won't do anything. And he trying to tell you, it's your own fault.

- female off-street in-call sex worker

Requiring employers to fulfill the safety standards mandated under the *OHSR* could make working for an employer a much safer option for sex workers. As one massage parlour owner stated, under the current legal framework, working for an employer is still the safest route, particularly in comparison to street-level sex work:

A. I personally feel a massage parlour is the safest place to work, I mean the place I've been at now, I've worked there now for six years, I've never ever been present when someone's had a bad date, as a matter fact when we get new staff who have never worked before, who have only worked outside, or have only worked for an escort agency, they say "well, what's your signal for a bad date?" we laugh at them because we're like it just doesn't happen here. It just doesn't happen. If someone has a chip on their shoulder or they're . . . you know they don't go into a place where they don't have the balance of power. If a guy is uh, is aggressive or violent, he's going to put himself in a situation where he has the balance of power which is a one-on-one situation um, obviously the street um, I think it is fairly obvious that is the unsafest way to work . . . the most violent way to work would be street where it is entirely anonymous, you have no back-up and you're by yourself one-on-one with somebody in a car. There really is no recourse for you if you have a problem.

- female massage parlour owner, former sex worker

One sex worker expressed this same preference for working for a responsible employer:

A. Me? Well I prefer to work for somebody. Because I mean – I know from past experience working from – for myself, right? 'ere's like – I got raped, I got beaten up, I got shot at, and it's like that if I had an employer, right? That I was working for – I would feel protected.

- female street-level sex worker

Another specific benefit of the *OHSR* is that it requires employers to provide and maintain minimum levels of lighting in the workplace in order to provide safer working conditions.⁸⁶ This provision means that clients would no longer be able to control the lighting to facilitate assaults on employees:

⁸⁶ *Ibid.*, s. 4.65.

A. One time . . . in that massage parlour. One time, I get in and it's so dark. The customer they can control the light. If they want to put it darker and I got raped.

- female off-street in-call sex worker

While it is clearly a criminal offence to physically or sexually assault another person,⁸⁷ the *OHSR* sets out several additional provisions requiring the workplace to be as safe as possible in order to minimize the possibility of violent⁸⁸ incidents in the workplace. Employers must inform workers of the risk of violence, and this includes notifying workers of clients who have a history of violent behaviour.⁸⁹ This requirement could result in creation and distribution of bad trick sheets or bad call lists. Some sex workers reported that their employer permits some violent clients to continue frequenting the establishment in which they work. The *OHSR* requires employers to conduct risk assessments and develop appropriate policies, procedures and work arrangements to eliminate or at least minimize the risk of violence where complete elimination is not possible.⁹⁰ Such protections clearly are needed in sex industry workplaces.

The *OHSR* authorizes workers to refuse to engage in unsafe work,⁹¹ while placing an obligation on employers to investigate and remedy unsafe conditions. Further, the *OHSR* prohibits employer discrimination against workers who refuse to undertake unsafe work.⁹² Permitting employees to refuse to engage in what they deem unsafe practices without fear of reprisal could help avoid the situation where employers force workers to engage in unsafe practices, or practices they are not comfortable with, either explicitly or by implication. This provision further supports the principle that there should be an industry-wide standard allowing the worker to dictate what services will be provided. Because of the overlying sexual assault *Criminal Code* provisions regarding consent,⁹³ individual workers must be able to choose what services they will provide, as well as be able to withdraw their consent to any activity at any time. A provision to this effect was explicitly included in New Zealand's legislation.⁹⁴

Drug and alcohol use in the workplace

Drug and alcohol use were frequently mentioned as precipitating violence in the sex industry. One massage parlour sex worker described the alarming situation where employers deliberately impair their employees by supplying them with drugs in order to make them dependent and obedient:

A. One girl she got a pimp, and she said that's her boyfriend. But it's totally does not look like her boyfriend because it look like she is just a servant because she is following his back and stuff like that. And couple of times, I go over to her place. It's her boyfriend place, she said. And she has her own room, and it does not look like her boyfriend. And her boyfriend is a dealer; and like he is supplying her with the drugs. Like all the money it's go to the dealer . . . But some girls does not. Like those Thai girls. They do not usually use condoms. Because they do not know freedom. They just listen to whatever . . . You know, peoples want. The just worry they could not get the money. Because they are drug users. Because the owner is really terrible like you

⁸⁷ *CCC*, *supra* note 1, ss. 265(1), (2).

⁸⁸ **Violence** means the attempted or actual exercise by a person, other than a worker, of any physical force so as to cause injury to a worker, and includes any threatening statement or behaviour which gives a worker reasonable cause to believe that he or she is at risk of injury. *OHSR*, *supra* note 7, s. 4.27.

⁸⁹ *Ibid.*, ss. 4.30(1), (2).

⁹⁰ *Ibid.*, ss. 4.30(3), 4.28, 4.29.

⁹¹ *Ibid.*, s. 3.12.

⁹² *Ibid.*, s. 3.13.

⁹³ *CCC*, *supra* note 1, s. 273.1(2).

⁹⁴ *PRA*, *supra* note 18, s. 17(1).

know they have the way to control them.

- female off-street in-call sex worker

Under s. 4.20 of the *OHSR*, workers would not be permitted to work while impaired by alcohol or drugs⁹⁵ and employers must not knowingly permit a person to remain at the workplace while impaired.⁹⁶ Similarly, under s. 3.19, workers with any kind of physical or mental impairment that may affect their safety, or the safety of anyone else, are not permitted to work.

Sex workers generally agreed that employers should prohibit drug use on the job:

Q. Drug and alcohol, should they be allowed on the job?

A. Nnnnnnnnnnnnnnn!

A. No.

A. It's too dangerous. All the way.

A. Yeah.

A. Definitely too dangerous.

A. And violence comes of it.

Q. Who should make the rules and who should enforce them?

A. The house. The house.

- female street-level sex workers

Some sex workers were so opposed to drug use on the job that they advocated drug testing:

A. I think, sex trade, y'know, is definitely a unique employment situation so, I think, being tested . . . I am sure there are other places where you, places of employment where you have to have certain tests, before you go to work. . . . Drug tests, like to be on the Police there are a lot of medical tests. I don't think you should take offence, I think that it is the way that it should be. Because it's the risks of the employment, of the job

- female off-street out-call sex worker

A. A smart person, who has a brothel, would not let drugs in their brothel . . . Same thing. I just think that someone who is intoxicated either by drugs or by alcohol, is not effective. They are not – it's harder to be on their game. It's harder to be aware of your surroundings; it's harder to be aware of danger. That's the biggest thing. So . . . it's not safe.

- female off-street out-call sex worker

One project participant talked about the improvement she found in her work when she managed to quit drugs:

A. But like now, since I have been off drugs it's – I've noticed a considerable difference in bad dates. It's almost gone down – almost gone down to zero.

- female off-street out-call sex worker

Some sex workers reported that drug and alcohol use on the job is common. If prostitution is to be made safer, further discussion about drug and alcohol use is needed. One of the primary objectives of policy initiatives in this regard should be to reduce drug-related harms for sex workers.

⁹⁵ *OHSR*, *supra* note 7, s. 4.20(1).

⁹⁶ *Ibid.*, s. 4.20(2).

Hazardous substances

Blood and other bodily fluids are classified as hazardous substances under the *WCA*.⁹⁷ Special provisions apply regarding worker education and training that include providing information to workers about the potential effects of exposure to hazardous substances, and the means to prevent exposure.⁹⁸ In addition, because blood and other bodily fluids can transmit disease causing organisms and toxins, the Workplace Hazardous Material Information System (WHMIS) classified them as “poisonous and infectious material” (Class D) and as “biohazardous infection material” (Division 3).⁹⁹ WHMIS applies to all workplaces, including healthcare and laboratory facilities. The WHMIS system assumes that every sample is dangerous and encourages safety precautions in every instance of handling hazardous substances.

The requirements under WHMIS are fairly extensive, and the onus falls on the employer to maintain an effective program in concert with the overall workplace health and safety program.¹⁰⁰ One provision relevant to prostitution is that the employer must maintain a list of job tasks that create the potential for occupational exposure to blood borne pathogens, and implement a system of precautions for each listed task.¹⁰¹ WHMIS requires that workers wear personal protective equipment to shield them from biohazardous materials.¹⁰² These provisions applied to prostitution would mandate the education of workers about the risks associated with each type of service provided, and would require condom use where the contraction of sexually transmitted disease is possible.

Some project participants expressed support for this type of health and safety program, lamenting the current lack of information and lack of awareness of risk:

- A. You see I see it as rules that go along with the sex trade you know. It's safety. Not only do you have to practice what you preach but you know you've got to teach it as well.*
- A. A lot of it's just a given.*
- Q. Okay well these people don't know what the givens are so let's kinda lay them out. What are the givens that people have to do to reduce . . .*
- A. You go out there; you have a date. You have to wear condoms. If the date turns around and says well I don't want to do the date if you want to use a condom well you know you've got to be able to hold your ground and say look I'm sorry it's not going to go. And you shouldn't have to go that far because your employer should have this date already pre-screened and already set up so that condoms and everything are there. They're going to be used and it's mandatory. There is no change.*
- A. The client agrees.*
- Q. The client agrees in advance. That's a good point.*
- male street-level sex workers

The application of the *OHSR* to prostitution would result in increased education and awareness, and more fair and safe workplace practises by both employers and employees. Prior to applying any law to prostitution, however, careful consultation with sex workers themselves should be undertaken by government.

97 **Hazardous substance** means (a) a controlled product within the meaning of the *Hazardous Products Act* (Canada); (b) a substance designated as a hazardous substance by regulation; and (c) a biological, chemical or physical agent that, by reason of its properties, is hazardous to the health or safety of persons exposed to it. *WCA*, supra note 6, s. 106.

98 *OHSR*, supra note 7, s. 5.2.

99 B.C., *WHMIS at Work* (B.C. Workers' Compensation Board, 2004) at 8, online: <http://www.worksafebc.com/publications/Health_and_Safety_Information/by_topic/assets/pdf/whmis.pdf>.

100 *WCA*, supra note 6; *OHSR*, supra note 7.

101 *OHSR*, supra note 7, s. 6.35.

102 *Ibid.*, s. 6.36(2).

Supplies

Under s. 115(2)(d) of the *WCA*, employers must provide personal protective equipment and ensure that it is used on the job. If the criminal laws were to be repealed, it would have to be determined through consultation with sex workers what supplies would be included as personal protective equipment. Condoms are the obvious example, but the obligation also may include provision of birth control pills, rubber gloves, dental dams, or water-based lubricants to prevent condom breakage. One female street-level sex worker suggested that employers provide the morning after pill in the case of an accidental condom breakage or a sexual assault.

Provisions requiring that employers provide workers with supplies are very important in the context of prostitution, as many workers reported having to provide their own condoms. Many sex workers stated that condom purchase is an added expense that sometimes they cannot afford. The current pressure to provide their own condoms sometimes leads sex workers to reuse them:

- Q. Now did they give you condoms there?*
A. No, you have to have your own condoms.
Q. So, were you using condoms?
A. Yes, I did.
Q. All used or . . .
A. All used.
 - female off-street in-call sex worker

Another massage parlour sex worker described having to pay her employer for condoms:

- Q. Right. So with the guys that you were having sex with that he was introducing you to, where you using condoms with them?*
A. He, himself. With him I did not.
Q. With him you did not, but with the other guys you did?
A. He said remember to do that.
Q. Okay, and who was buying you condoms?
A. Him and he charge me.
Q. He charged you for the condoms?
A. And starting to charge guys more money. And he starting charging me for food too.
 - female off-street in-call sex workers

Most sex workers believed that employers should be responsible for providing the equipment required to work safely:

- A. The house, or the - your employer. You're working –*
A. Yeah . . .
A. Should all - should supply everything that you need as far as safety goes.
A. As far safety goes, yeah.
 - female street-level sex workers

Some massage parlour sex workers reported that their employer did not give them free condoms unless a non-profit organization promoting workplace health supplied them to the employer. One sex worker in a massage parlour reported that her employer was selling condoms he had obtained for free from a non-profit organization designed to help sex workers. Such exploitative practises would be prevented by the application of the *OHSR* prostitution, should it be decriminalized.

One WHMIS provision relating to supplies specifically deals with Hepatitis B. The provision states that vaccination against Hepatitis B must be provided at no cost to workers upon request where

there is a risk of infection.¹⁰³ As there is a clear risk of Hepatitis B infection in prostitution even where precautions are taken, the application of this provision would result in free vaccinations in sex industry workplaces.

Hygiene

The *OHSR* includes various provisions concerning personal hygiene during employment. According to s. 5.82(1)(c), employers must provide adequate washing facilities, this could include showers. Similarly, the B.C. *Health Act*¹⁰⁴ requires the provision of adequate washing facilities¹⁰⁵ in personal service establishments, where ‘personal service establishment’ specifically includes massage parlours, saunas and steam baths.¹⁰⁶

Several project participants said they would like to see hygiene standards implemented:

- Q. This is a kinda related thing. What about hygiene in the work place.*
- A. That should be provided by the work place.*
- A. That's a mandatory.*
- A. Ya.*
- A. Hygiene for people who are doing this thing don't have the given on that. Having to work all day and . . .*
- A. Ya, you know it's like slap more lube on. You know it's like no.*
- A. You have to be picky when it's sticky and it's icky.*
- Q. So now you're talking about hygiene for both the clients and the workers?*
- A. Ya.*
- A. Ya.*
- A. Yup.*
- Q. Which do you think is the bigger issue?*
- A. We pretty much have good hygiene.*
- A. It's tough to say though cause no offence but you know I've had a lot of people tell me that they've picked somebody up, no names mentioned, but they gave them \$20 and said you know get the, you stink buddy.*
- A. Get out of the car.*
- A. But you know in the same instance I've gone to go down on a couple of people and I mean like fuck you know, like no. I'm sorry that stinks and it's just not happening.*
- A. Get a shower or douche.*
- A. Mandatory.*
- A. I don't think the hand sanitizer bottle's big enough some days you know. Really.*
- A. I think again if you're working for somebody this is all going to be pre . . .*
- A. But you have to be showered.*
- A. Ya but you have to be showered. Showers are nice beforehand. You're not going to have some guy coming off the construction yard after 14 hours of working coming around walking into your establishment and saying hi can I have one of your girls for an hour you know and then expect to get laid. It's going to be okay like sure you can but there's a shower and everything down there and if you don't want to shower and everything then you don't get service. Stinky dinky no stinky.*

- male street-level sex workers

¹⁰³ *WCA*, *supra* note 6, s. 6.39.

¹⁰⁴ *Health Act*, R.S.B.C. 1996, c. 179 [HA].

¹⁰⁵ *Personal Services Establishments Regulation*, B.C. Reg. 202/83, s. 2.

¹⁰⁶ *Ibid.*, s.1.

Many of the massage parlours visited during the project had showers in the rooms. However, some massage parlour sex workers reported that the showers are intended for clients, but they are not made available to sex workers.

Public health

A final health-related theme that also figures prominently in the New Zealand legislation involves the role that the government must play in monitoring public health. One relevant provision in the B.C. *Health Act* specific to occupational health and safety at personal service establishments states that, “no person shall operate or cause to be operated a personal service establishment unless he maintains and operates it, and uses and maintains the instruments and equipment required for the service, so as to prevent a health hazard occurring.”¹⁰⁷

Under s. 26 of the New Zealand *PRA*, medical health officers and qualified inspectors have the power to enter and inspect premises where they have reasonable grounds to believe that a business of prostitution is being carried out, and where they are seeking to determine whether the operators or workers are following the safer sex practices mandated by s. 8¹⁰⁸ and s. 9¹⁰⁹ of the *PRA*.¹¹⁰

Analogous provisions exist in the B.C. *Health Act*. Under s. 61,¹¹¹ public health officials have numerous broad-ranging powers of inspection to determine whether a health hazard exists on a premise. For example, they are able to enter premises and question residents, inspect records, and take photographs. One additional measure in the *Communicable Disease Regulation*¹¹² within the *Health Act*, gives authority to medical health officers to close down public gathering places in order to control the spread of communicable disease, and this could include, for example, a massage parlour that demonstrates a poor record of occupational health.

There are many advantages to be gained by the inclusion of prostitution in the protections offered in the *WCA* and *OHSA*. But again, it is important that the application of any laws to sex workers be undertaken only with careful consultation with those workers.

Section 3: Unionization

The right to establish or join a trade union is protected by the *Universal Declaration of Human Rights*¹¹³ and the *International Covenant for Economic, Social and Civil Rights*.¹¹⁴ The *Universal Declaration of Human Rights* says quite simply that, “Everyone has the right to form and to join trade unions for the protection of his [or her] interests.” However, there are currently various legal barriers to the unionization of sex workers.

A union is an organization or association of employees that act collectively to address common labour issues on behalf of workers. One central purpose of a union is the regulation of relations between employers and employees through collective bargaining, which means bargaining as a group, rather than as individuals. The law governing unions in B.C. is set out in the *LRC* which guarantees the right of provincially-regulated employees to join a union, and sets out the rights and duties of employers, unions and unionized employees. Also it sets out the law on forming a union – the process

107 *Ibid.*, s.3.

108 *PRA*, *supra* note 18, s. 8.

109 *Ibid.*, s. 9.

110 *Ibid.*, s. 24.

111 *HA*, *supra* note 104, s. 61.

112 *Communicable Disease Regulation*, B.C. Reg. 4/83, s.18.

113 *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), art. 23.4.

114 *International Covenant for Economic, Social and Civil Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 2, 3, 8.1(a), Can. T.S. 1976 No. 47, 6 I.L.M. 368.

of “certification” – collective bargaining, basic standards for collective agreements, strikes, lockouts, picketing, grievances and mediation. The *LRC* provides unions with the right to bargain with the employer on behalf of the employees it represents (the bargaining unit) and, on their behalf, to enter into a collective agreement setting out the terms and conditions of their employment. In return for that right, the union has the duty to represent all of the employees in the bargaining unit in a manner that is not arbitrary, discriminatory or in bad faith.

Not every worker in B.C. is covered by the *LRC*. Only those persons who meet the definition of an “employee” are entitled to be part of a union and exercise collective bargaining rights. Therefore, “independent contractors” cannot unionize, and nor can personnel who perform a managerial role in the employment context, or if a person is employed in a confidential capacity in matters relating to labour relations or personnel. Some employees in B.C. are not covered by the *LRC* because they work in industries that fall under federal jurisdiction. For example, the *Canada Labour Code*¹¹⁵ governs collective bargaining rights for employees of the federal public service and Crown corporations, employees of chartered banks, and the grain industry.

The ensuing discussion describes sex workers attitudes to unionization, how they feel a sex worker union should be structured, who should represent sex workers, and how unionization would occur under the current legislative framework. Current labour laws in Canada, with the exception of Quebec, do not provide for the unionization of autonomous or contract workers where there is no clearly defined employer/employee relationship, and this could be an obstacle to many sex workers who may want to unionize. However, in this section, we assume that, if the industry is decriminalized, sex workers who meet the definition of “employee” under the *LRC* will be eligible to join or form a union. Also, we assume that provincial labour laws would cover sex workers, and not the areas of federal jurisdiction listed above.

Do sex workers want to unionize?

Overall, support for the idea of having a union for sex workers was strong among all categories of sex workers interviewed.¹¹⁶ There were two main reasons why sex workers want to unionize. First, sex workers believed that unionization might result in higher wages. Second, many sex workers supported the idea of having someone to represent their interests in negotiations with employers.

Among the workers we spoke to, the strongest support for unionization came from street-level sex workers – they all supported the idea of unionization. Some escorts and massage parlour workers were more reluctant to unionize because they felt that they could get a better price than other workers, and wanted the independence to do so. They also felt that by remaining independent, they would maintain greater control over the type of work that they do and the clients they serve. This finding likely reflects the fact that street-level workers are among the most vulnerable and lowest paid of all sex workers.

Wages

Some sex workers felt that unionization would provide them with greater bargaining power and, as a result, the potential to receive higher wages:

A. Unionization implies that someone is paying you a wage, right and you are fighting for a certain wage.

- female off-street in-call sex worker

Another sex worker supported the prospect of an hourly wage, and felt that being part of a union would increase the possibility of getting paid more than minimum wage:

¹¹⁵ *Canada Labour Code, R.S., 1985, c. L-2.*

¹¹⁶ Note: there were no data from male street-level sex workers about unionization.

A. And the first thing we would do is fight for slightly above minimum wages. We would have to have minimum \$10.

- female off-street out-call sex worker

Unionization could offer sex workers the opportunity to bargain collectively for better wages. Canadian statistics show that, on average, unionized employees and non-union employees working under a collective agreement earn significantly more than non-unionized employees.¹¹⁷

Representation on issues faced by workers

Many sex workers supported unionization as a way to ensure that their concerns and grievances are heard, that health and safety conditions are enforced, and that there is a formal mechanism enabling them to negotiate with their employers:

A. [I]f we were unionized, and we had our union rep and like someone who would speak for us girls, then I would be open to that.

- female street-level sex worker

Some sex workers felt that unionization would create solidarity with other workers, and would provide a more powerful voice for sex workers:

A. And solidarity. Y'know, having somewhere to go, with issues and things? And have some – y'know, if enough issues come up? Then there is somewhere, a recognized organization, by the public, to give voice. Y'know, a dozen women have come forward with this problem – could speak in solidarity for everybody?

A. [Y]ou would be able to avail yourself of legal services if you needed them, you would have a voice if you need a voice, the media would be well informed about needs, maybe de-stigmatization could occur, that to health benefits and things like that, coverage, so maybe, you know, maybe, maybe they've got a point.

- female off-street out-call sex workers

Other sex workers thought that unionization would create better occupational health and safety standards in a workplace and that workplace violence would be reduced:

A. What I think is happening, when bad dates happen . . . so when that happens there is no effective way for us to deal with that. Rather than it just being put on a piece of paper, and reported, it is like . . . there should be some sort of way to link them with charges that stick. You know, do something. Right? You know, maybe a union or something, it is not okay for these guys to come into town and doing what ever.

- female street-level sex worker

Another project participant suggested that her working conditions would improve if she had a formal advocate:

A. . . . we could complain to somebody. You know, have[complaints] looked into. For example, the work where I work now, she turns off the heaters on the floors in the winter for us. So we have this one minute heater that's turning around in the room. So we have 14 girls that are freezing without robes on. That's cruel, and who are we going to complain to? The girls have other issues too, labour complaints or whatever but no one takes it seriously, no one comes in and inspects it.

- female off-street in-call sex worker

¹¹⁷ "Average hourly wages of employees by selected characteristics and profession, unadjusted data, by provinces (monthly) (Canada)," online: Statistics Canada <<http://www40.statcan.ca/l01/cst01/labr69a.htm>>.

Another perceived benefit of unionization is protection from unfair and unequal treatment by massage parlour owners via the enforcement of standardized working conditions:

A. I could see some good things about that [unionizing] . . . definitely for the fact of the way, that the owners of these houses, that are run, yeah – because they are not fairly run where . . . this new girl, y’know, so they can control them and get away with more. So then, these people who know what they are doing, and, expect what they are worth back . . . they push them out. Y’know, and that’s what I have been seeing happening, because they don’t want them informing the other ones. What is it that they don’t have to do or what is – not to let people do certain things to them and for their own safety reasons and their own respect of themselves. And how, in that sense, it needs to be a standard set of what, y’know, its up to her and so that the clients, I mean, so the agencies can’t tell the girl that they have to be - put them into a fear state that they have to do whatever that client wants. And that they get complaint, oh then you go on probation, kind of bullshit, y’know and its just – so then they are just sitting there worrying and especially new to the trade. I know, because when I was, you don’t know what you can say no to, y’know? So that kind of standard thing is definitely needed.

- female off-street out-call sex worker

Concerns about working conditions could be addressed through a union’s grievance procedure. This is discussed in the section on “Complaints and Grievances” below. Also, unions could negotiate the provision of work-related supplies, the allocation of tips, the creation of in-house rules, and employee discipline.

Desire to retain independence and control over their own business

Some sex workers did not like the idea of unionization, because they felt that it would mean a loss of their independence and a loss of control over the way that they conduct business:

A. Again, it’s giving control to one person or to one organization. And here in Edmonton, I mean years ago when I was dancing and I got out of it because, I mean, we were getting \$125 a set, which meant work five songs. And basically, what happened is the bikers came in and took it over and all the dancers are working for the bikers now. So that’s exactly what would happen if we went union . . . you know, it would be the same thing.

- female street-level sex worker

Some sex workers were concerned that unionization would result in a loss of privacy:

A. I could see some good things about that [unionizing]. But then it depends on where they settle with the union and what the terms would be. Also, the privacy of the girls.

- female off-street out-call sex worker

Overall, project participants did not oppose unions on principle, but felt that each sex worker should have the option of joining a union if they want to:

A. I am mixed on that because I am a bit of a monopolist, yeah, and I like supreme privacy. But I think unions should be there and I think women should have a choice between unions or not. However, most of the women who mention loss of independence as a concern also say that forming a union would depend on each employer or employment situation and they note that people should have the option to unionize.

- female off-street out-call sex worker

Some sex workers were concerned about union rules, and did not want to have to worry about breaking them:

A. I would always want the option of being independent too. Even while working in a union, I would always want the option without worrying about being thrown out for whatever.

- female street-level sex worker

These viewpoints make it clear that the option of unionizing should be made available to those sex workers who wish to reap the benefits of union protection.

Who will represent sex workers?

Project participants stated that they want a union run by sex workers, and driven by member concerns. Sex workers described an ideal union representative as a seasoned sex worker who understands the work, and is caring and reliable:

A. We would all take a part of running it because we all look out for each other's best interests.

A. That is certainly an interesting point. Umm, so basically, just to make sure we are clear here, because what you are in fact saying is that you would like the union to be run by sex workers.

A. Yes, More preferably, because they would know . . . they would know what the other girls are going through and make the other girls more comfortable. A comfortable environment. You know, like being in a person's shoes. Having . . . just basically having an idea of what these girls want.

- female street-level sex workers

Unionization of sex workers

Certification

Sex workers should be able to unionize through the normal certification process under Part 3, Division 1 (Acquisition of bargaining rights) of the *LRC*. The key issue with respect to unionization under the existing legal framework is whether sex workers can join an existing union or whether they can form their own union. While opinion among the sex workers interviewed varied as to how a sex workers' union should be structured, in large part, the B.C. Labour Relations Board will determine sex worker union structure because the Board has the exclusive authority to determine whether workers can form a new union, join an existing union as a new bargaining unit, or join an existing bargaining unit.¹¹⁸ Guidelines for the determination of the appropriate bargaining unit are found in the Board decisions and on its website.¹¹⁹ In seeking to determine whether a group of employees is appropriate for collective bargaining the Board considers a number of factors, including:

- similarity in skills, interests, duties and working conditions;
- the physical and administrative structure of the employer;
- functional integration;
- geography;

¹¹⁸ *LRC*, *supra* note 5, s. 22.

¹¹⁹ "Guide to the Labour Relations Code," online: Labour Relations Board of B.C. <<http://www.lrb.bc.ca/codeguide/chapter4.htm>>.

- the practice and history of the current collective bargaining relationship; and
- the practice and history of collective bargaining in the industry or sector.

All of these factors relate to what the Board calls a “community of interest.” There has to be a sufficient community of interest for the Board to certify a bargaining unit. Where practical, the Board prefers large bargaining units rather than small, fragmented groups.

The *LRC* requires that a union be local or provincial in character, and this can include local branches of national or international unions. To form a new union, a group of employees must establish a constitution and by laws, sign up members and elect officers. When a union applies to be certified, it must be able to satisfy the Board that it meets the criteria for being defined as a union. More typically, employees who wish to be unionized will contact, or be contacted by an existing union, and apply to become a chartered local of that union or join an existing local union. As there are no existing sex trade unions in B.C. or Canada, the most likely scenario if the laws pertaining to adult prostitution were to be repealed, would be for sex workers to start a new union for the sex trade. However, one project participant suggested that sex workers could join an existing service industry union:

A. I think that getting backing and going unions would be the service industry. The service industry does that . . . And it would probably be local 40.

- female street-level sex worker

Another possibility for sex workers to unionize would be to join an existing international sex work union. Currently, there are sex work unions in several other countries.¹²⁰ Although presently none of these unions are international, at some point they may become so. In Britain, the GMB trade union (Britain’s General Union that any worker can join) has union recognition agreements for three lap-dancing clubs. Also, there is a unionized brothel. The London-based International Union of Sex Workers joined the GMB in 2002. In Germany, the Verdi public sector union is recruiting and organizing sex workers in Dortmund and Hamburg, where it has helped set up a works council in one brothel. In the Netherlands, the long-standing Red Thread sex workers’ rights group has become part of the Netherlands Trade Union Federation (the “FNV”), the largest trade union confederation in the Netherlands that is now organizing and representing sex workers. In the U.S., dancers at the Lusty Lady peepshow in San Francisco gained union recognition in 1996. In Australia, two sex workers’ rights groups (Workers in the Sex Industry, and the Prostitutes’ Collective of Victoria) joined the Liquor, Hospitality and Miscellaneous Workers Union in 1995. In 2002, the Striptease Artists of Australia was formed as a union to represent lap dancers and strippers, while UNITE in New Zealand organises sex workers and dancers.

How might established labour unions in Canada react to sex workers joining their bargaining units? Some union members may be reluctant to ally themselves with the sex industry. It has been noted that in other countries – such as Australia, Germany and the Netherlands – the interest of established unions in helping sex workers to unionize reflects their attempts to tackle their own membership declines. In the process, they have recognized the de facto employment relationship that characterizes much sex work, and have become much more open to supporting prostitutes’ rights discourse.¹²¹

A similar reaction may well occur in Canada given recent statements from the Canadian Union of Public Employees (CUPE) and the Canadian Labour Congress. Both of these organisations have committed themselves to working toward legislative reforms to help end the discrimination expe-

¹²⁰ Gregor Gall, “The Unionisation of Sex Workers,” online: Word Power <<http://www.word-power.co.uk/platform/PlatformStyle-17>>.

¹²¹ *Ibid.*

rienced by sex workers. At the 2001 CUPE National Convention, members passed a resolution for CUPE to take the lead in the Canadian Labour Congress for the repeal of the criminal laws pertaining to prostitution in Canada.¹²² Also, in 2002, the Canadian Labour Congress, an organization that represents 2.5 million workers in many different unions, called on the entire labour movement to support sex workers.¹²³

Union structure

If sex workers form their own unions, how would they structure their bargaining units? For example, would sex workers doing different types of sex work – such as street-level, escort or massage parlour work – be in one bargaining unit, in one union with separate bargaining units, or in completely separate unions? Opinion among sex workers varied on whether different kinds of sex workers should be in the same union or bargaining unit, or whether different categories of sex workers should be in separate unions or bargaining units.¹²⁴

A. Yeah, I think so. I think so. I think that it should be broken up into society. Like, if there is a union rep. for like, a residential area, not a residential area, but some kind of geographical area. Like two union reps for this geographical area, and then they go back and let everyone know and then they hear the feedback and they take that back to the table. Y'know . . . Because if you have it from each house, you are going to have a lot of bickering and a lot of yapping. Not necessarily getting a lot of work done.

- female off-street out-call sex worker

Other project participants wanted to see all sectors of the sex industry in the same union:

Q. So like, would, would – people would everybody be – out-calls, in-calls, street-level, would everybody be in the same Union, or would people have different Unions?

A. Same Union.

A. Same Union.

A. Same, yeah.

A. Yeah.

- female street-level sex workers

Another project participant thought the needs of workers in different sectors of the industry would best be served by different unions:

A. [I]t would have to be a little bit more complex and thought of and planned out. How would it work with certain, like, would just brothels be in it? Or would there be everyone? Or what like? There would have to be guidelines. There would have to be different for like, street-level or different unions for, y'know. I think that if it is decriminalized, then I think that it would be a necessity. I do not see how it would work without a system like that. There are a lot of different aspects, there are a lot of medical, emotional needs, physical and medical needs when you are thinking about sex work. Like counselling or whatever . . .

- female off-street out-call sex worker

Regardless of what workers might think about union structure, however, the Labour Relations Board ultimately decides which employees are able to comprise a union.

¹²² "Sex work: Why it's a Union Issue," online: CUPE <<http://cupe.ca/updir/BackgroundPaper-SexWorkEng.doc>>.

¹²³ *Ibid.*

¹²⁴ As mentioned earlier, the final decision on the structure of a bargaining unit is up to the Labour Relations Board.

Strikes and picketing

Part 5 of the LRC sets the rules for picketing and strikes. Some project participants said that they would be willing to participate in picketing and strike if they were part of a union:

- A. So would those strategies be useful to sex workers, striking and picketing?*
A. Yeah.
A. Oh sure. Well if there is a reason for something happening, like somebody's, like you wanna open up a house and it's a unionized house of workers and next door they say well no we don't want this house to open well then you have to picket and strike to keep it open. Yeah, that would be y'know.
 - female street-level sex workers

However, one out-call sex worker argued that, in order for a sex worker union to be successful picketing and striking, it would have to be in a workplace setting, like that of a massage parlour, where a group of employees work at one location waiting for business to come through the door.

Section 4: Complaints and grievances

In order to improve working conditions in the sex industry, employment standards should be created along with a mechanism to enforce them. Presently, for a host of reasons, sex workers have few, if any, options to report unfair or exploitative workplace conditions. One project participant suggested that, as things stand, the police are the only available option:

- A. Women get fired all the time, not showing up to work, late all the time, customer complaints. Customers will complain if the girl rushed them out or a girl was too cold, or not nice enough she would just walk away if something bad happened there, there is no one she feels she could complain to unless maybe if she went to vice [police] and said they are pimping the girls in this establishment.*
 - female off-street out-call sex worker

This is hardly a satisfactory situation, because many sex workers stated that police do not take their reports seriously. Given that the police are not in a position to establish or enforce employment law, sex workers feel they have few, if any options, to change poor working conditions. Workers in other industries have access to a number of different complaint mechanisms to combat poor working conditions. For example, if a worker feels that an employer is violating an *OHSR* standard, they can make a complaint to the Workers' Compensation Board. Also, where an employee feels that their employer is violating a provision of the *ESA*, they can make a written complain to the Employment Standards Branch (the "Branch").

Under the *ESA*, the Branch reviews the complaint and, if it suspects that a violation is occurring, it will attempt to mediate a settlement between the employee and the employer. If this is not possible, then the complaint may be taken to the Employment Standards Tribunal (the "Tribunal") for a hearing. The Tribunal comprises independent members who make a decision based on the facts as presented to them. Complainants can request that their identity be kept confidential, and it will not be disclosed unless the disclosure is necessary for the purposes of a proceeding, or the director believes that the disclosure is in the public interest. The director of the Employment Standards Branch has access to all relevant information during the course of the investigation.

Sex workers face a number of barriers should they wish to participate in this complaint process. The main reason that sex workers do not report their employment concerns to government agencies is that it could attract the attention of police and result in criminal consequences for the worker or the business owner. Another reason is sex workers do not make complaints is that the existing bodies

have likely never considered sex industry employment issues. One employer suggested that it is very important for sex workers to be able to speak out when they feel that they are being exploited in the workplace:

A. I mean, people in this business don't mobilize very often for a cause. And that's a good example of a group of people coming together, current employees, ex-employees, coming together and saying, we, we need to do something about this, it's so wrong. It takes a lot for a sex worker to say, this is wrong. A lot of what we do is wrong. We swallow our pride everyday, y'know, men will make disgusting comments, and you just sort-of smile, Oh – you're, you're funny! Um – y'know, part of the job is swallowing your pride. Because part of the job is playing to the male ego. And, again, I am sorry for your gender. But part of the job, involves swallowing your pride. So when it comes to what an employee will take from an employer, quite a bit! And I mean, I have, myself. And – and I'm not a pushover. It's just part of your cost to doing a lot of business. I've worked for a lot of pigs. And I've – I've never wondered y'know, mobilize against someone – it would have to be really bad.

- female massage parlour owner, former sex worker

When asked whether they would be interested in having a mechanism for complaints against employers, many participants said that sex workers need a mechanism for making complaints about problems in the workplace. However, sex workers raised a number of concerns about a governmental body, such as the Branch, handling complaints. They were concerned that a government body would not understand prostitution and the particular workplace issues that sex workers face. Several project participants felt that any government or other body that is made responsible for overseeing sex workplace standards will need to include sex workers in its membership if it is to understand and address the problems that sex workers currently experience:

- A. Regardless of the section of employer, I definitely think that there needs to be an arbitration board or a complaint system. Because there's – there's been known abuses in this industry.*
- A. For sure.*
- A. And you don't have no voice. Traditionally, the women doing the work have no voice, if there are problems and complaints.*
- A. You have to, yeah, establish like somebody that would listen to the hearings though.*
- A. And I think that should be a board of retired hos.*
- A. Yeah. Somebody who has been in the industry for years*
- A. Then it would be like a tribunal, not just a union, a tribunal always, only, like three voices.*

- female off-street out-call sex workers

Some project participants identified ways that the existing *ESA* complaint system would have to be modified to address the particular needs of sex workers. They felt sex workers should be able to make anonymous complaints. Also, they suggested that it should be possible to make a complaint at any time of day or night:

- A. That there would be an organization that they could go to report these incidents of that are occurring and how they are being treated. And so that, something that backs their involvement. That they won't just be fired, that there is some sort organization that can come in and say hey this is either the regulations, you can't do this and you can't do that. So then they get penalized for it . . . You could make the complaint anonymous, y'know, and just make a number, or something. To make it an anony-*

mous thing. To have it reported, y'know what I mean. Then if they get two of them, then they will be knowing that there is something going on . . . Then they wouldn't know which girls are doing – that they are doing that. Amongst themselves they would talk about be having this happen, and they all know it. So that would give them a chance to do that without losing their jobs . . . So that they could report it. A phone number, actually, that is a really good idea. A work line. For these agencies, because the crap that goes on at, y'know, six o'clock in the morning when they are expecting, y'know, is putting your life at risk. And you are pressured into it. You need to have someone that they don't know and y'know, to put that agency back in line. Just because of that money-hungry thing, y'know. So. Yeah I think that phone line thing is a really good idea. Because if they had more than one, and at the time, they can be there even for that particular problem. A good idea.

- female off-street out-call sex workers

Concerns were raised about the loss of privacy that occurs once a complaint is filed with the government:

- Q. Yah? Okay here's another one. If you make a claim for compensation, or if you file a complaint against your employer, your workplace personal records, including your medical records, can be inspected by people from the government. How do you feel about that?*
- A. I don't like it, but that's something we'd have to give up. It truly is . . .*
- Q. How do you guys feel about that? So I'll just say it again. The issue is whether, you know, as a result of WCB, you can make a claim or complaint, they can look at your files.*
- A. Hmm. I think if they want to do it, they're going to find a way to do it anyways.*
- A. That's right.*
- A. 'Cause they're the government.*

- male street-level sex workers

Aside from sex work, there are already concerns about the effectiveness of the *ESA* complaint process. There is evidence that the complaint process does not work well for unrepresented workers. As the Law Commission of Canada notes:

The effectiveness of complaint-driven enforcement mechanisms depends on the ability of individual workers or their bargaining agent to take action. Unrepresented workers have a very limited ability to take action against violations of labour standards. Moreover, many workers are unaware of the protections they do have. Most complaints are made once the employee leaves the workplace, a fact that demonstrates the real and perceived threat of reprisal against employees who complain about their employment while on the job... [I]t is not uncommon for workers to be told that any kind of resistance to or complaint about work conditions will be met with dismissal. Few workers are willing to take the risk. Many also find the complaint procedure confusing and intimidating. Added to this is the problem of reduced spending on enforcement and compliance. Budget cuts at all levels of government mean that even where there is a willingness and desire to assist vulnerable workers, the resources are insufficient for timely investigation and resolution of complaints.¹²⁵

The point may be particularly pronounced in the case of what the Law Commission of Canada terms “stigmatized” workers, including exotic dancers:

¹²⁵ *Is Work Working*, *supra* note 10, at 22.

Many freelance dancers could meet the test for employee status, because of the high degree of control exerted by club owners. However, an exotic dancer, like any other worker with minimal bargaining power, risks losing her status as a dancer at a particular club if she complains about work conditions. She also risks being labelled a troublemaker and thus, being banned from other clubs as well. Moreover, given the stigmatized nature of the work exotic dancers do, many would be unwilling to risk public exposure by complaining about their work conditions.¹²⁶

These considerations are equally applicable to sex workers. We asked sex workers if they felt that unionization would assist in a grievance process. The process for filing grievances in a unionized workplace is set out in the *LRC*. The grievance arbitration process is used for settling disputes between the union and employer. Grievances can be filed for a number of reasons, but they usually arise in situations where an employee has been disciplined or terminated, or where there is a disagreement about the interpretation of some part of the collective agreement. The grievance arbitration process attempts to resolve the difference between union and employer representatives. If that fails, the parties appoint an arbitrator to make a binding ruling. The decision of an arbitrator or arbitration board is final.

One major difference between the process set out for unionized employees and that set out in the *ESA* for non-unionized employees is that, under the *LRC*, the union brings the grievance, not the employee. The union is the complainant. There was support for having a union representative or advocates assist workers with their complaints:

- A. *An advocate.*
- A. *Yes, and having a mediator.*
- A. *A mediator and an advocate, just like any other union would.*
- A. *I think that the ideal situation just in – in a house where there is a sort-of collective, but maybe one person that or two people, that are basically taking care of keeping the house safe. There should be an advocate or somebody in the house that is voted on or picked or voted on in a collective to take in the complaint. And go over it, and talk over with the person making the complaint and make sure that it's in the proper order and all the things that she wants complained about, are in it. Rather than just a general idea, it's an actual complaint and then take it from there.*
- A. *Yeah that would be like having a shop steward. Like in a construction job I could tell the Shop Steward I gotta bitch between this and this, my employer didn't pay me, I did a double, he paid me for a blow job . . .*
- A. *And I'm pissed off so this is what he owes me – I'm gonna go to the Shop Steward, the Shop Steward's gonna go to them and they're going to fight my battle for me. Be an advocate.*
- A. *But I guess in this case we're talking about a union.*
- A. *You would go to your Shop Steward.*
- A. *That's what they do. They always have a mediator.*

- female street-level sex workers

Of course, unionization brings a set of different problems. Even if the employee believes that they have a legitimate complaint, the union is not obliged to proceed with it. Because it takes ownership of the complaint, it also decides whether to proceed with it.

Some project participants felt that a non-governmental regulatory body specifically created for sex workers would be preferable to the existing mechanisms:

¹²⁶ *Ibid.*

- A. *Well, I mean, a non-governmental regulatory body would probably be [the] best solution there, right?*
- A. *Non-government, yeah.*
- A. *And do other places around the world have sex worker organizations, like that?*
- A. *There's an International Union of Sex Workers.*
- A. *There is – oh is that the one in Edmonton?*
- A. *There is Coyote.*
- A. *Oh yeah, Coyote.*
- A. *London.*
- A. *Oh in London. Oh.*
- A. *If we could get help from something like that I would think we would choose to figure things out too.*
- A. *Like a backbone, a structure.*
- A. *Yeah. I mean – I think that was where we should go for help. To find out – to help us figure out what to do for ourselves. Because they would know. The government, and these other things, they don't know. They are used to abusing us.*
- female off-street out-call sex workers

Some participants felt that sex workers will never have the economic power or social acceptance necessary to develop a strong professional body. Perspectives varied significantly as they discussed various scenarios:

- A. *I think since it's labour, it should be under something that's existing, like a union.*
- A. *So, you don't think there should be like any regulating body for working girls like for the escorts or for the sex industry?*
- A. *Same as something that doctors and lawyers have? I don't think we have the economic power, frankly.*
- A. *. . . because being sex trade workers it's going to be so different than just normally working so if there was one [non-governmental professional regulatory body] I think I would complain to them because they would know what's going on, they would know everything instead of going to the labour.*
- A. *I'm just, I'm afraid of starting too many things that are just for prostitutes. I think we should fit instead of make ourselves stand out.*
- Q. *Why don't you want it to stand out?*
- A. *Because that's where we are now and to me progress would be integration.*
- A. *And not special treatment.*
- A. *Right.*
- female off-street out-call sex workers

In the event of decriminalization, sex workers are entitled to the protections that unions offer. Although some were less supportive of unions than others, many stated that they would favour the protections that unionization would bring. Unions in Canada are beginning to encourage prostitution law reform, and unions for sex workers have existed in other countries for several years. Unionization is another means to improve the empowerment and safety of sex workers. Union leaders in Canada have a significant role to play in helping sex workers unionize, assuming that they are open to the guidance of sex workers about the specific characteristics of the sex industry.

Section 5: Sex workers as independent contractors

The preceding discussion applies to sex workers who wish to be characterized as employees so they are able to claim benefits and protections under the *ESA* and other employment related statutes such as the *LRC*. However, some sex workers will prefer to work on their own as independent contractors. Others may be forced to do so as a result of their inability to secure or retain employment. Many sex workers who remain as independent contractors may be at greatest risk in terms of having to continue to operate in unsafe working conditions. In response to this concern, many sex workers expressed an interest in establishing working arrangements with other sex workers.

Section 6: Sex workers operating as a collective

Participants were asked for their opinion about working in a “collective.” For the purpose of these discussions a “collective” was described as a group of sex workers with a common goal and vision that upholds the equality of its members, and strives to ensure that its members have equal decision-making power and responsibility.

Some sex workers were sceptical of the potential for a group of sex workers to work together in an environment where they work and share profit:

- A. There's just too much pettiness with the girls. Personally, I worked in them, but I could not stand being around girls with pimp, for that long period of time. And – Right. Whoever, wherever. And them being – it's just a different mentality, being in the business and not having your needing or wanting, a desire, or threatened by it. And whereas, it's a competition for money, so then there's the thing that goes on between girls inside the trade, inside the massage parlours, is that they want that girl – oh, she's new, she's pretty – she's taking business, our money now, so then they start ganging up on that person and they push her out. So that's not really fun, either in that fairness way, but, y'know, like all those little whiteys will stick together and do their stupid little things.*

- female off-street out-call sex worker

However, for many others, working in a collective environment was an appealing concept:

- A. I would [prefer to work as an] independent, but more of a cooperative. Rather than alone-independent, I think.*
- A. Like everyone, all the working girls having a share in the . . .*
- A. In the company, in the house.*
- A. And for a full service, you would have different times when you are on duty, answering that phone. And then, y'know, the other time, when you are not, you are doing the kid-care part. And then, it could even be one separate place, but not totally.*
- Q. What do some other people think? Independently or for an employer?*
- A. I'd say independently but I like the idea of a co-op too . . .*
- A. Yeah cause its always being alone it's . . .*
- A. Yes, the girls would all, with the coop all the decisions would be made cooperatively.*

- female off-street out-call sex workers

Another project participant felt that it would be appropriate to have an elected position within the collective for someone to handle complaints:

- A. *I think that the ideal situation just in – in a house where there is a sort-of collective, but maybe one person that or two people, that are basically taking care of keeping the house safe. There should be an advocate or somebody in the house that is voted on or picked or voted on in a collective to take in the complaint. And go over it, and talk over with the person making the complaint and make sure that it's in the proper order and all the things that she wants complained about, are in it. Rather than just a general idea, it's an actual complaint and then take it from there.*

- female street-level sex worker

Some sex workers felt that working in a collective would create a healthy work environment and a greater sense of community among women in the industry:

- A. *So everyone would have the same goal – like the girls would want to make money and they want to . . .*

A. *Equal, yes.*

A. *And I don't want to make more than this girl, but we all do the same.*

A. *The same amount of work.*

A. *It might help the cooperation instead of the competition actually, mightn' it?*

A. *That would be something to be overcome maybe too. Because it is fierce competition. But I like the idea of the co-operative or a collective. It seems to me . . . it's the isolation factor is the biggest hardship in a way . . . And for a lot of women there, that's the only place, that if you don't show up, after a while, somebody is concerned and wondering where you are. Cause for a lot of those women, there's no-one else. And you're not necessarily all that close to anybody at WISH. But it's the camaraderie, right? You don't have to get like personal – Without being personal. It's really beautiful. But it really struck me a few times, that it's all that anybody has. Because you get so isolated because you are out-cast and you are working alone. Like bus drivers, they don't work alone. But they have such camaraderie between each other, and they are always looking out for each other and they hardly ever make each other late to make each other wait a shift, cause you might have to drive for two hours, to get off that bus, if you're late. Y'know if the other guy's late for a shift. So they all they are like us, they all work alone, but they really have an acute understanding of the hardships . . .*

A. *Cab drivers are the same way.*

A. *Yeab, yeab. And they go to each other's rescue, like that. Because they really know the hardship and stuff. So they have a brotherliness, that we've got to develop.*

- female street-level sex workers

General, the sex workers we interviewed embraced the idea of working in a collective as a means of creating a safe, egalitarian and non-exploitive work environment.

Formal collective arrangements

While sex workers would be free to establish informal collaborative or cooperative structures, they may wish to consider formalizing these by establishing a legal corporation or cooperative.

Incorporation would enable workers to formally set out the respective rights and obligations of the “owner” members, as well as rules and decision-making procedures. Since the cost of forming a company is currently less than \$500, this should not be prohibitive for all but the most impoverished sex workers, if shared between four or five workers.

The major attraction of establishing a formal corporate entity is that it would enable the “owner/workers” to be hired by the company as employees – in effect, they would “hire” themselves. While

this would have little practical significance under the *ESA* as the employees would also be the owners of the company, it would facilitate access to workers' compensation and Canada Pension Plan benefits. Also, it could be used to facilitate the establishment of a pension or retirement scheme for the owner/employees. However, sex workers would still not be eligible for employment insurance since the Act requires that employees and the corporate employer be at arms length.

In addition to these other benefits, it may be useful to establish a corporation or cooperative because it could act as a support and lobby organization for all sex workers. Such an organization could offer a number of services, including:

- advice;
- training;
- access to supplies through bulk purchasing;
- income replacement insurance as an alternative to Employment Insurance;
- lobbying; and
- dispute resolution.

The development of sex worker corporations or cooperatives would provide several of the functions that unions serve, but on a potentially broader scale, as it could function like a professional association for sex workers. Indeed, an aggregation of such entities could constitute an association with an elected board composed of peers. An association comprising and operated solely by sex workers would be best suited to providing the above noted services in a manner that is both sensitive and appropriate for sex workers. Also, sex workers could benefit from the united front offered by a professional association to end exploitation and violence in the workplace.

Employment benefits and protections for sex workers recommendations

Repeal the criminal laws relating to adult prostitution

1. Repealing the criminal laws relating to adult prostitution (ss. 210, 211, 212(1), 212(3) and 213) is the critical first step towards providing sex workers with access to the employment and labour protections that are generally afforded to workers under the laws of B.C. and Canada.

Employment standards

Employment standards branch

2. Provide sensitivity training and education to all levels of staff at the Employment Standards Branch so that they are able to handle cases involving sex workers in a sensitive and respectful manner.

Recognition of sex work as “work”

3. Consensual adult sex work should be recognized as work.
4. Sex workers should be given full access to the rights and protections found in the *ESA*, *LRC*, *WCA* and *OHSR*.
5. Persons who are coerced or forced to engage in prostitution against their will should have full access to the protections found under the criminal laws of Canada, and specifically those provisions which prohibit sexual and physical assault, harassment, threatening, and extortion.

Sex workers as “employees” versus “independent contractors”

6. Sex workers should be provided information to assist them to understand the different rights and privileges that are offered to workers who are classified as being “employees” as opposed to “independent contractors.”
7. Sex workers who are deemed to be independent contractors by their employers, but whose employment circumstances fit the legal definition of “employee,” should be given full access to the Employment Standards Branch, Labour Relations Board or a court of law in order to seek recognition as “employees,” and have their rights protected as such.

Hiring practices

8. Employees in the sex industry should be provided with full access to the protections found in the *ESA* relating to hiring practices, including the right to be fully informed about the nature of the position and the conditions of employment.

Coercion

9. Job applicants and employees should have full access to the Employment Standards Branch and the police in cases where, during the interview process or at any other stage of employment, an employer coerces or forces a job applicant or employee to engage in sexual activity with the employer or any other person.

Children and youth

10. The conduct of employers and clients should continue to be subject to the *Criminal Code* provisions that prohibit obtaining for consideration, or communicating with anyone for the purpose of obtaining for consideration, the sexual services of a person who is under the age of 18 years.¹²⁷

Limits on employment contracts

11. Enact a section in the *ESA* that sets out that the fact that a person has entered into a contract to provide commercial sexual services does not of itself constitute consent for the purposes of the criminal law if he or she does not consent, or withdraws his or her consent, to providing a commercial sexual service. In other words, despite entering into an employment contract, a sex worker must always maintain the right to refuse to provide sexual services and the right to withdraw consent at any time. This section should explicitly state that it applies to both employees and independent contractors.
12. Enact a section in the *ESA* that permits persons to create contracts for provision of commercial sexual services subject to the following proviso: despite any terms of a contract for the provision of commercial sexual services, a person may, at any time, refuse to provide, or to continue to provide, a commercial sexual service to any other person. If a person refuses to provide or continue to provide a commercial sexual service, the other party may recover damages for a commercial sexual service that is not performed. This section should explicitly apply to both employees and independent contractors.
13. Provide accessible plain-language information to employers and workers about the specific limitations that must be considered when drafting sex work employment contracts.

¹²⁷ *CCC*, *supra* note 1, ss. 212(2), 212(2.1), 212(4).

Termination

14. Enact legislation that stipulates that refusal to provide a commercial sexual service to any person does not constitute “just cause” for the termination of an employee.

Terms of employment

15. Provide employees in the sex industry with the wage protections found in the *ESA* in order to ensure that they do not earn less than the minimum wage.
16. Provide employees in the sex industry with information about what job training and business costs the employer must pay under the provisions of the *ESA*.
17. Provide employees in the sex industry with full access to the Employment Standards Branch if they are being subject to illegal penalties or fines by their employer.
18. Provide employees in the sex industry with information about their rights in relation to hours of work, overtime, statutory holidays, vacation time and sick days.

Privacy

19. Protect personal information about sex workers and their clients by protecting that information in existing B.C. privacy legislation.

Complaints and grievances

20. The existing grievance process for employees in B.C. is problematic in terms of its ability to handle the employment issues that sex workers face. This system must be evaluated with the specific needs and issues that confront marginalized workers, and particularly sex workers.
21. Sex workers should be supported if they chose to look further into the possibility of developing their own professional regulatory body.

Unionization

22. Respect the rights of sex workers under the *Universal Declaration of Human Rights* and the *International Covenant for Economic, Social and Civil Rights* by decriminalizing employer/employee relationships within the sex industry, and by providing sex workers with full access to the unionization process as set out under the *LRC* and the *Canada Labour Code*.
23. The Canadian Labour Congress should support the repeal of the criminal laws surrounding adult prostitution and support sex workers in their efforts to become unionized.
24. Provide resources and information to sex worker groups for further discussions, consultation and research on the question of union formation, certification and the creation of effective bargaining units.
25. Provide sensitivity training and education to all levels of Labour Relations Board staff and members so that they are able to handle cases involving sex workers in a sensitive and respectful manner.

Workers' Compensation

26. Repeal the criminal laws relating to adult prostitution and provide sex workers with equal access to the protections found in the *WCA*.
27. Ensure that coverage for independent workers is affordable and practical.
28. Add HIV/AIDS to the list of compensable diseases in Schedule B in order to protect workers in any profession who face the possibility of contracting HIV in the course of their employment, and

provide coverage for post exposure prophylaxis for workers who may have contracted HIV in the course of their employment.

29. Acknowledge pregnancy as a workplace risk that must be accommodated within the *WCA*.
30. Inform sex workers, clients and employers that, in order to engage in commercial sex as safely as possible, and in order for workers to make a *WCA* claim, workers may be obliged to take reasonable steps to protect their health, and the health of their clients, through the use of protective equipment.
31. Explain disease infection disclosure requirements to workers, clients and employers.
32. Do not impose mandatory HIV testing or medical certificates for sex workers, but do provide safe, easy and confidential access to testing for workers and clients.
33. Engage in further consultations with sex workers on the issue of whether to enact legislation prohibiting a person from providing or receiving commercial sexual services unless he or she has taken all reasonable steps to ensure that an appropriate barrier is used when those services involve vaginal, anal, or oral penetration, or any other activity with a similar or greater risk of sexually transmitted infection.
34. Enact legislation to ensure that a person's entitlement to Worker's Compensation is not lost or affected if he or she refuses to engage in, or refuses to continue to engage in sex work.

Occupational Health and Safety Regulations

35. Sex workers' rights should be protected under occupational health and safety legislation.
36. The application of any occupational health and safety regulations to sex work should be undertaken only in careful consultation with sex workers.
37. Provide sex workers with protections found in the *OHSR* and require that employers provide safe physical working conditions.
38. Issues around drug and/or alcohol use on the job should be addressed through the leadership and direction of sex workers.
39. Educate employers about their obligation to provide personal protective equipment and adequate washing facilities to their staff.
40. Give sex workers access to educational materials and training on occupational health and safety and involve sex workers in the creation of these materials.
41. Subject employers in the sex industry to the provisions in the *WCA* and *OHSR* that oblige employers to ensure safe physical working conditions.
42. Ensure that any legislation relating to condom use enables sex industry workers and employers to establish working conditions that support consistent condom use,
43. Do not create intrusive legislation that is based on a punitive approach to sexually transmitted disease infection.
44. Consult with sex workers to develop a list of personal protective equipment items that employers must provide to sex workers pursuant to *WCA* s. 115(2)(d).
45. Ensure that the application of any *OHSR* laws to sex work is only undertaken after careful consultation with sex workers.

PART 4: INCOME ASSISTANCE AND EMPLOYMENT INSURANCE

Income Assistance: In 2002, the Government of B.C. introduced the *Employment and Assistance Act* (the “EAA”) and *Employment and Assistance Regulations* (the “EAR”). Together, these statutes set out the province’s welfare program. Sex workers who participated in this project were critical of four aspects of B.C.’s welfare legislation: the work search and employment related requirements; the two-year prior work experience requirement; the declaration of income requirement; and the three-week waiting period requirement.

Work search/employment related requirements

In order to apply for income assistance, a person must meet a series of requirements.¹ One of these involves conducting and providing evidence of a three-week work search.² The only exception to this requirement is if the applicant can prove that such a work search would cause undue hardship.³ Once a person has completed this work search, and if they are found to be eligible for income assistance, they must agree to an employment plan setting out the basis of a continued work search.

According to the *EAA*, if at any time a recipient of income assistance fails to accept suitable employment, is fired from employment for just cause, leaves employment voluntarily without just cause or fails to continue searching for work, that person’s income assistance will be reduced or cancelled altogether.⁴ Because the *EAA* and the *EAR* do not provide definitions of “suitable employment” and “just cause,” it is unclear how these policies would apply if prostitution is decriminalized. For example, in a decriminalized context, it is possible that prostitution would fit the definition of “suitable employment,” and that income assistance recipients would be compelled to look for, accept, and remain in prostitution.

Sex workers were asked how they felt about this possibility. Many respondents thought that income assistance applicants should not be compelled to accept employment in prostitution as a condition of welfare eligibility.

A. I don't think that you should be forced [to work] at McDonald's, nor should you be forced to work as a sex worker too [in order to qualify for income assistance]. You should not be forced to work in sex work.

- female off-street out-call sex worker

Another worker suggested that prostitution should always be a last resort, and usually is not a choice that someone with options would make.

¹ *Employment and Assistance Regulations*, B.C. Reg. 263/2002, s. 3.

² *Ibid.*, ss. 3(1)(a), 3(1)(b).

³ *Ibid.*, s. 3(2).

⁴ *Employment and Assistance Act*, S.B.C. 2002, c. 40, s.13.

- A. *Well I should say sex work, being in the sex trade is not an option; it's just like a survival thing. I mean . . . it's usually . . . not by choice If someone were forcing you to go back, . . . that's like a pimp, that's kind of saying, oh you have to go risk your life. They do not know those circumstances. It's not like quitting a job, because it's not a job, y'know. It's a way to live.*

- female off-street out-call sex worker

A male sex worker felt that the danger sex workers face is a strong reason to never force anyone into prostitution:

- A. *I don't think they should be forced into the trade [by an income assistance worker] because of things that could happen in the industry as being a sex worker – harmful to the mind like bad dates and drug use . . .*

- male street-level sex worker

In arguing that income assistance applicants should not be compelled to prostitute, and be denied welfare if they do not, sex workers emphasized that prostitution is an intensely personal choice; the government should not be able to influence that decision:

- A. *I just think that would be like the government pimping you . . . it's just up to the person.*

- male street-level sex worker

Another sex worker suggested that if financial aid workers are in a position to tell a person that they must prostitute, then they should personally provide the employment training.

- A. *You know what I'd say to [being forced into sex work by income assistance]? . . . make that worker go out and show us how to do it first then.*

- male street-level sex worker

Several workers stated that women and men must have autonomy and control over the decision to enter prostitution.

- A. *Yeah, I don't think that's a very good idea [to make people look for sex work in order to qualify for income assistance]. I mean, it got to be a choice. You know, I made this choice. It's what I've chosen to do. Nobody's made me do it. You know, it's got to be a choice.*

- female off-street out-call sex worker

- A. *[Forcing someone to find sex work before qualifying for income assistance is] government slavery . . . That's enslaving a woman into prostitution by the government.*

- female off-street out-call sex worker

- A. *As a sex worker you can't have anybody say I want you to go out there and sell your ass to get this money. It just doesn't happen. We go out there for ourselves and the minute somebody pipes in to do it for them then it's not a good situation.*

- male street-level sex worker

Other sex workers pointed out that prostitution is not suitable work for everyone:

- A. *That's sort of like saying that you could, you know, climb buildings and be a window washer but you're afraid of heights or something, you know like, and not mention that some jobs like they can't force you to do. Like they can't force you to be an astronaut. They can't force you to do things that scare the hell out of you or are against your religion.*

- male street-level sex worker

A. Because not everybody has the emotional control to be a sex worker, or detachment. Detachment to be a sex worker.

- female street-level sex worker

Many sex workers felt that prostitution is a very specialized type of work:

A. I believe that it is a very hard job to do, you are basically a sexual surrogate . . . and I agree that it takes a certain . . . personality type to do that kind of job. It's a very, very specialized occupation.

- female street-level sex worker

A. . . . to make people applying for income assistance go out and you know "if you don't go out and work on the street-you don't get benefits." Well of course not.

A. There's a difference between selling your ass and selling a hamburger. The hamburger's not personal.

- male street-level sex workers

By way of comparison, New Zealand's *Prostitution Law Reform Act 2003* (the "PRA") contains a provision which states that a person's refusal to work as a sex worker does not affect their entitlement to income assistance or other benefits provided by the government.⁵ Many sex workers strongly supported this approach. However, some sex workers took the opposing perspective, arguing that prostitution should be understood as "suitable employment" for the purpose of the *EAA* and *EAR*. They believed that it is contradictory to argue that prostitution is legitimate work while also arguing that it should not be considered "suitable employment" for the purposes of income assistance eligibility:

A. Actually I'm not sure they should get benefits then if they could become a sex worker. What gives them any right to benefits like when there is something that they can do which others before them have had to do to survive, right? Like I mean if they want to whine and say "Oh well, I don't want to do that. I want benefits." Well then they should work double hard to go find something else they could do, right? So they don't have that as a last option.

- male street-level sex worker

A. Well if they're gonna consider [sex work] a form of employment, right, then it should apply all across the board.

- male street-level sex worker

That being said, there are strong arguments in favour of emulating the New Zealand model, so that income assistance applicants who do not want to be involved in sex work are not forced to by the state.

Two-year employment requirement

The *EAA* imposes a general requirement, subject to numerous exceptions, that in order to qualify for income assistance applicants must have worked for at least 840 hours in each of the two years prior to making an application.⁶ At the present time, hours worked in prostitution are not considered legitimate employment, nor do sex workers necessarily accurately record them. For this reason, we asked sex workers if their hours worked should be considered as contributing to the 840 hours and, if so, how would they go about maintaining a record.

Participants took the view that applicants should be allowed to include hours spent in prostitution in order to meet this requirement.

⁵ *Prostitution Reform Act, 2003* (N.Z.) 2003/28, s.18

⁶ *Employment and Assistance Act, s. 8; Employment and Assistance Regulations, s. 18.*

- A. *Absolutely [hours working in the sex trade should count towards income assistance eligibility]*
- A. *Yeah [time as a sex worker should count towards income assistance eligibility] but if the people are embarrassed to admit it, I guess it can be optional. To those who don't want to have it in the record that they did that.*
 - male street-level sex worker

When asked whether there should be a special exemption from the two-year employment requirement for sex workers, some participants argued that sex workers should not be exempt:

- A. *We don't want special privileges.*
 - female street-level sex worker
- A. *Yeah, if prostitution is legalized then, yes, they should have to prove they've worked [in order to qualify for income assistance].*
 - female off-street out-call sex worker

Some thought that counting those hours would be either embarrassing or unworkable:

- A. *It's impossible to count the hours that you work per day.*
- A. *I would feel degraded.*
 - female street-level sex worker

Others expressed concern about loss of privacy:

- A. *The proving hours thing – What that means to me is – is exposure. Again like this is, yes it's a business, but it's private, it's your sexuality. You don't throw that out for the government to look at.*
 - female off-street out-call sex worker
- A. *Yeah, if prostitution is legalized then, yes, they should have to prove they've worked. Of course if it is legalized, I can't see how [sex workers are going to prove the amount of hours that they have worked] – how [are they] going to get receipts?*
 - female off-street out-call sex worker

The issue of prostitution aside, Pivot believes that the two-year employment rule creates an unreasonable barrier for individuals in need of welfare, and should be repealed. However, if this section of the *EAA* remains in force, then prostitution should be recognized as “employment” and sex work should count as contributing to the requisite 840 hours. Further, some kind of provision needs to be made that acknowledges the difficulties some sex workers may have in keeping track of the hours they work. For example, in order to accept prostitution as contributing towards the two-year requirement, employment and assistance workers may need to accept an applicant’s word. However, repeal of the criminal laws relating to prostitution may result in improved systems of record keeping, such as declaration of prostitution earnings in income tax returns, which could be used as proof of hours of work in the sex industry.

Declaring income

Both earned and unearned income is usually deducted from a recipient’s income assistance payment. However, if a recipient is classified as a Person with Disability (PWD) or as a Person with Persistent and Multiple Barriers (PPMB) to employment, he or she is eligible for a \$500 earnings exemption.⁷ To be classified as a PWD or PPMB, a person needs a physician’s opinion of a current medical condition.

⁷ Persons with Disabilities Fact Sheets, online: Ministry of Employment and Income Assistance <<http://www.eia.gov.bc.ca/fact-sheets/2006/EarningsExemption.htm>>.

In the event that the criminal laws relating to adult prostitution are repealed, sex workers on income assistance will be required to declare their income. Unless a sex worker qualifies for PWD or PPMB, every dollar earned would be deducted from his or her income assistance check.

Sex workers were asked what they thought about having to declare income earned while on income assistance, and then be subject to deductions as a result. Our participants suggested that, as things stand, income assistance is not enough to live on; to have income earned from prostitution deducted would cause hardship. One person described several factors that make it important for sex workers to have access to a financial safety net, including the transience of many workers, the inconsistency of their earnings, and the personal toll of working in prostitution:

A. The thing is too, the sex trade, a lot of women that have been in the business, they're in it for a transient period of time. They're in and out throughout their lives at different times when they need the money, it may not be a full-time thing for them The sex trade is up and down. It's not a regular steady [job] It's like some days are bad, some days are good, and some days are just in between. And maybe I don't feel like working every day. It's a little hard on your brain. You don't always want to do sex trade every single day. It gets to you so you may only work part-time, which again reduces your income. I don't know, it's hard to keep a tab on some things like that. And if you get into the streetwalkers and the girls who are less educated and drug addicts, it could be very hard to nail down their income or get anything from them.

- female off-street out-call sex worker

One sex worker suggested that involvement in prostitution is already a result of the inadequacy of current welfare rates.

A. Half of us probably end up in the sex trade because we are waiting for that next welfare cheque to begin with, and we got kids to feed. . . . What are you going to do? You got three kids. Your welfare cheque takes you where?

- female street-level sex worker

One participant supported the idea that sex workers should be able to legitimately claim prostitution income, because it would be a relief to be able to be open about being involved in sex work.

A. I mean I would like to think that . . . if prostitution should be legalized, if you are on disability, then a certain amount of income we all claim. I think it would be fabulous to claim that and be honest about who you are and what you do.

- female off-street out-call sex worker

Others remarked that, at times, prostitution income is already being deducted from income assistance cheques.

A. Basically, with myself, I had a child when I was 17 years old and I was on Social Assistance at that time, and basically Social Assistance found out that was a prostitute and cut me off Social Assistance because I had an income. So I don't know what the difference really is. Yeah . . . it doesn't make . . . yeah . . . I mean it's happening here already.

- female off-street out-call sex worker

Judging by the low income assistance rates currently available in B.C.,⁸ it is hardly surprising that

⁸ Seth Klein and Andrea Long, "A Bad Time to Be Poor: An Analysis of B.C.'s New Welfare Policies" (June 2003) online: Canadian Centre for Policy Alternatives <www.policyalternatives.ca>.

sex workers were concerned that prostitution income, once declared, would be deducted from their income assistance. In order to remedy this situation, be it in a criminalized or decriminalized context, the B.C. government should raise its income assistance amounts to reflect the realistic cost associated with having a reasonable standard of living. In addition, the B.C. government should grant earnings exceptions to all income assistance recipients.

Three-week waiting period

Before an income assistance applicant qualifies for income assistance, he or she must complete a three-week work search. During this “three-week waiting period” the applicant does not receive any income assistance. This waiting period means that some people may have no financial resources for weeks at a time; as a result, they may have to engage in prostitution to survive.

Several respondents stated that a three-week waiting period is inappropriate for persons in desperate need, and for sex workers who are trying to exit the sex industry.

A. Those three weeks [of waiting for income assistance] screwed as far as I am concerned. I mean you got to consider that most people, if they're in the survival sex trade say, they are not usually there because that is their first job of choice.

- female street-level sex worker

A. And that three weeks is a long time to wait. I mean, who's to say you are going to make your money for the three weeks, that you are going to be able to eat for the next three weeks while you are waiting for welfare? That's not necessarily true. Just because you are in the sex trade, does not mean that you make a lot of money. Not always. There's lots of days that you don't make nothing. three weeks is a long time to wait for welfare.

- female off-street out-call sex worker

A. Well there's three chances – I mean three weeks of chances to go missing and get harmed. So it could mean loss of children, loss of life, loss of livelihood cause you got a month of hurtin' cause you can't turn the tricks no more. Then you got three weeks of that.

- female off-street out-call sex worker

Regardless of whether adult prostitution is decriminalized, the province should eliminate the three-week waiting period. This legislative change is necessary in order to assist sex workers who wish to exit the industry and to ensure that no one is forced to enter prostitution as a result of having to wait three-weeks for income assistance.

Employment Insurance

The Employment Insurance (“EI”) program is administered through the Government of Canada’s Department of Human Resources and Skills Development (“HRSD”), and is set out in the *Employment Insurance Act*⁹ (the “EIA”). The legislation says that employers must make deductions from each employee’s paycheque and remit those funds to HRSD which then provides insurance to employees who experience periods of unemployment. “Regular benefits” are available to employees who lose their job through no fault of their own, such as shortage of work, redundancy, or seasonal lay-offs. EI also funds maternity, parental, and sickness benefits. EI provides for compassionate care benefits if an employee has to be away from work temporarily to provide care or support to a family member who is gravely ill with a significant risk of death. EI is only available to employees; consequently, in the case

⁹ *Employment Insurance Act*, S.C. 1996, c. 23.

of independent contractors, an employer is not required to make EI deductions or remittances.

When an employee applies for EI benefits, he or she must provide a extensive personal information to HRSD, including their Social Insurance Number, a “Record of Employment” from each job held over the previous 52 weeks, complete bank information, a detailed version of facts if an employee quit or was dismissed from any job in the last 52 weeks, and details regarding the most recent employment and the salary received. If applying for sickness or compassionate care benefits, an applicant must provide a medical certificate.

Sex workers supported the idea of participating in the EI program. One explained her predicament when unable to work and had no safety net to carry her through a period of unemployment.

A. I, right now, have nothing. And it has been really hard trying to get up and there is no services really . . . And even what is there, just everything has been cut. So if there was unemployment [insurance], if they are paying from . . . [the] money that they make, then they would receive unemployment, an income insurance, so I think that is a good idea. And then that protects them to come back into y’know – it decreases the amount of space between the square world and the live world by allowing it to have something integrated. Y’know, it’s like a, what would you call it? Just a package in-between. So it makes it kind of easier.

- female off-street out-call sex worker

Much like any other kind of worker, sex workers face periods of unemployment, including maternity leave:

A. . . . maternity leave is something that interests me. Because I have so many people just go on really hard times because, again, people don’t have any savings in this business. And I am sure the hard person in all of us, says, oh that’s their own fault, then. Why aren’t they more responsible? Why don’t they manage their own money? Blah, blah, blah. But it doesn’t really matter why. The fact of the matter is – they don’t. No one ever really has any money. No one is a broad term. Ninety-five percent, doesn’t have any money saved. So, when they find out that they are pregnant, and no one ever really plans a pregnancy, unless they have money saved. So, let’s say most people haven’t planned their pregnancy, and they find out they are pregnant, they realistically have four more months to make enough money to last another year – which is virtually impossible. And this is where you see people, taking a lot of chances. This is – these are the girls that will steal from clients, these are the girls that will steal from each other, these are the girls that are all of a sudden – they are desperate, because no matter what, by about the five month mark, they can’t hide it anymore. And they have zero income, and they go from a lifestyle of a 25 hundred dollar a month rent, \$800 car payment and you can’t go from that lifestyle to no income. Where do you go? Where do you go get a job at five months pregnant and for what kind of money? So maternity leave is an interesting one. Because I don’t know what the solution is? But there’s need to be something in place for – I don’t know. I don’t know what. Then you have people hiding their pregnancy.

- female massage parlour owner, former sex worker

Many sex workers felt that they would benefit considerably by being eligible for maternity leave:

Q. Yup, what about EI and maternity leave?

A. Oh for sure, that would be wonderful. I always think about that, I’m thinking about having a baby lately and I’ve just been like scrimping my money together because obviously you can’t work when you are pregnant. I have been thinking a lot about

that lately. My only option is to save my money and to make sure that I have some for the year I stay home.

- female off-street in-call sex worker

Recipients of EI have to satisfy a complex set of criteria. For example, when receiving “regular benefits” during periods of unemployment, an EI recipient must be able to demonstrate that they are willing and able to work at all times. They must be able to demonstrate that they are looking actively for work, and maintain a record of their work search. Claimants can be disentitled to benefits if they fail to prove that, on any given working day, they were capable and available for work and unable to find “suitable employment.”¹⁰ In light of these criteria, would HRSD see prostitution as “suitable employment,” and under what circumstances would it be viewed as such? Depending on the interpretation, HRSD could disqualify a claimant for refusing to look for or accept employment as a sex worker. Again, the New Zealand legislation deals with this eventuality by providing that a person’s refusal to engage in sex work does not affect his or her entitlement to benefits such as EI. The sex workers we talked to agreed that this type of provision should be included in the Canadian *EIA*.

Even if sex work is completely decriminalized, Canada’s EI scheme will still exclude specific groups of sex workers who may need financial support during periods of unemployment. For example, independent contractors do not have EI deducted from their pay, and therefore cannot claim EI benefits. A significant proportion of sex workers are currently categorized as self-employed workers or independent contractors, and will likely continue to be so even if the criminal laws are repealed. Therefore, it is likely that many sex workers will continue to be barred from participating in EI.

Part-time workers and workers who are faced with fluctuating levels of work often are also excluded from EI. Many of these workers are ineligible for EI because they do not meet the minimum number of hours of insurable employment that is required during the qualifying period to be eligible to claim EI. Most people will need between 420 and 700 insurable hours of work during their qualifying period to be eligible, depending on the unemployment rate in their region at the time of filing their claim for benefits.¹¹ These workers can be denied benefits even after having paid into the system. Many sex workers currently work part time or experience fluctuating levels of work and, therefore, could be denied benefits for not having worked an adequate number of hours in the period before they became unemployed. Sex workers will benefit from the EI scheme if it is restructured to allow self-employed workers to pay into the EI program, and if part-time and other vulnerable workers are not subject to a requirement that they work a minimum number of hours of insurable employment in their qualifying period.

Income Assistance recommendations

1. B.C. should enact legislation that is modelled after the New Zealand *PRA* which states that a person’s entitlement to social assistance may not be cancelled or affected in any other way by his or her refusal to work, or to continue to work, as a sex worker.
2. Repeal the *EAA* two-year employment rule because it creates an unreasonable barrier for individuals who need welfare.
3. If the two-year employment rule remains in force, then prostitution should be recognized as “employment” under the two-year employment requirement for income assistance.

¹⁰ *Ibid.*, s. 18.

¹¹ *Ibid.*, s. 55.

4. B.C. employment and assistance workers should include prostitution as a form of work contributing to the 840 hours that must be worked in each of the preceding two years in order to qualify for welfare.
5. Income assistance rates should be raised to reflect current living costs and to provide a reasonable standard of living.
6. All income assistance recipients should be allowed income exemptions.
7. Eliminate the three-week waiting period.

Employment Insurance recommendations

1. Enforce the requirement that employers in the sex industry pay into EI on behalf of their employees.
2. The *EIA* should contain a provision which states that refusal to work in the sex industry does not affect a person's entitlements to EI.
3. *EIA* should be amended so that self-employed workers are able to pay into the EI program.
4. Part-time and vulnerable workers should not be subject to a requirement that they work a minimum number of hours of insurable employment in their qualifying period in order to qualify for EI.

PART 5: INCOME TAX LAW

Paying income tax and claiming income: Canada's *Income Tax Act*, R.S.C. 1985, (5th Supp.) c. 1 (the "ITA") requires that every person who is a resident in Canada pay tax annually on his or her taxable income.¹ The requirement to pay income tax even applies to income earned through criminal activities. Sex workers are legally required to file tax returns and pay income tax on income received from prostitution, even if they commit a criminal offence in the course of their work. Many sex workers pay income tax on their earnings in the escort business or in massage parlours. However, some sex workers do not pay income tax, and have been somewhat shielded from tax authorities because of the relative anonymity and secrecy that results from the criminalized status of their work.

Income that independent or self-employed sex workers receive is classified as "business income." If sex workers are employees, they must report their "salary, wages and other remuneration, including gratuities"² to Revenue Canada as "employment income."³ Income from criminal activities is deemed to be "business income" subject to income tax.⁴ With the repeal of prostitution laws, the payment of income tax by sex workers may become increasingly necessary as Revenue Canada increases its efforts to collect tax from them.

Sex workers expressed a variety of opinions on the subject of taxation. Project participants raised five main issues regarding taxation and prostitution:

- Gaining access to the benefits of being a tax payer.
- Protecting privacy interests of sex workers.
- Calculating income from prostitution.
- Calculating deductible business expenses.
- Avoiding liability for retroactive tax.

¹ *Income Tax Act*, R.S.C. 1985 (5th Supp.), c. 1, s. 2.

² *Ibid.*, s. 5(1).

³ *Ibid.*, s. 248(1) defines employment as "the position of an individual in the service of some other person (including Her Majesty or a foreign state or sovereign) and "servant" or "employee" means a person holding such a position." The status of sex workers as either independent contractors or employees will likely take on new significance in a decriminalized environment. Currently many owners of massage parlours and escort agencies treat sex workers as independent contractors and do not make contributions to E.I. If operating as independent contractors, sex workers are responsible for paying their own CPP, WCB, EI, etc.) See Revenue Canada pamphlet RC4110 "Employee or Self-employed? "There are four common law tests used to help determine whether a person is an independent contractor or an employee for tax purposes (*Wiebe Door Services Ltd. v MNR*, [1986] 2 C.T.C. 200 (F.C.A.); *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983). Under the "control test" the more control the payor has over the service provider the more likely there is an employment relationship; under the "ownership of tools test" if the service provider provides his or her own tools for the job, there is more likely an independent contractor relationship; under the "entrepreneurial test" if the service provider has a chance to make more profit and has a risk of loss, there is more likely an independent contractor relationship; under the "integration/economic dependence test" if the service provider wouldn't be providing services but for the existence of the payor, there is more likely an employment relationship. No test is determinative of a service provider's status - it is a fact specific inquiry and the entire relationship between the employer and tax payer is examined.

⁴ Revenue Canada Interpretation Bulletin, IT256R, online: Revenue Canada <<http://www.cra-arc.gc.ca/E/pub/tp/it256r/it256r-e.html>>.

Several sex workers stated that they declare their income to Revenue Canada:

A. Many people like myself had to lie to find a way to claim income because without claiming income you can never buy anything. . . . Many people own their own homes or their apartments, or have RRSPs and RESPs for their children. You can't do these types of things if you don't claim an income. Yes there's many people who claim nothing again that would be the exception, because really you can't live without claiming [something].

- female former off-street in-call sex worker

A. I do know that escorts . . . pay their taxes . . . most escorts anyway, or a large number of them do pay their taxes. The few that don't, they really live hand to mouth.

- female off-street out-call sex worker

Other participants commented that many sex workers do not claim their income:

A. Well maybe there is like, five percent that I . . . actually see pay tax, because they need to, if they want to ever buy anything. And I know lots of people that have bought their homes and or have gone onto start a business. Many have gone on to start a business and failed. But those are the only people that claim their income.

- female off-street in-call sex worker

Some sex workers said that they do not claim their income because of the criminalization of prostitution:

A. Well I just don't think anyone should claim unless it's legal.

- female off-street in-call sex worker

One sex worker was fundamentally opposed to the idea that the government should receive any of the proceeds from prostitution because that places the government in the same position as a pimp:

A. No, I refuse to pay taxes to the government for selling my body. That makes the government legalized pimps.

- female off-street out-call sex worker

Some emphasized the hypocrisy of the government taxing prostitution while at the same time criminalizing living on the avails of prostitution:

A. No, I refuse to pay taxes to the government for selling my body. That makes the government legalized pimps.

- female off-street out-call sex worker

A. Now as far as paying taxes go, it really depends on the person In fact many people think that would be living off the avails and don't think that the government should earn tax on that if the profession is illegal.

- female massage parlour owner, former sex worker

Overall, sex workers felt that the repeal of the criminal laws surrounding prostitution may mean increased pressure to pay taxes on income generated from prostitution. Sex workers predicted a range of benefits and disadvantages arising from this change.

Benefits of paying tax

The benefits of inclusion

Sex workers stated that there would be benefits to paying income tax and becoming part of the “system.” Some participants said that paying tax would increase the social acceptance of sex workers, and promote their greater inclusion and equality in society. Some sex workers suggested that their status as non-tax payers increases their marginalization:

- A. *The taxes that's the real marginalizing factor between us, what we do and the rest of society. That's what says you're lower than a snake's belly. You don't pay taxes; I do . . . I want to be equal to the guy whose got the condo near where I'm working, in a high-rise somewhere, he's working right, he's paying taxes, that way he can't look down on us and say they're not paying taxes right? You don't have the police and law enforcement and everything, you don't get that, they're not targeting you especially 'cause you're not a tax payer right?*
- Q. *So you think that paying taxes would make you more equal-in society?*
- A. *Yep.*
- A. *Oh good point, 'cause everybody else pays taxes.*
- A. *See when you're, like I said I'll use myself as an example, when I was homeless, a homeless drug-addict slash fag or whatever, 'cause I worked the stroll, everybody pisses on you. Everybody thinks they're better than you and mainly, a lot of the biggest thing, is the thing of society where if you sell your body you're the lowest scum of the earth. I think if you paid taxes like he said. I think you would make it equal.*
- male street-level sex workers

Others commented that paying tax would reduce the stigma associated with being a sex worker:

- A. *Well the basic stigmatism of a known sex trade worker, which is something that is going to be, in the next 10 years a lot of that attitude is going to go out the window, I hope. But – ah – Other than that, no I really can't see – I think it would benefit everything to pay taxes.*
- female street-level sex worker

Some commented that paying tax would increase sex worker's credibility in the eyes of the general public:

- A. *I think that we should actually pay into taxes and that might actually give us a little boost as far as society looking down on us.*
- A. *Right.*
- A. *Credibility.*
- A. *Yeah, credibility.*
- female off-street out-call sex workers

Across all genders and areas of the sex industry, sex workers stated that they should pay their taxes like all other Canadians and, thus, be treated the same as other citizens:

- A. *Whatever we make, that's what we have to pay out. I will be on the higher bracket . . . with the lawyers and stuff. They are getting their asses taxed off, probably. I feel it has to be straight across the whole way if we were to be decriminalized. They can't just make all these work exceptions for us . . .*
- female off-street in-call sex worker

- A. *To me it's like any other business. If it's legalized then you pay taxes on it. And boy, I mean most people would probably disagree with me, but we gotta pay our fair share too.*
- male street-level sex worker
- A. *Oh I will list my job when it becomes decriminalized, sure, I'll tell them. I'm going to claim my income and submit my taxes like anyone else.*
- female off-street out-call sex worker
- A. *If it's gonna be decriminalized, and you are going to look at sex trade as a professional job, you can't pick and choose. Okay, well we'll do this, but we won't do that. I mean, no other job gets to pick and choose.*
- A. *If everybody has to claim their money that they made, as actual wage, then so should you if you are a sex trade worker, right?*
- female street-level sex workers

Nevertheless, many sex workers felt that they should not pay income tax under the current regime of criminalization because they do not receive the benefits of full citizenship.⁵ Some described the unfairness of sex workers paying tax when they are denied the protection and consideration afforded to other citizens:

- A. *Why should we pay our taxes as sex workers if we're not going to be treated with respect and if we're not going to be able to call on the police to say 'so and so ripped me off, or hurt me' or whatever? Even if we can do it we may feel that we can't. We may feel that they'll focus more on what directly did you do, how did you meet this person, how did this happen, is it all your fault, kind of thing? So uh, really, I don't want to play along with society's rules in terms of getting business licenses and paying taxes and so on, if I'm having to live as a second or third class citizen. It just doesn't fly.*
- female massage parlour owner, former sex worker
- A. *Why should you have to pay the government of Canada money for income tax on a profession that they do nothing to protect, help or even recognize, as a legitimate choice for a profession? No.*
- female escort agency owner, former sex worker

The economic benefits

Many sex workers are willing to paying tax if by doing so they gain access to the rights and privileges of being a tax payer, including access to benefits that would improve their financial security, such as CPP, EI and WCB.⁶ The reality, however, is that most of these benefits are only available to employees. Sex workers do not have “employee” status, but work as independent contractors, because criminal laws relating to procuring and living on the avails mean that they cannot be “employed” as sex workers.

Some participants noted that paying tax allows sex workers, especially those earning high incomes, to have bank accounts, purchase homes and pay into RRSPs, allowing them to establish longer term

⁵ Some participants also expressed the opinion that income from sex work should be non-declarable income because of its unique qualities.

⁶ These sentiments echo the demands made by the International Union of Sex Workers that there be no taxation of sex workers unless they have “the right to work on the same basis as other independent contractors and employers and to receive the same benefits as other self-employed or contracted workers” online: International Union of Sex Workers <www.iusw.org>.

financial stability. In order to pay into RRSPs, for example, a person requires what is termed ‘contribution room’ in the *ITA*.⁷ “Contribution room” is calculated at 18 percent of earned income reported to Revenue Canada for the prior year. Therefore, a person who does not claim any income is not eligible to make RRSP contributions. Obviously, if they do not pay tax, they do not need the tax relief that an RRSP payment provides, but as a consequence, they are unable to take advantage of the customary vehicle that many citizens use to plan for their retirement.

One participant described the difficulty of planning for a financially secure future when not claiming income:

- A. If you don't want to pay your tax on, you can't put your money in the bank. So you always have your money and you have to think about where you put your money? Do you hide it in your house? Well that's not always a good idea, because you usually have some shady fucking boyfriends, or some shady friends or there's people around. So it's not a safe thing to have this kind of money . . . Well then you tend to carry it around with you all the time. Well, what happens when you carry money around? You spend it . . . The fact that you can't make an effort to save your money, without paying tax on it, that is a huge stumbling block, right there.*

- female massage parlour owner, former sex worker

One participant described the advantages of a legitimate income:

- A. And then you could become legitimate too and then you could then, like, buy a house. And then you could do this and then you could do that. If you are not paying taxes, you can't prove your income. You cannot do those things.*

- female off-street in-call sex worker

Another talked about a sex worker she knows who pays income tax and has achieved financial security:

- A. I met this woman a long time ago in C****. She's still up there . . . She was, was a prostitute in C****. Everybody knew and she always filed income tax, every year . . . She claimed all her money and paid her taxes and in the end she got a lot more out of it . . . So she's got her pension and that's – think it is imperative to have pension – plus all the extra money that she made when she bought the house and her property and all that now and she's set for life. . . . After a while you it was just like okay, that's the town prostitute. It was just like nothing any more . . . Yeah, she still shopped at the corner grocery store, she still raised the kids, just a regular woman. The whole town got to see her finally. What a warrior for women's' rights – that beautiful lady!*

- female off-street in-call sex worker

While higher paid sex workers commented that paying taxes would make it easier for them to purchase houses and other assets, female street-level sex workers emphasized the advantage of gaining access to government benefits, such as the Canada Pension Plan:

- A. I don't want to be 65 and out there working . . . you have nothing to fall back on to. You know, it is one of the disadvantages about it. If we had a union, and we all pay taxes, and by rights we should have something to fall back onto. Especially [in] our tax bracket. You know, we should be able to have something at the end of all that.*

- female street-level sex workers

⁷ *Supra* note 1, s. 146: Contribution room refers to the maximum amount a tax payer can deduct from contributions made to RRSPs. The calculation is based, in part, on earned income from the previous year and unused RRSP deduction room from the previous year. Unused RRSP deduction room is a tax payer's RRSP deduction limit for the year minus the amount deducted for RRSP contributions for that year.

A. Hey, they want this legalized, they wanna help us out, they want to make this a legal thing? The government wants a piece of the pie? Fine. Tax us. Pension us. Everything else like a regular job. It also gives you maternity leave, it also gives you paid leave, workers compensation, in case you get hurt on the job, god knows you could get lock jaw.

- female street-level sex workers

Q. Okay, so you would be willing to claim income taxes on your work?

A. I would.

A. I think in my situation, having . . . claiming the taxes . . . yeah, I think that would be okay with me. I would want to see . . . ah, what is that, worker's compensation and stuff.

A. That would be good! That would be really good. Because if we got beat up . . .

A. Yeah, and we can't work for . . .

A. That's fine!

A. A lot of times, us girls, we do get beat up and stuff like that. So that would be alright because a lot of times if we got really badly hurt, and we had those things around . . .

A. And we can't work for that month, or those months . . .

A. Exactly, exactly.

- female street-level sex workers

Some sex workers noted that they are hesitant to claim income to Revenue Canada for fear that they would then be subject to investigation for breach of the criminal laws related to prostitution. And many are bothered by the double standard involved in taxing a criminal activity:

A. Unfortunately that's a double standard that I don't agree with. Because on one hand they are saying, Pay your taxes. And oh sure, they are going to decriminalize it. But on the other hand it is still illegal and they are arresting people for it . . . How can they make you pay taxes on something that's illegal? And you can sit in jail for it? It's bullshit. It's bullshit. It's a double standard. They say one thing and do another.

- female street-level sex worker

Other sex workers reported that Revenue Canada treated them scornfully:

A. Even with Revenue Canada. I asked them a few times . . . I said, "well, what can we claim and what can't we claim?" And I said to the guy, I said "well look . . . for my work . . . to bring up my income, I went in and had a boob-job. Can I claim that?" He started laughing and said no. I said, "well, why not?" If I were mechanical and buy more tools, you know . . . and I said, okay, listen, how about condoms? And he said, no, you can't claim that. And I said, "well, what's the difference between me buying 10 boxes of condoms or the guy in the office buying ten boxes of paper clips? . . . until we get through that barrier, we have to find out . . . we don't even know what we can and can't claim on taxes.

- female off-street out-call sex worker

Such experiences with tax officials lead many sex workers to refrain from attempting to obtain more information about filing of taxes, their personal tax liability, and entitlement to deductions. One participant indicated the need for much more information:

A. That would be great if Revenue Canada would work with us and tell us what we can and can't do. But they don't give us any guidelines . . . Well . . . I want to know what I can and can't claim. You know, I want to know what I can . . . how much income

I'm allowed to make before I have to pay GST. Like, all of that. But they just won't work with us, they won't tell us . . . I don't know why they won't tell us. I mean when I phone them and ask them, it's like, you can feel their face go red on the other end of the phone, you know?

- female off-street out-call sex worker

These comments suggest that two major barriers prevent sex workers from paying tax: criminalization, and a lack of understanding and willingness on the part of Revenue Canada employees to understand sex work. The repeal of the criminal laws surrounding adult prostitution would solve the first issue, but not necessarily the lack of sensitivity on the part of Revenue Canada employees. It appears that specialized education and sensitivity training will be required in order to make the income tax system accessible to sex workers.

Concerns about paying tax

Concerns about loss of privacy

While sex workers felt there were benefits to paying tax, they expressed concern about having to disclose personal information to Revenue Canada. Some sex workers expressed their distrust about the degree to which Revenue Canada would protect their confidentiality:

A. How would we be stigmatized though, because we would still probably be confidential? Or is it that people doing our files and our taxes would see what we are and then it would just get through the . . .

A. Well, yeah it would.

A. Yeah.

A. Definitely would. Y'know –

A. So you definitely have to be prepared to go public.

- female street-level sex workers

Some of these concerns may be well founded. While personal information collected by Revenue Canada is protected by the *Privacy Act* and specific provisions of the *ITA* regarding confidentiality,⁸ release of information occurs in certain situations. Information must be disclosed if criteria in the *Privacy Act* are met, such as complying with a subpoena issued by a court of law. In addition, specific provisions in the *ITA* allow taxpayer information to be shared with other federal and provincial departments or agencies⁹ (ie. for administering CPP, EI, WCB, social assistance, and family maintenance programs). Of particular relevance to sex workers, the *ITA* allows taxpayer information to be disclosed to police officers for the purpose of investigating whether an offence has been committed under the *Criminal Code*.¹⁰

Further, Revenue Canada is allowed to make inquiries and compel people to give information for any purpose related to the administration of the *ITA*.¹¹ For example, Revenue Canada could ask a sex worker to disclose who their clients are for the purposes of an audit on the sex worker. In addition, Revenue Canada can seek judicial authorization to compel a taxpayer to reveal information regarding

⁸ *Supra note 1*, s. 241(1).

⁹ See *Income Tax Act*, s. 241(4) for a list of the exceptions to confidentiality.

¹⁰ *Ibid.*, s. 341(4)(p).

¹¹ *Ibid.*, s. 231.2: (1) Notwithstanding any other provision of this Act, the Minister may, subject to subsection (2), for any purpose related to the administration or enforcement of this Act, including the collection of any amount payable under this Act by any person, by notice served personally or by registered or certified mail, require that any person provide, within such reasonable time as is stipulated in the notice,

(a) any information or additional information, including a return of income or a supplementary return; or
(b) any document.

a third party.¹² This means a sex worker could be compelled to provide information about a client who is being audited.

Revenue Canada does not require specific details about the type of business a taxpayer is engaged in for the purposes of filing income tax, and sex workers could use a general category such as “entertainment business” on their tax returns.¹³ Similarly, a detailed list of business expenses is not required on a tax return. Expenses for condoms, etc. may be listed as “miscellaneous” expenses. However, in circumstances where a taxpayer is being audited, it is necessary to disclose detailed information to Revenue Canada. All taxpayers risk being audited.

Despite the safeguards in the *Privacy Act* and the limited disclosure initially required in a tax return, many sex workers fear the prospect of Revenue Canada knowing what they do for a living. In contrast to the relative secrecy afforded by the illicit status of prostitution, legal reform could mean much greater exposure of sex work to Revenue Canada.

Some participants expressed concern about the implications of being labelled as a “sex worker”:

A. Well just the label. I am just wondering how they will label it once you put it on your income tax.

A. And that once you have been a sex worker, you are a sex worker for the rest of your life. You just carry it around like an anchor – I was 20 years old and I worked as a sex worker – woah, it said it on your income tax, little girl. Meanwhile you are 60. So that’s just my issue.

- female off-street out-call sex workers

Another sex worker describes how she is willing to pay tax as long as she does not have to disclose her means of making a living.

A. Sure, as long as it says nothing about an escort . . . just like, a business licence has nothing to do with the trade, nothing whatsoever, I would have no problem with that.

- female off-street out-call sex worker

For some sex workers the thought of filing a tax return is embarrassing. Female and male street-level sex workers discussed the highly personal nature of disclosing one’s status as a sex worker:

Q. How do you feel about having to submit a tax return and pay your tax returns in regards to your regular income?

A. It’s degrading.

A. It’s like telling the tax man that you suck cock.

A. It’s too personal.

A. Even if it’s legalized, it will be hard to make an industry out of it because you are not going to go public about it.

- female street-level sex workers

A. I think that kind of tax would be embarrassing. . . . Oh how many did you do in this time? I would keep that under wraps.

- male street-level sex worker

¹² *Ibid.*, s. 231(3): On ex parte application by the Minister, a judge may, subject to such conditions as the judge considers appropriate, authorize the Minister to impose on a third party a requirement under subsection 231.2(1) relating to an unnamed person or more than one unnamed person (in this section referred to as the “group”) where the judge is satisfied by information on oath that (a) the person or group is ascertainable; and

(b) the requirement is made to verify compliance by the person or persons in the group with any duty or obligation under this Act.

¹³ A tax payer does not have to give specific details about the type of business he or she engages in when filing a tax return, see Form T2124, Statement of Business Activities, online: Revenue Canada <<http://www.cra-arc.gc.ca/E/pbg/tf/t2124/README.html>>.

Some sex workers worry that information given on a tax return could be used against them in other ways. For example, one sex worker expressed concern about being discriminated against by other countries where she may wish to travel.

A. It's a really good point, because, yeah, you start doing your taxes, and you start, you have some card in your wallet. And you are not going to be able to go to America anymore.

- female off-street out-call sex worker

When discussing disclosure of work-related information to Revenue Canada, sex workers expressed a conflict between two competing interests: the desire to become accepted as a legitimate profession, and fear about ongoing discrimination as a result of having prostitution become more public. It is quite likely that increased exposure of the sex industry would create challenges for individual sex workers, as decriminalization may not reduce the stigma of sex work.

Concerns about increased tax law enforcement by Revenue Canada

The repeal of the criminal laws related to prostitution may make the sex industry more visible, potentially increasing Revenue Canada's ability to track and assess sex workers. Some participants were concerned that legal reform would result in Revenue Canada enforcing tax laws against sex workers more rigorously. A business owner felt that many sex workers are not ready to pay the amount of tax that the government demands:

A. So 10 grand a month, no matter what wonderful things, awesome things, would come with decriminalization, that is to our benefit, and all those things that would go along with it – I think, the one question – that's a 45 percent tax bracket. I think if you told them – did you know that you would have to give up 45 percent of that money? That's your tax bracket? First they would never believe you, as most of these women have never paid tax in their lives. And, if you told them, that y'know, that when you go do a blow job then, for \$200, you're really only going to get \$110. They would laugh at you . . . But I think, if you were able to pull off street sex workers, and after going through every wonderful benefit, they could get from decriminalization, and said, But to be decriminalized, you would have pay the tax man, 40-45 percent of your income. Do you still want it to be decriminalized? The resounding answer would be no, because at the end of the day, you have to remember why we are in this business – to make money.

- female massage parlour owner, former sex worker

As one female street-level sex worker put it, “the disadvantages would be that the government knows exactly where you are located and . . . tax time!”

Concerns about retroactive taxation

An individual who fails to file a tax return as required by the *ITA* is guilty of an offence, and may be liable to pay a fine and/or face imprisonment.¹⁴ Also, they may be subject to penalties that increase the amount of tax owing.¹⁵ Revenue Canada can assess individuals for taxes not paid on income received in prior years.¹⁶ Although sex workers already face the prospect of retroactive tax assessment, sex workers were concerned that the repeal of criminal laws could increase the priority

¹⁴ *Supra* note 1, s. 238(1).

¹⁵ *Ibid.*, s. 162.

¹⁶ *Ibid.*, s. 152(4): In general there is a three year limitation period in which Revenue Canada can reassess a tax payer. However if a misrepresentation can be attributed to neglect, carelessness, wilful default or fraud, Revenue Canada is not subject to any limitation period.

Revenue Canada places on retroactive tax collection from sex workers, and its ability to track sex workers.¹⁷ Participants were concerned that retroactive assessments could result in some sex workers having to increase their involvement in the sex industry to pay back taxes and penalties.

Revenue Canada could seek to exempt sex workers from retroactive assessment should prostitution be decriminalized. Such an exemption is rare and requires the approval of the federal Minister of Finance. Revenue Canada does not have the authority to waive taxes owed. There have been past examples where the Minister of Finance has waived taxation for certain groups. One example is s. 87 of the *Indian Act* which exempts those who qualify as “status Indians” from taxation on their personal property – including employment income – that is situated on a reserve.¹⁸ Participants felt it was appropriate to provide an exemption from retroactive tax assessment for sex workers so that they are taxed only on income earned after the date that the *Criminal Code* provisions relating to prostitution are repealed.

Some sex workers suggested that there should be an exception for all sex workers:

A. Oh definitely, an exception. Once – Once it’s legalized it should be just start fresh. Because no – Who’s going to remember? Y’know street-level or what – Which it basically is, now, is street-level. I mean who is going how much you made? Y’know, I don’t count how many tricks that I did last week. Or how many this I did. So no there should be an exception. As soon as you start payin’ taxes, that’s when you start getting taxed . . .

Q. Do you think the exception should only be made for street-level sex workers? Or for all sex workers?

A. All sex workers.

- female street-level sex workers

Some sex workers felt that liability for retroactive tax would force them to work more to pay off their debts to Revenue Canada.

A. I was thinking that if you did it, retroactively. What about if you were out of the business and they were to say, Oh! You owe this money. And now you would have to get back into it. I mean that’s not very good.

A. Oh well, that could easily happen. What would they care?

A. Oh yeah! That’s my point, that’s all my point.

A. I mean that’s – that’s like absolutely ridiculous like, to make people do that.

A. And And by what I am saying is by asking for taxes, that is essentially the message you are sending; get to work, make it up and pay us.

- female off-street out-call sex workers

Some participants felt it would be unfair to expect them to pay retroactive tax:

A. Well it was illegal before so what about right when they put the law into place then say, okay, here’s your start date if you continue on to do sex work, because some people started when they were teenagers just to survive and the government didn’t do nothing for them back then . . .

¹⁷ Canada Customs and Revenue Agency [CCRA] notice released June 12, 2003: Revenue Canada has a program, administered by the Investigations Division, to identify people who support themselves through illegal activities and ensure that they file income tax returns and financial statements, if necessary, every year. CCRA auditors have a network of special contacts in the various police forces and in governmental and para-governmental bodies who carry out criminal investigations and gather information. The auditors also receive information from the media and leads provided by the public.

¹⁸ Therefore, if an Indian earns employment income, what must be determined is whether that income is situated on a reserve. When making this determination, the approach taken by the Supreme Court of Canada, in the case of *Glenn Williams v. The Queen*, 92 D.T.C. 6320, [1992] 1 C.T.C. 225, must be followed. This approach requires the examination of all factors connecting income to a reserve.

- A. Yeah I was going to say that many of the sex trade workers got into the, when they started they got into this type of work through unfortunate circumstances*
- A. And it, when it was to uh, you know desperate measures for food or for drugs or whatever, so they shouldn't, that unfortunate shouldn't be exploited to take taxes out of it.*
- A. So that person has already suffered enough as it is.*
- male street-level sex workers

Under Revenue Canada's Voluntary Disclosure Program an individual can make a voluntary disclosure to Revenue Canada that allows him or her to avoid the penalties and prosecution that would otherwise be imposed under the *ITA* for outstanding taxes.¹⁹ A voluntary disclosure occurs when a person contacts Revenue Canada and provides information to correct inaccurate or incomplete information, or to disclose information not previously reported. If a valid voluntary disclosure²⁰ is made, Revenue Canada does not have the authority to waive the taxes owed, but can refrain from assessing interest and penalties.²¹

Where a taxpayer is unable to meet his or her tax obligations because of extraordinary circumstances, such as financial hardship, it is also possible to make a "fairness application."²² Under a fairness application, an individual can ask Revenue Canada to waive the penalties and interest owing. Both of these options require being able to navigate the many complex aspects of our income tax system, and being prepared to pay taxes owed to Revenue Canada.

Concerns about calculating income

Another issue participants discussed concerned how income from prostitution would be calculated and recorded for tax purposes. The *ITA* defines "business" as "including a profession, calling, trade, manufacture, or undertaking of any kind whatsoever and includes an adventure or concern in the nature of trade but does not include an office or employment."²³ This broad definition encompasses sex work. In reporting business income, the *ITA* requires a taxpayer to calculate income using commercially accepted accounting practices.²⁴ This means sex workers would need to keep proper records of the income received from customers, as well as expenses incurred.²⁵ As most payment is received in cash and customers do not require receipts, it may be difficult to prove sex workers' income. However, even without receipts, if sex workers could record the amount of money they receive and the expenses they incur, this may be sufficient for tax purposes.

If Revenue Canada suspects that a person is under-reporting their income, then it performs an assessment to figure out a taxpayer's net worth.²⁶ From the net worth assessment, Revenue Canada calculates the taxpayer's tax liability. Once Revenue Canada makes a net worth assessment, it is up to

19 CCRA Information Circular 00-1R Voluntary Disclosure Program, September 30, 2002, online: Revenue Canada < <http://www.cra-arc.gc.ca/E/pub/tp/ic00-1r/ic00-1r-e.html> >.

20 For a valid voluntary disclosure a person must be facing a penalty and the information provided must be complete and given voluntarily.

21 *Supra* note 1, s. 220(3.1) gives Revenue Canada the authority to waive or cancel penalties and interest.

22 *Ibid.*, s. 152(4.2).

23 *Ibid.*, s. 248(1).

24 *Ibid.*, s. 9.

25 *Ibid.*, s. 230(1): Every person carrying on business and every person who is required, by or pursuant to this Act, to pay or collect taxes or other amounts shall keep records and books of account (including an annual inventory kept in prescribed manner) at the person's place of business or residence in Canada or at such other place as may be designated by the Minister, in such form and containing such information as will enable the taxes payable under this Act or the taxes or other amounts that should have been deducted, withheld or collected to be determined.

26 *Ibid.*, s. 152(7). "The net worth assessment is calculated by determining the taxpayer assets and liabilities at the end of the taxation year and at the end of the last previous year for which tax could be determined; and assuming that the taxpayer's income was equal to the increase in his or her net worth in the period plus an estimated amount spent for personal and living expenses" (Canadian Master Tax Guide, 59th ed. (2004) at part 12100).

the taxpayer to prove Revenue Canada wrong if they believe its assessment is inaccurate.²⁷ Therefore sex workers should keep a record of each transaction in order to be able to challenge Revenue Canada's net worth assessment should such a need arise.

Some participants felt that sex workers would not accurately report their income or would choose not to report it. As one sex worker stated:

A. As soon as you would legalize prostitution, there's a black market for it. As soon as you say, like, oh say its okay, there's an underground market. Because I don't know any ho's that would like to work – "oh this is what I made tonight" to the government or anything like that, right? So then it is going to create a black market, first of all.

- male street-level sex worker

Some participants noted that sex workers declaring income do not report their full income because customers rarely ask for receipts for the sexual services they pay for. As one massage-parlour owner commented:

A. And of course you are in the same situation with taxes. I mean, yes, they pay their taxes. Yeah, on the people that want receipts. No one wants receipts from us. They don't, strangely enough. Two a year, maybe. Can I get a receipt please? Sure, what would you like me to put on that?

- female massage parlour owner, former sex worker

Participants felt that income was easier to calculate for sex workers who work in an organized environment. These sex workers may have the resources to consult an accountant. As one explained:

A. . . . a lot of escorts do pay their taxes. And interestingly enough, the ones that I know that pay their taxes most consistently originally worked for agencies. And their agency owners were the ones that insisted that they go to their accountants and, and, do their taxes. And of course the reason being is that they didn't want anything coming back to them, the agency owners [laughs] so, so, most escorts anyway, or a large number of them do pay their taxes. The few that don't, they really live hand to mouth.

- female off-street out-call sex worker

Under the *ITA* tips count as fully taxable income. For an employee, all tips or benefits, such as gifts received in the course of employment, must be included in employment income.²⁸ Self-employed sex workers must declare tips as business income.²⁹ Sex workers noted the importance of tips in earning their living and the difficulty of proving this type of income:

A. I am sorry to say, on the street with all the girls, it was. No matter what you do, you are in a negotiation with a guy, you don't get enough money, you get some money back in tips and it should not be taxed.

A. And so you get more money back, on your tips, than the guy could ever give you in a given date.

- female street-level sex workers

A. I don't mind the income tax thing, but when you get tipped out, . . . like, when you go see a client, your initial amount agreed on is, like, \$200. Well, then, any other up

²⁷ *Dezura v. Minister of National Revenue* (1947) 3 D.T.C. 1101 (Exchequer Court of Canada).

²⁸ *Supra* note 1, s. 5: "a taxpayer's income for a taxation year from an office or employment is the salary, wages and other remuneration, including gratuities, received by the taxpayer in the year." *Ibid.*, s. 6: There should be included in employment income "the value of board, lodging and other benefits of any kind whatever received or enjoyed by the taxpayer in the year in respect of, in the course of, or by virtue of an office or employment."

²⁹ *Ibid.*, s. 9.

and above over that is your tip out . . . \$100, \$200, \$300. I mean, that is game. The most money you get, for the least amount of work. And then that money shouldn't be taxed, because you can't regulate it. And you can't prove it (female escort).

- female off-street out-call sex worker

A group of sex workers described how fees and tips were treated at one establishment.

A. Who was talking about Ottawa? That massage club in Ottawa? Remember?

A. Yeab.

A. It was at the pink house session, right? And it was so much, they were paid the minimum, whatever it was. As the massage. And they were taught how to do a light massage thing? And then the rest was, the rest.

A. Right.

A. So it could be, like, priceless. Anything that's sexual, on top of it, like giving a client a massage, or whatever your specialty was. Card reading, counselling session . . . And that's what you are paid on. And the sex is a gratuity, an extra, a tip, and no-one's bloody business.

- female off-street out-call sex workers

A group of sex workers commented that sex workers' tips could be taxed the in same way as tips earned by waiters or waitresses.

A. When they legalized liquor, they made bars, then, y'know, paid people to work in the bars, and y'know, you make tips at the bars. So shouldn't it be somewhere along that lines? Like legalize prostitution, you do it here, this is your wage, and then, this is your extra that you make. Then you claim off of that.

A. Don't the waitresses have to claim a portion of their tips?

A. They have to claim all of their tips.

A. Exactly. Well they should have to claim off of that.

A. In big fancy hotels, and stuff, waitress and what-not, you are charged x amount of money, automatically, for taxes on your tips.

A. You have to pay that much taxes, just because – that's because that's sort of the common level that everybody gets tipped up?

- female off-street out-call sex workers

Some participants were concerned that Revenue Canada would rely on informed estimates about what a sex worker earns and then may disbelieve sex workers if they report different amounts:

A. It wouldn't be like that. It would be like – the government would say so much for a blow job, and that's how much for this. Because they couldn't do it in any other way and if they did, like, everybody would be making something different, but paying the same tax.

- male street-level sex worker

A. Well, because it would be . . . you would, there would be so much . . . you know, they could . . . there would be so much other legal things that they could go after you on. Like, they could say, "Okay, we . . ." Okay, so say you have a slower week . . . month, or you didn't make as much money for a couple of months or whatever like that, then they could go . . . they could harass you, and do audits on you and all this bullshit thinking that you are lying and you are claiming what you should be claiming. That would be not good.

- female street-level sex worker

Judging by the experience in other countries,³⁰ this concern about the prospect of arbitrary standards being used to assess sex worker incomes is well founded. Current Canadian taxation practices give further substance to these concerns. For example, with respect to claiming income from tips, Revenue Canada accumulates data on the average amount of tips earned by workers in a particular profession, and then compares amounts claimed against what these data indicate. With respect to prostitution, this could be a matter of particular concern given the considerable range in tips across the sex trade.³¹

Tax deductions

Business expenses

Under the *ITA*, taxpayers earning business income are entitled to deduct expenses incurred for the purpose of earning business income.³² All business expenses can be deducted, except for deductions specifically prohibited by the *ITA*. Personal or living expenses cannot be deducted from business income,³³ and all deductions must be seen as reasonable in the circumstances.³⁴ Sex workers earning business income have a right to deduct their business expenses if they file income tax returns. The Supreme Court of Canada has held that, if business income is taxed, deductions for business expenses cannot be prohibited on the basis of public policy considerations.³⁵ Expenses for condoms, lubricants, sex toys, costumes, taxi rides, classified ads, and other items may be deductible business expenses under the *ITA*. For sex workers working out of their homes, the home office exemption allowing a portion of rent or mortgage to be deducted would be available.³⁶ While an argument can be made that expenses for enhancing a sex worker's appearance, such as breast implants or gym memberships, are business expenses, Revenue Canada may consider these to be personal or living expenses. The line between personal or living expenses and business expenses is blurry, and is determined on a case-by-case basis. The test is whether the expense was incurred for the purpose of gaining or producing income from a business. To determine whether the test has been met the court may ask:

1. What is the need that the expense meets?
2. Would the need exist apart from the business? and
3. Is the need intrinsic to the business?³⁷

30 The English Collective of Prostitutes and US PROStitutes Collective website states that some of the work they do is "helping women fight extortionate tax demands." The site goes on to say that "women have successfully challenged tax demands based on biased assumptions about what sex workers earn rather than the facts on the situation of each individual woman." "Summary of Work by the English Collective of Prostitutes and the US PROStitutes Collective" online: All Women Count <<http://www.allwomenscount.net/EWC%20Sex%20Workers/IPCpage.htm>>.

See also Petra Östergren, "Sexworkers Critique of Swedish Prostitution Policy" online: Petra Östergren <www.petraostergren.com>. "The legal situation regarding taxation is unclear and varies from city to city. Some tax authorities will leave sex workers alone, others will seek them out and tax them according to an arbitrary estimate. This worries sex workers. Some of them have been subjected to this procedure with disastrous financial consequences. Others have only heard about it and worry it will happen to them."

31 Some sex workers in massage parlours stated that they earned up to \$10,000 month while sex workers in other areas of the industry, such as the street level, earn barely subsistence amounts.

32 *Supra note 1*, s. 18(1)(a).

33 *Supra note 1*, s. 18(1)(a).

34 *Ibid.*, s. 67.1: "In computing income, no deduction shall be made in respect of an outlay or expense in respect of which any amount is otherwise deductible under the Act, except to the extent that the outlay or expense was reasonable in the circumstances."

35 The Supreme Court of Canada confirmed in its decision in *65302 B.C. Ltd. v. The Queen*, 99 D.T.C. 5799, that taxpayers are allowed to deduct expenses incurred for the purpose of earning income from an illegal business activity. The Court noted that even though the deduction of such expenses might appear to frustrate the intent of the Criminal Code, the "tax authorities are not concerned with the legal nature of an activity" (at 5811).

36 *Supra note 1*, s. 18(12).

37 *Scott v. Queen*, F.C.A. 98 D.T.C. 6530 at para 9.

Expenses are context-dependent. For example, the Federal Court of Appeal held that a foot and transit courier was entitled to deduct as a business expense an amount for extra food and water that his body needed for fuel.³⁸ The court concluded that, because the automobile courier is allowed to deduct his or her fuel, the foot and transit courier should be able to deduct the fuel his body needs. However, he could only deduct the extra food and water consumed above and beyond the average person's intake in order to perform his job. Food and water are normally considered a personal or living expense because the need for their consumption exists apart from the business. In this case, the taxpayer had no choice but to eat more than the average person in order to perform his job. Arguably, sex workers should be able to deduct expenses related to their personal appearance, as that expense is made over and above what an average person would spend on clothes, make-up and fitness, etc. Sex workers, like all taxpayers, need to keep proper records of expenses in order to deduct them.

Sex workers argued that they should be allowed to claim all of their business expenses if they are paying income tax:

- A. Realistically, sex trade workers make a lot of money. If it's legal, if it's above board, you are going to have to have the same tax. If someone is self-employed though, things are going to have to be a little different. They are going to have to be able to claim everything. I am talking from shoes to clothing to if they bring tricks back to their house; they have to be able to claim that. They have to be able to claim, any sex toys, lube. Everything you can think of. Even if you are doing outcalls, taxis. All of it... I mean, that could be an advantage because your taxes would significantly change. Because realistically, sex trade workers spend a lot of money on what they wear and what they use . . .*

- female off-street out-call sex worker

Some participants suggested that Revenue Canada ought to provide information describing allowable business deductions for sex workers. Some sex workers who had contacted Revenue Canada did not receive answers to their questions about deductible business expenses.

Personal deductions

Under the *ITA* various personal tax credits and tax deductions are available to taxpayers earning business or employment income. These include tax credits for supporting a spouse, child or other dependant, GST credits for low income tax payers, and tax deductions for child-care expenses, medical expenses, moving expenses, charitable donations, RRSP contributions, etc. Sex workers filing tax returns are entitled to take advantage of applicable credits and deductions. Sex workers stated that they want such benefits:

- A. Women should get that, of course. Like I mean if I'm supporting my husband in this business, I should get tax benefits for if I'm paying taxes, for my husband, he should be my dependent.*

- female off-street out-call sex worker

- A. No, I definitely support any woman who would not claim tax because of that – the laws. I definitely support that. I mean just like, just for me, it's more of a census thing for me. I want the government to know? And then I got diseases and then I started making less money. I think that it's really important that they know that – all my medical bills are on there, y'know?*

- female off-street out-call sex worker

³⁸ *Ibid.*

As with all taxpayers, sex workers should be provided with accessible information about the personal deductions that are available to them.

Income tax law recommendations

1. Provide information and education to sex workers who have not paid taxes on the income they have earned through prostitution so that they may understand the fundamentals of the Canadian tax system and learn how to file a basic income tax return.
2. Should prostitution be decriminalized, Revenue Canada and the federal Minister of Finance should exempt sex workers from retroactive tax assessments of income earned prior to the date the provisions in the *Criminal Code* relating to prostitution are repealed.
3. Provide specialized education and sensitivity training for Revenue Canada personnel in order to give them the information necessary to assist sex workers with the taxation information they need in a respectful and non-discriminatory manner.
4. Consult with sex workers about how to address their specific privacy concerns.
5. Ensure that sex workers are not subject to discriminatory treatment, such as unwarranted audits or disproportionate penalties.

PART 6: COMPANY LAW

Business structures: In B.C., businesses can be structured in several ways – a business may be set up as a sole proprietorship, a partnership, a corporation, or a cooperative. Sex workers felt that they should be able choose among the various structures that are available to businesses in general, and their industry should not be subject to any specific restrictions. Sex worker described how the diversity within the sex industry creates a need for a number of different types of business structures.

A. There's a place set up for co-ops, there's a place in it for individual houses, and there's a place in it, for a corporation.

- female street-level sex worker

Several participants expressed the view that sex workers should have the freedom to choose a structure that best suits their particular business objectives.

A. It depends, people are going to have different preferences right? They make different choices. It's where the profit's best.

- male street-level sex worker

A. I think that we should have the same freedoms as any business, really.

A. I think it should just be as broad as any other business. No restrictions.

A. Anything could really happen . . . as long as it's beneficial to the people working.

- female off-street out-call sex workers

Many sex workers felt strongly that sex work should be recognized as a legitimate business:

A. But to me, it's like, the big thing, is that it's not called the oldest profession for nothing – it's you know, the, almost, the most basic, simplest transaction that ever occurred and it goes a long long long way back, and as far as I'm concerned, all other enterprises probably followed it and based itself upon that original transaction. So I see it as the, you know, sort of the initial, or the basis for entrepreneurialism, really. For free enterprise. So it ought to be respected as such.

- female escort agency owner, former sex worker

The following discussion illustrates how sex workers see a number of potentially suitable business structures for prostitution.

Sole proprietorships

A sole proprietorship is the simplest way to structure a business, and is the easiest and least expensive business to organize. A sole proprietor is a self-employed individual who is fully responsible for all aspects of the business. He or she establishes the business, retains all profits, is responsible for paying taxes, and assumes all risks. While sole proprietors enjoy complete control over the business, they have unlimited liability by virtue of being legally responsible for all debts in a situation where they place both their business and personal assets at risk.

Many participants liked the idea of being their own boss, particularly because of the autonomy of being self-employed.

- A. You just have your own decision-making capabilities. And why not be your own boss?*
- female off-street out-call sex worker

Another escort believed that she would get more business by working independently:

- A. I mean, this business is really . . . a lot is determined upon your looks, okay? So I'm older, all of my friends are older, and so if I was to go work for a place with 30 women, I would never get picked because I'm not 20, and I'm not blond with big boobs and the whole nine yards of what they want so for me, it's better to work independent.*
- female off-street out-call sex worker

An owner agreed that sex workers should have the freedom to work independently:

- A. I just like most of what I do to be encouraging that person to be self-employed and be in charge of what they're doing for themselves. I think in sex work, that's a really good way to handle it in that if you're employed by someone, you may start to feel like you've got to do whatever they tell you to do, whenever they tell you, and I like the idea that there's an independence and you can say, you know "this doesn't work for me." 'Cuz it's a sensitive area, you know, you never want to be told, you know, "you must this" or "you must that."*
- female escort agency owner, former sex worker

In sum, a sole proprietorship is a simple and inexpensive business structure that appeals to many sex workers because of the independence it affords.

Partnerships

In a partnership, two or more people carry on a business together with a view to making a profit.¹ In B.C., partnerships are governed by the *Partnership Act*² (the "PA"). Partnerships are relatively simple to set up and dissolve. The partners may have a written partnership agreement that sets out how profits will be shared, decisions will be made, disputes will be resolved, future partners will be admitted, and how a partner can leave the partnership. The partners may decide how much time and capital each will contribute to the partnership. Alternatively, a partnership may arise without a formal agreement if two or more people are carrying on business together with the goal of generating profit. In either case, the partnership is governed by the terms set out in the *PA*.

Partnerships are not legally recognized as distinct entities. Rather, the profits and losses of the partnership flow through to the individual partners, who must pay taxes on these amounts in their personal tax returns. Each partner who is active in the management of the business is fully liable for all obligations of the business, even if other partners incurred the obligations. Like sole proprietorships, partners put their personal assets at risk, but enjoy the benefits of working and sharing profits with others.³

A partnership appears well suited as a business structure for prostitution. Many participants indicated a desire to work with other sex workers, and to maintain control over their working conditions. Safety concerns were a significant factor in many participants' preference for some form of partnership with other sex workers. This desire for a supportive workplace is illustrated in the following discussion:

¹ *Partnership Act*, R.S.B.C. 1996, c. 348, s. 2.

² *Ibid.*

³ *Ibid.*, s. 7(2).

- A. *Actually I like working with other people.*
 A. *I wouldn't work for anybody but I'd work with a group of guys, you know what I mean? But I wouldn't want to work for a business.*
 A. *More supportive support structure there, whereas if you're on your own you make sure you get some support here and there but it's not there in the same way.*
 - male street-level sex workers

Sex workers felt that working with others would help increase their safety:

- A. *Well, I think I prefer to work independently, but I would prefer to work with another girl for safety reasons. Just somebody, you know, the two of us could work together. We could kind of watch each other's back kind of thing. And the guy would also know that you aren't there by yourself; but the way it is now, they know we're here by ourselves, so you know, it's dangerous. Well, I, you know, it's like I say, just someone could sort of be here while I'm here, you know. We can make sure that each other are safe, the guy isn't beating you up and vice-versa, and you know, we could close together, walk out together at night, walk each other to our cars. It would be much safer, and plus, they know there's somebody else here so they won't likely try something. When they know you're by yourself, they'll try anything.*
 Q. *So would you work like in a partnership with somebody? Is that what you're describing, more like a partnership?*
 A. *Yeab. Like a partnership.*
 Q. *Okay. And why is that, again?*
 A. *Safety.*
 - female off-street out-call sex worker

Partnerships would allow sex workers many of the same freedoms they would enjoy as sole proprietors, with the added benefit that they could work together in a formally organized group, thereby establishing support networks and improving the safety of their working conditions.

Corporations

A corporation is a legal entity separate from its owners. It has all the powers of an individual: it can acquire assets; go into debt; enter contracts; borrow; lend; and sue or be sued. The owners of a corporation are called its shareholders. Shareholders invest in the corporation, and elect directors who appoint officers and make decisions about the corporation's operations. The number of votes each shareholder gets is often, but not always, proportional to the number of shares she or he owns in the corporation.⁴

Unlike a sole proprietorship or a partnership, when a company is incorporated, there are limits on the amount of risk that investors face. A shareholder's possible losses are limited to the amount paid for his or her shares; if the corporation becomes insolvent the shares may be worthless but the shareholder will not be required to use personal assets to satisfy the unpaid debts of the corporation.⁵ For this reason, a corporation is an attractive business structure for investors who do not want to play an active part in the management of the business and want to know the extent of their risk.

A corporation may be created under either federal or provincial legislation. Federally incorporated corporations are regulated under the *Canada Business Corporations Act*.⁶ If the business of the corporation will be carried on in only one province, it is usually incorporated provincially. In B.C., the

⁴ *Business Corporations Act*, S.B.C. 2002, c. 57, s. 30.

⁵ *Ibid.*, s. 87(1).

⁶ *Canada Business Corporations Act*, R.S. 1985, c. C-44.

applicable statute is the *Business Corporations Act*.⁷

While participants believed that sex workers ought to be able to structure their business as they wish, some were concerned that within a corporation, the shareholders might have too much power over decision-making. One escort felt that shareholders who are not involved in the day-to-day operations of the business might not be adequately informed to make decisions about it. Although shareholders do not necessarily play any part in day-to-day operations of a business, they do elect the directors who control the management.

- A. The shareholders, if they're not involved in the everyday running of the business, that they would not be able to properly assess. I mean you can have a situation in the facility and if they are not there than they will not be able to properly assess, unless they are specialists, you know, if they were, they need to be informed and aware though too.*

- female off-street out-call sex worker

Some participants indicated that a sex industry business should be permitted to grow to any size, without restrictions on the number of people that they employ. Therefore, in the case of large-scale enterprises, incorporation is likely the preferable business structure because the capital required to establish and maintain such enterprises could come from a number of investors rather than one person. Also, incorporation is best suited to a business franchise, which was suggested by a business owner as a direction she has considered with her company:

- A. I guess because there's a Wal-Mart out there does not mean there's not small hardware stores. There may not be as many small hardware stores as there once were as a result of that, but really, in a free enterprise system, there should be, you should be able to you know grow your businesses as big as you can I suppose. It, I guess you have the concern, is that making it a monopoly, but you know, I can't see in this business that there wouldn't be individuals still doing their own thing anyway, so it may be fine. I mean I've certainly thought 'is this a business I could franchise at some point?' I am interested in growing into other locations other than just Vancouver, and that may still mean that you know, I'm totally in charge of those other zones, but is there a point at which I would just apply my own you know, evolution of the way I do things for the last 25 years as a franchise business. It could happen and I don't see any reason why it couldn't basically, if it's a model that works, then it's better to have that out there than a bunch of floundering businesses that are still trying to figure out what they're doing I guess. That would be my take.*

- female escort agency owner, former sex worker

While it may seem like an unusual way to organize a sex industry business, it is certainly possible that, if the sex industry is no longer subject to criminal prohibition, a corporate business structure would be a viable option for this type of business.

Cooperatives

Unlike other business structures that are wholly profit driven, cooperatives are established to meet the economic, social, and/or cultural needs of the members. Cooperatives operate democratically on a one-member, one-vote basis.⁸ Surplus income from the cooperative is distributed among the members⁹ and members may elect to put this money back into the cooperative as retained earnings.

⁷ *Supra*, note 4.

⁸ *Cooperative Associations Act*, S.B.C. 1999, c. 28, s. 40(1).

⁹ *Ibid.*, s. 9(1).

There are many different types of cooperatives; virtually any business can be structured as a cooperative. In B.C., under the *Cooperative Association Act*, any three or more persons or eligible organisations may be incorporated as a cooperative association for the purpose of carrying on any lawful business or activity on a cooperative basis.¹⁰

Worker cooperatives are owned by their employees, so members are both workers and owners of the business. Worker cooperatives are generally established to provide workers with employment and full control over their work environment. Some participants expressed a strong interest in the cooperative model as an appropriate way to structure a sex industry business. A male street-level sex worker liked the way cooperatives facilitate worker ownership:

A. I think ideally there would be some sort of cooperative. A cooperative would work where, if you've been there for a length of time, that you end up owning a part of the company, as time goes on sorta thing.

- male street-level sex worker

Participants were attracted to the collaborative and democratic decision-making nature of the cooperative business structure, particularly with respect to setting prices.

A. So all the girls get together and discuss a set price and then agree to it, girls could work in cooperatives and set rates themselves. Cooperatives I think would spring up. Like literally. Like, you guys were saying that you had sort of something like that going, for a while? You'd have a house, you'd all have a room, you know what I mean?

- female off-street out-call sex worker

The idea of working together with other sex workers as equals was seen as very desirable:

A. I think that it works as long as everybody knows that nobody's the boss, nobody's better than the other person, and that you're all there to do the same job.

- male street-level sex worker

A former sex worker and current owner of a massage parlour thought that working cooperatively would give workers more of a stake in the business:

A. . . . everyone has a vested interest in the longevity of the business. There's a common vision for how the place should be run.

- female massage parlour owner, former sex worker

Participants felt that a cooperative business model would be an excellent way of building camaraderie between workers.

A. I like the idea of the cooperative or a collective. It seems to me, it's the isolation factor is the biggest hardship in a way. Because you get so isolated because you are outcast and you are working alone. Like bus drivers, they don't work alone. But they have such camaraderie between each other, and they are always looking out for each other. So they all, they are like us, they all work alone, but they really have an acute understanding of the hardships.

A. Cab drivers are the same way.

A. Yeah, yeah. And they go to each other's rescue, like that. Because they really know the hardship and stuff. So they have a brotherliness that we've got to develop.

- female off-street out-call sex workers

Participants suggested that some tasks, such as housekeeping, could be shared among cooperative

¹⁰ Ibid., s. 10(1).

members. Participants suggested that a cooperative might provide other services to workers, such as education and childcare.

- A. *And for a full service, you would have different times when you are on duty, answering that phone. And then, y'know, the other time, when you are not, you are doing the kid-care part. And then, it could even be one separate place, but not totally.*
- A. *So I see it functioning like that too – it's all inclusive, doable, cooperative setting, yeah. So you could take care of the sick and the old, the babies, and the pregnant. And so like there'd be spaces for all kinds of women, not just the sex workers. But all their support . . . so that any woman who doesn't have a home elsewhere could find some kind of work she wants to do in a safe setting. You know learn become a teacher, go do education. Whatever you want . . . y'know, stay awhile or stay a long time.*
- Q. *And how would it be funded?*
- A. *I didn't work out all the details but y'know, we have working women now, don't we? And then – if you, well, y'know, if you learn, and stuff – if you want to be more like a nun? Then you work and help clean the place, then you got your room and board. That takes care of some of it, the education part could be funded through education. 'Kay, when you get an education, you could send money back, to thank you for help. Well, that's one thing. Working women would pay a monthly rent. If they are making good money, hopefully. You could have a little theatre, y'know, like . . .*
- A. *Fundraising.*
- A. *Yeah, and little businesses, gift shops for women who wanted to learn how to make arts and crafts, and stuff like that. So through a little self-reliance, a little community. Yeah. And of course, we would not be like these current women-only places, who are very hateful towards men, we'd be user friendly towards the guys, of course. We'd be like – hey!*

- female off-street out-call sex workers

One escort was concerned that a cooperative structure could function as a cover for pimps:

- A. *The girls . . . they have to be, again, very honest, people that would be running these co-ops, because I can see somebody say they're running the co-op and actually the girl, or the women that are running it having a pimp behind them.*

- female off-street out-call sex worker

Overall, sex workers felt that a cooperative business model is a very desirable way to structure the sex trade, allowing sex workers to share their business expenses and increase workplace safety.

Housing cooperatives

Housing cooperatives are incorporated non-profit businesses formed by people who wish to provide and own their housing jointly. Like other cooperatives, a housing cooperative is a self-governing organization owned collectively by its members. The units in a housing cooperative are owned by the cooperative and cannot be bought or sold for a profit. Housing cooperative members pay a monthly housing charge that is set when the members approve the cooperative's yearly operating budget. Members agree to be involved in the cooperative's operation and to participate in membership meetings.

B.C.'s *Cooperative Association Act* contains several special provisions applicable only to housing cooperatives. Housing cooperatives are exempt from the provisions of the *Residential Tenancy Act* (the

“RTA”). The RTA regulates the relationship between landlords and tenants; in a housing cooperative, members collectively act as landlord.

A housing cooperative could provide a way for sex workers to share housing and maintenance costs while continuing to work independently.

A. Pure run by sex trade workers. Period. Licensing. When we talked about the co-ops before and it was brought up that if we had a house, and we all used it, paid into it, to keep it running, we would all be the bosses of the house, and pay into it, so that the laundry was done, the maintenance was done. Security was present, blah, blah, blah. But there wasn't so-called . . . There wasn't a hierarchy, right? It was pure run by the sex trade workers.

Q. Like do you mean a co-op?

A. Yeah, co-op.

- female street-level sex workers

These comments highlight the importance of work autonomy to most sex workers, and the need to explore ways that different business structures facilitate autonomy.

Company law recommendations

1. Sex workers believe that a range of business structures will be necessary to accommodate the diverse ways in which they would like to conduct business.
2. Sex workers want access to various business structures, such as sole proprietorships, partnerships, corporations, and cooperatives, all of which provide potentially suitable business structures for prostitution.
3. Ensure that sex workers are free to choose the way in which they structure their business activity; do not place any legislative restrictions on the way that prostitution businesses are structured.
4. Autonomy, choice, privacy and safety are paramount concerns for sex workers when selecting a business structure.

PART 7: HUMAN RIGHTS LAW

Human rights and discrimination: Many sex workers feel stigmatized and discriminated against because of their work. They described taking a very cautious approach in deciding when to reveal their line of work. They maintain a high level of secrecy within their personal lives, in society overall, and specifically in the context of accessing services such as medical care, loans or legal protections. Sex workers reported that the effect of this sense of stigmatization is that they often refrain from taking advantage of legal, health and other forms of protection and treatment because of their desire to conceal their work.

The type of stigmatization that sex workers described was often rooted in commonly held perceptions of sex and prostitution. Many of the workers we interviewed did not believe that the repeal of the criminal laws surrounding prostitution would, by itself, be sufficient to eliminate stigmatization and discrimination entirely. Nevertheless, decriminalization was identified as an important first step.

A. It's not difficult at all, but you have to start with the legalization. You can't just – you can't just create a system. You can't just create another system which is going to stigmatize prostitutes.

- female off-street out-call sex worker

A. Yeah, I think [decriminalization is] one step towards removing the stigma of prostitution as a valid career choice, as a form of work. That is not going to remove the stigma for a long time. There is many, many things that will be needed. For example, what's a good example? Being a stripper, okay? Let's look at being a stripper. It's, it's legal. It still has a certain connotation to it. It's kind of a slutty thing to do. You must be a bit of a slut to do that. And that's something that they would always think of a sex worker as well. You couldn't possibly be moral or ethical. And, y'know, you must be a slut, if you do that. You must have very low moral and ethical opinions on everything, if you sell yourself out like that. And this stigma, this stigma is a lot harder to remove than the illegality about it. It's one variable that's involved, I guess. I don't know. That's a tough question.

- female off-street in-call sex worker

It is clear from the opinions expressed by sex workers in the course of this project that they experience a high degree of discrimination and stigmatization in their everyday lives. Human rights legislation may provide an important tool for addressing some of their specific concerns about discrimination and stigmatization.

Human rights law generally

Canada's human rights legislation at both federal and provincial levels aims to create an inclusive society in which all individuals are free from discrimination and inequality.¹ Human rights codes provide protection against discrimination on prohibited grounds – such as sex, race and age – in relation to listed practices, such as the provision of goods, services, and accommodation.

The *Canadian Human Rights Act*² (the “CHRA”) provides protections against discrimination, but only in relation to federal private businesses and the Government of Canada. Therefore, the CHRA would apply to employers and service providers who fall under areas of federal jurisdiction, including national airlines, federal departments and agencies, and Crown corporations. Thus, even in a decriminalized setting, few if any sex workers would fall under the jurisdiction of the CHRA.

In B.C., the *B.C. Human Rights Code*³ (the “BCHRC”) presents sex workers with the greatest potential for protection, both at present and in the event that prostitution is decriminalized. The BCHRC offers protection against discrimination in the areas of employment, services, and accommodation that do not fall under federal jurisdiction.

In order to be covered by human rights codes in Canada an individual must be discriminated against in a context that includes employment, provision of services and accommodation, or on the basis of some other ground listed in the legislation. Interaction between persons outside of one of these relationships or contexts is not covered under the legislation. For example, if an individual walking down the street receives verbal insults from a stranger, a claim cannot be made against that person under the BCHRC. To bring a claim under the BCHRC, you must file a complaint with the B.C. Human Rights Commission within six months of the date of the harassing or discriminatory behaviour.⁴

Discrimination involves the treatment of an individual differently, and less favourably, because of certain personal characteristics or grounds, such as race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, or disability. Some Canadian human rights legislation, including the BCHRC, also prohibits discrimination based on past criminal convictions. This is significant in the context of sex work, where workers may have previously been convicted of prostitution-related offences, and may suffer discrimination in the context of their employment or in their attempts to access services to the public. A claimant may be eligible for compensation for lost wages, injury to dignity, feelings and self-respect flowing from the discriminatory behaviour.

Human rights protections for sex workers

There are two main areas where sex workers would benefit from the protection of human rights legislation should they seek such protection: discrimination based on lawful source of income occurring in the context of housing and provision of services, and discrimination based on sex through sexual harassment occurring in the context of employment. Even under the current system that criminalizes most activities surrounding sex work, many of the protections under the BCHRC are available to sex workers. However, it is clear from sex workers that very few, if any currently avail themselves of such protection.

The next two sections look at sex workers' experiences of discrimination based on lawful source of income and discrimination based on sex, and consider how B.C.'s human rights legislation can offer protections for sex workers. Also B.C.'s human rights laws are examined to see how they could be deployed should the criminal laws relating to adult prostitution be repealed.

¹ See, for example, the statements of purpose at s. 2 of the *Canadian Human Rights Act*, R.S. 1985, c. H-6 and s. 3 of the *B.C. Human Rights Code*, R.S.B.C. 1996, c. 210.

² *Canadian Human Rights Act*.

³ *Human Rights Code*.

⁴ *Ibid.*, s. 22.

Discrimination based on source of income

Experiences of discrimination in housing

The *BCHRC* prohibits landlords from discriminating against potential renters on the basis of a person's lawful source of income. However, this section offers only limited protection to sex workers, many of whom described difficulty finding housing due to discrimination based on their source of income.

Q. Okay, [name omitted], you mentioned housing, do you want to talk a little bit about that?

A. There should be some organizations that take care of just strictly housing. Have lists of housing, apartments. That when you are leaving the sex trade, you don't have to go through all this rigmarole of references and nah-nah-nah. You just kinda proven yourself by getting that far and they should be there should be some places that can lead you on to good housing.

A. Well the thing that . . .

A. Because that's the number one importance when you leave, is the housing.

A. Well the thing is too, is like, even – even if it's decriminalized, people are still gonna be people that are always gonna look at you as lower class. And there always gonna be people who discriminate against more jobs, or housing. I mean, I've been turned away and not because it's illegal, but because they have moral issues with it. Oh, well we don't want you here. We won't rent to you. We won't this, we won't that, right? So I mean, even if it's legalized, you are still going to have, people are still gonna.

- female street-level sex workers

Many sex workers reported that landlords refuse to rent to sex workers. In order to be protected from discrimination in the housing market on the basis of their source of income, sex workers must first establish that their source of income is lawful.

Section 10(1) of the *BCHRC* prohibits landlords from discriminating against tenants because of their "lawful source of income." This means landlords cannot refuse to rent to someone, or impose unfavourable terms on their tenancy agreement on the basis of their lawful source of income. This ground has been applied to protect people receiving social assistance from such discrimination,⁵ but has not yet been applied to other types of wage earners, including sex workers.

The requirement that the source of income be lawful creates an added barrier for sex workers. Currently, the sale of sex between consenting adults is legal under Canadian law. However, certain activities associated with sex work are criminalized under s.s 210 to 213 of the *Criminal Code*. Many establishments that currently offer both sexual services and non-sexual services are legally licensed; their work can be described as both legal and illegal under Canadian law. On this basis, depending on the circumstances of the case, it may be possible for some persons employed in such establishments to successfully argue that they are lawfully employed for the purposes of making a human rights claim under s. 10(1). For example, an employee of a licensed massage parlour, depending on the particular facts in evidence, could make a valid argument that they are lawfully employed. However, based on the available information, it appears that such an argument has never been made before the B.C. Human Rights Tribunal. After the criminal laws are repealed, sex workers would enjoy full protection under s. 10(1) of the B.C. *Human Rights Code* against discrimination in renting tenancy premises, as there work would be fully "legal."

⁵ See, for example, *Neale v. Princeton Place Apts. Ltd.* (2001), B.C.H.R.T. 6 and *Tanner v. Vlaka* (2003), B.C.H.R.T. 36.

Experiences of discrimination in the provision of services

Although the *BCHRC* prohibits discrimination in the provision of services on the basis of race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, or criminal record, it does not prohibit discrimination in the provision of services against a person on the basis of their lawful source of income. This is problematic because, when attempting to access various kinds of services, many sex workers felt they had been discriminated against on the basis of their profession. For example, many sex workers thought that they had experienced discrimination when trying to access medical services.

- A. *There's lots of times we don't go to the doctor because we don't have the option of going into the clinic and they treat us like shit down there and we don't want to tell them what we do. I made that mistake before, telling the doctor that I want to do tests for everything, and I am a sex trade worker. And just the attitude you got, it's not good. They just start freaking out and wanting to test you for everything under the sun. We are probably cleaner than the typical girl that a guy meets in a bar over the weekend 'cause those girls get drunk and they don't have even one condom in their purse.*

- female off-street in-call sex worker

Several sex workers identified advertising services as another area where they experienced discrimination by virtue of their involvement in prostitution. Specifically, the rates for advertising services related to prostitution were identified as being much higher than the rates offered to the general public for comparable classified ads.

- A. *Unfortunately, the cost of doing business is not sort of on a level playing field as other businesses. Advertising costs, you pick up the phone and find out this. You gotta call a major newspaper in Vancouver and ask for their classified rates for, for, you know maybe selling a fridge, and then ask them for their body care section rates, they're about three times higher, the cost of doing business is, is really quite high and what you find is a lot of women who can't afford to keep the agency running or the massage parlour running unless they're working at the same time.*

- female massage parlour owner, former sex worker

Also, she described receiving inconsistent and discriminatory treatment regarding what and how she could advertise:

- A. *If I owned a magazine, I think, I guess I should have the right to say who can and cannot advertise in it. And if so, what I decide what has a level of taste and what doesn't. And I guess, as a publisher, that should be my right. Do I have the right to apply that unequally? No. So can I charge some people more to do a more risqué ad over others who can't afford to pay more, so they just get to do just an average ad? I don't agree with that . . . All of sudden, all of the advertisers have gotten really restrictive with my ads. Why is that? I was used to do whatever I wanted in a lot of my ads. Or you will be told – say by a certain telephone book company – that no, no we are not allowing any more body parts in the ads. You will have to do up something that does not have any body parts whatsoever. No faces, no hands, no feet. So you pay an artistic designer to do up something, and try and look sexy with no body parts in it. Y'know, you have some wine glasses maybe, and a limousine, some roses – you try and do something up kind of sexy. I believe that if I am a publisher of a big thing, or a little thing, I guess I should have the right to say of what goes in and what doesn't. But I guess there should be some sort-of discrimination type appeal,*

when the rules are not being equally applied to everybody. And I object hugely that people in my industry pay two to ten times more than other businesses to put our ads somewhere. Just because they think that we can afford it. And you should count yourself fucking lucky that we even let you advertise in there, so shut up and don't complain, or I won't let you put your ad in there at all. Who do you complain to? No one. There's no one to complain to. And even if there was, do you want to attach your name to that, and make that statement? Make that public outcry? No. So you are like, constantly just swallowing your pride and writing a cheque here you go.

- female massage parlour owner, former sex worker

We examined the classified advertising rates for home appliances as compared to sex industry businesses in six periodicals and newspapers in the Vancouver area.⁶ The results provide support for the concerns voiced by sex workers. Our review of advertising rates revealed that advertising in the adult classified sections was more expensive than advertising for sale of a home appliance in all six publications. The paper with the smallest discrepancy between the two prices still had 20 percent higher prices for advertising sex work than for advertising home appliances, while the greatest discrepancy was nearly 300 percent higher for advertising sexual services as compared to home appliances.

Two local newspapers justified the higher rates for advertising sexual services as a deterrent: the more expensive the ads for sexual services, the less likely people would be to run them. Another local newspaper stated that sex ads are more expensive “because of the market,” but declined to elaborate. One paper stated that the ads were more expensive because there is more involved in placing an adult ad, such as verifying phone numbers and checking identification.

Participants reported that it is common for escorts to pay between \$60 and \$100 per week in advertising costs. The costs of such discriminatory advertising rates are not merely monetary. Many sex workers indicated that advertising is the key to building an independent off-street client base. Given that independent escort work is one way for a sex worker to exit street prostitution discriminatory advertising rates appear to make working off-street that much more difficult.

A different form of discrimination occurred in the way various financial and insurance companies react to prostitution. Sex workers stated that they face discrimination on the basis of their source of income when seeking loans, credit, or insurance.

- A. *Well it's rampant. It's everywhere you look. I mean, all you can do about it is pretend that you do something else. I mean you're not going to go to the bank and say "I'd like a mortgage and say I'm a madam" you know, you're not going to a hotel and say "I have this kind of a business and I want to have a function in your ballroom . . ." You know, you've got to hide it or minimize it or whatever you can do at every turn. Absolutely. You have to use euphemisms or complete fabrications for what you do for a living, all over the place. Now, you know, I rebel against that having been in this business 25 years – I'm less apt to want to play that game any longer and so I'm more and more interested if somebody chatting at the bar or whatever says what do you do, I tell them what I do. And if they're okay with it, great, and if they're a little shocked, that's their problem kind of thing. You know, it means I probably tend to hang out at places I know I'm kind of understood and accepted. The discrimination is everywhere – it really is everywhere. You cannot today be completely open about what you do, how you earn your money, at all, and I think that's criminal. I think you should be able to say this is what I do, this is how much I make, I don't disparage any other,*

⁶ The six newspapers studied were: The Vancouver Sun; The Vancouver Province; Westender; Buy and Sell; The Georgia Straight; and Xtra West.

I want credit or a loan, some kind of insurance, whatever. I at one time had home insurance or something like that and then when they found out that maybe there was some business going on in that home, they wouldn't pay off for some items that got stolen, somebody broke in and stole some things or whatever. And I just went, fine, I just won't use insurance service . . . But there's many many situations like that where you just can't be a full member of society. You have to sort of be on the fringe.

- female off-street out-call sex worker

A final barrier that sex workers mentioned due to the stigma of being employed in prostitution was in terms of access to legal protections.

A. One of the major issues with all of the legal protections available is anonymity. In order to avail yourself of a legal protection, you have to, as a sex worker, you have to out yourself basically, as a sex worker. Either through signing some forms saying that this happened and I am signing a grievance or I am filing a claim, that had something to do with sex work, with your name on it, of course. Some sex workers feel that it is the anonymity that they want to keep, which keeps them from, y'know advocating for increased legal protection. So it's kind of like catch-22. It is. And it's – even if you are told that y'know, it's not about being prosecuted or – that isn't that type of assurance that we are looking for. It is because of the stigma. You can't ever come out and speak on behalf of your profession. And then if you speak anonymously, then it just doesn't carry the weight behind it. Because what would carry some weight is for a person in the community, such as myself, where I lived, stand up and say I am a prostitute, how does that make you feel?

- female massage parlour owner, former sex worker

It is clear from the foregoing evidence that sex workers currently experience a high degree of discrimination on the basis of their source of income, and that they require protection from such discrimination. The *BCHRC* does not currently provide protection for people in B.C. who experience discrimination on the basis of their lawful source of income in regards to accommodation (other than tenancy, as previously discussed), service or facility customarily available to the public. This means that even after legal reform, a sex worker who is deprived of medical treatment because he or she earns income from sex work would receive no protection from such discrimination under the *BCHRC*. The data suggest that the rights of sex workers would be better protected if discrimination on the basis of lawful source of income should be added as a prohibited ground listed in all sections of the *BCHRC*.

Discrimination based on sex: sexual harassment

Forms of sexual harassment encountered by sex workers

Sex workers experience sexual harassment in many forms from both employers and clients. Sexual harassment involves conduct of a sexual nature that may be verbal or non-verbal, subtle or obvious. Sexual harassment can include such behaviour as pinching, grabbing, hugging, kissing, leering, propositioning, gender-based insults, and remarks regarding a person's appearance or sexual habits. To constitute harassment, these acts must be unwelcome. They may be characterized by persistent and repetitive behaviour or a single incident depending on the degree of severity of the alleged act.⁷ In some cases, the harassing behaviour need not occur within the workplace itself for it to be covered under the *BCHRC*. For example, if an employer sexually harassed an employee at an after-work party

⁷ *Janzen v. Platy Enterprises Ltd.*, [1989], 1 S.C.R. 1252 at 1284 [*Janzen*].

or a weekend office function, that behaviour would be considered to be sexual harassment within the context of their employment.

Sexual harassment by employers

Many sex workers reported incidents of sexual harassment by employers. Several sex workers explained that owners of escort agencies and massage parlours often required the performance of sexual acts as part of the interview and training process:

- A. *This is pretty disgusting, but this happens to every single one. I mean every massage parlour that have it. I am pretty certain, hundred percent sure. 'Cause I have been some like you know three different massage parlours. I did not really work for the first one. What happens is the first thing when you go for interview, and they will ask you, "do you know how to do massage?" They will want you to get into the room. And like you know they will asking you to wear dress, skirt usually. What happens is they say, you know "I am the test." And the test is you have to have sex with the guy.*
- female off-street in-call sex worker

Escorts described sexual harassment as a common part of their work experience:

- A. *Okay, when I went around looking for a job or to become an escort . . . I mean, every one of those guys that interviewed me, I had to have sex with them. Like that, to me, is sexual harassment. The escort owners want to try you out. I don't know of any other profession that, when you go in to be a secretary, you have to give your boss a blow-job. You know, that is a form of harassment. You know . . . and it's no different from escort to massage and so forth . . . it's all the same. And I don't think that's ever going to change*
- female off-street out-call sex worker

Such conduct is not only sexual harassment as prohibited under the *BCHRC*, but it may also be found to be sexual assault and punishable under the *Criminal Code*.

In the context of their employment, many sex workers described being subject to unwanted sexual advances by their employers. Sex workers felt that such conduct should be considered sexual harassment and be prohibited, as it would be in any other workplace:

- Q. *Do you think there's any place for sexual harassment law in sex work?*
A. *Well, yes. I do.*
Q. *Okay, and where would you draw the line between what is included in when you talk about sex work and where sexual harassment starts?*
A. *I think it kind of could be pretty much the same as any other employee. The thing is again education. So when we're going to assume that all these people are going to be licensed, and currently even in Edmonton, they are being interviewed, [name omitted] does try and if he does find somebody brand new he does spell it out for them that they're not really going to be escorting anyone anywhere and are they aware of what they're going to do. So, I mean, let's make those people actually earn some of the money that they're soaking us for. And uh, go once step further and say look, here's the deal, if this, uh, pimp of yours does this, this, this, or this, you come back and you talk to me, because, uh, then we can do something about it. And you know, I mean it's not a perfect world and even if I'm working as a waitress, and my boss is you know, pinching my behind, it's not guaranteed that just because I know I'm being harassed that I'm going to do anything about because I want my job, so you know, even, that's reality. But that doesn't prevent us from at least trying to educate*

people and to knowing it.

- Q. Okay, so from a legal perspective, if a sex worker wanted to bring a sexual harassment claim against a client, the first thing a court would say is where do you draw the line basically.*
- A. Woah, woah, woah. I'm sorry, I misunderstood you, I thought against the pimp.*
- Q. Oh no, I meant sort of more, certainly against an employer, but also against a client.*
- A. Okay, from the point of an employer I think yes, they are the ones that take advantage, they're the ones that believe in free sampling of the wares. You know? You'd be surprised.*
- female off-street out-call sex worker*

Business owners agreed that sexual harassment by employers should be prohibited. They suggested that, because of the nature of the work, sexual advances by employers is more prevalent in workplaces within the sex industry than in other industries.

- A. In the employee-employer relationship there should be [a place for sexual harassment claims]. There should be no situation when an employer should ever be involved with staff. Absolutely not. Well if it were like other work places you would want to say that the owner of the business or the employees – the office staff or whatever – would not really be able to grope the escort, that that wouldn't be fair game. In the escort field, people tend to be a little more open minded about their sexuality than in other work places, so there might be a certain amount of kidding around, and, you know, hugging and kissing, and stuff that might be off limits in an office environment that we would think nothing of in our business. For instance a lot of my ladies will go to my photographer's place and studio and be photographed in various stages of dress and undress. You know, nothing dirty goes on but he sees them walking around and takes their pictures and so on and so forth. That wouldn't fly in an office environment but it makes perfect sense given what they're up to in their work.*
- female escort agency owner, former sex worker*

It is clear from the opinions and experiences conveyed that sex workers must receive the full protection of the law from harassing employers. Sex workers, perhaps more than other types of workers, endure sexual harassment from employers on a regular basis.

Sexual harassment by clients

Many sex workers described experiencing unsolicited and unwanted sexual advances at the hands of clients, although they doubted that a clear line could be drawn between contracted sexual services and sexual harassment. Nevertheless, many sex workers want protection from unwanted touching, verbal insults, and coercion by clients. Many of the sex workers we interviewed stated that they frequently experience unwanted behaviours on the job. Sex workers generally agreed that they deserve legal protection from sexualized conduct that falls outside the scope of the agreed upon services.

Although it may be difficult to draw the line between services contracted for and unwanted behaviours, it is clear that certain client acts can be considered sexual harassment, or even sexual assault, depending on the particular circumstances. It would be up to human rights tribunals to determine case-by-case whether the conduct that is the subject of a complaint is part of the contract between a client and worker, or whether it constitutes sexual harassment. Under the current legal regime, it is difficult for sex workers to seek protection under human rights codes.

Current protections against sexual harassment

The Supreme Court of Canada has defined sexual harassment as constituting discrimination on the basis of sex.⁸ Although the *BCHRC* does not expressly prohibit sexual harassment, it does prohibit discrimination based on sex.⁹ Consequently, even when a human rights code does not explicitly prohibit sexual harassment, it is considered to be discrimination on the basis of sex under provincial human rights codes.

More specifically, s. 13(1) of the *BCHRC* prohibits discrimination in the context of employment, or any term or condition of employment on the basis of sex,¹⁰ as do the human rights statutes of all other Canadian provinces and territories. In the context of employment, the Supreme Court of Canada has defined sexual harassment as “unwanted conduct of a sexual nature which detrimentally affects the work environment or leads to adverse job-related consequences for the victim of the harassment.”¹¹ Thus, it is clear that unwanted sexual behaviours, including sexual assault, in a workplace environment by either clients or employers would constitute sexual harassment. Consequently, a victim of sexual assault could file a human rights complaint in addition to pressing criminal charges.¹²

Sexual harassment by employers in the sex industry clearly constitutes an abuse of both economic and sexual power; it undermines and demeans the dignity and self-respect of the victim, both as an employee and as a human being.¹³ Provincial human rights codes provide a form of protection from discrimination and harassment by making employers liable for discriminatory conduct.¹⁴ Such protections are not extended to persons engaged in work that constitutes criminal behaviour. For this reason, sex workers who are able to argue that they are lawfully employed – such as employees of licensed massage parlours – have greater access to the protections available under human rights codes.

In addition to being held accountable for their own conduct, employers may be found liable for sexual harassment by clients. Courts and human rights tribunals have held employers vicariously liable for sexual harassment of their employees when that harassment is perpetrated by co-workers under the employer’s direction, and even sometimes when it is perpetrated by non-employees where the environment is, to some extent, under the employer’s control. Under the law, employers are required to take reasonable steps to maintain a workplace free of sexual harassment. This has been interpreted to mean that when an employer knows or should know of sexual harassment in the workplace, and fails to take reasonable steps to remedy or prevent the harassment, the employer may be held liable for violating human rights statutes. In situations involving sexual harassment of an employee by a client or other non-employee, the level of employer liability would depend on the employer’s extent of control over the non-employee. Therefore, employer responsibility for sexual harassment by non-employees depends on the circumstances of each case.¹⁵

Another potential barrier to sex workers accessing full protection under human rights codes, even if adult sex work is completely decriminalized, is the fact that many sex workers are classified as independent contractors under the law, and not as employees. Where sex workers are independent contractors but work on contract within another business, it is likely that they would be considered employees for the purposes of human rights legislation, particularly when the victim and the perpetrator interact within the workplace that is controlled by the employer.

⁸ *Ibid.*

⁹ See ss. 11-13 for the protections in the context of employment. The *Code* also offers protections in other contexts: see ss. 7-10, 14.

¹⁰ *Human Rights Code*, s. 13(1).

¹¹ *Janzen*, *supra* note 7.

¹² Since *Janzen*, *supra*, it has been accepted in Canadian law that sexual assault can constitute sexual harassment and a victim of sexual assault in the workplace may choose to file a human rights complaint and/or press criminal charges. *Skelly v Karp* (1994), B.C.C.H.R.D. 24 at para. 69 (QL).

¹³ As explained in *Janzen*, *supra* note 7.

¹⁴ *Robichaud v. Canada* (Treasury Board) (1987), 8 C.H.R.R. 680.

¹⁵ Arjun P. Aggarwal. *Sexual Harassment in the Workplace*, 2d ed. (Toronto: Butterworths, 1992) at 218-222.

However, even if adult prostitution is completely decriminalized, workers who operate outside of any form of employment relationship – such as street-level workers and independent escorts – will not be protected against harassment by clients. Instead, harassment by clients would have to be dealt with under criminal law. Alternatively, independent sex workers could try to argue that they are protected against discrimination in their workplace because they are actually employed by their client, rather than being self-employed.

Human rights law recommendations

1. Repeal the criminal laws relating to adult prostitution in order to afford greater protection to sex workers from sexual harassment by both employers and clients.
2. Ensure that sex workers have full access to the human rights complaint process in cases where they are subject to sexual harassment by their employers and clients.
3. Educate sex workers, employers and clients about the laws relating to harassment and the potential for employers to be held partially responsible for failing to provide a workplace free from discrimination.
4. Ensure that members of federal and provincial human rights tribunals understand that an activity can only be considered part of sex work when the worker provides consent, and that sex workers can experience the same emotional and psychological trauma from all forms of discrimination, including sexual harassment, as any other type of worker.
5. Human rights tribunals should consult with sex workers on the appropriate criteria to apply in distinguishing sexually harassing behaviour from contracted sexual services so that sex workers may enjoy protection from sexual harassment by clients.
6. Discrimination on the basis of lawful source of income should be added as a prohibited ground listed in all sections of the *BCHRC*.
7. Canada's human rights tribunals should work with sex workers to develop new ways to offer full human rights protections to self-employed sex workers.
8. Canada's human rights tribunals should be provided with information concerning the appropriate means for adjudicating claims involving sex workers.

PART 8: IMMIGRATION LAW

The legal issues faced by migrant sex workers can be extremely complex given the way in which their lives are affected by both criminal and immigration law. Migrant sex workers may be subject to two punitive systems. First, they may be criminalized due to their involvement in sex work which may contravene one or more *Criminal Code* sections that relate to prostitution.¹ Second, under the *Immigration and Refugee Protection Act*² (the “IRPA”), they may be subject to removal or deportation. Their right to remain in Canada may be tenuous if they have not secured permanent resident status.

Given these vulnerabilities, migrant sex workers are frequently subject to serious human rights violations in their work environments. These violations often go unnoticed and unreported as many migrant sex workers are unable to avail themselves of legal and social protections that could make their work and lives safer. Under these conditions, migrant sex workers are in a position of extreme vulnerability.

In this chapter, we use the term “migrant sex worker” to refer to a person born outside of Canada who engaged in sex work once having migrated to Canada. This Part begins with a discussion of prevalent assumptions about migrant sex workers, examines the rights that sex workers who find themselves at various stages of the immigration process, provides an overview of the research into human trafficking and smuggling, and concludes with a list of recommendations for law and policy reform.

Are all migrant sex workers “trafficked persons?”

The experience of migrant sex workers is often subject to overgeneralizations given the tendency to label all migrant sex workers as “trafficked persons.”³ The label “trafficked persons” certainly describes the situation faced by many migrant sex workers who have become involved in sex work as a result of coercion and exploitation. However, our interviews with sex workers suggest that the term “trafficking” should not be applied indiscriminately to all persons who migrate to Canada and become involved in the sex industry. Some migrant sex workers asserted that they did not end up in sex work as a result of exploitation or coercion and choose to engage in prostitution.

Central to any discussion of trafficking in persons is the issue of “consent.” From a legal perspective, consent involves a person’s capacity for agreement free from fraudulent representation, force or undue pressure. There is ample evidence that many women and children⁴ involved in the sex trade are subject to exploitation, including coercion, blackmail and physical brutality. Trafficking in persons is commonly referred to as the modern-day slave trade.⁵ Against the view that all sex work-related migra-

1 *Criminal Code*, R.S., c. C-34 [*Criminal Code*].

2 *Immigration and Refugee Protection Act*, S.C. 2000, c. 27 [*IRPA*].

3 While the term “trafficked persons” is used to describe many situations involving people forced to perform labour, it will only be used in the context of sex work in this report.

4 Sex work involving children is outside the scope of this report. Therefore, sex work-related trafficking and migration involving children will not be discussed in this chapter.

5 A. Cockburn, “21st-Century Slaves” (2003), online: *National Geographic* magazine <<http://magma.nationalgeographic.com/>

tion is a form of trafficking, our project participants suggested that migrant women have various degrees of control over their situations:

A. [My friend] told me about two kind of girls. When you reach her at your homeland, you got money to pay for fake passport, and you have money for airplane ticket. You are free. What do they say? Free body . . . So, they can choosing where they want to go to work. They can choosing who they want to work for. And they can choosing when do they want to go . . . And you know so much better than some girls because they are so poor, their families need the money, need some money for food or whatever. So, they will sell the girl. So, the girl will belong to the guy; she does not belong to herself anymore.

- female migrant off-street in-call sex worker

This chapter discusses how the fundamental rights and freedoms of migrant sex workers as enshrined in the *Canadian Charter of Rights and Freedom*, are being routinely violated.

Migrant sex workers in Canada

While there are currently no reliable statistics available on the number of migrant sex workers in Canada, it is clear from our interviews that a significant number of sex workers in Canada are non-Canadian:⁶

Q. So, let us talk about that a little bit. Let's talk about the difference between the Canadian girls and the non-Canadian girls . . . in the [massage] parlours that you worked in, what percentage do you think were actually Canadian, what percentage were not?

A. Let me think about it. I remember at the older place . . . one was Chinese. Five to six girls is coming from Thailand and Malaysia and it's not Canadian . . . they are not allowed to work in Canada because they are coming in from, you know like, visitor.

Q. Out of how many girls would that be like? Out of ten girls that were working there, maybe five of them were not Canadian?

A. Right.

Q. Okay, and do you think that the owners preferred girls that were not Canadian or just whoever came along and was willing to work?

A. I think . . . He wanted both.

- female migrant off-street in-call sex worker

Current working conditions of migrant sex workers

The experience of migrant sex workers in Canada runs across a broad spectrum from those who have a high degree of personal freedom and autonomy to those who have virtually none. The women no freedom or autonomy are treated as property. Almost every aspect of their lives is controlled, and they are kept in servitude. At the other extreme are migrant women who do act independently. As one female migrant sex worker explained:

Q. I know a girl . . . Her name is [name omitted]. She is Malaysian. Chinese Malaysian and she is gone now and I think it's okay to say that now. Like she is using your fake

ngm/0309/feature1/;>; E. Vitagliano, "Malevolent Bargains: Slavery continues in the form of forced prostitution" (April 2004), online: AFA Journal <<http://www.afajournal.org/2004/april/404culture.asp>>; Lieut-Colonel Dawn Sewell, "Sexual Trafficking: Fighting the New Slave Trade" (2005), online: The Salvation Army – International <http://www1.salvationarmy.org/ihq%5Cwww_sa.nsf/0/F2E8F16550A2461A80256EDD007A73DD?opendocument&cid=0B976C67E8CF7C9D80256EDD006E3BB0>.

⁶ The term "Canadian" will be used to define the status of a person who holds Canadian citizenship.

passport and she is a traveler. She is not supposed to be here and she travel all over the place and making money with prostitution.

Q. So she travels around to different countries or different cities?

A. Different countries . . . Her last stop was the United States before she come to Vancouver.

Q. So she travels around and works sex trade herself and that's how she makes money?

A. Yeah. And what happened is she told me two kinds of girls. Two kinds. One kind like her, is free like her, which means she knows those dealers for sex . . . and because she got money in Malaysia so she can pay for her own passport. Fake passport money . . . And she can pay for the . . . airplane ticket. And that's why she is free so she chooses who she work for . . . And she told me there is a different one. The different one is the . . . I met later on at the massage parlour . . . they do not have freedom. They have to stay in certain places. They cannot walk out; they cannot talk to people. They cannot tell people their real name and stuff like that because like those dealers, those people dealers they pay for the passport and for the airplane and ticket and stuff like that.

Q. So where does those girls usually come from or does that not matter?

A. Usually those girls coming from Thailand or Malaysia around those countries between those countries.

- female migrant off-street in-call sex worker

Many of these women are held in a system of debt bondage that is tantamount to “sexual slavery.” As a result of issues such as language barriers and employer-imposed restrictions on their activities, some migrant sex workers have limited access to information about their legal rights in Canada, and consequently are vulnerable to mistreatment and abuse. One female migrant described a situation where migrant sex workers are kept in isolation and forbidden to interact with other people, even in their work environment:

Q. Now, what is the relationship in the massage parlour between the Canadian girls and the other girls? Like do you guys get to spend time together? Do you guys talk?

A. I remember one time . . . I was not working, but [name omitted] was working in that massage parlour because I always hang out with her too. Cause I go with her for drugs, right? . . . So, we talk to each other. Not all of them are that bad. But when they are not free; like they belong to somebody else, that, they pretty much got separate.

Q. So they do not get to talk to you?

A. Not at all. I met them few times. Like we know each other in the big room.

- female migrant off-street in-call sex worker

This same woman explained that some migrant sex workers are hidden in massage parlours and other establishments, and are denied access to anyone other than customers:

Q. Do you think this is the problem that we are having at [name of parlour omitted]? Why we always see the same girls over and over?

A. Right.

Q. I wondered about that. So you think there are more [non-Canadian] girls there?

A. I believe that and they are. Especially he is Chinese . . . Because they have their own connections for getting those girls . . . So when they are owner, they have their own way . . . To dealing with that. That kind of guy. . .

Q. So, if they sell the girl in Thailand or Malaysia to a massage parlour over here?

A. . . . They have a few guys in Thailand. And they Chinese Thailand people whatever.

Because I heard about a couple of guys still there. And the wife is over here. And they work together, which means . . . over there he is the dealer. He does all the work of paying like every year, they send money to the family, that's all.

Q. Okay, so he buys the girl from the family and brings her to Canada to where his wife is waiting, who owns the massage parlour?

A. Actually . . . I think that lady at the time. I am pretty sure because I used to work in her house. Not her house because she would rent some house and would hide the girls there . . . They were doing business there. Starting to run out of business there, and that's why she starting to send the girls to the massage parlour . . . she is not the only one.

- female migrant off-street in-call sex worker

Some migrant sex workers experience language barriers or employer-imposed restrictions on their activities, and are therefore very limited in their ability to seek assistance from police, health care services, government agencies, social service organizations, faith-based groups or their peers. For example, one migrant sex worker explained that, in general, migrant sex workers are more vulnerable to sexual assault than other sex workers and face substantial barriers to legal redress:

A. Like two girls coming from Thailand or whatever . . . They got raped a couple of girls of them. They got raped more than two times . . . And they just have to settle.

Q. At the new, the other one on [location omitted] did anything like that ever happen there? Did you ever feel unsafe?

A. I do feel unsafe, but it's not that bad. The guy did not raped me. He just . . . he was trying to like having sex with me. It's a Vietnamese guy. He was trying to have sex with me without a condom. I said no. And then he trying to grab me. Starting to grab me really hard, trying to forcing me to do it. Like he want to rape me, like possible. So, I was screaming. And my friend, that is my friend was just passing by and she knocked on the door. Like, knock, knock, go, go. That's why I was lucky. That's why I was [able to get] away . . .

Q. So she rattled on the door and he got scared?

A. Yeah, and then he stopped. I went out and I said, I do not want to do him . . . This is the difference when you are Canadian; you have a choice to say I do not want to do this guy . . . In all those massage parlours if you are not, like you cannot say no.

- female migrant off-street in-call sex worker

Even when in need of immediate medical care, some migrant sex workers are forced to continue to work, and to do so in dangerous conditions:

Q. But you won't get a chance to talk to [non-Canadian sex workers] and find out what's going on?

A. Not at all. But I remember once, the girl was crying and I was trying to talk to her. And she do not really speak English very well. But she was trying to tell me the sponge, the boss was telling her to put it inside her vagina because she was bleeding . . . And she, because it's really hurting; it's really painful. She trying to put a smaller one in. And the customer complaining because he saw blood. So, the owner, like apparently, slapped her or whatever because she was crying.

Q. Oh, so he hit her?

A. Yeah, I think so and she needs to put a bigger sponge inside. She told me that and then she said like, like she hate her life and stuff like that. I feel so bad.

- female migrant off-street in-call sex worker

In some establishments, wages are higher for Canadian than for migrant sex workers. In some massage parlours, workers are not paid an hourly wage – their income consists only of tips they may receive from clients for the sexual services they provided. In these cases, the client pays the establishment for the massage, and then negotiates the sexual services with the individual worker. This means that when business is slow, or in instances where the client receives a massage only, a sex worker does not get paid:

Q. Yeah, so do you think that [non-Canadian sex workers] charge the same as Canadian girls?

A. No, it's totally different. I know that. I am pretty sure.

Q. What do you think the difference is?

A. Okay, like Canadian girls when they work in the massage parlour. Say, I do not really remember, but say one hour you get \$25 an hour pay. For one session, not one hour, like 45 minutes. Me myself I only got \$15 for an hour because I do not have a license . . . But I was complaining and that's why they pay me. Because before, I having argument with them. I do not have pay for hours . . . And I find out, that all the girls. They are working when they don't have. First off, when they do not have the license.

Q. The massage certificate.

A. License. And some girls they are not even supposed to live in Canada . . . And they do not get paid for hours . . . It's crazy. You know, how much money the owner makes? I mean like one hour, the owner charges 50 bucks. Like at that time. Like now it's lower prices. But at that time, it's 50 bucks . . . So, the girl's 25 bucks an hour, you got 25 bucks. But now when the girl do not get the \$25, he gets 50 bucks for nothing.

Q. And what does the girl get?

A. The girls get zip. The girls get the money if they have sex with the guy.

- female migrant off-street in-call sex worker

Having to acquire a massage certificate or a license creates an additional barrier for a migrant sex worker. For example, she may not have the financial means to do so, or she may not want to register any information with the government or educational institutions for fear that she may be arrested or deported.

In the following excerpt, the same migrant massage parlour worker explained how Canadian sex workers are paid for their work even if they do not engage in the sale of sex acts, while their migrant counterparts are not paid:

Q. The owner gets paid for the room and time, and the girl gets paid for whatever sex that she does. So, if he just wants a massage, do you get paid?

A. I do.

Q. And how do you work that out?

A. They got a paper.

Q. Right.

A. When you get it you gonna put your name on and how many hours you are in there. This is the problem here. When the girl is not Canadian, they do not get paid for an hour. So, if the guys does not do anything, they got nothing. But usually they will pay tips, at least 20 bucks.

Q. Oh, okay. But for you because you are Canadian, you get a . . .

A. They have to.

Q. Paid for the hour.

- female migrant off-street in-call sex worker

In addition to being denied wages for their work, some migrant sex workers are not paid at all. Their earnings for sexual activity sold are paid directly to their “owner,” pimp or boyfriend:

- A. *I know a couple of guys that always come to the massage parlour to take the girl. And I believe the owner does not own the girls sometimes. Sometimes, they may own one or two, but sometimes like what I saying they are richer. But most of the girls are not richer; they just have a pimp to do it. So they have their own pimp.*
- Q. *So, it's not necessarily the massager parlour that's buying them? It's somebody else.*
- A. *They do too, but they probably got one or two. And actually, what they doing because they do not want to get caught, they will find some guy to do them that job. So, they dealing with all the pimps.*
- Q. *Yeah, so what about the . . . You have suffered some violence, but you had the right to say no. Did you see any of those other girls suffering?*
- A. *I saw some girls suffering . . . One girl she got a pimp, and she said that's her boyfriend . . . And her boyfriend is a dealer; and like he is supplying her with the drugs. Like all the money it's go to the dealer. Like the boss over at the massager parlour, he won't give the girl money . . . You can say they are professionally doing sexually, you know like prostitution and stuff like that. Because the money it's to the boss and the boss would give it to the pimp. Because the pimp would tell him if the customer pays, you get the money and you give it to me. You know, they have a deal first. And the girl says, this is my boyfriend, so they have to listen. You know what I mean, aye?*

- female migrant off-street in-call sex worker

Because some migrant sex workers have limited information about their legal rights, they can be more vulnerable to intense levels of exploitation and abuse. As a result, many migrant sex workers prefer to work at street level even though they will continue to be vulnerable to violence and other abuses:

- A. *I mean like you the owners it's terrible. They got a lot of rules. You have to follow the rules. Like you know, at least I am more happy on the street. I mean like it's totally they give you a lot of stress. Because the girls there are alone and stuff like that. On the streets, when something bad happens, the girls. If the girls know you, they stand by. They help you . . . And I got a lot of help like those services. I go to doctor; I have a counsellor. And that's I turn my life back around.*
- Q. *So, you get more service when you are working in the streets than when you are working in a massage?*
- A. *Oh, yes. Yes, because like in the massage you feel totally got cut off from everything. It's like they are trying to cut you off from outside . . . Like that's totally like feels like isolated, feels like you got cut from connection to the world. I mean like the feeling is so terrible. Like when you got raped in the massager parlour and the owner won't do anything. And he trying to tell you, it's your own fault . . . You know on the streets when I am in a bad day, I go ask for help. I report it you know. People help me to calm down. I got people take care of me. They report it, they write down for other girls. And this is what I found, you know. This is why I like to be. I am clean; I do not do drugs anymore. I want to helping other girls because . . . I found that a lot of girls, they do not even know that. They do not even know a lot of rights; they do not know they have rights. Just say something.*

- female migrant street-level sex worker

Health concerns

The criminalization of prostitution and the risk of deportation make the working conditions of migrant sex workers much worse, increasing their risk of being subject to violence and making them less able to insist that clients use condoms. These conditions place them at greater risk of contracting HIV and other STDs.

Some migrant sex workers may have a limited understanding about the health risks inherent in their work. Further, they may live in poverty or with an addiction which can reduce their control over the way they do their work:

- Q. Do you think that some of the customers offer [non-Canadian sex workers] more money not to use a condom?*
- A. Yes, I believe that.*
- Q. And the girls that do not have papers. You said last time that maybe they do not use condoms. Is that because they do not know or because they need to make more money?*
- A. I think it's because they need to make more money because they do not get paid per hour.*
- Q. Right. So, tell me a little about . . . Do you know, does the massage owner ask you about diseases, STDs, HIV?*
- A. No, they do not . . . [W]e know we are supposed to [use condoms]. But some girls does not. Like those Thai girls. They do not usually use condoms.*
- Q. And did you know that Thai girls did not use condoms?*
- A. Because they do not know freedom. They just listen to whatever . . . You know, peoples want. They just worry they could not get the money.*
- Q. Oh, okay so they are scared about not getting the money.*
- A. Because they are drug users. Because the owner is really terrible like you know they have the way to control them.*

- female off-street in-call sex worker

The Immigration and Refugee Protection Act

The *Immigration and Refugee Protection Act* (the “IRPA”) is federal legislation relating to immigration and refugee protection in Canada. Foreign nationals can apply to immigrate to Canada under a specific “class” of immigrant, such as through the “skilled worker class,” “business class,” or “family class.” Also, foreign nationals can apply as refugee claimants or as persons in need of protection if they fear persecution or may face torture or cruel and unusual treatment or punishment in their country of origin.

IRPA sets out the conditions for inadmissibility to Canada. It states that a foreign national is inadmissible on grounds of “criminality” and a permanent resident is inadmissible on grounds of “serious criminality.”⁷ These provisions are highly relevant to migrant sex workers because they may break the law in the course of their work and may be vulnerable to removal from Canada if convicted of a criminal offence. The method by which a migrant sex worker applies to enter or remain in Canada

⁷ *IRPA* at s. 36. 36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed; 36 (2) A foreign national is inadmissible on grounds of criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence.

will affect whether or not she can be subject to removal from Canada for being convicted of criminal activity within Canada. The right to remain in Canada will also be affected by the stage a sex worker is at in the immigration process. The following discussion provides a brief overview of a range of possible immigration scenarios, and discusses whether a criminal conviction can lead to removal or deportation in each situation.

First, a migrant sex worker may be in Canada without having adhered to the procedures set out in *IRPA*. In that case, she or he is in Canada illegally and can be detained and removed or deported at any time.

Second, a migrant sex worker may come to Canada temporarily on a tourist, work or student visa, all of which provide them with permission to stay in Canada for a defined period. However, by committing a criminal offence in Canada, a sex worker or any other foreign national who is in Canada on a visa can be prosecuted, subject to enforcement action and required to leave the country.⁸

If a sex worker has applied to immigrate to Canada under one of the above-mentioned immigrant classes and has been granted permanent resident status, she can be removed from Canada if found to have engaged in “serious criminality.” “Serious criminality” is defined by *IRPA* as being convicted of an offence which is punishable by a maximum term of imprisonment of at least 10 years, or of an offence for which a term of imprisonment of more than six months has been imposed.⁹

Therefore, a single conviction under the “communicating law”¹⁰ or being found in a common bawdy house,¹¹ will likely not result in removal from Canada because these offences carry a maximum sentence of six months imprisonment.¹² However, the sentence that may result from a conviction under s. 210(1) of the *Criminal Code*, keeping a common bawdy house,¹³ or s. 212 of the *Criminal Code*, procuring,¹⁴ could meet the threshold for “serious criminality.” In either case, the fear that deportation may result from a criminal conviction will often have the effect of driving sex workers underground.

Refugee claimants can also be found to be inadmissible on the basis of “serious criminality.”¹⁵ If they are in the process of making a refugee claim and have yet to be granted permanent resident status, they can be found to be ineligible on the grounds of serious criminality. However, for refugees, “serious criminality” means having been convicted of an offence that is punishable by a maximum term of imprisonment of at least 10 years and for which a sentence of at least two years was imposed.¹⁶

Migrant sex workers often fear arrest, detention and removal from Canada, and this fear can have the effect of driving them underground, particularly when they are in Canada illegally or on temporary visas. While trying to hide from the authorities, migrant sex workers are often forced to work in very poor conditions, including dangerous and slavery-type conditions and may avoid seeking the assistance of law enforcement, emergency services, community organizations, and other social services.

Human smuggling and trafficking

Definitions of trafficking in persons

While the terms “smuggling” and “trafficking” are often used interchangeably, they are different phenomena. The term “smuggling” is commonly employed to describe the movement of a person across an international border in contravention of applicable immigration laws. Smuggling is as a

⁸ *IRPA*, s. 36(2).

⁹ *IRPA*, s. 36(1)(a).

¹⁰ *Criminal Code*, s. 213.

¹¹ *Criminal Code*, s. 210(2)(b).

¹² *Criminal Code*, s. 787.

¹³ *Criminal Code*, s. 210(1).

¹⁴ *Criminal Code*, s. 212.

¹⁵ *IRPA*, s. 101(1)(f).

¹⁶ *IRPA*, s. 101(2)(a).

“fee-for-service” operation – the business transaction and association between the parties ends at the destination.¹⁷

In contrast, “trafficking” involves an association that continues beyond the person’s arrival at the destination, and frequently is exploitative and violent. In some cases, smuggling turns into trafficking.¹⁸ Trafficking does not necessarily contravene immigration laws; trafficking can occur in the context of legal entry into a receiving or transit state. Unlike smuggling, the movement of a person to a different location is not what constitutes trafficking, rather it is the deception, coercion or force exercised on a person to become or remain in servitude that defines trafficking.¹⁹

The key components of trafficking include the use of some form of deception, coercion or force in order to exploit the trafficked person upon their arrival at the destination. Usually, the trafficked person is subject to either sexual exploitation or forced labour. Most cases of trafficking investigated by the Canadian law enforcement involve individuals engaged in the sex industry.²⁰

Canada is known to be a country of transit and destination for trafficked persons. Internal trafficking of both Canadians and non-Canadians takes place throughout the country. For example, law enforcement agencies are aware that some organized crime groups engage in the trafficking of persons, both Canadians and non-Canadians, among provinces for the purposes of prostitution and other activities.²¹

Trafficking in persons is described as a modern-day form of slavery involving victims who are typically forced, defrauded or coerced into sexual or labour exploitation. Some agencies and organizations argue that it is among the fastest growing criminal activities, occurring both worldwide and in individual countries.²² A UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²³

Consent of a person to exploitation is irrelevant if there has been any coercion or deception involved.²⁴

Statistics

Each year, it is estimated that anywhere between 700,000 to four million persons are trafficked globally.²⁵ Approximately 80 percent of global trafficking victims are female, 70 percent of whom are trafficked in the commercial sex industry.²⁶ The Royal Canadian Mounted Police (RCMP) estimates that 800 persons are trafficked into Canada per year. However, some non-governmental organizations

17 RCMP, “Project Surrender: A strategic intelligence assessment of the extent of human trafficking to Canada,” 30 Jan 2004 at 18.

18 *Ibid.* at 6.

19 Office to Monitor and Combat Trafficking in Persons, “Trafficking in Persons Report” 3 June 2005 (U.S. Department of State) at 10, online: <<http://www.state.gov/documents/organization/47255.pdf>>.

20 *Supra* note 17 at 8.

21 Protection Project, The, “2005 Human Rights Report on Trafficking in Persons, Especially Women and Children,” 2005 at 1, online: <<http://www.protectionproject.org/report/canada.doc>>.

22 *Supra* note 19 at introduction.

23 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, United Nations, 2000, Article 3(a).

24 *Ibid.* at Article 3(b).

25 *Supra* note 17 at 5.

26 International Rescue Committee, *Trafficking Watch*, Issue No. 5, Summer 2004 at 9.

(NGOs) estimate that as many as 16,000 persons are trafficked into Canada per year.²⁷ In Canada, trafficked persons are usually discovered through police raids or when victims seek asylum. These incidents likely represent only a fraction of this activity – commonly-cited statistics suggest that only one in ten victims of trafficking come to the attention of police.²⁸ Therefore, it is possible that the estimates above depict only a small portion of a much larger phenomenon.²⁹

Trafficking procedure

In Canada, it is believed that trafficking in persons is coordinated mostly in Vancouver and Toronto by organized criminal groups from South Asia and Russia, respectively.³⁰ These organized groups are believed to recruit women, men, and children for the purposes of prostitution or the drug trade.³¹

Most of the Chinese, Korean, Malaysian, and Thai women found in raids on brothels, massage parlours, and karaoke bars across the country told police that an agent in their home countries charged them for transportation to Canada and for job placement.³² The agents then sold the women to bar and brothel owners for prices ranging from \$7,500 to \$15,000.³³

Revenue generated from trafficking in persons

According to the U.S. Federal Bureau of Investigation, human trafficking generates an estimated \$9.5 billion in annual revenue.³⁴

The potential for profits in [trafficking] in Canada is staggering . . . The attraction for human commodity lies in the fact that it is a resource that offers multiple opportunities to turn a profit. Persons can be used, reused and resold.³⁵

In some cases, instances of smuggling can turn into trafficking. Migration to Canada is geographically challenging, and can be financially challenging for some people as well. These challenges may increase the vulnerability of someone migrating illegally, or being smuggled, to being trafficked. Smugglers will move someone from Canada to the United States for a fee of \$800 to \$6,000, and from Asia to Canada for a fee of \$30,000 to \$60,000. These amounts owed to smugglers can represent a significant debt that may require servicing through illegal activity, which can translate into years of debt-bondage and servitude.³⁶

Challenges facing law enforcement

Jurisdictional issues

One logistical challenge to combating trafficking in Canada is that it involves multiple government departments and agencies. For example, Citizenship and Immigration Canada is responsible for illegal migration, whereas individuals or groups who finance and engage in human trafficking fall under the jurisdiction of the Canadian Customs and Revenue Agency, the Department of Foreign Affairs and International Trade, the Department of Justice, the RCMP, and Solicitor General

27 Donna E. Stewart and Olga Gajic-Veljanoski, "Trafficking in women: the Canadian perspective", online: <<http://www.cmaj.ca/cgi/content/full/173/1/25>>.

28 *Supra* note 17 at 11.

29 *Ibid.*

30 *Supra* note 21 at 1-2.

31 *Ibid.*

32 *Ibid.* at 3.

33 *Ibid.*

34 *Supra* note 19 at 13-14.

35 *Supra* note 17 at 13.

36 *Ibid.* at 14.

Canada.³⁷ Additionally, the covert nature of trafficking makes it difficult to detect and estimate its frequency, since the parties involved hide their activity.³⁸

Detection difficult due to mobility

Detection of trafficking is difficult due to the mobile nature of the businesses and individuals who are involved. Research suggests that women are quickly circulated between different cities. This practice of moving sex workers to different cities or different establishment is considered to be a profitable way to do business while facing less inherent risk than retaining the same staff over a longer period of time.³⁹ For example, one suspected mastermind behind a trafficking scheme told undercover police that he had a contact in Vancouver who owned a brothel filled with Malaysian women and moved them every six months to avoid detection.⁴⁰

Due to the ease of moving sex workers from location to location, and the mobility of massage parlours, de facto brothels and other commercial sex establishments, the owners and operators of these establishments can be difficult to apprehend:

- Q. Okay, so [location omitted], but it's closed down now. So the police busted it? . . .*
A. So like what happened, it's like . . . Okay because she is not. She could not stay here that's why she got locked up for a few days.
- Q. Because from immigration?*
A. From the cops . . . But the cops help her out.
- Q. Wait, wait. Why did they lock her up?*
A. Because she is not Canadian, but we are Canadian. So we out. They just lock us up around 24 hours.
- Q. Oh, so you were working at the massage parlour too?*
A. Yeah.
- Q. And you got busted too? So when the police came in there what did they say to you guys? Like what were their reasons for going in there?*
A. Well, actually they got guns and everything so they are coming in. Actually, what happened, the one that got busted is not a real massage parlour. It's somebody rent a place and say we are doing massage, but we actually are doing sex.
- Q. What was their reason for entering was it to look for drugs or was it prostitution?*
A. They thought it was prostitution. They do not want the drugs but they found the drugs. They found out all girls doing drugs and the wanted to charge them . . . So they need witnesses . . . So they offered me and one other girl. She is Canadian too; they offered us like to be witness so that they won't charge us . . . Okay and [name omitted] got a little problem because she is not supposed to stay here, but they help her. They get the immigration letters to let her stay for the case . . . Cause they need her . . . because she knows a lot of things more than they know at that time . . . Like she knows how the girls are coming over and stuff like that . . . They need us to prove [the massage parlour owner] is selling drugs there to control the girls . . . He need us to prove that he, he is using us in prostitution over there . . . And he make a lot of money and stuff like that.
- Q. But he had not been arrested so he got away.*
A. He . . . he got arrested in the jail three days but he is out.

37 Public Safety and Emergency Preparedness Canada, "Fact Sheet: Trafficking in Human Beings," 29 July 2003, online: <http://www.psepc.gc.ca/policing/organized_crime/FactSheets/trafficking_e.asp>.

38 *Ibid.*

39 *Supra* note 21 at 3.

40 *Ibid.*

Q. Oh, okay so when he is out he run away. Oh, okay I get it . . . sorry.

A. And okay when he is out when the day when supposed to be in the court he ran away because he saw us.

- female off-street in-call sex worker

Difficulty obtaining witness testimony

Another challenge facing law enforcement agencies is the difficulty of obtaining witness testimony. In October 2001, police infiltrated a Vancouver prostitution ring involving eleven Malaysian women, at least five of whom reported being deceived by traffickers before their arrival in Canada. It was discovered that all eleven women had been subjected to slave-like conditions while working in Canada. Nevertheless, none of the victims were willing to testify against their traffickers, and Canadian authorities deported them to Malaysia.⁴¹

IRPA gives witnesses very little incentive to testify about being trafficked into Canada because the possibility of deportation to her country of origin remains even if a sex worker testifies in legal proceedings. Further, she could face retaliation by her traffickers or their associates in Canada or in her country of origin. Finally, the social stigma of being engaged in prostitution, regardless of her consent or lack thereof, increases her fear of deportation. A woman who has been trafficked and then must return to her country of origin may be ostracized by her own community and family.

In order to protect victims of trafficking and encourage their testimony, Canada could provide visas for potentially trafficked persons, similar to the arrangements made by Australia in 2003.⁴² Australia's initiatives include the provision of a permanent visa for trafficked persons in certain circumstances, a comprehensive victim support scheme that includes assistance with accommodation, expenses, training and access to social support, legal, medical and counselling services. Further, reintegration assistance measures have been created for trafficking victims who are returned to source countries in South East Asia, spearheaded by AusAID and the International Organization for Migration (IOM).

Changes to anti-smuggling and trafficking laws

Immigration and Refugee Protection Act

IRPA was Canada's first legislation to specifically address the issue of trafficking in persons. *IRPA* defines the offence of trafficking as organizing "the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion."⁴³ Under *IRPA*, trafficking in persons includes "their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons."⁴⁴ The maximum punishment under *IRPA* is life imprisonment, a fine, or both.⁴⁵ Also, the courts may order forfeiture of any property seized in relation to the offence.⁴⁶ The first charges under *IRPA* for trafficking in persons were laid in April 2005.⁴⁷

Under *IRPA*, a person without Canadian citizenship is inadmissible to Canada on grounds of organized criminality which means being found to be a member of an organization that is believed

41 M. Trepanier, "Trafficking in Women for Purposes of Sexual Exploitation: A Matter of Consent?" Canadian Woman Studies, Migration, Labour and Exploitation: Trafficking in Women & Girls, Volume 22, Nos. 3, 4, Spring/Summer 2003.

42 HumanTrafficking.org: A Web Resource for Combating Human Trafficking. Academy for Educational Development, Washington, DC. Last modified August 2005, online: <http://www.humantrafficking.org/countries/eap/australia/bestpractices.html>.

43 *IRPA*, Article 118(1).

44 *IRPA*, Article 118(2).

45 *IRPA*, Article 120.

46 *IRPA*, Articles 118(1) and 137(1).

47 Legislative Summary, Bill C-49: An Act to Amend the Criminal Code (Trafficking in Persons), Prepared by Laura Barnett, Law and Government Division, 7 July 2005, online:

http://www.parl.gc.ca/common/Bills_ls.asp?Parl=38&Ses=1&ls=C49#12backgroundtxt.

to be or to have been engaged in activity such as people smuggling, trafficking in persons or money laundering.⁴⁸

The *Criminal Code of Canada* and Bill C-49

The *Criminal Code of Canada* (“*Criminal Code*”) currently prohibits trafficking in persons in sections which include “offences such as fraudulent documentation, prostitution-related offences, physical harm, abduction and confinement, intimidation, conspiracy, and organized crime.”⁴⁹ Bill C-49, which received Royal Assent on November 25, 2005, adds to the existing *Criminal Code* provisions by targeting specific forms of exploitation and abuse that are inherent in trafficking. Bill C-49 goes beyond the issue of international trafficking to address trafficking of persons within Canada.

Trafficking in persons

Bill C-49 creates a new *Criminal Code* provision, s. 279.01(1), which treats the offence of “trafficking” as any circumstance where a person “recruits, transports, transfers, receives, holds, conceals or harbours a person, or who exercises control or influence over the movements of a person, for the purposes of exploiting them or facilitating their exploitation.”⁵⁰ If convicted of this offence, a person may be imprisoned for up to 14 years, or for life if the person also “kidnaps, commits an aggravated assault or sexual assault against, or causes death to the victim during commission of the trafficking offence.”⁵¹

Profiting from trafficking

The new *Criminal Code* s. 279.02 creates the offence of economic gain obtained by trafficking in persons: “A person who receives a material benefit, financial or otherwise, knowing that it results from trafficking in persons, has committed an offence and may be imprisoned for up to 10 years.”⁵²

Withholding or destroying documents

The new *Criminal Code* s. 279.03 outlines the offence of withholding or destroying documents including identity, immigration, or travel documents in order to facilitate the trafficking of persons, carrying a penalty of imprisonment for up to five years. For the purposes of s. 279.03, the document(s) in question would not need to be either authentic or Canadian.⁵³

Restitution

The *Criminal Code* currently allows for restitution to a victim of bodily harm⁵⁴ Bill C-49 extends restitution to victims subjected to psychological harm.⁵⁵

Protection of vulnerable witnesses

Bill C-49 provides for enhanced witness protection where the witness is under the age of 18 and the accused is charged with any trafficking offence.⁵⁶ Such enhanced witness protection would include expansion of a judge’s ability to exclude the public from the courtroom, and allow a witness to testify outside the courtroom or behind a screen so as to be able to avoid seeing the accused.⁵⁷

48 IRPA, Article 37(1)(b).

49 *Supra* note 47.

50 *Ibid.*

51 *Ibid.*

52 *Ibid.*

53 *Ibid.*

54 *Criminal Code*, section 738(1)(b).

55 Bill C-49: An Act to Amend the Criminal Code (Trafficking in Persons), Royal Assent: 25 November 2005, S.C. 2005, c. 43, clause 7 [hereinafter referred to as Bill C-49].

56 *Supra* note 47, clause 4.

57 *Supra*, note 47.

Public policy

In addition to humanitarian and compassionate considerations, the government may consider public policy in determining whether a person may enter or remain in Canada as a permanent resident, or be granted an exception from any criteria or obligation under *IRPA*.⁵⁸

We are unaware of any circumstance where a victim of trafficking has been allowed to stay in Canada, although she or he could claim refugee status or request to be allowed to stay on humanitarian grounds. In the event that trafficking victims are allowed to stay in Canada, some groups and organizations argue that this is not sufficient protection since there are no government programs designed to help them transition to a life where they are not compelled to engage in prostitution.⁵⁹

The Canadian authorities are in a position to provide some protection to trafficked sex workers in Canada by not deporting them as a matter of course; instead they could consider their circumstances on humanitarian and compassionate grounds as per the current provisions of *IRPA*. Trafficked sex workers are not perpetrators but victims of crime, and should be protected as such. Australia has acknowledged this, and in 2003 introduced a new visa arrangements for potentially trafficked persons, including a permanent visa in certain circumstances.⁶⁰

Immigration law recommendations

1. Migrant sex workers need greater access to the rights and protections found in the *Charter of Rights and Freedoms*.
2. Not all migrant sex workers should be characterized as “trafficked persons” or “victims.”
3. Trafficked persons should be seen as having suffered significant human rights abuses and be granted permanent resident status so that they do not fear removal or deportation as a result of coming forward.
4. Trafficked persons should not be compelled to testify without appropriate witness protections in place.

⁵⁸ *IRPA*, Article 25(1).

⁵⁹ *Supra* note 21 at 7.

⁶⁰ *Supra* note 42.

PART 9: FAMILY LAW

Because of the nature of their work, many sex workers have been subjected to questions about their ability to parent when the Courts become involved in a dispute over child custody, or when B.C.'s Ministry of Children and Family Development ("MCFD") initiates a child protection investigation. If adult prostitution is decriminalized, it is likely to become more visible, in which case it may become more difficult for sex workers with children to conceal their involvement in prostitution. In this chapter, we examine family-law issues that may arise for parents who work in the sex industry. We focus on the ways that government agencies and the Courts should protect the rights of sex workers and their children.

Child custody, access and guardianship

When parents live together they share custody and guardianship of their children. If they separate or divorce, custody and guardianship may continue to be shared or may be awarded to one of the parents. When parents separate, the custodial parent lives with and provides daily care for the children. In a sole custody arrangement, only one parent has legal custody of the children. In a "joint" or "shared" custody arrangement, the child spends time living with both parents. In a "split" custody arrangement, each parent has custody of one or more of the children. "Guardianship" refers to the responsibility for making decisions about important aspects of the child's life, such as the education or health care the child will receive.¹ Like custody, guardianship can be retained by one parent only or can be shared between the parents.²

"Access" refers to the time a parent is permitted to spend with their child when they do not have legal custody of that child. Usually, if one parent has full custody of a child, the other parent is granted access. In rare cases where a judge believes that a parent might harm or kidnap the children, the judge may refuse to allow that parent access to his or her children. Alternatively, the judge might order "supervised access," meaning that the non-custodial parent may spend time with the children only when another adult is present.

Parental involvement in prostitution and the "best interests of the child"

The "best interests of the child" is the paramount criterion in custody determinations.³ However, this concept is elusive and difficult to define; its application is highly contextual and varies from case to case. When attempting to establish what is in the best interests of the child, the Court considers such factors as the child's health and emotional well-being, the views of the child where appropriate, the love and affection that exist between the child and others, the potential for the child's education and training, and the capacity of each person to whom custody or access may be granted to exercise adequately the rights and duties of custody or access.

¹ Guardianship also refers to the responsibility for the estate of a child. [*Family Relations Act*, R.S.B.C. 1996, c. 28, s. 25.]

² The Family Justice section of the B.C. Ministry of the Attorney-General website provides basic information about custody, access, and guardianship issues. It is available at: <<http://www.ag.gov.bc.ca/family-justice/index.htm>>. Legal definitions and terms can be found in the *Divorce Act*, *Child Support Guidelines*, and *Family Relations Act*.

³ *Divorce Act*, R.S. 1985 (2nd Supp.), c. 3, s. 16(8); *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 24

In making custody and access decisions Courts must not consider parents' past conduct, unless it has a substantial effect on the best interests of the child.⁴ This factor may be significant for sex workers who are involved in child custody and access disputes. Unless a parent's involvement in the sex industry substantially affects the best interests of his or her children, courts must not take that parent's profession into account when making determinations of custody or access. However, there are cases where continuing involvement in prostitution has been taken into account because of its perceived impact on the best interests of a child. In some cases the Courts have taken a parent or relative's engagement in prostitution as a potentially "undesirable" factor affecting that person's right to be granted custody or access.

In *N.F. v. H.L.S.*,⁵ the B.C. Supreme Court overturned the lower court's decision to allow a grandmother who worked as an escort to have access to her seven-year-old grandchild. The Supreme Court found that the mother of the child had the right as the child's custodian to make moral decisions regarding the child's upbringing, including denying access to the grandmother for as long as she remained active as a sex worker. The case went to the Court of Appeal which upheld this decision on the ground that the grandmother bore the onus of proving that her access was in the best interests of the child, rather than the mother having the onus of establishing that access was contrary to the child's best interests.

In *L.B.S. v. S.T.*,⁶ the mother and the father each sought interim sole custody of their two-and-a-half-year-old daughter. The mother admitted to being a sex worker and the father admitted that he was a member of the Hell's Angels Motorcycle Club. Both parents accused each other of being unfit to have custody of their child for a variety of reasons, including drug use, abusive behaviour and alleged criminal activities. The Court found that the parents should share joint custody, reasoning that neither parent would intentionally allow their "questionable activities" to become known to their child, nor would either of them "promote the undesirable aspects of their lifestyles and activities to their child." The Court explained:

Even though most of the allegations of misconduct have not been made out, in my opinion, the present lifestyles of both Mr. L.B.S. and Ms. S.T. will probably be harmful to M.M.S. if continued for another year or two. By then, she will probably begin to learn about, and understand to some limited extent, the activities of her parents, and will begin to form opinions of her own about them. If that point is reached, then in my view their conduct would be relevant to M.M.S.'s "health and emotional well-being", and to the capacity of her parents to adequately exercise the rights and perform the duties associated with her guardianship and custody, which are factors in s. 24(1) of the *Family Relations Act* that must be considered.

However, I am satisfied that neither parent would intentionally allow their questionable activities to become known to their child, nor would either of them promote the undesirable aspects of their lifestyles and activities to M.M.S. And so I find that their lifestyles are relevant only to a limited extent, at this time.

I continue with the mandatory analysis under s. 24(1) of the *Family Relations Act*. I am satisfied that, at the present time, both parents have suitable homes and are capable of safeguarding, preserving, and promoting M.M.S.'s health and emotional well-being [s. 24(1)(a)], they both have much love and affection for M.M.S., and competent and reliable support persons who also have strong ties with her [s. 24(1)(c)], they are both capable of providing proper "education and training for the child" [s. 24(1)(d)], and that they both have adequate capacity to exercise the rights and duties associated with guardianship and custody of M.M.S. [s. 24(1)(e)].⁷

⁴ *Family Relations Act*, *ibid.*, s. 24(3).

⁵ *N.F. v. H.L.S.* [1998] B.C.J. No.1739 (B.C.S.C.).

⁶ *L.B.S. v. S.T.* [2000] B.C.J. No. 2304 (B.C.S.C.).

⁷ *L.B.S. v. S.T.*, [2000] B.C.J. No. 2304 at paras. 43-45.

Although the Court granted shared interim custody to the parents, clearly the parents' "present lifestyles," including the mother's participation in the sex industry, were seen as potentially harmful to the best interests of the child as she grew older.

Participation in the sex industry in and of itself should not preclude a parent from being granted custody of a child or children.

A. I should not be discriminated against because of my employment. Same thing as if I'm working as a lawyer, a job is a job.

- female street-level sex worker

A. Also if you're – If the city's intent on the sex trade to say that women can't have a child, 'cuz she's a prostitute – that's bullshit.

- female off-street out-call sex worker

Many sex workers described the negative consequences of the stigmatization of prostitution, including its impact on family relations:

A. The one girl that I know that has a child – he has zero respect for her. And I know that it's because of the job she does.

A. Because men come in and have no respect for her, and use her and he doesn't get it. And – I don't think that he is going to grow up and have – How is he going to treat women?

A. Well all the kids that I have known, to grow up around this industry? Absolutely no respect for women. Absolutely none. And absolutely no respect for themselves.

A. I disagree.

A. And it's really sad. And I know, that's just my experiences.

A. It's not the business, it's the attitude.

A. Well, yeah. Definitely, definitely it's the attitude.

A. The culture teaches them to stigmatize.

A. Basically the mother has to say to them, y'know you have to lie about this. You can't tell anyone about this.

A. Exactly.

- female off-street out-call sex workers

In a decriminalized environment, the stigma currently attached to prostitution may well diminish over time, so that sex workers have greater freedom to disclose what they do for a living. However, in order to remove this stigma, lawyers, judges and family law mediators must be educated to recognize and avoid the biases and misconceptions that often cloud perceptions of prostitution. Individual circumstances must be considered in all custody and access decisions, not stereotypes and assumptions.

While involvement in prostitution alone should not be a reason to bar custody or access, factors that affect a child's well-being are relevant in these decisions. Sex workers agreed that child custody decisions should be made on a case-by-case basis.

A. Should it affect [custody decisions] that she's a sex trade worker? No, absolutely not. Oh . . . depending on what kind of sex trade work it is though. If it's a sex trade worker on Hastings Street, that's doing crack, or it is someone like me that stays in the clear, and this is how they make their money.

- female off-street in-call sex worker

A. I guess it should have something to do with the sex trade worker. It's the circumstances of what's going on.

- female off-street in-call sex worker

Working out of the family home

Sex workers expressed concerns about a parent who sees clients in the family home; some participants felt this would be unacceptable, while others thought that it might be a viable choice for sex workers with children. Some participants suggested that a double standard is at play whereby sex workers who bring clients into their home are frowned on, while parents who bring several different sexual partners into their home are not.

A. One point. Just if the child sees that, and like, sees the sex trade worker, working? Then yeah, that should be considered [in custody decisions]. But other than that? No.

A. Like the – the guy coming into the house and then going into the bedroom. And then of course, they would hear what was going on. So on, so forth. Whether they saw the act or not, just – I mean, kids absorb everything, right?

A. And that would really hurt them. Because they – they would never understand that.

A. If it was – was kind-of – working outside of the home, then no, that should have absolutely nothing to do with . . . child custody. But if it is in the home, and the child sees it, yes it should have.

A. But – a guy can so easily get child custody by getting the kid to lie about what the kid's mother – its mother was doing.

A. And I mean, okay. I thought about this 'cuz it comes up every meeting and I'm always for... like in my heart, I am in agreement with it and how it should be away from the kids but then all of a sudden my brain kicks in and I'm going wait a minute, is this two faced or what? If we're trying to say it shouldn't be stigmatized but at the same time we're saying, kids shouldn't see it, I think there's some stigma with that.

A. That's . . . the same thing as like having a boyfriend

A. Many boyfriends coming in and the child will become gradually messed up, because of that. Just seeing different boyfriends coming in. So I am sure that would happen whether they're getting paid or not.

A. It depends on how you can be present to your child when you're having to work in the building. All those things sort-of factor in, y'know?

A. And saying that the child shouldn't be there and it shouldn't be affected, is really talking from the lap of luxury.

A. Yes well there's the issue of childcare. Can you find your sitter? And can you afford to pay her?

- female off-street out-call sex workers

One escort felt that prohibiting sex workers with children from working in the home would limit their freedom to organize their work in the manner they deem most appropriate.

A. Yeah, that's right, what if a woman is choosing to work at home, for the same reasons that we do, because we like it, but she has a kid. Then what? Is she going to be forced to then work in a massage parlour, with all of the complications? Working with other girls, and all the bullshit being the employer-employee, y'know?

- female off-street out-call sex worker

Despite the wide range of opinion about working out of the same home that children are raised in, our participants all agreed that the best interests of the child should be the paramount consideration in custody and access considerations. The same types of issues arise when it comes to child protection legislation.

Child protection

In B.C., the *Child, Family and Community Service Act*⁸ (the “CFCSA”) is the law governing child protection services. A “child” is defined as any person less than 19 years of age.⁹ Under the *CFCSA*, MCFD has a legal duty to investigate reports about children who are suspected of being abused or neglected, or who may be in danger. If MCFD believes that a child is not safe, a social worker may remove the child from the home; children who are removed live in care, usually in a foster home or a relative’s home, until a judge determines what living arrangements are in their best interests.

The safety and well-being of the child must be the paramount consideration for decision-makers applying the *CFCSA*¹⁰ which stipulates that children are entitled to be protected from abuse, neglect, harm, and threats of harm. “Protection” can mean a number of things: apprehension of the child or other forms of intervention, such as family support services, supervised care, or a combination of these measures.¹¹ According to the *CFCSA*, protection may be required in several circumstances. Protection is warranted when a child has been or is likely to be physically or sexually abused or exploited by the child’s parent,¹² or by some other person and the child’s parent is unable or unwilling to protect the child.¹³ Protection is warranted when a child has been or is likely to be physically harmed due to neglect by a parent,¹⁴ or if the child is emotionally harmed by a parent’s conduct.¹⁵ Also, protection may be necessary where parents are unable or unwilling to care for the child, and have not made adequate provisions for the child’s care.¹⁶

Parents facing the removal of a child or children through the application of the *CFCSA* have certain rights under the *Canadian Charter of Rights and Freedoms*. A parent whose child has been apprehended has the right to legal information, to be represented by a lawyer, and to know about the court process and the options available, as well as the consequences of any court decisions or actions. Also, parents have the right to due process and to make a complaint about unfair procedures.¹⁷

Parental involvement in prostitution and parenting ability

Participants believed that a parent’s involvement in prostitution should not automatically raise child protection concerns or create grounds for the removal of a child from the family home. Sex workers can be competent and nurturing parents; their occupation alone must not be a reason to deem children to be in need of protection. However, the prevalent stereotypes about sex workers may influence the decision making of MCFD workers or the Courts. Determinations about child protection and apprehension must not be misinformed by myths or stereotypes about prostitution

8 *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46.

9 *Ibid.*, s. 1(1).

10 *Ibid.*, s. 2.

11 *Child, Family and Community Service Act*, ss. 25-33.

12 *Ibid.*, ss. 13(1)(a), 13(1)(b).

13 *Ibid.*, s. 13(1)(c). Sexual abuse and exploitation include coercing or assisting a child to engage in prostitution [ss. 13(1.1)(a), 13(1.1)(b)].

14 *Ibid.*, s. 13(1)(d).

15 *Ibid.*, s. 13(1)(e).

16 *Ibid.*, s. 13(1)(h).

17 In *New Brunswick Minister of Health and Community Services v. G. (J.)*, [1999] 3 S.C.R. 46, the Supreme Court of Canada held that a mother’s right to security of the person, protected by s. 7 of the *Canadian Charter of Rights and Freedoms*, was violated when she was denied legal aid for a custody hearing after MCFD apprehended her child.

- A. *Your profession should have nothing to do with your ability to raise a child.*
- A. *Or the court's decision to take a child away.*
- A. *I think that if a parent is public about it that is fine. They should be allowed to say what they do and it should be no problem. I think if you go public – I don't think [being in sex work] should determine . . . the fate of the children.*
- female street-level sex worker

Many sex workers expressed the view that ability to parent is unrelated to one's work in the sex trade.

- A. *I don't think [sex work affects an individual's ability to parent] . . . it's the individual. I have seen girls that are wonderful parents and that are not. But I have also seen that when I have worked in daycare centers . . .*
- female off-street in-call sex worker
- A. *Absolutely not, [being involved in sex work does not affect one's ability to parent]. 'Cuz parenting is totally different than being a prostitute. I mean being a great prostitute and a great mother at the same time, that's – just because you are, doesn't mean you can't be a great mother.*
- female off-street out-call sex worker

Again, several participants expressed concern about the stigma associated with prostitution, and how that stigma might influence determinations of a sex worker's fitness to parent:

- A. *But the way society looks upon [sex work], y'know, no way . . . It's an automatic unfit mother.*
- A. *Yeab but that's society stigmatizing . . .*
- female off-street out-call sex worker
- A. *Even though, I may be a good parent, all of a sudden, they stick you with, if you are a sex trade worker, you're not a good parent.*
- female street-level sex worker

Sex workers with children may be subject to having their children apprehended if their conduct is perceived to be causing emotional harm to the child.¹⁸ Court decisions are not consistent with regard to whether a parent's work in the sex industry constitutes emotional harm to a child that merits state intervention. In *B.C. (Director of Family and Child Services) v. K.B.*,¹⁹ the Court dismissed this notion stating:

. . . prostitution alone is not a reason for a continuing custody order as long as a child is adequately cared for while the mother is working or if she sleeps during the day.

In *B.C. (Director of Family and Child Services) v. R.P.F.M.*,²⁰ however, the Court did consider the mother's sex work to be detrimental to her child, and a factor to be considered when evaluating whether the child needs protection. The Court stated:

No specific instances were alleged of harm to N.R.D.M. because of Ms. C.B.'s activities as a prostitute. Ms. C.B. testified that she never conducted the business of prostitution in the presence of the children. Her lifestyle certainly cannot be said to be beneficial to N.R.D.M. It brought danger into her life, as evidenced by the fact that she was assaulted in November. Raising a child in an environment where the mother-figure is involved in an unhealthy life-

¹⁸ *Child, Family and Community Service Act*, s. 13(1)(e).

¹⁹ *B.C. (Director of Family and Child Services) v. K.B.* [2000] B.C.J. No. 2606 (B.C. Prov Ct.) at para 4.

²⁰ *B.C. (Director of Family and Child Services) v. R.P.F.M.* [2003] B.C.J. No. 780 (B.C. Prov Ct.).

style such as this is a factor that I believe I must consider in determining if the child is in need of protection.²¹

In conclusion, the court stated:

In this case, I find that N.R.D.M. is in need of protection as contemplated under the CFCSA. I reach this conclusion based not on any one concern by itself, but by the cumulative effect of all of the concerns raised by the Director. Each ground alone may be insufficient to show a need for protection. Taken as a whole and in light of the Court of Appeal's comments in S.(B)., I conclude that a need for protection has been shown. The lifestyle of Ms. C.B. and its potential for emotional harm to N.R.D.M., as well as the possibility that the injuries to N.R.D.M. may have resulted from neglect, merge together to lead me to conclude that someone should be looking out for N.R.D.M. It is the combined effect of all of these circumstances which bring me to this conclusion. For these reasons I find N.R.D.M. to be in need of protection as contemplated by the CFCSA.²²

This excerpt reveals that the Courts will make a determination after looking at those circumstances they deem relevant; involvement in prostitution will be seen as relevant if it creates the potential for harm to the child.

Our participants felt that, as long as children are well cared for, a parent's involvement in prostitution should not be assumed to be harmful to a child.

- A. *I don't [think that being involved in sex work affects one's ability to parent]. People automatically assume because you are a sex trade worker, you're not a good parent. As far as I am concerned, I am a better parent because I will go to put my butt out on the street, for – to make sure that I have milk for my kid, than for another parent, to sit there and watch her kid starve...*
- A. *Well, and you know, you know, what morals you stand by at home.*
- A. *Well, yeah.*
- A. *Everybody's got different morals . . .*
- A. *Right, right.*
- A. *Different morals.*
- A. *That's like saying a child of a doctor who performs abortions is moralistically challenged.*
- A. *Yeah, yeah.*
- A. *I mean, like c'mon! Y'know, really? And everybody has got different moral standards.*
- A. *And being able to talk to your child about sex better. Bringing them up with a better attitude towards sex. You wouldn't have the predators that you have now, if the children of the "new generation" are brought up properly . . . So no, it's a – as far as I think and seen, kids that are brought up by sex trade workers are a lot more versatile than a lot of other kids. They are not as closed-minded.*
- A. *Well-adjusted.*
- A. *Yeah. My kid's pretty damn well-adjusted.*
- A. *Yes, she is.*

- female street-level sex workers

Some sex workers described experiencing discrimination from MCFD because of their involvement in prostitution. They feared that their work could be misrepresented, or framed in such a way as to make them appear to be unfit parents thereby putting their children at risk:

²¹ *Ibid.*, at para. 24.

²² *Ibid.*, at para. 27.

- A. *I had social workers try to imply that my son had seen me in the act, so that they could keep him...because they wanted to take my child into permanent custody.*
- A. *I think welfare like, literally, or . . . specific social workers, and these workers in particular that they're . . . totally discriminating against sex workers. And . . . it's just like, I don't care what happens, I want your kid away from you because you do this as a living and I don't like it.*
- A. *So when it comes to child custody, the father can fabricate the stories, child welfare can fabricate the stories and the mother is devastated . . .*
- A. *Women really don't have very much power in this society, do they?*
- female off-street out-call sex workers

One escort mentioned other factors that are stereotypically associated with the decision to engage in prostitution – such as drug and alcohol use – and expressed concern that they might influence, or be thought to influence, a sex worker's ability to care for a child. However, sex workers argue that the stereotype that drug use and prostitution are automatically linked is erroneous – a contention borne out by Canadian research²³ – and thus very harmful. Some sex workers certainly do use illicit drugs, but many do not, a profile that characterizes many occupations:

- A. *It's another job, like any other job, you know. She can still be a good parent. A lot of women I know are in this job because they have . . . you know, they're single mothers, they are supporting their children as best they can, and they love their children. As long as they're not exposing them to drugs and doing drugs in their house . . . but you know that's a different issue. There's a lot of straight people that do drugs, or unemployed people who do drugs, so just because you're a sex-trade worker it doesn't . . . no, you should still be allowed to have your children.*
- female off-street out-call sex worker

While many participants agree that the ability of some sex workers to parent may be affected by their addiction or use of drugs, the parental competence of sex workers must be evaluated on a case-by-case basis. Sex workers should not be subject to stereotypes linking prostitution and addiction.

Many participants raised the issue of whether it is appropriate for sex workers to carry out their work in their home. Many argued that prostitution should not occur in homes where children reside for fear it could be detrimental to a child's well-being.

- A. *I don't think being a prostitute has any bearing on whether or not you can care for your child. I think a lady of the evening, or working women can care for children so long as they are not working out of the home.*
- female street-level sex worker

Many sex workers felt that children could be adversely affected by seeing clients come and go from the home.

- A. *I mean if you go to work, and that's your job, and you go to work, and you – you come home, then I don't think that would affect your child. I think that if you work at home the way I do then definitely it affects your child because they see men come and go and like you said earlier sex trade work is degrading for women. What kind*

²³ Committee on Sexual Offences Against Children and Youth. *Sexual Offences Against Children*, Ottawa: Supply and Services Canada, 1984) and The Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada*. (Ottawa: Supply and Services Canada, 1985).

C. Benoit and A. Millar. *Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers*, online: Cecilia Benoit, University of Victoria <<http://web.uvic.ca/~cbenoit/papers/DispMyths.pdf>>.

of respect will your son or your daughter have for you, if they see you – I don't think they should see that. I think if you have children and you are in sex work you should work outside the home. Still absolutely, if that's the job that you want to do, then you should absolutely do that, but you should do it outside the home . . .

- A. *I agree. Not around children.*
- A. *I don't think that people with children should work out of their home. Like, I don't think you should use that home. If there's children in the home, there should be no sex trade going on in that house. Then you need to rent an apartment with a girlfriend and you need to go to work everyday and send your children to daycare, and you should not bring it to your house if there's kids. It's just not right.*
- A. *I have never met a woman, who has children, that is happy in heart about what she is doing, when she does – when she works out of her home. Y'know, they are always nervous about the kid waking up, and there seems to have been, I have dealt with extra guilt over that. So, that's the only thing that I have about operating out of your own home. And the safety factor – who's, y'know, who's going to be there for you if you need somebody? But, I mean, if a woman sucks in some regular customers, and it's a happy home-based business, I think that's kind of – y'know the best solution? Y'know, for some people? But, for women with kids, the system does not seem to work very well, in their own homes.*

- female off-street out-call sex workers

Other participants disagreed with the argument that a parent engaging in prostitution in the family home would adversely affect children.

- A. *What about a single mother who is dating? Or there's a new guy coming for every . . .*
- A. *Yeah, yeah. Like, I agree, completely. That's no better than when you are getting money for it.*
- A. *Well that's – when it's labour you are respecting yourself, it is your labour . . .*
- A. *When you are getting money for it, you are offering yourself, you are employing yourself and that should be given a bit more respect.*
- A. *Well exactly! I think it should be that kids should see that.*

- female off-street out-call sex workers

The divergence of opinion suggests that decisions regarding whether children are in need of protection in such a situation should be made on a case-by-case basis. Judges must be cognizant of the fact that sex work is not a homogenous industry; sex workers are a diverse group. As such, they must be treated as individuals, and their ability to parent must be assessed as objectively as possible. Education of judges may be necessary to ensure that stereotypes and biases about the nature of prostitution do not influence judicial decision making.

Family law recommendations

1. Protecting their safety and human rights is the best way to support sex workers to be positive parents. The health and well-being of a parent is central to the health and well-being of a child.
2. Educate judges, lawyers, mediators, MCFD officials and the general public that a parent's involvement in prostitution should not automatically be relevant to the determination of the best interest of the child, nor does it automatically mean that a person is an unfit parent.
3. In child protection cases, determinations that a child is being harmed or neglected must be made on a case-by-case basis after a consideration of all relevant factors, and should not rely on stereotypes and assumptions about sex workers.

PART 10: CRIMINAL LAW

In Canada, the vast majority of criminal offences are set out in the *Criminal Code of Canada*.¹ The *Criminal Code* is federal legislation, meaning that it applies throughout the country. This chapter focuses on areas of criminal law that are of specific concern to sex workers: assaults, offences involving youth, indecency laws, and laws with respect to the transmission of disease. The discussion does not address the existing laws of specific application to prostitution (i.e. the “bawdy-house” provision,² the “procuring” provision,³ and the “communicating” provision⁴) because these are analyzed in detail in, *Voices for Dignity*.⁵ The problem of “trafficking” is addressed in Part 8 on Immigration Law.

Assault

Under Canadian law, any intentional application of force to another person without her or his consent is an assault, regardless of whether the degree of force is slight or severe.⁶ An assault does not have to result in physical injury in order to be a criminal offence. Many sex workers experience violence in their work, often at the hands of clients, and also from employers and pimps. Most participants were of the view that the existing laws with respect to assault are sufficient to address instances of violence that occur in the sex industry. Therefore changes to the assault laws are not required to address the concerns of sex workers.

- A. *Okay, okay, rule number one – no still means no. But they are all horny.*
- A. *But there’s still those types of guys out there [who commit violent acts] otherwise they wouldn’t be a bad date.*
- A. *For sure.*
- A. *So it still happens.*
- A. *But it’s already illegal already, you don’t need a special regulation for it.*
- female off-street out-call sex workers
- A. *[T]here does not need to be any special laws, around violence. There’s plenty of laws already around violence.*
- female off-street out-call sex worker

However, the existing assault laws are only useful if they are properly enforced. The evidence set out in *Voices for Dignity*⁷ suggested that many sex workers feel the police are not sufficiently diligent

1 *Criminal Code of Canada*, R.S. 1985, c. C-46 [*Criminal Code*].

2 *Ibid.*, ss. 210, 211.

3 *Ibid.*, s. 212.

4 *Ibid.*, s. 213.

5 *Voices for Dignity: A Call to End the Harms Caused by Canada’s Sex Trade Laws*. Pivot Legal Society: Vancouver, 2004 [*Voices for Dignity*].

6 *Criminal Code*, s. 265(1); *R. v. Burden* (1981), 25 C.R. (3d) 283 (B.C.C.A.).

7 *Voices for Dignity*, *supra* note 5.

in investigating assaults on sex workers; many sex workers receive substandard treatment by police.⁸ It appears likely that the criminalization of many aspects of prostitution contributes to under-enforcement when sex workers are the victims, as those who report assaults can be subject to discriminatory treatment by police and, in some cases, treated as a criminal rather than as a victim of crime.

One issue raised by several sex workers is the potential for the current assault laws to protect them from being forced to engage in sex with an employer or prospective employer in order to secure or maintain a position in an escort agency or massage parlour. A massage parlour worker described this alarming and common job requirement:

A. No, I tell you something. This is pretty disgusting, but this is happens to every single one. I mean every massage parlour that have it. I am pretty certain, hundred percent sure. 'Cause I have been some like you know three different massage parlours. I did not really work for the first one. What happens is the first thing when you go for interview . . . And they will ask you do you know how to do massage. They will want you to get into the room. And like you know they will asking you to wear dress, skirt usually. What happens is they say, you know, I am the test. And the test is you have to have sex with the guy [the owner], with the manager. Usually, what happens is some of them, they have managers. They say manager but I think that's just a pimp. Usually we call them dealers because they do not treat the girl as a person. They just called dealers. Doing the deal.

- female off-street in-call sex worker

Another former worker and current massage parlour owner described a similar situation:

A. The type of stuff that takes people over the edge – is the type of the stuff that happened in [massage parlour] where you're, y'know, where you have to let the owner go perform oral sex on you on a regular basis, to hold your job.

- female massage parlour owner, former sex worker

Sex workers expressed a need for protection in cases where they are coerced into engaging in sexual activities with an employer in order to keep a job, or if they feel they are forced to provide particular sexual services to a client. This issue is looked at in more detail in the following discussion of sexual assault.

Sexual assault

The term “sexual assault” is not defined in the *Criminal Code*, but case law has determined that it means any non-consensual touching of a sexual nature.^{9&10} In other words, any assault that is sexual in nature is a sexual assault.

Consent – general considerations

Section 265(3) of the *Criminal Code* states that consent is not obtained if a person submits or does not resist by reason of actual or threatened application of force, fraud, or the exercise of authority. Consequently, the law offers protection to those who are intimidated into “consenting” to unwanted sexual contact. Therefore, one issue that arises is whether the law of assault would apply to protect sex workers who are compelled to engage in sex with an employer or prospective employer in order to secure a position at an escort agency or massage parlour.

For such a prosecution to succeed, the court would have to decide that the economic power of an employer amounts to an “exercise of authority” within the meaning of s. 265(3) of the *Criminal*

⁸ *Voices for Dignity*, *supra* note 5.

⁹ *Criminal Code*, s. 271.

¹⁰ *R. v. Ewanchuk* (1999), 22 C.R. (5th) 1, 131 C.C.C. (3d) 481 (S.C.C.).

Code. Usually this provision has been invoked in the circumstances of doctor-patient or therapist-patient relationships. However, the sort of authority envisaged by 265 (3)(d) is not limited to situations in which the more powerful person has a right to issue orders and enforce obedience.¹¹ In *R. v. Matheson*,¹² the Ontario Court of Appeal concluded that the purpose of s. 265(3)(d) is to criminalize coerced sexual relations: a person who extracts consent to sex by exercising his or her authority will be caught by this section if he or she had the power to influence the conduct and actions of others and used that power to compel the complainant to engage in sexual activity.

Consent – sexual assault

Section 273.1(2) of the *Criminal Code* includes a non-exhaustive list of factors that can vitiate consent.¹³ In the context of sexual assaults, s. 273.1 (2)(c) provides that consent is not obtained in situations where the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority. The courts have held that 273.1(2)(c) aims to protect the vulnerable and the weak, and to preserve the right to freely choose to consent to sexual activity. For instance, a drug addict's consent to sex with her drug dealer may be invalid if their relationship created a dependency which meant that she could not give consent to his advances freely and independently.¹⁴

The expression “a position of trust, power or authority” is not defined in the *Criminal Code*. In *R. v. Hogg*, the Ontario Court of Appeal noted that the dealer-addict relationship was not one of an imbalance of power per se: it is not a case of a position of authority or trust, such as in the typical doctor-patient or teacher-student relationship, where vulnerability is inherent to the relationship itself.¹⁵ When it is unclear whether the accused was in a position of trust, power or authority, the Crown has to prove that there was a significant level of dependency.

Whether an employer-employee relationship would be characterized as conferring the necessary power on an employer is yet to be determined. While it is not the type of relationship that involves the similar moral obligations found in a teacher-student or doctor-patient relationship, the courts in numerous sexual harassment cases have acknowledged the inherent imbalance of power in the employer-employee relationship.¹⁶ It is arguable that if the requisite degree of vulnerability is present in the employer-employee relationship, a sex worker's “consent” to sex with the employer as a condition of employment will likely be deemed to be invalid, as per s. 273.1(2)(c). This provision may also apply to the requirement that a sex worker agree to offer certain services to clients or risk dismissal from her position.

The assault and sexual assault laws require that a sex worker always maintain control over whether, where, when and how she or he provides sexual services. Therefore, should the provisions of the *Criminal Code* related to adult prostitution be repealed, employers would find that sex workers cannot enter contractual arrangements requiring them to engage in sexual relations which they do not consent to at the time that the sexual encounter is to take place. This will likely result in employer dissatisfaction with the restrictions upon what can be demanded of their employees, but sex worker's argued that it is important for them to maintain control over the extent and nature of services they offer.

¹¹ *R. v. Saint-Laurent* (1994), 90 C.C.C. (3d) 291 (Qc. C.A.).

¹² *R. v. Matheson* (1999), 23 C.R. (5th) 269, 134 C.C.C. (3d) 289 (Ont. C.A.).

¹³ *Criminal Code*, s. 273(3).

¹⁴ *R. v. Hogg* (2000), 148 C.C.C. (3d) 86 (Ont. C.A.), obiter.

¹⁵ *Ibid.*

¹⁶ See, for example, the early case of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, in which the Supreme Court held that even an employee could be in a position of authority with respect to other employees where he had the power to terminate them.

Youth

In Canada, the general age of consent to sexual activity is 14 years, although special provisions apply to criminalize sex within relationships of dependency, or those in which the older party is in a position of trust or authority towards a person between the ages of 14 and 18 years.

In the context of prostitution, the relevant age limit is found in s. 212, which creates several offences intended to prevent the sexual exploitation of individuals under 18 years of age. Section 212(2) of the *Criminal Code* makes it an offence to live wholly or in part on the avails of prostitution by a person under 18. Further, s. 212(2.1) says that if the person living on those avails encourages a young person to engage in prostitution, or uses coercion in relation to that person, then an aggravated offence has been committed and a minimum five-year sentence applies.¹⁷ Finally, s. 212(4) makes it an offence to purchase sexual services from a person under 18, or to communicate with anyone under 18 for the purpose of purchasing such services. Related offences include s. 170 (a parent or guardian procuring sexual activity by a young person), s. 171 (a householder permitting criminal sexual activity with a young person), and s. 172 (corrupting children).

Sex workers agreed that a minimum age for prostitution is appropriate, and were satisfied with 18 years as the minimum age, as the comments of these male street workers attest:

- A. *Age limits. There should be an age limit . . . between clients and john.*
- A. *You can't say it's right for a 60-year-old man to pick up a 15-year-old boy. That's not right.*
- A. *I think there should be a legal age of prostitution. You can't have kids out there, that's not right.*
- A. *Eighteen.*
- A. *But then again that's the way some kids survive.*
- A. *You know, hey man, I survived the same way. I wish someone kicked my ass when I was 13 and I was out there. I wished someone had kicked my ass outta there.*
- A. *Not me I was having a good old time.*
- A. *Every time I see those kids out there I say go home. Go home, you don't need to be out here.*

- male street-level sex workers

Many participants were of the view that no change is required to the age restrictions contained in ss. 212(2) and 212(4). If any reform is to be introduced, Canada may chose to follow the New Zealand *Prostitution Reform Act 2003*, (the “PRA”), which expressly protects youth by exempting them from prosecution.¹⁸ While we did not directly discuss this issue with our project participants, many academics and sex worker advocates argue that sexually exploited youth should not be criminalized for their involvement in prostitution.¹⁹

Indecency

Canadian criminal law contains several offences intended to protect the public from offensive or indecent sights or sounds: laws prohibiting obscene publications,²⁰ a ban on sending obscene or

¹⁷ Pivot has previously recommended reform of some aspects of the procuring law (s. 212), inasmuch as the extortion-related aspects of the section are redundant. The same wrongful activity is already subject to general extortion offences (Voices for Dignity, supra note 5).

¹⁸ *Prostitution Reform Act*, 2003 (N.Z.) 2003/28, s. 23(3) [Prostitution Reform Act].

¹⁹ D. Brock, *Making Work, Making Trouble: Prostitution as a Social Problem* (Toronto: University of Toronto Press, 1998).

²⁰ *Criminal Code*, s. 163.

indecent materials through the post,²¹ and a law making it an offence to expose or exhibit an indecent display in a public place.²²

Participants made few comments about the role of criminal laws relating to indecency, other than with respect to the need to control advertising for sex work in the same way that all commercial displays are regulated.

Q. What do you guys think about advertising for sex work? So right now you don't see television ads advertising sex work. You don't see billboards that are you know . . .

A. Agencies or bus stops.

Q. That's because there's laws.

Q. Do you think there should be any restrictions on the content or location of advertising for sex work?

A. Do you think it should be done just like any other business?

A. As long as you don't show like naked . . . because we have to realize that okay there are children so you have to do it in a way that is not too visual kind of thing.

A. Discreet.

A. Existing obscenity laws apply. They're out there right now.

- female off-street out-call sex workers

As our participants observed, existing obscenity laws would apply to the advertisement of sexual services. Sex workers did not comment on whether they felt that the issue of “indecency” required clarification in criminal legislation, or whether it could be better dealt with through civil legislation.

By way of comparison, New Zealand's *PRA* imposes special restrictions on the advertising of sexual services.²³ It is an offence to advertise such services by means of television or radio advertisements or cinema trailers. The *PRA* also gives territorial authorities the power to make by-laws regulating signage advertising commercial sex, but only if the authority is satisfied that the by-law is necessary to prevent nuisance or offence, or to preserve the character of an area.

Non-disclosure of HIV-positive status

Fear of sexually transmitted diseases was the principal justification offered for 19th century laws regulating and restricting prostitution.²⁴ Fear of disease is again a recurrent theme in discussions of prostitution and the law.²⁵ Canadian criminal law addresses the issue of deliberate or reckless disease transmission through the assault law. Sexual or other physical contact is an assault absent a valid consent. One way in which consent may be vitiated is if it is obtained through fraud. One example is the case *R. v. Cuerrier*, where it was established that if a person who is HIV-positive either fails to disclose that status, or deliberately lies about it, and through this fraud puts another party at significant risk of bodily harm, then the other party is deemed not to have consented to sex.²⁶

The exposure of another person to a significant risk of HIV transmission is enough to make the fraudulently-obtained consent an aggravated assault as defined in s. 268(1) of the *Code*, because it endangers the life of the complainant. There is no need for the complainant to actually become infected in order for the act to constitute aggravated assault: the risk of infection is considered to be

²¹ *Ibid.*, s. 168.

²² *Ibid.*, s. 175.

²³ *Prostitution Reform Act*, ss. 11-14.

²⁴ For a discussion of England's Contagious Diseases Control Act, which was the model for similar laws in many Commonwealth countries, see: S. Metznerath, “To Test or not to Test” (1999) 18(3) *Social Alternatives* 25.

²⁵ K. Bastow, “Prostitution and HIV/AIDS” (1996) 2(2) *Canadian HIV/AIDS Policy & Law Newsletter* 13; D. R. Brock, “Prostitutes are Scapegoats in the AIDS Panic” (1989) 18(2) *Resources for Feminist Research* 13.

²⁶ *R. v. Cuerrier*, [1998] 2 S.C.R. 371.

sufficient endangerment.²⁷ Other criminal offences that have been used to punish those who knowingly expose others to the risk of HIV infection through unprotected sex include criminal negligence causing bodily harm,²⁸ and common nuisance.²⁹ The issue of criminal law and non-disclosure of HIV-positive status is an extremely contentious and complex. The B.C. Civil Liberties Association, the B.C. Persons with AIDS Society, the Canadian AIDS Society, and the Canadian HIV/AIDS Legal Network have all argued against the use of criminal sanctions in cases of non-disclosure.³⁰

There was no consensus among our participants when asked for their views on the appropriate way to deal with STD transmission. Many male street-level sex workers argued that HIV-positive sex workers should be obliged to inform clients of their health status:

- Q. So what if we have a sex worker who has AIDS, but is really careful, he wears a condom always*
- A. He should . . . give forewarning*
- A. You should know what you're getting yourself into*
- Q. So that's one aspect that should be made criminal?*
- A. Oh for sure, well if you're going out deliberately . . .*
- A. Destroying a healthy man's life, or a women's life*
- male street-level sex workers

One male street sex worker, who was HIV-positive himself, agreed that HIV-positive status should be disclosed:

- A. I agree. I myself am HIV-positive right and I myself, I agree with it. If somebody does sleep with someone and doesn't tell them, you're damn right you should send their ass to jail.*
- male street-level sex worker

Another male street-level sex worker stated that non-disclosure of HIV-positive status should be a criminal offence:

- Q. Lets say they're infected and someone asks them "are you infected" and the person says "no I'm not" and they have sex.*
- A. They outright lie?*
- A. I think it should be criminal.*
- male street-level sex worker

Some female sex workers were similarly equivocal:

- A. [I]t would be nice to be able to determine whether or not everyone has a disease but it is not realistic.*
- A. Yeah. And . . . we are talking about if you come down with HIV and you discover the other person never revealed it, right?*
- A. Then if . . . they used a condom, then so far, you didn't break the law. They didn't . . .*
- A. Well, I think that they should have to take that out. That if you have HIV, you should have to tell them. Whether you use a condom, or not. Because it's just not perfect using condoms*
- female off-street out-call sex workers

²⁷ *Ibid.*

²⁸ *R. v. Mercer* (1993), 84 C.C.C. (3d) 41 (Nfld C.A.).

²⁹ *R. v. Summer*, [1989] A.J. No. 784 (Prov. Ct.) (QL), aff'g 73 C.R. (3d) 32 (Alta. C.A.).

³⁰ Richard Elliot, "After Cuerrier: Canadian Criminal Law and the Non-Disclosure of HIV-Positive Status" (1999), online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/Maincontent/issues/criminallaw/finalreports/cuerrier/e-cuerrier.pdf>>.

Some respondents, including the sex workers quoted below, stated that in order to protect both clients and sex workers, commercial sex without a condom should be illegal:

- A. *And a lot of men like to pay extra, for y'know, unsafe sex.*
 A. *That . . . should be illegal . . .*
 A. *Because if you are a sex trade worker, you are having sex with lots of different people, or getting them off or whatever you want to call it.*
 A. *Right.*
 A. *And so, yeah, you should . . . be responsible and you should do your business.*
 Q. *So who should be penalized for offering it? Should it be the john, or should it be the girl for accepting it?*
 A. *Both, both, definitely both.*
 - female off-street out-call sex workers

Many sex workers felt that disclosure of HIV-positive status was an important prerequisite to conducting business as safely as possible. These views are inconsistent with the recommendations of the Canadian HIV/AIDS Legal Network (the “Network”), which has argued that criminalizing HIV transmission or exposure would be counterproductive, and would further stigmatize people living with HIV/AIDS. The Network argues that the possible benefits of criminalization are outweighed by the social and economic costs of applying criminal sanctions that are less effective than public health measures. The Network noted that, although the use of criminal sanctions might be seen as ‘getting tough’ in the fight against AIDS, it would have little real impact on transmission rates, may deter people with HIV/AIDS from getting tested, and would divert attention and resources away from more effective public health initiatives.³¹ Given the complexity of this issue and the limited time dedicated to it in this project, further consultation and dialogue with sex workers is recommended.

Criminal law recommendations

1. Repeal s. 210, 211, 212(1) and 212(3) and 213 as set out in Pivot’s 2004 report, *Voices for Dignity*.³²
2. Provide education to police and improve police accountability so that sex workers receive equal protection when they are victims of crime.
3. Ensure more proactive enforcement of criminal assault laws by police and Crown prosecutors in order to protect sex workers from violence.
4. Educate sex workers and employers about the potential for assault laws to be used to protect sex workers who are coerced or forced to engage in sex with an employer or prospective employer.
5. Educate sex workers and employers about the rights of sex workers to determine what services they provide and to whom.
6. Educate employers about the *Criminal Code* interpretation of consent to sexual activity and how it affects an employer’s expectation of the duties performed by sex-worker employees.
7. Do not criminalize youth who are involved in the sex industry.

³¹ “Criminalization: Does It Make Sense?” (March 1999), online: Canadian HIV/AIDS Legal Network <<http://www.aidslaw.ca/Maincontent/issues/criminallaw/e-info-cla4.pdf>>.

R. Elliott, “Criminal Law and HIV/AIDS: Final Report” (1997), online: Canadian HIV/AIDS Legal Network & Canadian AIDS Society <<http://www.aidslaw.ca/Maincontent/issues/criminallaw/finalreports/CRFR-COVER.html>>.

³² *Voices for Dignity*, *supra* note 5.

8. Uphold the criminal laws which prohibit the purchase or procuring of sexual services from anyone under 18 years of age.
9. Consult further with sex workers about the impact of indecency laws on sex industry advertising.
10. Consult further with sex workers about the use of criminal law to address non-disclosure of HIV-positive status.

PART 11: CALL TO ACTION

The widespread and systemic rights violations experienced by sex workers in Canada must be addressed. Sex workers are routinely denied the rights and protections accorded to other workers and, as a result, are forced to live and work in dangerous and demeaning conditions. In many instances, sex workers are not entitled to avail themselves of these legal protections because of their source of income. In other cases, they are entitled to these rights and protections, but face practical barriers as a result of pervasive stigmatization and prejudice.

The purpose of this report is to provide a comprehensive overview that will serve as a starting point for discussion of the many complex and controversial issues surrounding sex work and regulation of the sex industry. Sex workers themselves should be provided with a prominent role in any law, policy, or social reform. This report highlights the issues to be considered by all levels of government as they engage in the process of law reform. As illustrated by the information presented, sex workers have expertise, knowledge and insight into the legal issues they face and the ways in which laws can be applied or amended to provide them with the equality, liberty and personal security that is guaranteed under the *Canadian Charter of Rights and Freedoms*.¹

Although there is considerable diversity among sex workers, they share the experience of systemic discrimination, marginalization and social alienation. If they are to achieve full citizenship, sex workers should have access to the human rights complaint process and equal opportunities when it comes to availing themselves of the other protections offered by law. All legislation effecting sex workers must be consistent with the *Charter*.

The starting point when considering the issue of sex work and legislative reform is the need for criminal law reform. Pivot's research suggest that the only way to evolve towards a legal framework that is empowering and allows for the safety of sex workers is to repeal the *Criminal Code* provisions relating to adult prostitution. Repealing the criminal laws relating to adult prostitution, ss. 210, 211, 212(1), 212(3) and 213, will create the opportunity for sex workers to access the employment and labour protections that are afforded to other workers under the laws of B.C. and Canada.

With the repeal of these criminal laws, sex workers will face fewer barriers to accessing the protective services of the police. Clearly, the criminal laws that are in place to protect all Canadians from exploitation and violence should be applied equally to sex workers in cases where they are victims of crime. Sex workers emphasized that they want full access to police protection as well as rigorous enforcement of laws when they are victims of crime, including when they are subject to exploitation by pimps or clients. Sex workers deserve equal access to the criminal justice system. Persons who are coerced or forced to engage in sex work against their will should have full access to the protections found under the criminal laws of Canada, and specifically those provisions that prohibit sexual and physical assault, harassment, threats and extortion. While they want and deserve equal access to these existing laws, sex workers indicated that no additional laws designed specifically for their protection are necessary.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K), 1982, c. 11 [*Charter*].

Like other industries, the laws that regulate employment, labour and occupational health and safety should be applied to improve working conditions in the sex industry. This report has found that there are a wide range of employment standards that could provide sex workers with the rights and protections they seek. Sex workers did not demand amendments to the existing employment standards; they felt that the existing protections are sufficient in the context of their work. However, they suggested that the legislation should contain an explicit provision that sex workers never lose their right to terminate a contract for sexual services at any time for any reason.

Consensual adult sex work should be recognized as a legitimate form of labour. It is of utmost importance that sex workers have information concerning their rights and, specifically, the knowledge that only they can control what services are provided to whom. Sex workers should never be denied their right to personal autonomy, and empowering them to consistently exercise this right is a crucial human rights measure.

Finally, the right of sex workers to unionize as set out in the *Universal Declaration of Human Rights*² and the *International Covenant for Economic, Social and Civil Rights* must be respected. This objective can only be achieved with the decriminalization of employer/employee relationships within the sex industry. Only when sex workers are recognized as legitimate employees can they achieve full access to the unionization process as set out under the *Labour Relations Code*⁴ and the *Canada Labour Code*.⁵

Municipalities should begin contemplating the legal and practical issues that lie ahead. Specifically, municipal governments should begin to meaningfully engage sex workers in planning in order to develop a mechanism of licensing and zoning that fits both the needs of sex workers and their communities. Any licensing scheme should meet the following objectives. First, sex workers who wish to work independently or in small owner-operated businesses should not be limited or restricted from doing so by an oppressive licensing regime.

Any applicable licensing scheme should be fair and not disproportionately costly or restrictive. All municipal by-laws that impose disproportionately high licensing fees should be repealed. Further consultation with sex workers from all facets of the sex industry is necessary to inform the issue of where to locate sex-work businesses. With respect to zoning, any relevant scheme should be guided by concerns for the safety, privacy and autonomy of sex workers.

Many sex workers are willing to participate in the Canadian income tax system. However, training is required for all Revenue Canada employees to ensure that they can provide sex workers with accessible and accurate information in a respectful manner, and also ensure that sex workers and sex work businesses are not subject to disproportionately high instances of audits. Sex workers are conscious of the potential loss of privacy resulting from filing income tax returns; therefore government should work closely with them to create a system for their safe and equitable integration into the taxation scheme.

In the family law context, criminal law reform is necessary to lessen the current stigma surrounding sex work and allow for safer working conditions; protecting the safety and human rights of sex workers is one of the best ways to support them as parents. Judges, lawyers, mediators, MCFD officials and the public should be sensitized to the fact that a parent's involvement in sex work is not automatically relevant to the determination of the best interests of the child, nor is it automatically a negative factor. In child protection and custody cases, determinations of the best interests of the child should be made on a case-by-case basis in consideration of all factors, and the process and outcome

² *Universal Declaration of Human Rights*, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), art. 23.4.

³ *International Covenant for Economic, Social and Civil Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 2, 3, 8.1(a), Can. T.S. 1976 No. 47, 6 I.L.M. 368.

⁴ *Labour Relations Code*, R.S.B.C. 1996, c. 244.

⁵ *Canada Labour Code*, R.S., 1985, c. L-2.

should not be clouded by assumptions, discrimination and prejudice surrounding a parent's involvement in sex work.

A full range of business structures should be available to accommodate the diverse ways in which sex workers will want to conduct business. Sex workers should have the freedom to choose the way in which they structure their businesses, just as other businesses do, and not be subject to any legislative restrictions on possible business models. Additionally, sex workers should always have the ability to work independently, and not be pressured financially or otherwise to work for an employer.

Sex workers will require education and support to negotiate for employee status and the rights and protections that flow from it. Sex workers expressed the need for education for officials and employees of government and tribunals, including the Employment Standards Branch and Labour Relations Board, to reduce the stigma and prejudice that they often endure.

Sex workers requested explicit legislative protection whereby a person's entitlement to social assistance and Employment Insurance may not be cancelled or affected in any other way by his or her refusal to work, or to continue to work, as a sex worker.

Law reform is not enough

Law reform is not enough. Social and economic initiatives should be designed to assist women and men who are involved in sex work and are seeking alternative options by which to earn their livelihood. However, it should not be assumed that all sex workers are seeking to exit the sex industry. In order to ensure that any such initiatives are appropriate and effective, education and sensitivity training should be provided for all levels of government, law enforcement and emergency services staff who make decisions that affect sex workers and the sex industry.

The intersection of criminal and immigration issues makes migration and sex work a very complex matter. If a non-Canadian sex worker is in Canada contrary to immigration laws and procedures, then she or he can be detained and deported at any time. If a sex worker is in Canada on a temporary visa and commits a criminal offence, she or he can be subject to criminalization and required to leave the country. If a sex worker has permanent resident status, he or she would probably not be deported, but may be subject to criminalization. The potential of arrest, detention and removal from Canada means that migrant sex workers can be doubly punished for engaging in sex work. This has the effect of driving migrant sex workers underground, particularly those who are in Canada illegally or on temporary visas, and will often prevent them from seeking the assistance of police, emergency services, community organizations, and other social services.

Women and men engage in sex work for a wide variety of reasons and, regardless of their motivation or personal circumstance, they deserve safe working conditions and access to the same rights and protections as other workers in Canada.

The *Charter* acknowledges that Canada is founded upon principles that recognize the rule of law.⁶ The Charter also establishes that every person is "equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination."⁷ Sex workers, a distinct and marginalized class of persons, will not begin to realize their individual and collective right to equality before and under the law until the criminal laws surrounding adult prostitution are repealed. This is the first step towards recognizing the human rights of sex workers and moving towards a new, progressive legal framework for the sex industry.

⁶ *Charter*, *supra* note 1.

⁷ *Charter*, *supra* note 1, s. 15.

APPENDIX A: THE ALLOCATION OF LEGISLATIVE POWER UNDER CANADA'S FEDERAL STRUCTURE

If the criminal laws relating to adult prostitution are repealed, the provincial and federal governments will need to consider their respective areas of jurisdiction to determine which level of government has the constitutional power to regulate prostitution, either by using existing legislation or by enacting new laws.

Section 91 of the *Constitution Act, 1867*¹ defines the scope of the power of the federal government and s. 92 sets out the powers of the provincial governments. Areas of law relevant to prostitution that fall under federal jurisdiction include: criminal law, immigration law, federal taxation law, some aspects of family law, federally incorporated companies, the federal pension plan, and employment insurance. Provincial jurisdiction includes: employment law, some aspects of family law, provincially incorporated companies, employment law, provincial labour law, and many aspects of social welfare. The provincial government delegates some of its powers to municipal governments via the *Municipalities Act*.

If a government enacts a law in an area outside its jurisdiction (i.e. it is *ultra vires*), that law is unconstitutional. Therefore, any new laws designed to regulate prostitution in Canada must be enacted by the appropriate level of government for them to be constitutionally valid. Given the way powers are divided between the federal government and the provinces, the federal government does not have the authority to enact one piece of overarching national legislation that regulates all aspects of prostitution. In fact, should prostitution be decriminalized, the majority of new laws enacted to regulate it will fall within provincial jurisdiction, with the result that very different standards and regulations could be created in different provinces. There are some safeguards to curb discriminatory legislation at the provincial and municipal levels, but in the event of decriminalization, it will ultimately be impossible for the federal government to retain control over the regulation of all aspects of prostitution.

How current laws would apply

Because the regulation of prostitution cannot fall under exclusive federal jurisdiction, no single binding federal legislation regulating every aspect of the industry can be enacted (in contrast to New Zealand, a unified state which enacted a single regulatory mechanism when prostitution was decriminalized).² Instead, in a decriminalized context, the sex industry would be subject to laws of general application that regulate all industry and commerce, and protect civil rights. Many of these laws fall under provincial jurisdiction.³

¹ *Constitution Act, 1867* (U.K.).

² *Prostitution Reform Act, 2003* (N.Z.) 2003/28, s.18

³ These include: s.92(7) public health; s.92(8) municipal institutions in the province; s.92(9) licenses in order to raise revenue for provincial, local, or municipal purposes; s.92(10) local works and undertakings; s.92(13) property and civil rights in the province; and

Some aspects of federal jurisdiction would still apply to prostitution, as it does to other workers, such as unemployment insurance,⁴ and the raising of money by any mode or system of taxation.⁵ However, most of the existing laws that would apply to the sex industry are provincial, or have been delegated by the provinces to their municipal governments.⁶

Provincial powers and sex work

In a completely decriminalized context, the provinces would have the authority to apply existing legislation as a way of regulating some aspects of prostitution. The provinces may also choose to create new legislation that is specific to prostitution.

Limitations on provincial government powers

There are limitations on the provincial power to legislate in the area of prostitution. For example, provinces cannot intrude on the federal power over “crime,” and they cannot regulate morality. In addition, *Charter* constraints and the doctrine of paramountcy may apply.

Provinces cannot regulate morality

Although provinces do not have the power to enact penal provisions, they are entitled under s. 92(15) of the *Constitution Act, 1867* to create offences in order to enforce any laws with respect to all s. 92 enumerations. Such provincial offences would have to serve provincial legislative purposes and cannot be attempts to encroach upon the federal authority over crime.

Because of the federal authority over crime, provinces are not permitted to regulate morality and public order. In other words, provinces cannot enact legislation that contains a prohibition, a penalty and attempts to achieve a criminal public purpose.⁸ In the Supreme Court of Canada decision, *Reference re: Dairy Industry Act (Canada) s. 5(a)*, the court defined a crime as, “an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.”⁹

In *Westendorp v. The Queen*,¹⁰ the Supreme Court of Canada held that a Calgary municipal by-law prohibiting prostitution was unconstitutional because the city and the province did not have the jurisdiction to enact legislation to control street prostitution, which at that time was prohibited by *Criminal Code* s. 195.1.¹¹ The City of Calgary attempted to enact this by-law as within its power to regulate the streets, but the court found it to be a colourable attempt to punish prostitution, and that was not within its constitutional jurisdiction. Similarly, in *Goldwax v. Montreal (City)*,¹² a City of Montreal municipal by-law forbidding any person from remaining in a public place for purposes of prostitution or approaching another person for that purpose was deemed to be unconstitutional.

s.92(16) generally all matters of a merely local or private nature in the province.

⁴ *Constitution Act, 1867* s.91(2)(a).

⁵ *Ibid.* at s.91(3).

⁶ *Ibid.* at s.92(8) gives provinces authority over municipal dealings.

⁷ *Ibid.* at s.92(15): The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

⁸ The *Reference as to the Validity of Section 5(a) of the Dairy Industry Act* (Margarine Reference), [1949] S.C.R. 1, aff'd [1951] A.C. 179. Also, see for example *R. v. Morgentaler*, [1993] 3 S.C.R. 463. In this case, Nova Scotia enacted legislation prohibiting the private delivery of abortion after the decriminalization of this service in 1988 (*R. v. Morgentaler*, [1988] 1 S.C.R. 30).

⁹ *Reference re: Dairy Industry Act (Canada) S. 5(a)* [1949] S.C.R. 1.

¹⁰ *Westendorp v. The Queen* [1983] 1 S.C.R. 43.

¹¹ *Criminal Code*, R.S., c. C-34 [*Criminal Code*].

¹² *Goldwax v. Montreal (City)* [1984] 2 S.C.R. 525.

In a more recent case involving licensing and regulation of body rub massage parlours, *Pimenova v. Brampton (City)*,¹³ the city sought to place a number of restrictions on these establishments, including limiting the number of parlours to eight, despite the fact that 16 such licenses already existed. The City of Brampton took the position that it was within its municipal jurisdiction to enact these by-laws. The Ontario Superior Court ruled that the section of the by-law regulating the number of facilities was in City's jurisdiction. However, the sections of the by-law regulating dress and physical contact in the parlours were deemed to be unconstitutional because they represented an attempt to regulate morality, thereby intruding into the federal power over crime. Two other sections dealing with limitations on the transfer of licenses and on hours of operation were found to be discriminatory and unfair, and struck down.

Human rights legislation

Protections against discriminatory legislation created by the provinces include the *Canadian Charter of Rights and Freedoms*¹⁴ and provincial Human Rights Codes. In the context of prostitution, it could be argued that overly stringent and unreasonable limitations on advertising by sex workers are in violation of their s. 2(b) right to freedom of expression under the *Charter*.¹⁵

Paramountcy

The doctrine of paramountcy holds that otherwise valid provincial legislation will be rendered inoperative where it is found to be inconsistent with a valid federal law. Where there is no inconsistency, both laws operate concurrently. Paramountcy may therefore be a relevant consideration even if the criminal laws surrounding prostitution are not completely repealed, and certain aspects of prostitution remain under criminal jurisdiction.

However, it should be cautioned that the determination of validity and paramountcy of legislation is inconsistent across provinces, and depends on the specific wording of the legislation in question. For example, in the context of provincial prohibitions against possession of the drug LSD within Alberta and B.C.'s respective Health Acts, the relevant Courts of Appeal came to opposite conclusions regarding the validity of the legislation.¹⁶ In Alberta, provincial prohibition was deemed to be valid because it related to public health, a provincial jurisdiction. In B.C., similar legislation was held to be invalid, because it relates to a matter of criminal law, thus falling under federal jurisdiction. In a 1987 case pertaining to strip clubs, an attempt by New Brunswick's Liquor Licensing Board to impose a prohibition on nude entertainment was deemed *intra vires* the province as a legitimate regulation of local industry.¹⁷ And while the provincial legislation dealt with an activity that falls under the *Criminal Code*, there was no express conflict or intrusion, so paramountcy was not invoked.

National standards

The overall ability of the provinces to regulate those aspects of prostitution that fall under their s. 92 enumerated power – although limited in some respects – means that it would be difficult, if not impossible, to ensure a national set of standards and objectives regarding prostitution. For example, Sectuib 3 of New Zealand's Act, sets out its purpose:

¹³ *Pimenova v. Brampton (City)* [2004] O.J. No. 2450.

¹⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 [hereinafter referred to as the *Charter*].

¹⁵ *Ibid.* at s.2(b).

¹⁶ *Regina v. Snyder and Fletcher* (1967) 61 W.W.R. 112 and 576 (Alta. C.A.) compared to *Regina v. Simpson, Mack and Lewis* (1969) 1 D.L.R. (3rd) 597, 1196913 C.C.C. 101 (B.C.C.A.).

¹⁷ *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59.

The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that:

- safeguards the human rights of sex workers and protects them from exploitation;
- promotes the welfare and occupational health and safety of sex workers;
- is conducive to public health;
- prohibits the use of prostitution in persons under 18 years of age;
- implements certain other related reforms.

Thus the New Zealand legislation is based on national objectives All New Zealand “territorial authorities” authorized to enact legislation pertaining to sex work must abide by the objectives laid out in the national legislation.¹⁸

Because Canada cannot proceed this way, decriminalization would leave most regulation of prostitution in the hands of provincial and municipal governments, in which case a patchwork of provincial schemes with varying standards and objectives is likely to develop. Indeed, such a situation has developed in Australia. Australia has a similar federal structure to Canada, and there currently exists a patchwork of regulatory schemes across the territories regarding prostitution. Criminal law in Australia is a territorial and not a federal power, so its federal structure does differ slightly from Canada’s.

Federal influence over the regulation of sex work

The federal government may attempt to influence regulation of prostitution by leaving some of the *Criminal Code* provisions in force, and carving out exceptions within the *Criminal Code* or through federal spending power, much like it does with gambling.

Criminal code exceptions

One scheme that the federal government could develop to maintain some control over prostitution would be to retain the current criminal provisions while creating some limited exceptions; prostitution would remain illegal with exceptions allowing the provinces to regulate certain aspects of the trade. Thus the federal government could set the standard of regulation that a province would have to meet for it to be able to regulate prostitution.

This strategy of carving out limited *Criminal Code* exceptions is currently used to regulate gambling. Under s. 207(1) of the *Criminal Code*,¹⁹ lawful lottery schemes may be conducted by the government of a province, or by a charitable or religious organization, or board of a fair or exhibition in accordance with the terms of a licence. Section 207(2) gives the Lieutenant Governor in Council the authorization to issue licences in accordance with the *Criminal Code*.

In principle, the strategy of transferring control to the provinces where they fulfil certain criteria should enable the federal government to retain some control over regulation. However, this strategy can still result in inconsistent regulatory schemes in different provinces. For example, in the case of gambling, carving out *Criminal Code* exceptions has meant a liberalization of gambling regulation and a gradual transition from criminal prohibition to legalization, but it has also resulted in regional variations in the interpretation of the law. The Law Commission of Canada’s 2005 study, *The Legalization of Gambling in Canada*, describes four models of regulation.²⁰ Gambling is either managed through a Crown Corporation, through a hybrid model where it is regulated in partnership with private companies, through a charitable organization under license, or through First Nations groups.

¹⁸ *Supra* note 2. For example, ss.12 – 14: Territorial authority to make bylaws .

¹⁹ *Criminal Code* at s.207.

²⁰ C.S. Campbell, T.F. Hartnagel & G.J. Smith, “The Legalization of Gambling in Canada” (6 July 2005), prepared for the Law Commission of Canada [*Campbell*].

Canada's use of the criminal law to regulate gambling has been criticized as an illegitimate means to consolidate and legitimise a provincial government monopoly over gambling as a means to generate revenue.²¹ In addition, loose federal regulation and a desire to maximize profits has been criticized for creating a massive expansion of gambling at a significant social cost.²² In particular, the federal government has ignored issues of gambling-related crime and gambling addictions,²³ and critics have argued that the federal government has done this deliberately as a way to abdicate responsibility for these social concerns.²⁴

Viewed sceptically, gambling legislation can be seen as an example of a permissive money-making scheme, and its rationale differs from that of Parliament carving out exceptions for provincially-regulated prostitution. However, the potential for similar inconsistent provincial interpretations of the law and different policy development clearly exists in the context of prostitution.

Parliament can only create exceptions within its criminal power where it is a *bona fide* use of this power, and not a colourable attempt to encroach on provincial jurisdiction. For example, any standards that the federal government might set before it permits provinces to assume jurisdiction cannot intrude into the provinces' power to regulate in the area of property and civil rights. Indeed, the federal government's control over gambling within the *Criminal Code* can be criticized as an improper use of its jurisdiction over criminal law: it seems incongruous that the federal government seeks to regulate gambling through the *Criminal Code*, and yet promotes it as a revenue-generating instrument.

Federal spending power

In addition to creating exceptions within the *Criminal Code*, the federal government could also attempt to retain some control over how the provinces and municipalities regulate prostitution through their use of the spending power. This power arises from s. 91(1)(a) of the *Constitution Act, 1867* which is the power to legislate in relation to the public debt and property. The federal government can provide financial gifts to the provinces with conditions attached in order to encourage the provinces to follow a certain course. Perhaps the best existing example is the health insurance program under the *Canada Health Act*. While payments to the provinces are authorized by the Act, some payments are subject to the fulfilment of certain criteria and conditions. In the context of prostitution, the federal government could use its spending power to encourage the provinces to enact legislation regulating this industry in a manner that is consistent with federal policy.

²¹ *Ibid.* at 8.

²² *Ibid.* at 27.

²³ *Ibid.* at 36-37.

²⁴ *Ibid.* at 91.