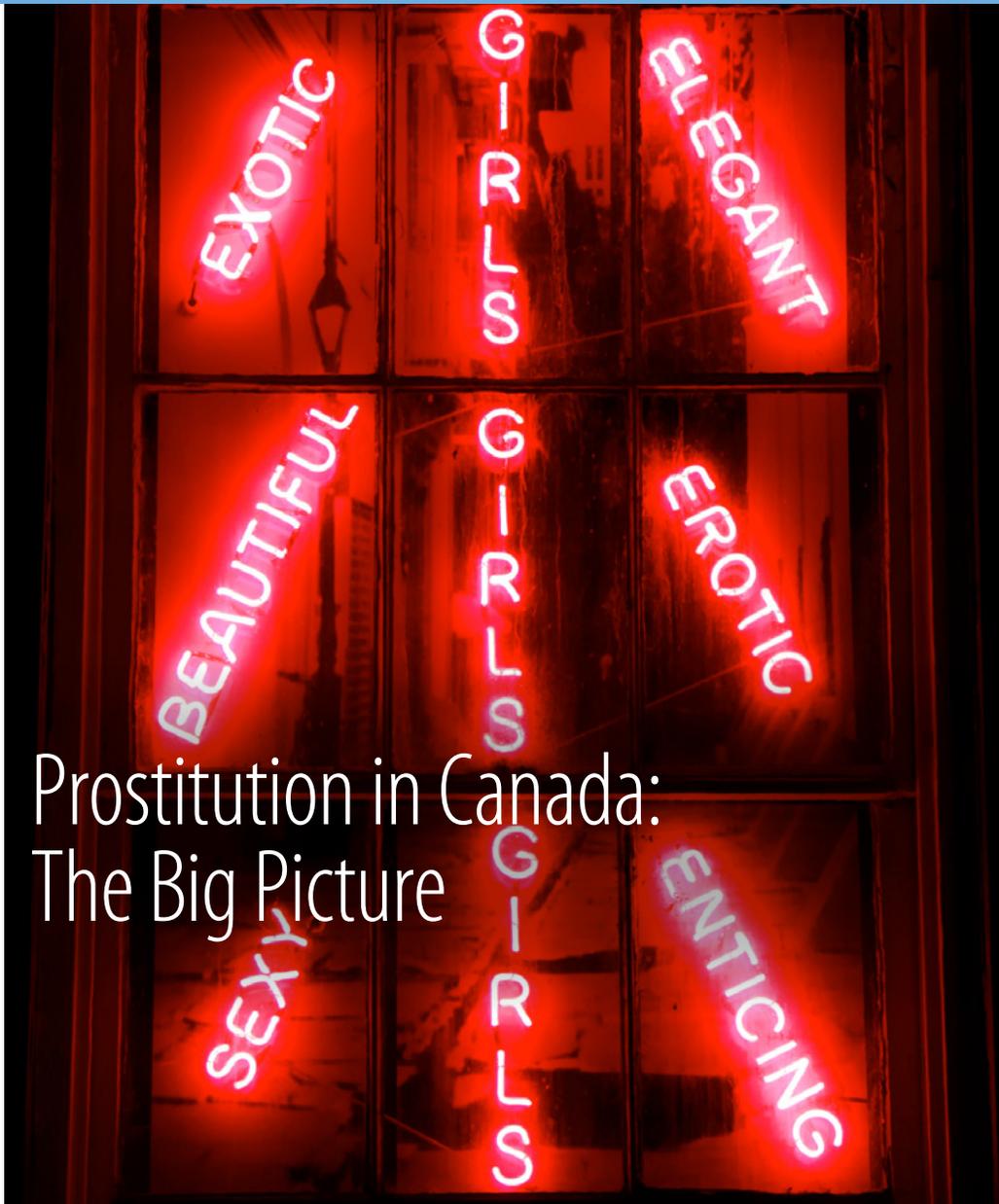


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Prostitution in Canada: The Big Picture

Linda McKay-Panos

Recent developments in Canadian prostitution law prompt an examination of some very important legal, moral and philosophical issues. For many years, the act of selling sex has *not* been illegal in Canada. However, several activities associated with prostitution are illegal: including communicating in a public place for the purpose of prostitution, keeping a common bawdy house (brothels) and living off the avails of prostitution (pimping). In 2010, the Ontario Superior Court

ruled in *Bedford v Canada*, 2010 ONSC 4264 (“ONSC”), that all three of the provisions of the *Criminal Code* dealing with activities related to prostitution were unconstitutional. The government appealed the trial court decision, and the Ontario Court of Appeal overturned parts of the trial decision (*Bedford v Canada (Attorney General)*, 2010 ONCA 814 (“ONCA”). The government applied to the Supreme Court of Canada for leave to appeal in May 2012, and Bedford applied for leave to cross-appeal in June 2012.

The *Bedford* case brings to mind the larger philosophical question of whether the government should be criminalizing morality. In one oft-cited quotation, then Justice Minister Pierre Elliott Trudeau commented (per *Globe and Mail* December 22, 1967, p 1): “The state has no business in the bedrooms of the nation.” He was commenting on the government’s proposals to give recognition to individual rights in several areas, including sexual behaviour. Morality came up in the *Bedford* case when determining whether the *Charter of Rights and Freedoms* was infringed. Justice Susan Himel of the Ontario Superior Court examined the history, interpretation, and legislative objective of each of the impugned *Criminal Code* provisions. Justice Himel noted (ONSC, para 225) that a law grounded in morality could be a proper legislative objective – provided it is in keeping with *Charter* values. She also noted (ONSC, para 227), that adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly through criminalizing many of the acts related to prostitution. Thus, the moral implications could be debated endlessly, but it is a given that whether it is illegal or not, prostitution exists in Canada, and around the world.

In striking down three current *Criminal Code* prostitution provisions, Justice Himel focused on the harm prostitutes face as a result of being prevented by law from taking steps to enhance their safety. These include: working indoors, alone or with other prostitutes; paying security staff; and screening customers encountered on the street to assess the risk of violence (ONCA, para 4).

If we accept that prostitution will exist despite laws and moral condemnation, then perhaps we should consider the implications of decriminalization, regulation or stricter criminal laws. Justice Himel thoroughly examined the situation (with respect to prostitution) in Canada and in several other countries.

The Netherlands, for example, allows its sex workers to have protected areas in cities and personal rooms with windows facing the street in order to allow them to remain indoors. There are unions, regular health and sexually transmitted disease checks, and support groups for those wishing to leave. The stated purpose of decriminalization and regulation – Netherlands had laws similar to Canada until 2000 – was to eliminate forced prostitution, de-link

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organized crime and the sex trade, protect prostitutes and address human trafficking (paras 185 to 190). Despite these changes, about one-half of the prostitution in the Netherlands occurs outside of the legal sector, and much of that involves foreign prostitution. Approximately two-thirds of the Netherlands's 20,000 female prostitutes are from Eastern Europe and developing countries (ONSC, para 187). The Netherlands has also set up new regulatory reforms to address the continued involvement of organized crime (ONSC, para 187). Decriminalization has resulted in improvements in the licenced sector. The women in that sector are not exploited or underage. Sexually transmitted diseases are less prevalent among prostitutes than the public at large, and about 90 percent of the reported incidents against prostitutes are against women who are working illegally (para 188). Approximately ten percent of prostitution continues to occur on the street. These prostitutes are often drug addicts or suffer from mental illness. Since they are unable to pay the rent for a window and are unwanted in brothels, they are on the street (ONSC, para 189). Social services are provided to help street prostitutes (ONSC, para 189).

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New Zealand also had prostitution laws similar to those in Canada until 2003, when it decriminalized consensual adult prostitution in all forms, and implemented a licencing regime for brothels. Brothels that are owner-operated and consist of four or fewer prostitutes are permitted without a licence. New Zealand also created a certification system for brothel operators and made it a summary conviction offence for clients, prostitutes or brothel operators to fail to promote or adopt safer sex practices (ONSC, para 193). Five years after the law was changed, the law was reviewed by the Prostitution Law Review Committee, which noted that incidents of violence, threats, forcible confinement, refusal to pay for services and theft have continued but are infrequent, except among street-based prostitutes. Prostitutes are more likely to report incidents of violence to the police. Under-age prostitution has not increased, and there are no identified incidents of human trafficking (ONSC, para 194). On the other hand, while the sex industry is about the same size, prostitutes are slowly moving from the managed sector (e.g., brothels) to the private indoor sector. In addition, there is little movement to move indoors in the 11 percent of the sex trade that is street-based (ONSC, para 196).

In Germany, before 2002, it was illegal to operate a brothel. Prostitution was deemed immoral and thus contracts for sale of sexual services were unenforceable. Prostitutes had to register with the government and undergo mandatory disease screening (ONSC, para 197). In 2002, Germany decriminalized brothels and lifted the prohibition against promoting prostitution, but pimping (in the absence of a voluntary agreement) remained a crime. Mandatory disease screening was abandoned (ONSC, para 198). The stated goals of these amendments were to prevent crime, improve working conditions for prostitutes, increase their access to benefits and facilitate their exit. It was also hoped that the amendments would protect children from exploitation and reduce human trafficking (para

199). An official report on the legislative reforms in 2007 indicated that there were no measurable improvements in social protection for prostitutes, in their working conditions, in encouraging them to leave the industry or in reducing crime. On the other hand, the fears that decriminalization would result in increased organized crime, human trafficking and the exploitation of minors have not appeared (ONSC, para 201).

In Australia, where jurisdiction over prostitution is a state matter, decriminalization has occurred in six of Australia's eight jurisdictions (ONSC, para 202). In Queensland, the law was changed in 1999 to allow licenced brothels to operate in restricted locations. Escort agencies and street prostitution remain illegal (ONSC, para 202). Stiffer penalties were enacted for street prostitution. In 2004, a review of the new legislation indicated that 75 percent of the sex industry did not elect to move into the legal sector and continues to operate illegally. Nevertheless, decriminalization has not led to an increase in the size of the sex industry (ONSC, para 204).

Sweden had decriminalized prostitution for decades. In 1999, Sweden introduced measures that criminalized buying sex and pimping, but selling of sex by prostitutes remained legal (ONSC, para 206). Prostitution is treated as an aspect of male violence against women and children. Since the law changed, the number of women involved in prostitution overall and in street prostitution in particular has decreased. Exploitation of foreign women and human trafficking appear to be decreasing (ONSC, para 207). While there was a 300 percent increase in arrests, convictions remain rare (ONSC, para 208).

A study conducted by Barbara Brents and Kathryn Hausbeck of the legalized brothels in Nevada, United States, indicated that legal brothels generally offer a "safer working environment than their illegal counterparts" (ONSC, para 213).

If safety of prostitutes is the paramount concern of our lawmakers, the experience with decriminalization, regulation or other remedies in other countries suggests that the most appropriate approach in Canada would be to decriminalize prostitution, but to criminalize buying sex and exploitative pimping. This would go together with providing increased social supports for prostitutes and incorporating aspects from the approaches to prostitution law in Sweden, Germany and the Netherlands. It is clear that no one approach is perfect and that illegal street prostitution will likely remain a reality. The *Bedford* case demonstrates how difficult it can be to legislate an activity, while respecting *Charter* values at the same time.

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