

Canada's Prostitution Laws: Promoting Security and Equality for Women

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Introduction

Canada's modern criminal laws on prostitution, enacted in 2014, are asymmetrical: they criminalize those who purchase sex in prostitution (referred to in this paper as "buyers") and those who profit from the prostitution of others (referred to in this paper as "profiteers" or "pimps"). These laws replicate a model that has been adopted in an increasing number of countries who have committed to addressing prostitution as a practice of sex or gender inequality. Canada joins Sweden, Norway, Iceland, France, Northern Ireland, Ireland and Israel in adopting this model, which has also been endorsed by the European Parliament.² As the asymmetrical model has spread beyond the Nordic countries in which it was first developed, it has come to be known as the "Equality Model."

By contrast, those who want sex buying and pimping decriminalized in Canada have only one country, New Zealand, a small island nation, whose scheme they want Canada to follow, despite its serious problems.⁴ Supporters of decriminalization acknowledge that all other legalized regimes, such as Germany and the Netherlands, are not models to be emulated by Canada, because of the serious human rights abuses documented to women in prostitution in those countries.⁵

As we consider the impact of Canada's adoption of the Equality Model, we must also consider what will happen if we abandon this approach and instead decriminalize or legalize sex purchase of and pimping. The evidence demonstrates that getting rid of these laws, thereby

²Coalition Against Trafficking in Women Australia, <https://www.catwa.org.au/nordic-model-legislation/>; see also "Punish the client, not the prostitute", EU Parliament News at https://www.europarl.europa.eu/portal/en/search?planet=_all&searchQuery=prostitution

⁴ Coalition Against Trafficking in Women, *Germany/New Zealand: A Comparison in Prostitution Laws 2002 – 2017*, <https://catwinternational.org/wp-content/uploads/2021/06/Germany-New-Zealand-A-Comparison-in-Prostitution-Law-FINAL.pdf>

⁵ Ibid. Lawmakers in both Germany and the Netherlands have acknowledged the failures of their systems in meeting their stated objectives, and have continued to impose new restrictions and regulations to try and address numerous problems.

endorsing men's purchase of women for sex and giving pimps the right to profit commercially from that prostitution will produce at least three negative outcomes:

- (i) it will increase the size and visibility of the prostitution industry, leading to more harm to increasing numbers of women, youth and others who are recruited to meet that demand;
- (ii) it will undermine the equality of all Canadian women by endorsing male sexual entitlement and outsourcing the servicing of that male entitlement to the most marginalized women.
- (iii) it will remove tools from law enforcement that are vital to interfering with buyers and pimps who cause harm.

Giving men the legal right to buy sex makes women less equal and more unsafe. What is needed in Canada today is an increased commitment to enforcing these laws and making clear that buying sex is a crime.

1. An Asymmetrical Model Decreases Demand; Decriminalizing Sex Purchase Increases It

When laws against sex purchase are publicized and enforced, the demand for prostitution decreases. Research in other jurisdictions has consistently demonstrated that men identify criminal prosecution, along with its attendant publicity, as the most significant deterrent to purchasing women for sex.⁶ This effect is strengthened over time as cultural norms shift and sex purchase is seen as inconsistent with a commitment to sex and gender equality. Far fewer men purchase sex in Sweden than in countries where sex purchase is legal.⁷ The City of Winnipeg,

⁶ Lorenzo Escot, Sabina Belope-Nguema, José Andrés Fernández-Cornejo, Eva Del Pozo-García, Cristina Castellanos-Serrano, and Selene Fabiola Cruz-Calderón, "Can the Legal Framework for Prostitution Influence the Acceptability of Buying Sex" 2021 *Journal of Experimental Criminology*, available online at <https://prostitutionresearch.com/wp-content/uploads/2021/11/ProstitutionLawsSocialAcceptability2021.pdf>; Melissa Farley, Jacqueline M. Golding, Emily Schuckman Matthews, Neil M. Malamuth, and Laura Jarrett, "Comparing Sex Buyers With Men Who Do Not Buy Sex: New Data on Prostitution and Trafficking" (2015) *Journal of Interpersonal Violence* 1, available online at <https://prostitutionresearch.com/wp-content/uploads/2015/09/Comparing-Sex-Buyers-With-Men-Who-Do-Not-Buy-Sex.pdf>

⁷ The Report leading to the passage of the EU Parliament Resolution stated: "The impact of this legislation in Sweden has been dramatic. Sweden's prostituted population is one-tenth of neighbouring Denmark's where sex purchase is legal and has a smaller population. The law has also changed public opinion. In 1996 45% women and 20% men were in favour of criminalising male sex purchasers. By 2008 79% women and 60% men were in favour of the law.

for example, recently took the step of banning massage parlours and similar businesses from operating in the city, citing their links to human trafficking and sexual exploitation.⁸ Winnipeg could take this step to improve women's equality and safety in their community because sex purchase is illegal in Canada.

The criticism that an Equality Model does not completely eliminate prostitution holds that model to a standard not imposed on legal and policy regimes targeting other forms of sexual exploitation and abuse. Despite the legal and public policy measures criminalizing wife assault or battering of women in spousal relationships, such violence has not been eradicated. This does not mean that such laws should be repealed and spousal violence normalized and destigmatized. What is important is that the Equality Model is the only approach that works, in conjunction with real supports for women to avoid prostitution, to decrease the size of the prostitution industry.

This does not mean that we should expect criminal laws of any kind to, on their own, solve complex social problems. The criminal law works to denounce behaviour as harmful and unacceptable, to deter some of that behaviour, and to give police authority to intervene when it does occur. The criminal law is not meant to address the social determinants of offending behaviour, nor is it sufficient on its own to change societal attitudes about that behaviour, although it is necessary for that process. There is a clear analogy here to other forms of gender-based violence. Criminal laws that prohibit homicide and assault do not, despite serious penalties, prevent all domestic assaults and homicides from happening. This does not make them a failure – they are a necessary part of a comprehensive societal response to the problem of domestic violence.

By contrast, decriminalizing sex purchase, and legalizing prostitution businesses such as brothels and escort agencies, increases the demand for prostitution. This demand includes men from other countries who will travel to jurisdictions where they will not face any consequences

Moreover, the Swedish police confirm that the Nordic Model has had a deterrent effect on trafficking for sexual exploitation: *Report on prostitution and sexual exploitation and its impact on gender equality* 3.2.2014, accessed at https://www.europarl.europa.eu/doceo/document/A-7-2014-0071_EN.html

⁸ The vote on January 27, 2022 was reported by the Joy Smith Foundation in a press release: <https://joysmithfoundation.com/wp-content/uploads/2022/01/Joy-Smith-City-of-Winnipeg-Vote-Release-01-27-22-pdf-Final.pdf>

for sex purchase. If Canada decriminalizes men's purchase of sex, we can expect to see demand increase from both Canadian men and those who travel from the United States and other locations to buy sex from Canadian women. Brothel businesses will advertise openly as they do in other countries, offering men the ability to select women by race or to purchase a pregnant woman, among other features. Some countries allow men to purchase unlimited sexual access for a specified time period, or to book a group sex "gang bang" in which they can share sexual access to the same woman with their male friends. All of these activities happen in legal brothels in other countries, which supporters of legalization identify as the "best" locations for prostitution.

An increase in demand produces a consequent pressure to increase supply. Again, the evidence is clear that an increase in male demand for sex purchase fuels sex trafficking and other forms of sexual exploitation in order to produce that supply.⁹ This has already occurred in Canada with the fast track work permits for strip clubs in the 1990s and 2000s. These clubs faced a shortage of Canadian women willing to work as "dancers". We could have celebrated this shortage as a sign that Canadian women's economic and social equality was advancing to the point where fewer women "chose" to make money through stripping, and simply let the demand be unfulfilled. Instead, the federal government allowed club owners to fast track the entry of women from abroad to work in their clubs, on the justification that these were legal businesses that ought to be treated no differently than other industries. These women were of course subject to pressures from recruiters and a much-reduced set of options compared to their Canadian counterparts. Club owners were allowed to profit from the constraints these foreign women found themselves in so that the Canadian male sexual demand would be satisfied. Some of these women were then funneled from the clubs into prostitution, an outcome that was hardly surprising.¹⁰

⁹ Seo-Young Cho, Axel Dreher and Eric Neumayer, Does legalized prostitution increase human trafficking? (2013) 41 World Development 67-82.

¹⁰See the Background Research Report to Bill C-57, *An Act to Amend the Immigration and Refugee Protection Act*, https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/391LS557E. The program persisted in various forms until 2012: Peggy Curran, "Canada gives truly 'exotic' dancers the boot" *Montreal Gazette*, (6 July 2012) <https://montrealgazette.com/news/local-news/canada-gives-truly-exotic-dancers-the-boot>

We can expect the same pattern to recur if sex purchase is decriminalized/legalized. Women in constrained circumstances around the world will be funneled directly into Canadian brothels and massage parlours to meet what will be described as the labour shortage of a legitimate business. Some of these will operate openly and others will be invisible in condos and back rooms of spas and bars. Many of the women in illegal indoor prostitution in New Zealand are foreign nationals, mostly undocumented women from Asia.¹¹ Industry supporters erase this exploitation of global poverty and outsourcing of male entitlement by relabeling it “migration for sex work.” It should be seen for what it is, an act of class and race privilege enacted globally.¹²

2. An Asymmetrical Model is Consistent with a Commitment to Equality

Prostitution is a deeply gendered practice. Almost all of the buyers are men; those purchased are overwhelmingly women and girls, although male buyers also purchase boys, men and transgender people in prostitution. The prostitution industry disproportionately targets those who are Indigenous, racialized and poor. These inequalities are present in systems of prostitution everywhere in the world because they are necessary to produce a supply of vulnerable people who can be funneled into prostitution.

An asymmetrical model is the only legislative response consistent with a commitment to equality for women and other marginalized groups. Canada has committed to the equality rights of women in ss. 15 and 28 of the *Charter of Rights* and to the combating of sexual exploitation of women in prostitution and human trafficking in its international commitments, including the *Convention on the Elimination of all forms of Discrimination Against Women*.¹³ Prostituting women does not enhance the equality of women in prostitution or the equality of women in general.

¹¹ New Zealand has never identified an adult as a victim of human trafficking or prosecuted any one for sex trafficking adults. Convicted child sex traffickers have been given house arrest rather than jail time: <https://www.state.gov/reports/2021-trafficking-in-persons-report/new-zealand/>

¹² Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (Routledge: 2008)

¹³ *Convention on the Elimination of All Forms of Discrimination Against Women* (18 December 1979), art. 6. <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>

The purchase of women for sex causes them grave harm. Harms to women in prostitution take the form of not only additional physical and sexual violence, including high rates of homicide, but also verbal abuse and physical and psychological trauma from the act of prostitution itself.¹⁴

Supporters of legalizing men's sex purchase and pimping argue that these harms are not inherent to prostitution, and that the goal should be to reduce these harms while continuing to provide male buyers with access to women's bodies. Yet these harms are present everywhere that prostitution exists. No matter how many women and other people harmed in prostitution speak about their experiences, supporters of the industry are willing to ignore them in favour of accounts from those who say they want to remain in prostitution.

Permitting men to buy sex ignores the composition of, and constraints on, the people who make up the vast majority of prostituted persons. Our legal and public policy focus needs to be on the large numbers of women and youth who enter prostitution, sometimes as teenagers, in response to poverty, coercion and deception, and violence and abuse in the home. They often have a very limited range of life choices, and most would not have entered if they had real alternatives. The system of prostitution chose them to meet men's demand for paid sex. The focus needs to be on reducing demand as a way of reducing the harm of prostitution.

It is easy to get mired in, and sidetracked by, attempts to quantify the numbers of women who "choose" to enter prostitution. Claiming that most women are there by choice is presented as a way of endorsing women's agency. In reality, it is a way for male buyers to absolve themselves from any responsibility for the harms they are causing, and a way for the industry to blame women for any harms they experience from prostitution itself.

The fact that some people choose, in the face of various constraints and inducements, to engage in an activity that carries risk and causes them harm, is no reason for the state to fail to intervene to denounce those who cause the harm. This is particularly true where the harms are concentrated in groups who have suffered discrimination. No one can reasonably claim that Indigenous women and girls, or Asian women, "choose" prostitution more than White women, without acknowledging that so-called choice is the product of sexism intersecting with colonialism

¹⁴ Melissa Farley, "Prostitution Harms Women Even if Indoors" (2005) 11 Violence Against Women 950.

and racism. For example, the fact that Indigenous youth are 25% of the youth population in Manitoba, but make up 75% of youth in state care, and 90% of youth in prostitution, is a reflection of this discrimination.¹⁵ These inequalities do not disappear when these young people turn 18. Recently, the Manitoba Court of Appeal sentenced a man to five years' imprisonment for obtaining sexual services from a 16-year old Indigenous girl through buying her alcohol.¹⁶ Those who advocate for repealing the purchasing offence are saying that a man who buys the same girl two years later, if she survives to the age of 18¹⁷, is not to be punished at all, because the act is transformed into sex work. This amounts to the total erasure of compounded trauma, exploitation and sexualized colonialism.

Legitimizing sex purchase also contributes to the inequality of all women, by normalizing a culture of male sexual entitlement that is an essential pillar of rape culture.¹⁸ Supporters of legalized prostitution endorse this by falling back on the discredited sexist stereotype of men's insatiable sexual "needs," that some women must have an obligation to fill. Prostitution reflects a hierarchy based on sex in which women are expected to satisfy men sexually on demand, with money and other forms of coercive power substituting for consent. Women cannot achieve social and political equality when prostitution is accepted as "women's work." We recognize that demanding sexual favours as a condition of employment, even if a woman worker agrees to do for the purposes of career advancement, is sexual harassment and a practice of sex discrimination. It is inconsistent to treat the same demand as legitimate by making the sexual harassment into its own job.

3. An Equality Model increases safety; Decriminalization increases risk

The Equality model does not endanger the safety of those in prostitution, compared to a regime that legalizes men's sex purchase. The purpose of the Equality model is to reduce the size

¹⁵ *R v Alcorn* 2021 MBCA 101.

¹⁶ *Alcorn, supra*.

¹⁷ The girl committed suicide at the age of 17, before the accused was tried. Other victims of prostitution have also tragically taken their own lives. *R v Ackman* 2020 MBCA 24.

¹⁸ The current laws also target the public display of advertising for prostitution businesses, which contributes to the equality of all women by reducing the sexual objectification of women.

of the sex trade. This improves women's security by doing the one thing that actually stops harm to them – getting them out of prostitution.

Giving law enforcement the ability to interfere with johns and pimps at the time they try to purchase sex advances women's security. An asymmetrical model gives both women in prostitution and law enforcement the tools and authority to interfere with harmful behaviour. A regime of legalization, by contrast, normalizes, obscures and immunizes harm to those in prostitution.

Women in countries such as Sweden, where the Equality Model is established, are provided with alternative sources of income, thus removing them from prostitution's harms. Those women who remain in prostitution confirm that the fact that buyers are committing a criminal offence gives them power over those buyers, as women have the ability to call police at any time without fear of their own arrest.

All locations for prostitution carry risk, because the risk comes from the buyers and pimps. In *R. v Evans*¹⁹, for example, the buyer, a university student, contacted the victim, a Metis woman, through the internet. They went to an apartment of her choice and under her control. It was equipped with a hidden camera. He became angry and strangled her to death, throwing her body in the bushes outside. Medical evidence at trial indicated that she was dead in about 90 seconds from the point at which he attacked her. Women and girls in prostitution have been sexually and physically assaulted by johns and pimps in brothels,²⁰ hotel rooms,²¹ their own homes²², public parks²³, vehicles,²⁴ buyers' homes²⁵ and every other imaginable location. It does not matter where prostitution takes place – it causes harm and carries the risk of further violence.

¹⁹ 2009 BCSC 1615.

²⁰ Evidence of Amy Lebovitch, *Bedford v. Canada (A.G.)*

²¹ *R v. Barton* 2019 SCC 3

²² Brian Platt, "Two female escorts found dead in New Westminster apartment building" *The Globe and Mail* (26 August 2013); Jennifer Saltman, "Pain, anger, love permeates sentencing hearing of man who killed two New Westminster women" *The Province* (11 September 2015) <https://www.newwestrecord.ca/local-news/pain-anger-love-permeates-sentencing-hearing-of-man-who-killed-two-new-westminster-women-3018044>

²³ Jane Armstrong, "Sex tourist convicted in B.C.," *The Globe and Mail* (2 June 2005) <https://www.theglobeandmail.com/news/national/sex-tourist-convicted-in-bc/article18229014/>

²⁴ *R v. Ramsay* 2004 BCSC 756

²⁵ *R v Pickton* 2010 SCC 32

The claim that women who continue to be prostituted face increased risk under a Equality model because prostitution is pushed “underground” also ignores several key features of this model. First, the fact that less prostitution takes place means that there is less risk and women’s safety overall is enhanced. This tends to be completely overlooked in the balance by proponents of legalizing sex purchase and pimping. Getting women out of prostitution (and not merely replacing them with other women) is the single most important method of increasing women’s safety.

A similar point can be made with respect to the harm of HIV transmission. As Professor Catharine MacKinnon has noted, “when prostitution is understood as commercial sexual exploitation, resulting cases of HIV/AIDS are a symptom, the cause of which is prostitution itself: sex with thousands of men a year under conditions that you cannot realistically control. The sex work perspective would protect the buyers from the women so they can keep using them without getting sick, rather than protecting the women from the buyers who are making them lethally ill.”²⁶

Second, women cannot screen men for violence in advance. Most women who are abused suffer that abuse at the hands of men they know and trust, in other words men that they have screened for months or years. Male buyers want women to get into cars quickly, or to meet up with them through less visible methods, such as the internet, in jurisdictions where prostitution is legal. Buyers try to keep out of sight not simply to avoid arrest, but to avoid being seen by spouses, family members and others who might recognize them. Regardless of the legal regime in place, most prostituted women also prefer that their involvement in prostitution is not widely visible to others. Nonetheless, prostitution can never be so underground that buyers cannot find it. This means that police and social service providers can find it as well, regardless of the legal regime in place.

²⁶ For a comprehensive review of the evidence on the harms of prostitution to women, see Catharine A. MacKinnon, “*Trafficking, Prostitution, and Inequality*” (2011) 46 Harv. Civ. Rts. Civ. Lib. L. Rev. 271-309 at 276.

What really pushes the harms of prostitution underground is a fully legalized or decriminalized regime. All countries that legalize sex purchase have large illegal prostitution markets. In such systems, most women do not operate out of licensed or registered venues, but the existence of such venues provides a veneer of acceptability so that the large majority of the industry can operate with impunity. In legalized venues, most women do not report the violence they experience to police, because of pressure from brothel owners. In New Zealand, for example, women in brothels cannot refuse clients unless they provide a good reason acceptable to the brothel operator. Police cannot enter brothels without permission or a warrant. Street prostitution; escort prostitution where a woman goes to a location selected by the male buyer; and youth prostitution all exist in jurisdictions where men can legally buy sex, despite the high risks and obvious harms to women. Buyers and pimps control the features of the market, in most cases, not women.

A fully asymmetrical model does not impede immediate concrete measures to support the health and safety of women in prostitution. Since the women are not criminalized, they can access services without fear of arrest. In addition to the social supports for exiting that are integral to this model, it is also consistent with supports such as contraception, health care, counselling, legal representation and other initiatives for women who have not exited prostitution.

The *PCEPA* amendments, which classify sex purchase as an offence against the person, are extremely important for facilitating the prosecution of violence against women in prostitution when that occurs. The high-profile case of Bradley Barton makes this clear, and shows exactly what can happen to women where sex purchase is legalized. Barton was passing through town for a work assignment and staying at a motel. He approached an Indigenous man and paid him a small amount of compensation to find him a woman to purchase for sex. The man offered up Cindy Gladue, a Metis mother of three daughters. Barton purchased alcohol for Gladue until she was highly intoxicated, and took her back to his hotel room. He applied such extreme force to her vagina that he caused a serious wound and she bled to death. Barton did not seek medical attention for Gladue and instead lied to police when her body was discovered. He had been searching for pornography involving gaping wounds in women's vaginas prior to meeting with Gladue. His defence was that she had consented to the application of force, so there was no sexual assault and no "unlawful act", meaning that he was not guilty of any offence in relation to her death. Had the

PCEPA amendments been in force, there would have been no need to speculate on whether Ms Gladue consented or whether she was too intoxicated to consented. Mr Barton would not have been able to argue that, even if she wasn't consenting, he believed that she was. He would have committed the unlawful act of obtaining sexual services for consideration, an offence against the person that interferes with bodily integrity, and so would be guilty of at least manslaughter.²⁷

The material benefit offence also acts to protect women from violence and other harms. Those who profit from the prostitution of others have a financial motive to keep those people stuck in prostitution, regardless of the trauma it is causing. Women in prostitution regularly report that so-called bodyguards and drivers did not intervene when they were attacked. Pimps assault women who get out of line, and keep them in line with threats. In *R v Moazami*,²⁸ the accused ran a prostitution business out of numerous condos and hotel rooms. In addition to threatening girls and women directly, he bought some girls small pet dogs and then threatened to kill the dogs if they disobeyed him. In a number of Canadian cases, pimps have also filmed the prostitution so that they can sell it to other men, and retain the recordings as leverage to prevent women from complaining about them.

Analysis of the *PCEPA* Amendments

Provisions on sex purchase and pimping (s. 286.1 and s. 286.2)

Section 286.1 creates the offence of obtaining sexual services for consideration or communicating for the purpose of obtaining sexual services for consideration. It applies in any place, indoor or outdoor. This offence tracks the language of s. 212(4) (now renumbered as s. 286.1), which already criminalized such conduct in respect of a person under the age of 18. Section 286.1 responds to the *Bedford* decision by criminalizing sex buying directly. It is in the Part of the Criminal Code that deals with offences against the person, including sexual assault and trafficking, and not grouped with public morals offences. These are very positive features of this offence. The offence is a hybrid offence with no minimum sentence of imprisonment,

²⁷ *Barton*, supra

²⁸ 2014 BCSC 1727

although it does contain a minimum fine. This offence makes clear Canada's position that buying sex, regardless of the location or the age of the person bought, is exploitative and deserving of criminal sanction.

Section 286.2 is the offence of receiving a financial or other material benefit from someone else's prostitution. This is a straight indictable offence with a maximum penalty of 10 years' imprisonment. There is widespread agreement that profiting from the prostitution of someone else carries with it the potential for exploitation; the profiteer has an incentive to keep the source of the profits in prostitution and a disincentive for interfering with male buyers who cause harm. The Supreme Court of Canada in *Bedford* recognized such offences have a valuable and valid objective, but it found that the previous living on the avails offence was overbroad.

The current "material benefit" offence contains a list of exceptions which were carefully designed to respond to the holding in *Bedford* that the living on the avails offence prevented women in prostitution from paying others for protection. These exceptions include (i) legitimate living arrangements; (ii) a legal or moral obligation of support; (iii) providing services to the general public; (iv) providing a service for fair value and without counseling the person to engage in prostitution. It is this last category that would apply to a full-time driver or booking agent, if it can be shown that they did not encourage the person to engage in prostitution. This is a wider exception than was previously permitted by the case law. The Ontario Court of Appeal has recently confirmed the constitutionality of this offence,²⁹ and it is prosecuted regularly against individuals who cause grave harm to women and girls.

There are also a number of conditions that disqualify a profiteer from relying on the exceptions, for example where violence, coercion or exploitation are used. These recognize that it is easy for exploitative pimps to hide behind the label of "driver" or "bodyguard." In addition, the accused cannot have received the material benefit in the context of a commercial prostitution enterprise. This prevents the proliferation of prostitution businesses that have caused so much harm and exploitation in countries such as Germany and Spain. This correctly recognizes that any assistance these businesses provide is incidental to their goal of profit maximization.

²⁹ *R v. NS*, 2022 ONCA 160

These provisions strike a balance between recognizing the exploitation of profiting and responding to the Supreme Court's concern that a very broad offence may preclude some opportunities for protection. Certainly, there is no constitutional right to run a brothel or an escort agency. Those with a motive of protecting women in prostitution can do so without the conflict that comes from profiting from that prostitution.

Note: To the extent that PCEPA continues the criminalization of women in street prostitution in some limited fashion, it is misguided. Punishing women for their own exploitation is not consistent with the rest of the objectives of the laws and raises Charter concerns.

Inadequacy of the remaining Criminal Code provisions

If the *PCEPA* amendments are repealed, all that would remain would be the procuring and trafficking provisions left untouched in the *Criminal Code* after the *Bedford* decision. These provisions are inadequate to address the violations of women's rights to security and equality by the actions of male buyers and third party profiteers and pimps. Although the procuring laws serve a useful function of penalizing those who assist in producing a supply of women to be prostituted, the remaining provisions are wholly inapplicable to pimping and profiteering that occurs after the woman is already prostituted. The point of recruitment is not the only moment at which exploitation takes place.

The trafficking offences, added to the *Criminal Code* in 2005, are also not sufficient to fill the gaps left by the striking down of the challenged offences. Trafficking laws apply only to traffickers, not buyers of trafficked women. Without the *PCEPA* amendments, it would be legal to purchase a trafficked woman in Canada. This is a serious deficiency in the trafficking laws that fails to recognize the role that demand plays in driving the trafficking of women in prostitution. The definition of trafficking is also quite narrow. It omits the circumstance where prostitution occurs as the result of the exploitation of a condition of vulnerability, which is a key part of the international definition of trafficking in the Palermo Protocol to which Canada is a party.

Criminalizing buyers and profiteers is constitutional

The criminalization of johns and pimps is entirely consistent with the *Canadian Charter of Rights and Freedoms*. The *Charter* does not protect the right of men to buy women for sex or the right of others to profit from their exploitation. Buyers and pimps choose to engage in this behaviour and can be penalized for doing so. The *Charter* does not require that such actors be decriminalized in order to benefit or assist women in prostitution. The Ontario Court of Appeal has recently unanimously held in *R v. N.S.* that the material benefit, procuring and advertising offences do not violate s. 7 of the *Charter*, and the Court of Appeal's analysis is instructive and sound.

That case did not consider the constitutionality of the offence criminalizing buyers who obtain sexual services for consideration. The questions a court will have to consider in relation to that offence are whether criminalizing johns and profiteers would violate the s. 7 right to liberty or security of the person of any relevant party and, if so, whether the violations would be contrary to the principles of fundamental justice. In addition, we must consider the role that the equality rights protected by s. 15(1) should play in this analysis.

A law criminalizing men for purchasing sex is also constitutionally sound. Even if a judge were to accept that a woman in prostitution has standing to argue that her security of the person is at risk because such a law limits her "screening" of johns, the balance under the s. 7 analysis is very different than it was in the *Bedford* case. First, if the woman is not criminalized, she does not herself risk arrest regardless of how long she engages in conversation with the buyer. This changes the factual context in which the argument is evaluated. Also, the prohibition extends to purchase in any place, so moving the conversation to a private location does not assist the john in escaping arrest, since arrests are typically done through an undercover police officer who will continue her discussion with the john once she is in the car or out of public view.

Second, it can no longer be argued that prostitution is a legal activity, a characterization that heavily influenced the Supreme Court. While it is true under an asymmetrical model the selling of sexual access to one's person is not criminalized, it should be made clear that *PCEPA* does not "legalize" prostitution, any more than not prosecuting trafficked persons makes

trafficking legal, or not prosecuting victims of incest makes incest legal. Buying sex is illegal in all circumstances, thus condemning the practice of prostituting women *per se* regardless of the location.

Third, the principles of fundamental justice demand consideration of the objectives of the new law. Since the objectives acknowledge that exploitation is inherent in prostitution; that prostitution has a disproportionate impact on women and children and the government is committed to protecting the equality of all persons; and that the purchase of sexual services which creates the demand for prostitution, should be denounced, any negative effect on screening is negligible compared to the benefits of the law in targeting the source of the harm to women. This is important, since the Supreme Court in *Bedford* relied heavily on the limited purpose of the street prostitution law as combating social nuisance in its conclusion that s. 7 was violated. Thus a law targeting johns is not arbitrary, overbroad or grossly disproportionate. It decreases the amount of prostitution taking place, which increases women's security so long as adequate alternatives to prostitution are available.

In *Bedford*, s. 15 of the *Charter* was wholly excluded from the court's analysis. The claimants did not raise it and the government was not able to argue that equality formed part of the laws' objectives. This omission inevitably skewed the analysis. Section 15(1) equality rights must form part of the basis for the new laws and be present as a clear interpretive lens for s. 7, such that each right must be interpreted harmoniously with the other. Prostitution is a violation of women's right to equality and this must form part of the constitutional equation. The Equality model provides women with alternatives to prostitution, decreasing the likelihood that women will have to turn to prostitution in order to survive. Expanding women's economic security enhances women's equality.

The arguments that were used in *Bedford* to challenge the bawdy house laws have no application to a law criminalizing the purchase of sex. Those arguments focused on the limitations such laws placed on the ability of women to prostitute from indoor locations which they considered to be less dangerous forms of prostitution. While this ignores the extreme danger of prostitution in any location, and its inherent harms, the argument does not apply in any event to a law

criminalizing johns, since prostituted women will not be criminalized in any location, including indoors.

In a decriminalized regime, visibility of the venue is not a guarantee of dignity or safety since police have no legal basis on which to enter the location. Moreover, no one suggests that criminalizing the purchase of sex from youth, in any location, is unconstitutional because it pushes youth prostitution out of public view, any more than criminalizing other forms of child sexual abuse has this effect. When prostitution is understood as a practice of abuse and exploitation, regardless of the present age of the person being bought, the harms targeted through the law are clear.

Conclusion

In jurisdictions where the prohibitions on buying sex and pimping are starting to be taken seriously, and police are enforcing the laws, we are beginning to see a shift in attitudes. Police, lawmakers and the general public are beginning to make the links between the sex trade and colonialism, racism, sexism and other forms of inequality. They are rejecting false dichotomies between child and adult prostitution; sex work and trafficking; and free and forced prostitution. As has been the case in other countries, it will take time for this shift in attitudes to take root. In the meantime, a highly lucrative industry is trying to legitimize prostitution by hiding behind concerns for women's health and safety. Buyers remain invisible and insulated from scrutiny for their choices. Parliament should reject this pressure and instead focus on ways to make sure that women have real alternatives to prostitution and that men who buy sex and those who act as pimps are held accountable for the harms that they cause. The question is not whether to support "decriminalizing sex work" – those who sell sex are decriminalized. The question is whether to support men's entitlement to buy sex. In Canada, that answer should remain negative.