

**PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS,  
FEDERAL LAW, AND PROVINCIAL AND MUNICIPAL JURISDICTION**

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## **PROSTITUTION IN CANADA: INTERNATIONAL OBLIGATIONS, FEDERAL LAW, AND PROVINCIAL AND MUNICIPAL JURISDICTION**

### **INTRODUCTION**

International trafficking in women and children, sexually exploited children in Thailand, female prostitutes murdered in British Columbia – each of these issues has special significance to Canada and its prostitution laws. Canada’s laws attempt to prosecute organized crime and protect victims of trafficking and other forms of sexual violence, whether at home or by Canadians abroad.

As a federal country within the international community, Canada has numerous obligations and a multifaceted approach to dealing with prostitution. Not only must the federal government implement criminal laws at the federal level to fulfill its international obligations; each province and municipality also has its own means of dealing with prostitution within its jurisdiction. These obligations occasionally clash, with laws that stretch beyond their mandated scope or do not manage to stretch far enough; yet the ultimate result is an interwoven fabric of legislation that attempts to cover prostitution in all its forms at every level of Canadian society.

### **INTERNATIONAL LAW**

The international community has established numerous treaties in an attempt to resolve problems arising from prostitution. Attitudes towards the practice of prostitution have changed over the last half-century, as have legal methods of dealing with the issue and Canada’s response to its obligations.

#### **A. International Conventions**

In 1949, members of the international community signed the United Nations (UN) *Convention for the Suppression of Traffic in Persons and Exploitation of the Prostitution of Others*<sup>(1)</sup> (1949 Convention). This document begins with the statement: “Whereas prostitution

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(1) UN General Assembly Resolution 317(IV) 1949.

and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community...” Focussing its attention on the problem of prostitution and procurement, article 1 of the Convention states that signatories must criminalize all persons bringing another into prostitution, even if done with the prostitute’s consent. Article 16 states that all parties must agree to take measures for the prevention of prostitution, as well as for the rehabilitation and social adjustment of victims of prostitution, while article 6 strictly prohibits any kind of state regulation of prostitution.

In general terms, this Convention introduced broad recognition of the issue of prostitution as a human rights concern at the international level. It also represents a strong statement in favour of protecting women exploited by prostitution. However, while the Convention outlaws trafficking, it also strongly condemns all forms of prostitution as a violation of individual dignity and welfare, whether that prostitution is voluntary or not.<sup>(2)</sup> In 1949 and still today, this position cannot be reconciled with the law in Canada, where prostitution itself is legal and only offences associated with it are criminalized. The Canadian government was unable to condemn all forms of prostitution in such an absolute manner, and thus never signed the 1949 Convention.

The 1979 UN *Convention on the Elimination All Forms of Discrimination against Women*<sup>(3)</sup> (CEDAW) was the next step in the international legal crusade on the issue of prostitution. This Convention focussed on women’s equality rights, with article 6 stating that state parties must take all appropriate measures to suppress trafficking in women and the “exploitation of prostitution of women.” Thus, it was now the exploitation of prostitution that was condemned, rather than prostitution itself. CEDAW also established a committee to monitor state compliance with its provisions, and required signatories to submit a country report every four years outlining the measures adopted to eliminate discrimination against women within their borders. Canada ratified CEDAW in January 1982.

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(2) Government of Quebec, Conseil du statut de la femme, *La Prostitution: Profession ou exploitation? Une réflexion à poursuivre* (May 2002), p. 94;  
<http://www.csf.gouv.qc.ca/telechargement/publications/RechercheProstitutionProfessionOuExploitation.pdf>.

(3) UN General Assembly Resolution 34/180 1979.

In 1989, the UN *Convention on the Rights of the Child*<sup>(4)</sup> was established to protect the human dignity and status of children, emphasizing the fundamental rights and best interests of children under 18.<sup>(5)</sup> In particular, article 34 stated that signatories must protect all children from sexual abuse and exploitation by taking appropriate measures to prevent them from being forced into unlawful sexual activity, and from being exploited through prostitution. This Convention was not directly aimed at children involved in prostitution, but was rather an attempt to protect them from sexual abuse through inducement, coercion and exploitation. The *Convention on the Rights of the Child* also established a committee to monitor state compliance with its provisions, and required signatories to submit a country report every five years outlining the measures adopted to protect children's rights within their borders. Canada ratified the Convention in December 1991.

Focussing on women's rights, in 1995 the Fourth World Conference on Women resulted in the *Beijing Declaration and Platform for Action*.<sup>(6)</sup> Paragraph 113(b) of this document highlighted the fact that forced prostitution is a form of violence towards women, omitting the reference to voluntary prostitution that had characterized the 1949 Convention. The Declaration outlined its strategic objective of eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking.<sup>(7)</sup> Signatories were called upon to support UN efforts to prevent and eradicate child prostitution, and to enact and enforce legislation to protect girls from all forms of violence, including child prostitution.<sup>(8)</sup> The Declaration recognized the element of choice involved in adult prostitution, focussing its attention upon forced prostitution and child prostitution.<sup>(9)</sup> The goal was to protect women from violence and to eradicate child prostitution. Prostitution as a whole was not the object. Canada committed itself to the Beijing Platform in September 1995.

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(4) UN General Assembly Resolution 44/25 1989.

(5) *La Prostitution* (2002), p. 95.

(6) A/CONF.177/20 1995 and A/CONF.177/20/Add.1 1995.

(7) *Ibid.*, para. 130.

(8) *Ibid.*, paras. 230(m) and 283(d).

(9) *La Prostitution* (2002), p. 95.

In 1999, the international community returned to the issue of children's rights in the International Labour Organization's *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*.<sup>(10)</sup> Articles 1 and 3(b) called on state parties to take measures to eliminate the worst forms of child labour, including the use, procurement, and offering of children for prostitution. In essence, child prostitution, whether voluntary or not, was established as a fundamental violation of international law. The Convention does not target the child, but the individual who used, procured, or offered the child. Canada ratified this Convention in June 2000.

Finally, the international community put forward two additional documents to combat trafficking and forced prostitution in 2000. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the UN *Convention Against Transnational Organized Crime*,<sup>(11)</sup> included the exploitation of the prostitution of others in its definition of "trafficking in persons,"<sup>(12)</sup> and article 5 called upon state parties to criminalize such trafficking. In this way, trafficking in human beings, which is integrally linked to the exploitation of the prostitution of others, was forcefully condemned in international law. Canada ratified the Protocol in May 2002.

The *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*<sup>(13)</sup> is the only recent convention on prostitution and trafficking that the Canadian government has signed but not yet ratified. Article 1 of the Optional Protocol calls on all parties to prohibit child prostitution, defining the term as "the use of a child in sexual activities for remuneration or any other consideration." States are required to penalize, under criminal law, the offering, obtaining, or providing of a child for child prostitution.<sup>(14)</sup> Thus, this Protocol explicitly outlaws any form of child prostitution, while again targeting the people perpetrating the prostitution rather than the child. The Committee on the Rights of the Child also monitors state compliance with the Optional Protocol, requiring signatories to include information regarding their implementation of the Optional Protocol with

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(10) International Labour Organization, Convention 182 (1999).

(11) UN General Assembly Resolution 55/25 2000.

(12) *Ibid.*, art. 3.

(13) UN General Assembly Resolution 54/263 2000.

(14) *Ibid.*, art. 3.

their Convention country reports. Although Canada signed this Protocol in November 2001, the federal government has not yet ratified it, as the Protocol raises a number of issues that overlap with provincial and territorial responsibilities. A domestic consultation process examining jurisdictional implications is ongoing, at the conclusion of which the government expects to be able to ratify the Protocol.<sup>(15)</sup>

## **B. Obligations**

Among these important conventions, Canada refused to ratify the 1949 Convention because that document condemned all forms of prostitution, while prostitution itself was, and still is, legal in Canada. By ratifying the treaty, Canada would have been in breach of the Convention's stated goals and values.<sup>(16)</sup> However, international law and norms on prostitution have changed since that post-war document. Today, international conventions avoid condemning all forms of adult prostitution so as to focus attention instead on criminalizing the exploitation of women through trafficking and forced prostitution. All forms of child prostitution, however, continue to be condemned. States are urged to punish those who exploit women and children, and to treat prostitutes as victims of crime. These are the obligations to which Canada has committed itself (although it has yet to ratify the final *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*), and they are reflected in Canadian law.

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(15) Committee on the Elimination of Discrimination against Women, "Consideration of reports submitted by State parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: Canada Addendum," 30 December 2002, CEDAW/C/CAN/5/Add.1, para. 106; Department of Justice, "Protecting our Children," 24 April 2003, <http://canada.justice.gc.ca/en/dept/pub/dig/children.htm>.

(16) According to the *Vienna Convention on the Law of Treaties* (UN Doc A/Conf 39/28 1969), a presumption of good faith holds signatories to the treaties they ratify. This presumption means that states must intend the treaties they ratify to be effective. Their signature is not a mere formality, but entails real responsibilities to fulfill their new international obligations to the utmost of their capacity and even beyond. The failure of any state party to furnish adequate means of enforcement constitutes a violation of the treaty. State parties must conform to understood standards of treaty observance for both their positive and negative duties under that treaty, in a way that satisfies the "dynamic legal principle of the progressive implementation of human rights." See Rebecca Cook, "Violation of Women's Human Rights," *Harvard Human Rights Journal*, Vol. 7, Spring 1994, pp. 147, 150.



## FEDERAL LAW

### A. Jurisdiction

Parliament has primary jurisdiction over prostitution-related concerns in Canada through its criminal law power. Federal jurisdiction over the criminal law is derived from s. 91(27) of the *Constitution Act, 1867*:

#### *Powers of Parliament*

s. 91(27) The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

### B. Criminal Code<sup>(17)</sup>

Prostitution-related offences are primarily contained within the *Criminal Code*. Sections 210 to 213 of the Code outline offences related to keeping or using common bawdy-houses, transporting a person to a bawdy-house, procuring, and prostitution. Essentially, while consensual sex between two adults for consideration is not in itself punishable in law, other events surrounding the act of prostitution are prohibited. The interpretation and application of each of these provisions will be dealt with in turn.

#### 1. Bawdy-houses

Section 210 of the *Criminal Code* contains the bawdy-house offence:

s. 210(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

- (a) is an inmate of a common bawdy-house,
- (b) is found, without lawful excuse, in a common bawdy-house, or
- (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.<sup>(18)</sup>

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(17) R.S.C. 1985, c. C-46.

(18) S. 787 of the *Criminal Code* sets out the general penalty for summary conviction offences as not exceeding a \$2,000 fine or six months' imprisonment, or both.

Section 197(1) defines the relevant terms. “Common bawdy-house” means a place that is kept or occupied, or resorted to by one or more persons, for the purpose of prostitution or to practise acts of indecency. Courts have interpreted this to mean that any defined space is capable of being a bawdy-house, from a hotel, to a house, to a parking lot – provided that there is frequent or habitual use of it for the purposes of prostitution or for the practice of acts of indecency,<sup>(19)</sup> and the premises are controlled or managed by prostitutes or individuals with a right or interest in that space.<sup>(20)</sup> Further, a community standard of tolerance test is used to determine whether an act is indecent.<sup>(21)</sup> Within this framework, interpretation of indecency will depend on context, looking at factors such as consent, the composition of any audience and the level of privacy of the room, community reputation of the place, and any harm caused.<sup>(22)</sup> For example, if the room is private, or if there is no actual physical contact between a client and an entertainer, then an act is less likely to be labelled “indecent.”<sup>(23)</sup>

Courts have also held that to be found guilty of keeping a common bawdy-house, a person must have some degree of control over the care and management of the premises and must participate to some extent in the illicit activities involved there – although this does not necessarily mean participating in the sexual acts.<sup>(24)</sup> A prostitute may even be found guilty of keeping a common bawdy-house where he or she used his or her own residence alone for the purposes of prostitution.<sup>(25)</sup>

Alternatively, to be found guilty of being an “inmate” of a bawdy-house, a person must be a resident or a regular occupant of the premises. To be guilty of being “found in” a bawdy-house, a person must have no lawful excuse for his or her presence and must have been

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(19) *R. v. Patterson*, [1968] S.C.R. 157; *R. v. Sorko*, [1969] 4 C.C.C. 214 (BC CA); *R. v. Rockert*, [1978] 2 S.C.R. 704; *R. v. Ikeda* (1978), 42 C.C.C. (2d) 195 (Ont CA); *R. v. Lahaie* (1990), 55 C.C.C. (3d) 572 (Que CA); William A. Schabas, *Les infractions d'ordre sexuel*, Éditions Yvon Blais, Cowansville, 1995, p. 107; *La Prostitution* (2002), p. 119; *R. v. Labaye* (2004), 191 C.C.C. (3d) 66 (Que CA); *R. v. Kouri* (2004), 191 C.C.C. (3d) 42 (Que CA).

(20) *R. v. Pierce* (1982), 37 O.R. (2d) 721 (CA).

(21) *R. v. Tremblay*, [1993] 2 S.C.R. 932; *La Prostitution* (2002), p. 122.

(22) *R. v. Theirlynck* (1931), 56 C.C.C. 156 (SCC).

(23) *R. v. Tremblay*; *R. v. Mara*, [1997] 2 S.C.R. 630; *La Prostitution* (2002), pp. 121-124; although in *R. v. Pelletier*, [1999] 3 S.C.R. 863, the Supreme Court of Canada did allow sexual contact between an exotic dancer and her client, provided that this activity took place in a private room.

(24) S. 197(1); *R. v. Corbeil*, [1991] 1 S.C.R. 830.

(25) *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont CA).

explicitly found there by the police at the time of raid.<sup>(26)</sup> Finally, courts have said that to be guilty of knowingly permitting the premises to be used for the purposes of a common bawdy-house, a person must have actual control of the place and must have either acquiesced to or encouraged use for that purpose.<sup>(27)</sup>

## 2. Procurement

The offence of procurement is contained in s. 212, and carries the toughest penalty for prostitution-related offences under the *Criminal Code*, with potential imprisonment for up to 14 years for offences relating to minors.

Section 212(1) lists various methods of procurement, and states that a person committing such crimes is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years. However, ss. 212(2) and (2.1) expand this offence for situations dealing with minors. Under s. 212(2), a person who lives on the avails of prostitution of a minor is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years. Section 212(2.1) provides a further offence punishable with imprisonment for up to 14 years, but not less than 5 years, for a person who lives on the avails of prostitution of a minor and who, for the purposes of profit, aids, abets, counsels or compels the minor to engage in prostitution, and who uses, threatens to use or attempts to use violence, intimidation or coercion against the minor. Finally, s. 212(4) states that every person who obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a minor, is guilty of an indictable offence and liable to imprisonment for a term not exceeding 5 years.

Section 212(3) relates to the evidence necessary for a charge under s. 212. Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution.

Procurement essentially refers to an act of persuasion. This accordingly excludes situations where the person whose sexual services are being sold is already or subsequently becomes a prostitute of his or her own free will.<sup>(28)</sup> Procurement encompasses the following situations:

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(26) *R. v. Lemieux* (1991), 70 C.C.C. (3d) 434 (Que CA).

(27) *R. v. Wong* (1977), 33 C.C.C. (2d) 6 (Alta CA); *R. v. Corbeil*.

(28) *R. v. Cline* (1982), 65 C.C.C. (2d) 214 (Alta CA); *La Prostitution* (2002), p. 126.

- Employers who require or attempt to require an employee to have sexual intercourse with a client;<sup>(29)</sup>
- Enticing someone who is not a prostitute into becoming a prostitute or into a bawdy-house for the purposes of illicit sexual intercourse or prostitution;
- Procuring a person to enter or leave Canada for the purposes of prostitution;
- Controlling or influencing another person for gain in order to facilitate prostitution;<sup>(30)</sup>
- Intoxicating a person for the purpose of enabling anyone to have sexual intercourse with the intoxicated person; and
- Living on the avails of prostitution.

On this last point, there is a rebuttable presumption that a person who lives with a prostitute, is in the habitual company of a prostitute, or who lives in a common-bawdy house, lives on the avails of prostitution.<sup>(31)</sup> This offence connotes a form of parasitic living on a prostitute's earnings, where an accused must have directly received all or part of the prostitute's proceeds from prostitution.<sup>(32)</sup>

As noted above, the penalty for procurement offences is raised when the prostitute is under 18, creating an additional offence for situations where the procurer lives on the avails of a child prostitute and uses threats or violence to compel such prostitution.

Most importantly, s. 212(4) states that it is an offence to obtain or to communicate for the purpose of obtaining the sexual services of *any* person under 18 for consideration. Thus, solicitation of a prostitute who is a minor is always illegal.<sup>(33)</sup> It is no defence to say that the accused believed the complainant was 18 years old.

### 3. Offences in Relation to Prostitution

Offences related to the act of prostitution itself revolve around the issue of solicitation and the use of public space.

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(29) *R. v. Deutsch*, [1986] 2 S.C.R. 2.

(30) *R. v. Perrault* (1996), 113 C.C.C. (3d) 573 (Que CA).

(31) *R. v. Downey* (1992), 72 C.C.C. (3d) 1 (SCC); *La Prostitution* (2002), p. 125.

(32) *R. v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont CA); *R. v. Bramwell* (1993), 86 C.C.C. (3d) 418 (BC CA); *R. v. Celebrity Enterprises Ltd.* (1998), 41 C.C.C. (2d) 540 (BC CA).

(33) *La Prostitution* (2002), p. 126.

s. 213(1) Every person who in a public place or in any place open to public view

(a) stops or attempts to stop any motor vehicle,

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, “public place” includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

The actual act of exchanging sexual gratification for consideration is not in itself illegal. However, it is illegal to engage in prostitution or to obtain the sexual services of a prostitute in a public place. This restriction encompasses stopping or attempting to stop a motor vehicle, and communicating or attempting to communicate in any manner for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.

Section 197(1) defines “public place” as any place to which the public has access as of right or by invitation, express or implied. This includes any place that is open to public view, including a car, even one in motion, that is on a public street.<sup>(34)</sup> However, a plainclothes police officer’s car is not considered a public place.<sup>(35)</sup>

The Supreme Court of Canada has upheld the constitutional validity of s. 213(1)(c). The Court held that although s. 213(1)(c) does violate freedom of expression as guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this is a reasonable limit under s. 1, given Parliament’s objective of eliminating street solicitation and the social nuisance it creates.<sup>(36)</sup> As well, the Court has found that the provision violates neither the Charter’s s. 7 guarantee of life, liberty and security of the person, nor the s. 2(d) freedom of association.<sup>(37)</sup>

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(34) *R. v. Smith* (1989), 49 C.C.C. (3d) 127 (BC CA).

(35) *Hutt v. R.* (1978), 38 C.C.C. (2d) 418 (SCC).

(36) *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123; *R. v. Stagnitta* (1990), 56 C.C.C. (3d) 17 (SCC).

(37) *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*; *R. v. Skinner*, [1990] 1 S.C.R. 1235; *R. v. Stagnitta*.

#### 4. Prostitution Abroad

Section 7(4.1) of the *Criminal Code* extends the territorial reach of Canadian criminal law for 11 sexual and sex-related offences against minors in order to catch sex tourism by Canadians within its scope:

s. 7(4.1) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that if committed in Canada would be an offence against section 151, 152, 153, 155 or 159, subsection 160(2) or (3), section 163.1, 170, 171 or 173 or subsection 212(4) shall be deemed to commit that act or omission in Canada if the person who commits the act or omission is a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Given that these offences deal with sex offences against minors, consideration for sexual services is not an issue under s. 7(4.1); rather, the offence must simply be committed outside Canada by a Canadian citizen or permanent resident, and the act or omission must be an offence under the specified sections if committed in Canada. The consent of the Attorney General of Canada is required for prosecution under this section.

#### C. *Immigration and Refugee Protection Act*<sup>(38)</sup>

The *Immigration and Refugee Protection Act* (IRPA) has been adapted to deal with issues of human smuggling and trafficking in response to international concerns. Sections 117 to 121 of the Act provide significant penalties for those caught trafficking persons for the purposes of sexual exploitation.

Section 117(1) prohibits anyone from organizing, inducing, aiding or abetting someone coming into Canada without a visa or passport. Section 118(1) equally prohibits bringing anyone into Canada by means of abduction, fraud, deception, or use or threat of force or coercion. Under s. 119, it is illegal to disembark a person or group of persons at sea for the purpose of inducing, aiding or abetting them to come into Canada in contravention of the IRPA. In determining what penalty should be imposed for these offences, s. 121(1)(d) states that the court shall take into account whether a person was subjected to humiliating or degrading treatment, for example, with respect to work or health conditions or sexual exploitation.

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(38) S.C. 2001, c. 27.

#### **D. Measuring up to International Obligations**

In response to its international commitments, the federal government appears to be living up to its obligations through the *Criminal Code* and the IRPA. While prostitution as a profession is not criminal, anything that makes the act of prostitution harmful to either the prostitute or the public is penalized. This attitude reflects the global movement towards protecting “victim” rights in international law – recognizing that prostitutes may be victims and ensuring that their rights as such are protected, rather than criminalizing prostitutes for their role in the profession. The *Criminal Code* accordingly focuses its major penalties on procurement, and targets prostitution only when it relates to minors or presents a harm to the public.

Certainly s. 212(4) makes it eminently clear that Canadian law has shifted towards treating child prostitutes as victims. Soliciting a minor, whether in an exploitative manner or not, is severely penalized under the *Criminal Code*. Procedural safeguards for juvenile witnesses appearing in prostitution-related proceedings have also been implemented. Minors can sometimes testify from outside the courtroom, from behind a screen, or on video; publication bans can also be issued in prostitution-related cases to protect the identity of complainants or witnesses under 18. As a signatory of the *Convention on the Rights of the Child*, Canada has an obligation to adopt national and international measures to protect children from sexual exploitation, but it is not *required* to criminalize the conduct of Canadians purchasing the sexual services of juveniles who reside outside the country.<sup>(39)</sup> Nonetheless, s. 7(4.1) of the *Criminal Code* responds to this issue. Section 7(4.1), along with other *Criminal Code* measures aimed at protecting children in prostitution, has received approval from the Committee on the Rights of the Child.<sup>(40)</sup>

Finally, the IRPA specifically targets organized crime and trafficking for sexual exploitation of women, in response to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*. The Committee overseeing international obligations under CEDAW has expressed its appreciation of these new criminalization measures.<sup>(41)</sup>

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(39) James Robertson, *Prostitution*, Current Issue Review 82-2E, Parliamentary Research Branch, Library of Parliament, Ottawa, 19 September 2003, p. 22.

(40) Committee on the Rights of the Child, “Concluding Observations: Canada,” 27 October 2003, CRC/C/15/Add.215, para. 52.

(41) Report of the Committee on the Elimination of Discrimination against Women, 28<sup>th</sup> and 29<sup>th</sup> Sessions 2003, A/58/38, para. 363.

## PROVINCIAL LAW

### A. Jurisdiction

Unlike Parliament, which has jurisdiction over criminal law matters through s. 91(27) of the *Constitution Act, 1867*, the provinces have no direct jurisdiction in relation to the criminal law on prostitution within each province. However, some of the provincial powers laid out in s. 92 of the *Constitution Act* provide scope for dealing with prostitution without any need to encroach on the federal criminal jurisdiction.

#### *Exclusive Powers of Provincial Legislatures*

s. 92(13) Property and Civil Rights in the Province

(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

(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.

(16) Generally all Matters of a merely local or private nature in the Province.

Although the provinces have no jurisdiction over the law on criminal matters, they do control the enforcement of that law. Courts also sometimes recognize a valid overlap between federal and provincial criminal jurisdiction, validating provincial legislation that deals with criminal issues in particular situations.<sup>(42)</sup> Essentially, legislation that merely regulates

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(42) In two seminal cases, the Supreme Court of Canada has upheld this overlap. In *Re Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, the Supreme Court of Canada allowed provincial censorship of films and theatres, holding that morality is based on local standards. In addition, theatres are local businesses that fall under the provincial property and civil rights jurisdiction; and ultimately, the censorship measures were preventative rather than penal, and were thus not in direct conflict with the federal criminal law. In *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, the Supreme Court of Canada again upheld provincial Liquor Licensing Board licences that included restrictions on nude entertainment. The court upheld the provincial power because it was essentially a control on a liquor marketing scheme, and thus local in nature. Again, the court allowed the overlap because this case dealt with the regulation of morality, rather than a prohibition.



morality and criminal conduct may be left in provincial hands, but legislation that creates an actual prohibition that is akin to criminal law must fall under federal jurisdiction. The harsher the penalty becomes, the more such provincial legislation would trespass on federal jurisdiction.<sup>(43)</sup>

Provinces have attempted to tackle the prostitution question from a number of angles in recent years, most often through legislation on highways and traffic, proceeds of crime, community safety, and child protection. In the mid-1980s, however, before many such measures were implemented, some provinces also tried using injunctions to deal with prostitution.

## **B. Injunctions**

Injunctions against public nuisances are one way for a province to try tackling prostitution without conflicting with criminal law. The Attorney General, as the guardian of public interest, may bring an injunction against a public nuisance in order to restrict prostitutes importuning pedestrians within a specified area.<sup>(44)</sup>

In *British Columbia (Attorney General) v. Couillard*,<sup>(45)</sup> the British Columbia Attorney General applied for an injunction to restrain prostitution-related activity in the West End of Vancouver as a common law public nuisance. The B.C. Supreme Court granted an interim injunction that forbade prostitutes from publicly offering or appearing to offer themselves, directly or indirectly, for the purposes of prostitution in the West End. The injunction also restrained other activities in relation to trespass and disturbance of the peace by prostitutes. However, this injunction was ultimately rescinded by request of the Attorney General, and a permanent injunction never granted, because of an amendment to the *Criminal Code* prostitution law enacted in 1985.<sup>(46)</sup>

In *Nova Scotia v. Beaver et al.*,<sup>(47)</sup> the Nova Scotia Attorney General applied for an injunction to restrain the public nuisance occasioned by prostitutes in downtown Halifax. In this case, the Nova Scotia Court of Appeal refused the application on the basis that the province was trying to use civil procedure to control a criminal matter, which came under federal jurisdiction.

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(43) *Rio Hotel; R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

(44) Jeffrey Berryman, *The Law of Equitable Remedies*, Irwin Law, Toronto, 2000, Ch. 9, Section B.

(45) (1984), 11 D.L.R. (4<sup>th</sup>) 567 (BC SC).

(46) Robertson (2003), p. 7.

(47) (1985), 67 N.S.R. (2d) 281 (NS CA).

Such injunctions may not be a good long-term solution for provinces, particularly given the mixed response from the courts and difficulties of enforcement.<sup>(48)</sup> What will most likely happen in such situations is that the prostitutes will simply move into another neighbourhood. After *Couillard*, the targeted prostitutes moved from the commercial district into a residential and school district.

From a legal perspective, the Nova Scotia Court of Appeal in *Beaver* stated that it is up to the trial judge's discretion whether an injunction of this kind should be granted. The court must consider whether the injunction "is really necessary in light of other procedures available to accomplish the same end. [The judge] should consider, as well, the damages of eliminating criminal conduct without the usual safeguards of criminal procedure available to an accused... Only in very exceptional cases where by reason of lack of time or otherwise no other suitable remedy is available should such an injunction be granted to prevent the commission of a crime."<sup>(49)</sup> Certainly using equity as a supplement to criminal law is somewhat problematic, although it may be easier to grant similar injunctions in cases like *Couillard*, where the issue is interpreted in the property law context as a form of zoning to protect property interests, rather than as an attempt to overlap with federal jurisdiction over criminal matters.<sup>(50)</sup>

## C. Provincial Legislation

### 1. Highway and Traffic

Using the powers set out in s. 92(13) of the *Constitution Act, 1867*, several provinces have amended their highway and traffic legislation to allow police to seize, impound and sell vehicles used in picking up prostitutes on the street. In Manitoba and Saskatchewan, the *Highway Traffic Act*<sup>(51)</sup> allows police to seize and impound vehicles used in prostitution-related offences.<sup>(52)</sup> Vehicles will be returned if the accused is either acquitted of the prostitution-related offence or attends a "john school" to learn about the ramifications of prostitution and its effect on

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(48) Federal-Provincial-Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, December 1998.

(49) *Beaver*, p. 293.

(50) Berryman (2000), Ch. 9, Section B.

(51) C.C.S.M., c. H-60; R.S.S. 1986, c. H-3.1.

(52) Manitoba *Highway Traffic Act*, s. 242.2(3); Saskatchewan *Highway Traffic Act*, s. 90.11(1).

its victims.<sup>(53)</sup> However, only first-time offenders are offered the alternative option of attending john school, and in Saskatchewan those charged with offences under ss. 212(2.1) or 212(4) of the *Criminal Code*, repeat offenders, and offenders with serious criminal records are also precluded from the alternative.<sup>(54)</sup> As well, if an accused does not complete or fully comply with the john school conditions, then his or her driver's licence will be suspended.<sup>(55)</sup> Finally, if the accused is convicted of the prostitution-related offence, he or she will forfeit the vehicle or deposit to the police.<sup>(56)</sup> In addition to impounding vehicles, s. 94.1 of Saskatchewan's *Highway Traffic Act* also penalizes those who repeatedly drive or park their car in areas frequented by prostitutes.

Both Alberta and Nova Scotia have recently put forward similar vehicle seizure legislation. In Alberta, the proposed new law passed third reading in November 2003 but will not receive royal assent until the Justice Minister decides whether the bill is enforceable.<sup>(57)</sup> In Nova Scotia, the bill has not proceeded past its first reading in March 2001.

While the power to impound vehicles for prostitution-related offences has not been contested as a violation of the federal jurisdiction over criminal law, proportionality concerns have been raised, arguing that such drastic measures should be saved for serious driving offences involving a real danger to the public or where the offence involves clear lack of fitness to drive.<sup>(58)</sup> There is also concern that impounding a car, only to be returned if the accused is acquitted, effectively nullifies the presumption of innocence inherent in Canada's criminal justice system.<sup>(59)</sup> However, alternative arguments point out that vehicle seizure could prove an effective remedy for getting prostitutes off the streets, provided that the threat of such punishment is backed up with increased police enforcement.<sup>(60)</sup>

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(53) Manitoba *Highway Traffic Act*, s. 242.2(8); Saskatchewan *Highway Traffic Act*, ss. 90.6(1) and 90.7.

(54) Saskatchewan *Highway Traffic Act*, s. 90.6(2).

(55) Manitoba *Highway Traffic Act*, ss. 273.3(1), (2), and (5) – the licence will be suspended until the accused is acquitted or convicted of the charge. Saskatchewan *Highway Traffic Act*, s. 90.6(3) – the licence will be suspended for one year.

(56) Manitoba *Highway Traffic Act*, ss. 242.2(26) and 242.2(28); Saskatchewan *Highway Traffic Act*, ss. 90.71 and 90.9.

(57) "Abuse of Power," *The Calgary Sun*, 26 November 2003, p. 14.

(58) Federal-Provincial-Territorial Working Group on Prostitution (1998).

(59) "Cruising for a Better Law," *Calgary Herald*, 26 November 2003, p. A12.

(60) Federal-Provincial-Territorial Working Group on Prostitution (1998).

On the issue of overlapping jurisdictions: although a province cannot enact street traffic legislation with the sole purpose of controlling prostitution,<sup>(61)</sup> this does not appear to be the case with the vehicle impoundment legislation. The clash of jurisdictions argument does not seem to have been seriously raised in this context.

## 2. Community Safety

Manitoba has adopted another approach to dealing with prostitution provincially, with its *Safer Communities and Neighbourhoods Act*.<sup>(62)</sup> This law allows for the closure of buildings and properties due to safety and prostitution-related concerns. In Manitoba, a person may make a complaint to the Director of Public Safety, stating his or her belief that a property is being habitually used for activities related to prostitution.<sup>(63)</sup> After investigation, the Director can attempt to resolve the matter through informal action (such as a letter) or may ask the court to make a community safety order.<sup>(64)</sup> In the latter case, if the court is satisfied that circumstances give rise to a reasonable inference that the property is being used for prostitution-related activities and that the community is adversely affected by those activities, it may make an order prohibiting anyone from causing or permitting those prostitution-related activities, and requiring the person in charge of the property to do everything reasonably possible to prevent those activities.<sup>(65)</sup> In addition, the court can make an order to vacate the property, to terminate a lease agreement, or to temporarily close the property. Thus the province, through the court, effectively has the power to close down properties relating to prostitution that cause a harm to local communities. As of early 2004, no claims had arisen to challenge this legislation, which does not impose criminal penalties on those involved in prostitution-related activities and thus does not appear to conflict with federal legislation.

## 3. Proceeds of Crime

Another potential provincial legislative challenge to prostitution-related activities has been implemented in Ontario with the *Remedies for Organized Crime and Other Unlawful Activities Act*.<sup>(66)</sup> This legislation provides a civil remedy for law enforcement bodies by

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(61) *R. v. Westendorp*, [1983] 1 S.C.R. 43.

(62) C.C.S.M. 2001, c. S-5.

(63) *Ibid.*, s. 2(1).

(64) *Ibid.*, ss. 3(1), 4.

(65) *Ibid.*, s. 6.

(66) S.O. 2001, c. 28.

allowing police to freeze, seize, or forfeit to the Crown any property deemed to be the proceeds of crimes, such as prostitution and drug trafficking, without laying criminal charges.<sup>(67)</sup> Similar legislation was introduced in the Manitoba legislature in November 2003.

Used effectively, such civil remedies may provide a successful deterrent to organized crime, a primary force responsible for putting and keeping prostitutes on the streets. However, one of the most significant elements driving organized crime is the fact that the risk – the penalties facing those caught and prosecuted – seldom outweighs the enormous profits to be made. In this context, it is unclear what the impact of the proceeds of crime legislation will be.

#### **4. Child Protection**

Perhaps the single most controversial method of regulating street prostitution used by provinces has been through child protection legislation. A number of tactics have been employed across Canada, from simply including prostitution among the criteria for classifying a child as in need of protection, to “secure care” legislation that authorizes the involuntary detention of minors engaged in prostitution.

Child welfare legislation is the most basic and the least controversial example of provinces taking jurisdiction over the child prostitution problem in this manner. Protection legislation in many provinces clearly states that welfare authorities have the power to remove children at risk of prostitution and place them into the child welfare system. British Columbia, Alberta, Saskatchewan, and Prince Edward Island<sup>(68)</sup> explicitly refer to prostitution, allowing a child to be found in need of protection if the child has been or is likely to be sexually abused or exploited. Such will be the case where a child has been or is likely to be encouraged or coerced into engaging in prostitution,<sup>(69)</sup> is exposed to prostitution-related activities,<sup>(70)</sup> or is harmed as a result of prostitution-related activities and the parent has not protected the child.<sup>(71)</sup> Once such a finding is made, then the child will enter the child welfare system, with the possibility of apprehension and placement in a foster home.

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(67) *Ibid.*, s. 3.

(68) British Columbia *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46; Alberta *Child Welfare Act*, R.S.A. 2000, c. C-12; Saskatchewan *Child and Family Services Act*, R.S.S. 1990, c. C-7.2; Prince Edward Island *Child Protection Act*, R.S.P.E.I., Cap. C-5.1.

(69) British Columbia *Child, Family and Community Service Act*, s. 13.

(70) Alberta *Child Welfare Act*, s. 1(2)(d), (3)(c); Saskatchewan *Child and Family Services Act*, s. 11(a)(iii).

(71) Prince Edward Island *Child Protection Act*, s. 3(d).

In addition to these basic provisions, courts in British Columbia and Alberta have the power to issue a restraining order if there are reasonable grounds to believe that a person has encouraged or coerced, or is likely to encourage or coerce, a youth involved in the child welfare system to engage in prostitution.<sup>(72)</sup> The legislation also adds a term of imprisonment or fine for any person who abuses children through prostitution.<sup>(73)</sup>

Supplementing its child welfare legislation, Saskatchewan has also implemented the *Emergency Protection for Victims of Child Sexual Abuse and Exploitation Act*.<sup>(74)</sup> Under this law, police or social workers who have reasonable grounds to believe that a child has been or is likely to be sexually abused (including involvement in prostitution-related activities) may apply to a Justice of the Peace for an Emergency Intervention Order to keep the alleged offender from contacting or attempting to contact the child victim.<sup>(75)</sup> The law creates an offence for failure to report sexual abuse or for breach of an Emergency Intervention Order.<sup>(76)</sup> It also expands police powers to search vehicles and seize evidence of child abuse if an officer has reasonable grounds to believe that there is evidence in the vehicle of child sexual abuse, or if a vehicle is found in an area where there could reasonably be expected to be a high incidence of child sexual abuse.<sup>(77)</sup>

Few claims have arisen to challenge such child welfare provisions and the consequential provincial power to interfere with child prostitution. The provinces have clear jurisdiction over child protection issues and, as a result, some degree of control over the regulation of child prostitution.

## 5. Secure Care

Some provinces, however, have moved beyond relatively standard child welfare legislation and begun to take an even tougher stance on child prostitution. In June 1999, provincial and territorial premiers met in Quebec City to affirm their commitment to providing

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(72) British Columbia *Child, Family and Community Service Act*, s. 98; Alberta *Child Welfare Act*, s. 30.

(73) British Columbia *Child, Family and Community Service Act*, s. 102(1); Alberta *Child Welfare Act*, s. 130; Saskatchewan *Child and Family Services Act*, s. 81; Prince Edward Island *Child Protection Act*, s. 59.

(74) S.S. 2002, c. E-8.2.

(75) *Ibid.*, ss. 3, 5, 7, 10.

(76) *Ibid.*, s. 24.

(77) *Ibid.*, s. 16.

for the safety of children and to recognizing child prostitutes as victims of child abuse. At this meeting, leaders agreed to begin a review of their child welfare legislation with a view to harmonizing provincial laws with respect to apprehension and protection of children engaged in prostitution. Since then, a number of provinces have enacted or are in the process of enacting new secure care legislation, essentially allowing for the involuntary detention of child prostitutes.<sup>(78)</sup> This trend has not gone unnoticed, and has led to constitutional challenges, as well as criticism from media and legal experts across the country.

Thus far, Alberta is the only province to have fully implemented secure care legislation. The *Protection of Children Involved in Prostitution Act*<sup>(79)</sup> (PCIPA) allows a police officer, or the Director of Protection of Children Involved in Prostitution, who has reasonable grounds to believe that a child is in need of protection to apply to the court for an order authorizing the police or the Director to apprehend the child and either return him or her to a parent, or detain the child in a safe house for up to 5 days for assessment and counselling. However, if the police or Director believes that the child's life or safety is in serious and imminent danger because the child is engaging in or attempting to engage in prostitution, then the police or Director may detain the child without an order from the court.<sup>(80)</sup> After the initial 5 days of detention, the Director can apply for a maximum of two additional confinement periods of up to 21 days each if the Director believes that the child would benefit from further assessment and counselling.<sup>(81)</sup> In order to safeguard the child's rights, however, the Director must appear before the court within 3 days of the initial apprehension to show why confinement is necessary, and the child must be informed of the time and place of the hearing, the reasons for the hearing, and his or her right to contact a lawyer and to attend the hearing. It is important to note that a child may also obtain these services voluntarily if the Director agrees that the child is in need of protection.<sup>(82)</sup>

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(78) Robertson (2003), p. 20.

(79) R.S.A. 2000, c. P-28.

(80) *Ibid.*, s. 2.

(81) *Ibid.*, s. 3(2).

(82) *Ibid.*, s. 7.1.

Finally, the PCIPA enhances provincial powers to penalize those encouraging child prostitution. The Director may apply for a restraining order if he or she has reasonable grounds to believe that a person has encouraged or is likely to encourage a child involved with the program to engage in prostitution.<sup>(83)</sup> Section 9 of the PCIPA also adds a further penalty for pimps and clients who deal with child prostitutes, by stating that any person who wilfully causes a child to be in need of protection is guilty of an offence and liable to a fine of not more than \$25,000, or to imprisonment for a period of not more than 24 months, or both.

The British Columbia *Secure Care Act*,<sup>(84)</sup> which received royal assent in July 2000 but has not yet been proclaimed into force, is similar in scope. This legislation provides for the involuntary detention of child prostitutes for the purposes of counselling and assessment. The Secure Care Board would examine cases brought by parents, guardians, and the Director of Secure Care, and issue secure care certificates authorizing detention of children for up to 30 days, with two possible renewals. In emergencies, minors might also be detained for up to 72 hours in a secure care facility without Board approval. Safeguards in this legislation would ensure that involuntary detention is used only when other measures prove inadequate to address the child's needs and to ensure his or her safety. Children subject to a hearing would be notified of their rights, and any matter decided by the Secure Care Board in the child's absence could be reconsidered with the child's input.

In Ontario, the 2002 *Rescuing Children from Sexual Exploitation Act*<sup>(85)</sup> has not yet been proclaimed into force. This legislation would allow police, with or without a warrant, to detain in a safe house any child they believe to be engaging or attempting to engage in prostitution-related activities, for counselling and assessment. The case would come before a judge within the first 24 hours of detention, and the court could order the child held for 5 days. At the end of those 5 days, the court could order that the child be held for up to 30 days from the time of initial confinement, or be sent back to his or her parents. In addition to this judicial review of the initial detention, safeguards in the Ontario legislation would ensure that children subject to a hearing are notified of their rights.

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(83) *Ibid.*, s. 6.

(84) S.B.C. 2000, c. 28.

(85) S.O. 2002, c. 5.



Nova Scotia introduced similar legislation in June 1999 that did not proceed past first reading.

By the end of 2003 in Alberta, the one province where secure care legislation has been fully implemented, more than 700 children had been apprehended since the law came into force in 2000.<sup>(86)</sup> Since then, numerous concerns have been raised, challenging the legislation as a violation of children's human rights as protected by the Charter. The most prominent among these was played out in *Alberta v. K.B.*,<sup>(87)</sup> a decision by the Alberta Court of Queen's Bench in December 2000. This case involved two girls detained without an order under s. 2(9) of the PCIPA, and led to a challenge to the legislation as a violation of sections 7 (right to life, liberty, and security of the person) and 9 (protection from arbitrary detention) of the Charter.

The Court of Queen's Bench upheld the legislation. Rooke J held that s. 7 was not violated: although the girls were deprived of their liberty when they were confined to the safe house, this violation was in accordance with the principles of fundamental justice in the child welfare context. When dealing with child welfare issues, the Court said, the Charter allows for some degree of restraint upon the liberty rights of both a parent and child. Not only does the s. 2(9) provision ensure that there is good reason for detention without a warrant, the 72-hour timeframe<sup>(88)</sup> allowed for detention also does not violate any constitutional norms. Rooke J stated that children such as these need help, which the PCIPA provides without exceeding s. 7 constitutional norms. For essentially the same reasons, the court found no violation of s. 9, holding that s. 2(9) ensures that officers have reasonable and probable grounds for their actions, and the 72-hour timeframe was neither arbitrary nor irrational, and in fact provided needed help to children on the streets.

Rooke J also found that s. 1 of the Charter was satisfied. The PCIPA was based on the pressing and substantial objective of stemming harm to a vulnerable group. Further, apprehension, confinement and assessment are rationally connected to protecting children from sexual abuse, and the 72-hour timeframe for counselling and assessment made sense within this context. Limiting the timeframe to 72 hours is not a major impairment of rights when balanced against the clear need for protection. In the end, the legislation passed the Charter test of proportionality, as the objective of protecting children from sexual abuse by far outweighs the 72-hour limit, which is subject to judicial scrutiny.

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(86) Mario Toneguzzi, "Anti-Child Prostitute Regulation 'Saved Me': Teens, Police, Officials Praise Protection Act," *Calgary Herald*, 22 December 2003, p. B1.

(87) [2001] 5 W.W.R. 508 (Alta QB).

(88) The PCIPA has since been amended to allow 5 days' detention in lieu of the original 72 hours.

Although the Court ultimately upheld the constitutionality of the PCIPA, the Alberta government had already reacted to a lower court ruling in the same case, which had held that the PCIPA was unconstitutional. To deal with this challenge, the government amended the Act to include the safeguards for children's legal rights mentioned above. (The Director must appear before the court within 3 days of the initial apprehension, and the child must be informed of the time and place of the hearing, the reasons for the hearing, and his or her right to contact a lawyer and to attend the hearing.) The amendment also included measures to provide children with additional care and support. Chief among these was the provision increasing the time that a child may be detained from 72 hours to 5 days.

Although this amendment provides further support for detained children, extending the initial time of detention from 3 to 5 days also potentially strengthens the challenge to the legislation under sections 7 and 9 of the Charter. It is unclear how courts will deal with challenges to this extended timeframe. A further concern raised is that the detention of child prostitutes against their will does not necessarily address the real problem of their involvement in prostitution. If the provinces want to help children, then providing practical support such as housing and social assistance may be a more effective remedy, while involuntary detention could further alienate such children from society, driving them deeper into the world of organized crime and prostitution.<sup>(89)</sup>

## **MUNICIPAL BY-LAWS AND PRACTICE**

### **A. Powers**

Also operating within this provincial framework, municipalities have independent power to control prostitution through municipal by-laws and other local measures. Because municipalities receive their authority from the provincial legislature, the same restrictions that apply to provincial powers to regulate prostitution in terms of overlap with federal criminal jurisdiction also apply at the local level. Accordingly, municipalities cannot create outright prohibitions of prostitution that would be akin to criminal legislation.

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(89) Federal-Provincial-Territorial Working Group on Prostitution (1998); Steven Bittle, "When Protection is Punishment: Neo-liberalism and Secure Care Approaches to Youth Prostitution," *Canadian Journal of Criminology*, Vol. 44, No. 3, 2002, p. 319.

Local police are in fact more likely to use municipal by-laws to regulate prostitution than to lay charges under the *Criminal Code*, given that it is easier to issue tickets for an infraction of a by-law than to collect evidence for a criminal charge. By-laws can also be more easily moulded to fit local context.<sup>(90)</sup>

## **B. By-Laws**

### **1. Regulating Use of Streets**

In the early 1980s, a number of Canadian cities passed by-laws regulating use of the streets, in a move that worked to effectively forbid street solicitation. Montréal and Calgary were prime examples of this trend, in 1980 and 1981 enacting by-laws that essentially forbade the use of streets and other public areas to those engaging in prostitution, under penalty of substantial fines.<sup>(91)</sup> These by-laws were passed under the municipalities' power to regulate the use of streets and to restrict activity that encourages criminality.

In reaction to these new laws, two court challenges reached the Supreme Court of Canada. In *R. v. Westendorp*, Westendorp was charged under the *Criminal Code* with communicating for the purposes of prostitution, and under Calgary's by-law with being on the street. This by-law had been enacted with the purpose of preventing violence and gatherings on the street. The Supreme Court struck down the by-law as a municipal attempt to enact criminal sanctions – thus an infringement of federal jurisdiction. Similar reasoning followed in *Goldwax et al v. Montréal (City)*,<sup>(92)</sup> when the Supreme Court struck down the Montréal by-law. The impact of these two rulings effectively nullified similar by-laws enacted or proposed in Vancouver, Niagara Falls, Regina, and Halifax.<sup>(93)</sup>

However, although these two seminal cases have established the general principle which ensures that municipalities do not intrude on federal jurisdiction through by-laws on street use that effectively prohibit street prostitution, a number of municipalities have continued to enact similar by-laws that directly and indirectly affect street solicitation. In 1983, Montréal

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(90) Eleanor Maticka-Tyndale and Jacqueline Lewis, "Escort Services in a Border Town: Transmission Dynamics of Sexually Transmitted Infections Within and Between Communities – Literature and Policy Summary," report prepared for Health Canada, 1999, p. 27.

(91) "The Rape Relief Files: Prostitution – Legal History," 1986, available at: [http://www.rapereliefshelter.bc.ca/herstory/rr\\_files86.html](http://www.rapereliefshelter.bc.ca/herstory/rr_files86.html).

(92) [1984] 2 S.C.R. 525.

(93) Federal-Provincial-Territorial Working Group on Prostitution (1998), p. 63; "Rape Relief Files" (1986).

enacted a by-law to forbid selling services on city streets without a permit. As the city did not issue permits for soliciting, prostitution was essentially forbidden. This by-law has been upheld by the Quebec Superior Court. In 2000, Winnipeg enacted a by-law outlawing “obstructive solicitation,” thus prohibiting anyone from impeding pedestrian traffic in the course of solicitation, from harassing a pedestrian in the course of solicitation, or from soliciting in groups of three or more people. In 2002, Surrey, B.C., enacted a by-law giving police officers the power to issue tickets to anyone engaging in prostitution, whether client or prostitute, within 300 metres of a school or 20 metres of a residence. This by-law also makes it illegal for clients in motor vehicles or prostitutes to solicit on public roads.<sup>(94)</sup> Finally, police in most municipalities commonly use anti-jaywalking and loitering laws to hand out tickets in areas frequented by prostitutes.<sup>(95)</sup>

## 2. Regulating Prostitution-related Services

In 1993, the Supreme Court of Canada handed down a seminal ruling interpreting the community standard of tolerance test used to determine “indecent acts.” *R. v. Tremblay* allowed private dances in adult entertainment parlours, provided that there was no physical contact between the patron and dancer. In reaction, in August 1995, the City of Toronto passed a municipal by-law prohibiting physical contact between patrons and dancers; establishments risked a fine of \$50,000 and licence revocation for violation. The Ontario Court of Appeal upheld the by-law in *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)*,<sup>(96)</sup> stating that it was enacted for valid provincial objectives relating to business regulation, including health, safety, and crime prevention. Accordingly, the by-law did not conflict with the *Criminal Code* or with federal jurisdiction over criminal matters. Further, the court held that the by-law did not violate dancers’ freedom of expression under s. 2(b) of the Charter because close-contact dancing does not amount to a constitutionally protected right. The ultimate result of this case was to leave municipalities with the power to regulate aspects of prostitution-related activities, such as placing limits on exotic dances, despite the federal prerogative over criminal law.

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(94) Mario Toneguzzi, “Anti-Hooker Petition gets more Backing: Zoning Changes Studied,” *Calgary Herald*, 14 December 2003, p. E1.

(95) Maticka-Tyndale and Lewis (1999), p. 28.

(96) (1997), 35 O.R. (3d) 161 (CA).

### 3. Licensing Prostitution-related Services

In addition to regulating the limits of prostitution-related activities, municipalities also exercise broad power over the licensing of such activities. Cities such as Calgary, Edmonton, Kitchener, Red Deer, Toronto, Victoria, Vancouver, Windsor, and Winnipeg have enacted by-laws that require dating and escort services, exotic entertainers, massage parlours, and others to obtain business licences like other business establishments. While nominally such services are not prostitution-related, it is widely believed that these establishments are often a front for or segue into prostitution itself. In order to obtain a licence, such establishments must comply with various conditions, including requirements pertaining to location, hours of operation, advertising, certification, minimum age, and police screening of escorts.<sup>(97)</sup> Licensing by-laws are generally held to be within municipal jurisdiction, because business licences are of general application and are not specifically targeted as a prohibition of prostitution or as a regulation of public morality.<sup>(98)</sup>

Nonetheless, a number of challenges have questioned the validity of certain by-laws in their application to prostitution-related activities. In 1988, the B.C. Supreme Court struck down a portion of the Vancouver licensing by-law, finding that the requirement for an escort service to provide records of all escort requests, with names and fee included, stretched beyond the city's power to regulate licensed businesses.<sup>(99)</sup> In 1999, the Ontario Superior Court struck down a portion of a Niagara Falls licensing by-law, finding that the lottery scheme used to award body-rub licences unduly limited competition, essentially creating an illegal monopoly.<sup>(100)</sup> In 2000, the Ontario Court of Appeal struck down a Richmond Hill licensing by-law, finding that the law's interaction with zoning restrictions in the town essentially created a

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(97) Jacqueline Lewis and Eleanor Maticka-Tyndale, "Licensing Sex Work: Public Policy and Women's Lives," *Canadian Public Policy*, Vol. 26, No. 4, 2000, p. 440; Mike D'Amour, "Bylaw to be Massaged: Big Bust Prods City to Review Licensing Structure for Rubdown Artists," *The Calgary Sun*, 7 November 2003, p. 3.

(98) *Re 538745 Ontario Inc. v. Windsor (City)* (1988), 64 O.R. (2d) 38 (CA); *Kovinic v. Niagara Falls (City)* (1999), 3 M.P.L.R. (3d) 285 (Ont SC); *Zivkovic v. Kitchener (City)* (1999), 1 M.P.L.R. (3D) 11 (Ont Gen Div); *Treessan Management Inc. v. Richmond Hill (Town)* (2000), 47 O.R. (3d) 221 (CA); *Body Rubs of Ontario Inc. v. Vaughan (City)* (2000), 15 M.P.L.R. (3d) 203 (Ont CA); *Strachan (c.o.b. Kats) v. Edmonton (City)* (2003), 38 M.P.L.R. (3d) 72 (Alta QB).

(99) *International Escort Services Inc. v. Vancouver (City)* (1988), 55 D.L.R. (4th) 194 (BC SC).

(100) *Kovinic v. Niagara Falls (City)*.

full prohibition of adult entertainment and was thus outside municipal jurisdiction.<sup>(101)</sup> In 2002, the Manitoba Court of Queen’s Bench acquitted a Winnipeg business owner of carrying on a dating and escort service without a licence. The court held that the services offered were not those of an escort service but were clearly prostitution services – “no licence of any sort is available to carry on prostitution”; rather, it is the *Criminal Code* that should apply.<sup>(102)</sup>

Recently, concern has also been expressed that some licensing fees may be set so high as to make licences unattainable. Some even claim that the concept of collecting licensing fees for essentially prostitution-related activities could make the government guilty of living off the avails of prostitution.<sup>(103)</sup> In 2002, an Edmonton prostitute launched a civil suit to challenge overcharging for licensing fees. She demanded that the city lower the licensing fee for independent escorts on the basis that the City was effectively living off the avails of prostitution. In April 2003, the Alberta Court of Queen’s Bench rejected this claim.<sup>(104)</sup>

#### 4. Zoning

Zoning by-laws are another means of restricting prostitution. Cities such as Niagara Falls, Vaughan, Moncton, and Saint John have zoning by-laws to control the location of body-rub parlours and adult entertainment facilities in certain areas of the city.<sup>(105)</sup> Like restrictions on licensing, zoning is generally considered to be within municipal jurisdiction, provided that it does not create a general prohibition of adult entertainment or is not actually regulating public morality, but merely limits it to certain areas.<sup>(106)</sup>

Essentially, by-laws facilitate policing of prostitution and are a mechanism for municipalities to have some control over the issue without violating federal jurisdiction.<sup>(107)</sup> However, municipalities walk a fine line between federal and municipal/provincial jurisdiction,

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(101) *Treessan Management Inc. v. Richmond Hill (Town)*.

(102) *R. v. Hrabchak* (2002), 171 Man. R. (2d) 140.

(103) Audrey Jensen, “Escort Fee Hike is Nothing but a Tax Grab,” *Red Deer Advocate*, 28 October 2003, p. A5.

(104) *Strachan (c.o.b. Kats) v. Edmonton (City)*.

(105) *Kovinic v. Niagara Falls (City)*; *Body Rubs of Ontario Inc. v. Vaughan (City)*; *Moncton (City) v. Steldon Enterprises Ltd.* (2000), 9 M.P.L.R. (3d) 201 (NB QB); *Saint John (City) v. 511260 N.B. Inc.* (2001) 25 M.P.L.R. (3d) 148 (NB QB).

(106) *Moncton (City) v. Steldon Enterprises Ltd.*

(107) Lewis and Maticka-Tyndale (2000), p. 440.

and must be careful not to take any measures that might deal with actual prostitution.<sup>(108)</sup> Part of this balancing act is maintaining the illusion that escort services, massage and adult entertainment parlours are not fronts for prostitution-related activities. Providing that municipal by-laws do not actually prohibit prostitution, they are generally upheld by the courts.

### **C. John-shaming**

“John-shaming” is another technique that is often used locally to combat prostitution. Without resorting to actual laws that could be open to challenge, john-shaming works as a form of public pressure to deter those who engage in prostitution. Examples of john-shaming include local newspapers that publish the names of clients charged with street prostitution offences.<sup>(109)</sup> In Vancouver and Saint John, police send letters to the homes of motorists seen frequenting known areas of prostitution.<sup>(110)</sup>

However, john-shaming measures do not necessarily lead to a decline in prostitution. Critics argue that such measures may only force prostitutes to move from one area to another, and can lead to family break-up, divorce, and violent confrontations.<sup>(111)</sup>

### **D. Community Efforts**

A number of community methods have also been used to combat prostitution at the local level without resorting to legislation. Citizen patrols are one means of deterrence and neighbourhood protection. In 1987, Toronto residents organized “hooker patrols,” in which residents patrolled the streets, photographing clients, shining flashlights in cars, and recording licence numbers for the police. Citizen patrols made up of community volunteers and police have also been implemented in parts of British Columbia and Nova Scotia, standing watch on street corners to force prostitutes and clients out of the area.<sup>(112)</sup>

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(108) *Ibid.*, p. 441.

(109) Federal-Provincial-Territorial Working Group on Prostitution (1998), p. 57.

(110) “St John Police Send Letters to Suspected Johns,” *Saint John Telegraph-Journal*, 4 December 2003, p. A3.

(111) Federal-Provincial-Territorial Task Force on Prostitution (1998), p. 57.

(112) *Ibid.*, pp. 61-62.

Community mediation is another technique. In Vancouver, Crime Prevention Offices and neighbourhood associations approach outreach agencies to mediate problems in the community in order to ensure that prostitutes stay out of certain areas, maintain certain areas litter-free, and respect certain rules of conduct. However, this is a long-term process that involves significant initiative on the part of the community for it to work effectively. A shorter-term solution is for residents to undertake neighbourhood enhancement measures to ensure that streets and parking lots are well-lit and open to public view in order to discourage prostitution.<sup>(113)</sup>

### **E. Other Municipal and Local Measures**

Finally, some municipalities have implemented other measures as a deterrent to prostitution. In 1986, Vancouver police established a Prostitution Task Force, involving officers who ambushed and interrogated prostitutes and clients in their various hiding places on public property. The City of Ottawa also implemented a traffic diversion program in the early 1990s to deter automobile traffic in an area frequented by prostitutes. Under this program, police and the community worked in unison to identify and target cars that caused the most congestion by circling the neighbourhood. Community members recorded information such as licence plate numbers, and the makes and models of the cars considered to be a nuisance. The police then used this information to target frequent visitors in sting operations.<sup>(114)</sup>

## **CONCLUSION**

Given this litany of laws, regulations, obligations, and other attempts to control prostitution, it is clear that it is an important issue on many levels. While the international community is most interested in protecting victims of trafficking and prostitution, local communities highlight the importance of protecting their cities, homes, and children from its side effects. Each level of Canadian government attacks the problem in different ways, depending on its priorities and powers. The end result is a broad network of prostitution-related measures that generally complement one another and work to resolve the problem at multiple levels. The

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(113) *Ibid.*

(114) *Ibid.*, p. 56.



federal government is striving to live up to its international obligations, and in large measure has succeeded in its criminal law that punishes procurement, trafficking, and those who sustain the child prostitution industry. Nonetheless, trafficking in women and children remains a reality in Canada and a further battle for the government, which must also work to strengthen its social programs to provide protection and a viable future for the victims of such crimes.

Beyond federal legislation, provinces and municipalities are also making full use of their powers to deal with prostitution. While those powers provide strong means for dealing with various aspects of prostitution, they are not immune from challenge. A number of the measures in place have been criticized as unconstitutional, although only a few have been actually brought before the courts. The dilemma is that there are so many different approaches to dealing with prostitution, and the problem is so varied throughout the country, that there will always be a perception that federal law is inadequate to deal with the issue. At the same time, however, attempts by provincial and municipal jurisdictions to regulate prostitution locally will continue to cater to issue-specific areas or area-specific issues, and are thus unable to solve the problem on a broader scale.