

Legalizing Prostitution

A Public Opinion Issue Review



October 2010

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The Issue

On September 28, 2010 the Superior Court of Ontario in a landmark ruling decided that three of the provisions of the Criminal Code pertaining to prostitution violate the Charter of Rights and Freedoms. According to the court, the provisions that were struck down “force prostitutes to choose between their liberty interest and their right to security of the person.”

Understanding the Environment... What it Means

The decision by the Superior Court has resulted in a changed public environment in which the issue of prostitution has become salient in the news. With the government expected to appeal the legislation the issue may become less visible as the court process continues.

That said, the issue is unlikely to be dormant since the fall out of the court decision will be to stir policy debate both in official and mainstream channels as interested parties brace themselves for the potential that the government loses on appeal.

Politically the issue is a risky one for governments as most policy issues that touch on sex tend to be. In addition, the issue has, in the past, failed to motivate the public particularly. Consider the observation of the 1985 Special Committee which found that “respondents neither had first hand experience with prostitution nor regarded it as a major problem. They viewed the activity as an “unfortunate and undesirable social fact” which always would defy efforts to combat it.”¹

Excerpt from *Bedford v. Canada*, 2010 ONSC 4264

The conclusion I have reached is that three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purpose of engaging in prostitution) are **not in accord with the principles of fundamental justice** and must be struck down. These laws, individually and together, **force prostitutes to choose between their liberty interest and their right to security of the person** as protected under the *Canadian Charter of Rights and Freedoms*. (Emphasis added)

¹ McCaghy, C. H. & Cernkovich, S. A. (1991). Research note: Polling the public on prostitution. *Justice Quarterly*, 8(1), 107-120.

In fact, while public opinion remains somewhat divided, the change over the last decade and a half suggests a reduced appetite for legislation of this activity. The most recent poll indicates that only a quarter of Canadians support a complete prohibition on prostitution with another 16 per cent supporting the status quo.

Support for legalization is largely driven by agreement with the idea that the current legal framework is at least partially responsible for a number of negative outcomes (including harm to prostitutes) than a *laissez faire* approach to sexual morality. Importantly, this is consistent with the reasoning of the Court in striking down the provisions of the Act.

Given that the issue affects few Canadians directly, public opinion is unlikely to be impassioned by the policy and court discussion. That said, the issue is *available* as part of a law and order agenda or could be swayed if public discourse moves away from discussions about protecting prostitutes from harm to other considerations.

Knowledge

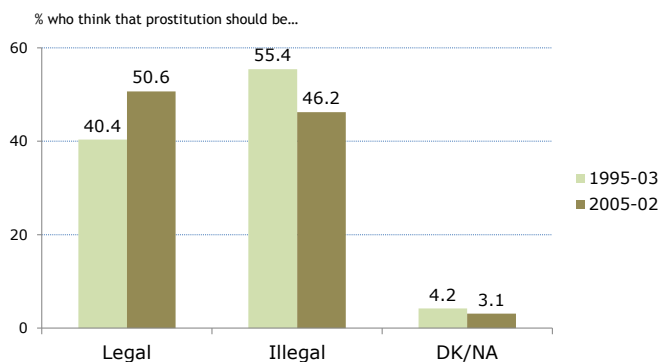
Laws, as they pertain to prostitution, are not as clear as they relate to other *victimless crimes*. The act of exchanging sex for money is not illegal but many of the activities around it are. Not surprisingly, Canadians do not fully understand the legal situation around prostitution.

An Angus Reid Poll in 2009 found that only 23 per cent of Canadians understood that it is legal to exchange sex for money. Although it is tempting to lament the poor understanding reflected in this low awareness of the law, the laws surrounding prostitution have largely made prostitution legal in effect by making most activities related to exchanging sex for money illegal.

The Evolution of Public Opinion

When Canadians were asked about prostitution 15 years ago, the clear position of a majority was that prostitution should be illegal. Notably, this position was held while Parliament was considering the laws around prostitution. By 2005, opinions had shifted decidedly and a slim majority (50.6%) now endorsed the view that prostitution should be legal.

Changing attitudes about prostitution



Q. In your opinion, should prostitution be legal or illegal?

(Sources: Environics Focus Canada [computer file], Environics Research Group, Toronto, ON [producer], Canadian Opinion Research Archive, Queen's University, Kingston, ON)

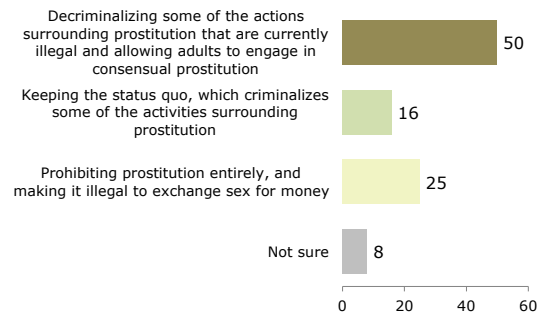
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Public support for decriminalizing prostitution was evident as recently as 2009 according to an Angus Reid Strategies poll. The poll, which asked about three options, found that 50 per cent of Canadians² support decriminalization, 16 per cent supports the status quo and 25 per cent would prefer that the law went further.

As might be expected, men (62%) are much more likely to support decriminalization than women (40%) in this poll.

Preferred approach to prostitution (2009)



Q. Generally speaking, which of these policy options would you personally prefer to deal with the issue of prostitution in Canada?
(Source: Angus Reid Strategies, "Gender Shapes Views on Debate Over Prostitution in Canada" November 27, 2009 (n=1009, online panel))

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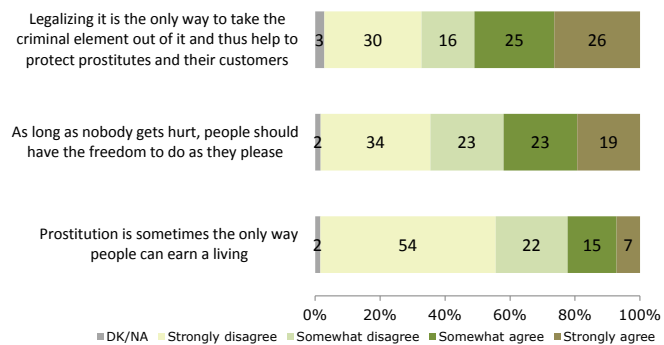
Attitudes

The judgment that struck down three of the provisions relating to prostitution reached this conclusion based in large part on the analysis of the impact of the laws on prostitutes. As quoted above, the laws “force prostitutes to choose between their liberty interest and their right to security of the person.” This is a position that Canadians are sympathetic to.

Consider that in 1995, when more than half of Canadians thought prostitution should be illegal, half also agreed that legalization was the only way to remove the criminal element and to help protect prostitutes and their customers.

Although many people are libertarian when it comes to prostitution as long as no one gets hurt, the majority 57 per cent reject the idea that people should be able to do as they please. There is even less support for the idea that prostitutes do not have a choice.

Attitudes about Prostitution (1995)



(Sources: Environics Focus Canada [computer file]. Environics Research Group, Toronto, ON [producer], Canadian Opinion Research Archive, Queen's University, Kingston, ON)

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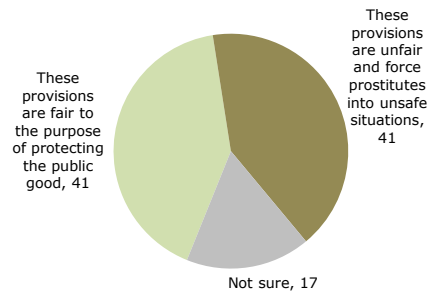


² This poll was conducted online using the Angus Reid Panel and is not based on a *representative sample* of Canadians.

The rationales for the provisions struck down include the notion that there is a public good associated with restricting the activities around prostitution (including public safety). Faced with the trade-off between a fair approach to protecting the public good and being unfair to prostitutes (by exposing them to danger), Canadians were divided. Forty-one per cent took the view that the provisions are fair and another 41 per cent took the view that they are unfair. That said, 17 per cent were not able to or were unwilling to offer a view.

Public Good versus Harm for Prostitutes

Q. Exchanging sex for money is currently legal in Canada. However, the Criminal Code makes many activities surrounding prostitution illegal. The Ontario Superior Court is currently reviewing a legal challenge to the provisions in the Criminal Code that prohibit public communication for the purposes of prostitution, and make it illegal to own, run, occupy or transport anyone to a bawdy house (or brothel). From what you have seen, read or heard, which of these statements comes closest to your own point of view?



(Source: Angus Reid Strategies, "Gender Shapes Views on Debate Over Prostitution in Canada" November 27, 2009 (n=1009, online panel))

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While prostitution no doubts strikes a moral and ethical chord with Canadians, it is also true that many Canadians, even before ruling legitimized this position, understood that the effect of the current laws is to expose prostitutes to danger. A fact that the Picton case in B.C. has driven home over the past few years.

In fact, many Canadians are of the view that prostitution is one of those non-violent crimes which it would be appropriate to have alternative penalties to incarceration.³ This reflects, no doubt, the importance of public safety as a primary motivator for attitudes towards sentencing and the fact that prostitution impacts relatively few people (ie. We would expect few people to fear being a victim).

Data in this Report

The analysis in this paper is based on public opinion that is in the public domain and the original authors of the studies bear no responsibility for the analysis and interpretation presented.

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³ Stein, Karin. 2001. Public Perception of Crime and Justice in Canada: A Review of Opinion Polls. Report prepared for the Department of Justice Canada. http://www.justice.gc.ca/eng/pi/rs/rep-rap/2001/rr01_1/p4_1.html