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Case Note

The Journal of Criminal Law

The Journal of Criminal Law
2020, Vol. 84(3) 266–270
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DOI: 10.1177/0022018320925010
journals.sagepub.com/home/clj
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The Unconstitutional Nature of the Criminalisation of the Purchase of Sex in Canada

R v Anwar & Harvey 2020 ONCJ 103

Keywords
Sex work, prostitution, advertising, material benefit, procuring, sexual services

The Applicants, Mr Anwar and Ms Harvey, operated Fantasy Worlds Escorts (FWE) agency in London, Ontario, Canada. They were charged with the following offences under the Canadian Criminal Code relating to the commodification of sexual activity: receiving a financial or material benefit from prostitution contrary to s 286.2(1), procuring a person to offer or provide sexual services for consideration contrary to s 286.3(1) and knowingly advertising an offer to provide sexual services for consideration contrary to s 286.4. The pair challenged the charges on the basis that they were in contravention of the Canadian constitution, specifically the Canadian Charter of Rights and Freedoms as the laws in question prevented sex workers from lawfully using third parties to protect them and to prevent them from forming associations in order to create a system of mutual protection. As the provisions targeted sex workers and prevented them from accessing things that are natural, expected and encouraged in other sectors of work, the Applicants argued that the existing prostitution laws denied sex workers, who are in particular need of protection, the benefits accorded to mainstream labour.

Anwar was the owner of FWE while his common law spouse, Harvey, ran the day-to-day operations of the business. The business mainly operated in London with two apartments used for the sale of sexual services, but 'outcall' services could be provided at a client's premises and the agency also made use of hotels and apartments in Calgary and Edmonton, Alberta, Canada. The pair controlled the advertising which took place on the FWE website, other websites such as sex work forums and posters were placed in bus stops throughout the City of London. The FWE website was also used to inform potential clients of the agency's terms and conditions, expected conduct and to recruit sex workers to join the agency, providing salary details, employment benefits and an application form to be completed. The terms and conditions included a Code of Ethics which set out standards of hygiene, safety and behaviour expected of clients. The Code also provided the right for an employee to refuse to see a client and the right to end a session if they felt it was unsafe to continue or were uncomfortable in doing so.

Harvey's role included acting as an intermediary between clients and escorts. She would negotiate the price, make payment arrangements and consider client preferences such as requests for a specific escort, the type of service or other special requests. Harvey also compiled information about clients such as a brief description, their preferences, records of their past behaviour and which employees they had encountered. In her role, Harvey screened clients and had a blacklist of approximately 400 clients who were either unacceptable in general or unacceptable for particular workers. The list also included the names of known drug users, prank callers, no-shows and men based in the buildings in which the sexual services were provided. Anwar handled recruitment with the process being quite open—applicants were clearly told of the operation of the business, salary details, benefits, commission taken by the agency and

security measures used. Before being offered a job, they were clearly told to go off and think about how badly they wanted the job and to follow up by providing a rating from 1 to 10 indicating how badly they wanted the job.

The business was subjected to police investigation from 2014 until it was finally shut down in 2015. During this investigation, one undercover officer posed as a potential employee and went through the recruitment process and another posed as a client and questioned an escort. During this questioning, the escort described the management as being very understanding and supportive to their workers.

The Ontario Court of Justice considered the law's impact on the rights set out in the Canadian Charter of Rights and Freedoms under Part 1 of the Constitution Act 1982. Particular emphasis was placed on rights held under s 2(b) which provides for the 'freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication' and s 7 of the Charter which provides that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in the principles of fundamental justice'. It was acknowledged by the Crown that the advertising ban under s 286.4 of the Criminal Code did interfere with the Charter's freedom of expression provision under s 2(b) but their argument was that this was justified under the derogation allowed under s 1 of the Charter which states that the rights are 'subject only to such reasonable limits prescribed by law as can be demonstrated in a free democratic society'. The Crown opposed outright any infringement of article 7 on the basis that under the Criminal Code, the seller of sex is 'immunised' from prosecution and in this case it was not the seller of sex but a third-party profiteer who sought constitutional protection, thus distinguishing the case from that of *Canada (Attorney-General) v Bedford* 2013 SCC 72 where the Supreme Court of Canada had struck down previous prostitution laws (the keeping of a 'bawdy-house' (brothel), living off the avails of prostitution and communicating in public for the purposes of prostitution) as being unconstitutional due to violations of s 7 of the Charter as it prevented sex workers from taking necessary precautions to negate the risks of sex work and implement adequate safeguards.

The Court held that offences under s 285.4 (advertising), s 286.3 (procuring) and s 286.2 (material benefit) were all unlawful. They were drafted so broadly that rather than just focusing on third parties who were in coercive, exploitative relationships with sex workers; they also exposed sex workers who wished to work with other sex workers and those who were in non-coercive, non-exploitative relationships with sex workers to criminal liability. The measures deprived sex workers who lacked desire, sophistication or the means to work alone the opportunity to enhance their own safety through the possibility of relationships with third-party managers. Rather than reducing risk to sex workers, the court found that these provisions increased the risk of harm and exploitation by restricting the way in which safeguards could be implemented and as such had a grossly disproportionate effect on their s 7 rights. The provisions imposed liability on third parties such as newspaper and magazine publishers, website designers, website administrators, social media companies and Internet providers. The legislation also denied sex workers the critical tools capable of enhancing their own safety. Limitations on sex workers' ability to communicate their terms and conditions to clients, their ability to negotiate and their ability to effectively screen their clients increased the risk of injury or death and as such the law was disproportionate and the infringement was, therefore, not justified under s 1 of the Charter (at [130]–[131]). Therefore, the court concluded that ss 285.4, 286.2 and 286.3 of the Criminal Code were all unconstitutional.

Commentary

At the heart of the debate over sex work in Canada (as with most jurisdictions) is the fight between those who see sex work as exploitation of women and hope to eradicate it through the criminalisation of clients in order to end demand for sexual services (see eg J Raymond 'Prostitution as Violence Against Women' (1998) 21(1) Women's Stud Int Forum 1) and those who campaign to have sex work recognised *as work* in order to recognise the rights which would come with this (see eg J Mac and M Smith, *Revolting*

Prostitutes (Verso, London 2018)). Previous sex work provisions were struck down by the Supreme Court of Canada in *Canada (Attorney-General) v Bedford* 2013 SCC. The Court finding that prior offences of the keeping and management of a bawdy-house, living wholly or in part of the avails of prostitution of another person and in a public place or in any place open in public view stopping, or attempting to stop any person in any manner communicating or attempting to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute, failed to strike a proportional balance between the legislations' objectives of removing the nuisance and preventing the exploitation of prostitution and the resultant impact the law produced in respect of increased harm towards sex worker's working environments. This infringement on sex worker's rights in relation to s 7 of the Charter could not be justified and as such, the court used its powers to strike down the legislation as being unconstitutional. The court, however, afforded the Canadian Parliament one year's grace in order to introduce new and more proportionate legislation.

In response, Parliament implemented the Protection of Communities and Exploited Persons Act 2014 (PCEPA) with the Hon. Peter MacKay (Attorney-General and Minister for Justice) explaining that the law would criminalise those who fuel demand for sexual services, receive financial benefits from prostitution, advertise the sale of sexual services and those who procure others for the purposes of prostitution while at the same time 'immunizing victims' from criminalisation (House of Commons Hansard (Canada) 102, 12 June 2014). However, the new offences, which also included at its core the criminalisation of the purchase of sexual services, also aim to reduce the public nuisance element of prostitution as well as protect society from the moral harms of sex work. The Court in *Anwar* described this new legislation as a version of the Nordic Model (laws which criminalise the client for the purchase of sex rather than the seller of sex) introduced with the purpose of abolishing the sex industry in Canada. The criminalisation of the purchase of sex and the prohibitions on advertising were aimed at reducing the demand for sexual services (at [209]). The latest challenge to the validity of Canada's prostitution laws, namely if PCEPA was compliant with the Canadian constitution, rested upon the relationship between the objective of the law and the effects flowing from the legislation. The key question being: Whether the law goes too far and interferes with some conduct that bears no connection to the law's objective? (at [100]). The Court referred to the judgment in *Bedford* where McLaughlin CJ described this as 'over-breadth' (*Bedford* at [112]–[113]).

During the proceedings, experts were instructed—two on behalf of the Crown and two for the Applicants. For the Crown, a PhD student from Concordia University put forward views that prostitution was harmful as at its heart are the systematic issues of patriarchy and colonisation (at [58]). She added that prostitution itself was the harm and that looking at prostitution as a form of labour 'simply conceals the underlying causes for people entering prostitution' (at [56]). The Crown's second expert, the more experienced Dr Madeline Coy of the University of Florida, advanced the argument that there was a link between prostitution and human trafficking for sexual purposes which could not be separated (at [64]). Nor could it be possible to separate the sexual exploitation of children from the practice of prostitution—it is part of the 'prostitution system'—the symbolic violence against women (at [69]). Dr Coy rejected alternative models of regulation to the Nordic model contending that prostitution could not be made safe and that any attempt to compare sex work to other forms of work was wrong, and health and safety measures enjoyed in other occupations were not appropriate for prostitutes as this would 'legitimize prostitution as work instead of a form of abuse' (at [67]). When research from New Zealand's decriminalisation model was put to Dr Coy, this was dismissed as problematic due to the small size of the country and the lack of women reporting violence to the police. Dr Coy also dismissed the legalisation model of Germany. Instead she suggested third parties could not make sex work safe as safety included psychological and emotional safety as well as physical safety (at [66]).

The Courts were critical of the two Crown witnesses. The first witness was described as having a 'limited' level of expertise and 'limited' experience in the academic study of prostitution. The court expressed even more concern that she was acting as an advocate for the Nordic model of regulation of sex work and made no attempt to make any pretence of objectivity. As such, the courts raised significant

concerns as to the admissibility of her evidence when applying the test of relevance, necessity, absence of an exclusionary rule and the need for a properly qualified expert set out in *White Burgess Langille Inman v Abbott and Halliburton Co* 2015 SCC 15 as well as the duty of the expert to 'provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within the expertise of the expert witness' (at [73]). As such, they concluded that this significantly limited the weight of her testimony. The Courts were equally scathing of Dr Coy suggesting that she 'displayed a complete unwillingness to concede that any viewpoint other than her own could conceivably be correct' (at [81]) adding that Dr Coy was not prepared to consider any possibility beyond her own viewpoint and describing her as 'a qualitative researcher who makes no attempt to maintain a position of neutrality while engaged in the research process' (at [81]). Their conclusion was that such bias raised not only questions concerning the weight of her evidence but its admissibility under the *White Burgess* criteria.

Evidence from the two experts on behalf of the Applicants was treated more favourably by the Court. The courts agreed with the views that the consequences of criminalisation impaired sex workers' abilities to implement safeguards such as client screening. They also accepted compelling research-based evidence that indoor sex workers experienced lower instances and risks of 'situational violence' than street-based sex workers and sex workers working from an established location were able to implement appropriate 'facilities and work conditions, establish security measures appropriate to their location and control entry to their work site'. Arguments were also presented that the Nordic model approach in PCEPA and the prohibition of advertising made it impossible for sex workers to be able to advertise their services without using the business services of third parties such as web hosts, service providers or newspaper publishers—placing those providers in legal jeopardy (at [36]–[37]). Use of websites allowed escorts to advertise services, screen clients, remain anonymous in their work and provided social networks which fostered 'togetherness' and combatted the isolation of sex work. Since the passing of PCEPA sex workers have been forced to change the information provided to websites in a way which increased risks to their personal safety and many third-party sites no longer permit terms that describe the services provided by sex workers and no longer allow links to websites containing those terms. As a result, PCEPA has re-introduced the very conditions which were found to have created a risk of harm to sex workers in the *Bedford* case (at [42]–[46]). The Court described the Applicant's experts as quantitative researchers who had taken an evidence-based approach to their studies of prostitution. Unlike the Crown's witnesses, the Court concluded that they had reached unbiased decisions based on their own research and research of others and as such had contributed 'significant evidence-based opinions to the factual underpinnings of the case' (at [78]).

In light of this evidence, McKay J declared the following findings of fact: That motivation for sex work tended to be to earn money. Indoor sex workers tended to earn more money that of unskilled workers. The level of violence indoor workers faced was lower than that reported by professions such as emergency room nurses. Research suggests coercion and control by third parties (of which a significant proportion possesses prior experience as sex workers) is not persuasive (at [83]). Sex work in Canada is no longer a nuisance and 80–90% of sex work in the last 20 years has moved indoors. This has been enabled through the use of the internet and the ability to advertise and screen online with the online environments reducing the risk of situational violence (at [85]). Reliance on third parties plays an important role in this aspect as advertising online requires the use of service providers, web domain hosts, web designers and professional photographers (at [86]). Third parties within the sex industry carry out various roles. Although some are abusive partners, predators and/or pimps who may coerce and exploit sex workers exist, the evidence indicates that the majority are not involved in coercion and merely fulfil similar roles to those carried out in other industries such as administration, training and mentorship and security (at [90]).

When considering the impact of PCEPA, it seemed apparent that conditions which prevailed prior to *Bedford* still prevail now. The court highlighting that sex workers, particularly street-based sex workers, are a high risk of being victims of physical violence but this risk can be reduced by working indoors, working closely with others, the use of paid security staff, proper screening of clients (for intoxication or

propensity for violence), having regular clientele, the use of predetermined locations for the sexual acts to take place which can be monitored, the use of drivers, receptionists and bodyguards and indoor safeguards such as CCTV, panic buttons, audio room monitoring and financial negotiations in advance (at [88]). The Court returned to the question of proportionality and suggested that any law so grossly disproportionate as to effect life, liberty or security of the person in order to achieve its purposes cannot rationally be supported (at [101]). 'Any grossly disproportionate, overbroad or arbitrary effect on one person is sufficient to establish a breach of s 7' (at [102]). As the effect of PCEPA created a heightened risk of violence towards sex workers, the Court deemed this as unacceptable and, in finding the law unconstitutional, concluded that the 'result is a law which has grossly disproportionate effect' (at [209]).

The decision in *Anwar* is a warning shot to the Canadian government in light of the new prostitution laws under PCEPA. The Ontario Court of Justice lacks the power to strike down legislation, but it will not pass unnoticed that the previous decision in *Bedford* made its journey to the Canadian Supreme Court via the Ontario courts. The immediate effect of this decision resulted in the staying of charges against the Appellants. It is not clear at the time of writing whether an appeal would be brought by the Crown as the Ontario Court of Appeal would have the power to nullify the laws if they were to uphold this decision but pressure has already mounted from proponents of the Nordic model to do just this. John Cassells, of SIM Canada (a Christian mission organisation), claiming that the decision was astounding as '[w]e're protecting pimps. Their Charter rights apparently supersede the rights of vulnerable girls and women . . . this has to be appealed' (Kate Dubinsky, 'Ontario Court Judge Rules Parts of Canada's Prostitution Laws Are Unconstitutional' CBC News, 21 February 2020 <https://www.cbc.ca/news/canada/london/ontario-court-judge-rules-parts-of-canada-s-prostitution-laws-are-unconstitutional-1.5471207>). Clearly this decision is a victory for those who seek to protect the rights of sex workers to work in safe spaces and to be able to implement measures to reduce risk of harm and enhance safety. *Anwar* demonstrates that when faced with the evidence from research showing the harms that the Nordic model causes to sex workers in driving sex work underground and the ideology of radical feminists wishing to eradicate prostitution, the Canadian courts seem intent on favouring evidence over ideology once again.

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