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COLLATERAL CONSEQUENCES: THE EFFECTS OF DECRIMINALIZING PROSTITUTION ON WOMEN'S EQUALITY IN BUSINESS

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INTRODUCTION

Prostitution may be decriminalized in Canada in the next few years. In British Columbia, the Downtown Eastside Sex Workers United Against Violence Society (SWUAV) and Sheryl Kiselbach are using the *Canadian Charter of Rights and Freedoms* (“*Charter*”)¹ to challenge the constitutionality of Canada’s adult prostitution offences.² SWUAV and Ms. Kiselbach were granted public interest standing to take their case forward by the Supreme Court of Canada (SCC) in September 2012.³ In March 2012, the Ontario Court of Appeal in *Canada (Attorney General) v Bedford* (“*Bedford*”)⁴ found the sections of the *Criminal Code*⁵ related to keeping a common bawdy-house⁶ and living off the avails of prostitution⁷ inconsistent with section 7 of the *Charter*.⁸ Communicating for the purposes of prostitution⁹ remains illegal, although this too was struck down at the trial level.¹⁰ Leave to appeal and cross-appeal the *Bedford* decision was granted by the SCC in October of 2012.¹¹

The decriminalization of prostitution will certainly affect the lives of sex workers, who are among some of the most marginalized women in our society. As many advocacy groups and sex workers themselves have argued, decriminalization stands to improve the lives of sex workers in numerous ways.¹²

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2 *Downtown Eastside Sex Workers United Against Violence Society v Canada (AG)*, 2010 BCCA 439 at para 4, 324 DLR (4th) 1.

3 *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, 34 BCLR (5th) 1.

4 2012 ONCA 186, 346 DLR (4th) 385 [*Bedford*].

5 *Criminal Code*, RSC 1985, c C-46.

6 *Ibid*, s 210.

7 *Ibid*, s 212(1)(j).

8 *Bedford*, *supra* note 4 at para 325.

9 *Criminal Code*, *supra* note 5, s 213(1)(c).

10 *Bedford v Canada*, 2010 ONSC 4264 at paras 6, 508, 327 DLR (4th) 52.

11 *Bedford*, *supra* note 4, leave to appeal to SCC granted, 34788 (October 25, 2012).

12 See generally Pivot Legal Society Sex Work Subcommittee, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (2004), online: <www.pivotlegal.org>.

Intersectionality theory,¹³ however, explains that a policy change that will improve equality for one group of women, such as sex workers, who live at one intersection of race, class, and gender, will not necessarily improve equality for all women. For example, networking is well-documented as a gendered activity that affects women's promotion and high-level success in the corporate world.¹⁴ Businesswomen are particularly disadvantaged when networking occurs in the context of sex entertainment, a barrier which I argue is likely to increase if prostitution is decriminalized. To achieve substantive equality, decision makers must take the differential effects of policy changes into consideration. I argue that women's equality in business can be addressed through a modification of the *Income Tax Act*¹⁵ to limit the deductibility of sex-entertainment expenses.

This paper begins in Part I with an introduction to intersectionality theory and its relationship to feminism and notions of substantive equality. I also explore the income tax system and its past use to advance equality causes. Part II describes the gendered aspects of networking, and Part III explains how decriminalizing prostitution will further reduce women's ability to network. The tax policy options available to prevent a move towards equality for sex workers from decreasing equality for businesswomen are discussed in Part IV. The paper concludes that a careful consideration of intersectionality theory and a timely policy response that prevents sex-entertainment expenses from being deductible for income tax purposes would be an effective solution to move our society towards substantive equality for everyone in light of the potential decriminalization of prostitution.

I. GENDER EQUALITY

A. Intersectionality, Sex Workers, and Business Women

The right to equality in Canada is embodied in section 15 of the *Charter*.¹⁶ It represents a right beyond formal equality—substantive equality.¹⁷ The term 'substantive equality' has been present in SCC jurisprudence since *Eldridge v British Columbia (Attorney General)*,¹⁸ while the concept was first articulated in 1989 in *Andrews v Law Society of British Columbia*.¹⁹ Although the commitment to substantive equality has not necessarily translated into successful equality claims, it still exists in our larger legal framework.²⁰ More recently, academics have argued that to achieve substantive equality, it is necessary to engage in intersectionality analysis, which the SCC has largely not done.²¹

13 American critical race theorist Kimberlé Crenshaw is credited as the first person to engage in intersectionality analysis. She used intersectionality to explain that the particular oppression experienced by women of colour arises through a combination of race and gender that cannot be explained with reference to race or gender alone. See Carol A Aylward, "Intersectionality: Crossing the Theoretical and Praxis Divide" (2010) 1:1 *Journal of Critical Race Inquiry* 1 at 9.

14 See e.g. Yvonne Benschop, "The Micro-politics of Gendering in Networking" (2009) 16:2 *Gender, Work and Organization* 217; Savita Kumra & Susan Vinnicombe, "A Study of the Promotion to Partner in a Professional Services Firm: How Women are Disadvantaged" (2008) 19:s1 *British Journal of Management* S65 [Kumra & Vinnicombe, "A Study"].

15 *Income Tax Act*, RSC 1985, c 1 (5th Supp).

16 *Supra* note 1.

17 Formal equality refers to the mere absence of distinction based on difference in a given law. Substantive equality, however, looks at whether the actual impact of the law is equal. See e.g. *Withler v Canada (AG)*, 2011 SCC 12 at para 39, [2011] 1 SCR 396.

18 *Eldridge v British Columbia (AG)*, [1977] 3 SCR 624, 151 DLR (4th) 577.

19 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

20 Margot Young, "Unequal to the Task: 'Kapp'ing the Substantive Potential of Section 15" (2010) 50 *Sup Ct L Rev* 2d, 183 at 184.

21 Aylward, *supra* note 13 at 8.

Since the early days of the feminist movement, tension has existed between power, privilege, and disadvantage.²² The effect of the decriminalization of prostitution on female sex workers and female businesspeople embodies much of this complexity. An integrated vision of feminism requires that we direct our attention towards intersections and the manner in which they combine to affect women's experiences of discrimination.²³

Intersectional discrimination "arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone."²⁴ Traditionally, intersectionality has been used to advance equality issues for particularly marginalized groups of people.²⁵ Such discrimination results from a combination of factors including, but not limited to, more traditional grounds of discrimination such as gender, race, class, disability, and sexual orientation.²⁶ By taking an intersectional approach, one can understand and appreciate how a policy change such as the decriminalization of prostitution can affect two different groups of the same gender inequitably.

From an equality perspective, sex workers are more in need of protection than businesswomen. Sex work is a highly gendered activity. Between 75 to 80 percent of Canadian prostitutes are women, and almost all clients are men.²⁷ Sex work is also racialized. Aboriginal women are over-represented among sex workers, particularly in the western provinces and Québec.²⁸ The class dimension is slightly more complicated. While only 20 percent of prostitutes work on the street, they are the most vulnerable to violence, making prostitution one of the most dangerous occupations in Canada.²⁹ Some prostitutes choose their work, while many others turn to it from a perceived lack of choice.³⁰

Pivot Legal Society ("Pivot"), who intervened in *Bedford*, asserts that the social conditions leading women to become involved in sex work include "poverty, homelessness, violence, addiction and colonization."³¹ Pivot seeks to end the violence and discrimination experienced by sex workers and to do so, they believe that the decriminalization of prostitution is an important first step.³² Sex workers live in and work in conditions that are extremely violent and dangerous, and from their own experience, the current structure of Canadian criminal law exacerbates those harmful conditions.³³ Therefore, a policy change that includes the decriminalization of prostitution would be a step towards equality for women who are sex workers.

22 Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002) at 3.

23 Aylward, *supra* note 13 at 2-7.

24 Mary Eaton, "Patently Confused: Complex Inequality and *Canada v. Mossop*" (1994) 1 Rev Const Studies 203 at 229.

25 See e.g. Kimberlé Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1988-89] U Chicago Legal F 139.

26 *Ibid* at 21.

27 Library of Parliament, *Prostitution in Canada: An Overview* by Julie Cool (Ottawa: Parliamentary Information and Research Service, 2004) at 3, online: Government of Canada Publications <<http://publications.gc.ca/collections/Collection-R/LoPBdP/PRB-e/PRB0443-e.pdf>>.

28 *Ibid*.

29 *Ibid* at 1, 7-8.

30 *Ibid* at 12.

31 Pivot Legal Society, *Sex Worker Rights*, online: <<http://www.pivotlegal.org/our-work/sex-worker-rights>>.

32 *Ibid*.

33 Pivot Legal Society Sex Work Subcommittee, *supra* note 12 at 2.

Businesswomen, however, will likely experience a different type of discrimination if the *Bedford* decision stands. Relatively high-level businesswomen exist at a different intersection of race, class, and gender than sex workers. They are privileged in terms of class, probably race, and likely only share gender with sex workers. However, as a society we do not want policy choices that may improve conditions for one group of marginalized women to worsen them for others. Through intersectionality theory, we can understand the nuanced mechanisms contributing to inequality and look beyond the problems to possible solutions.

Further policy change can prevent the secondary effect of the decriminalization of prostitution and perhaps even reduce the discrimination currently experienced by businesswomen. Business scholars Robin Ely and Debra Myerson suggest that to achieve a more equal workplace, one should “locate and enact a vision of work and social interaction that is less constrained by gendered and other oppressive roles, images, and relations,” which can be achieved through “an emergent, localized process of incremental change.”³⁴ I propose that changing the *Income Tax Act* in an effort to modify social behaviour in the workplace would be an effective method to address inequality for businesswomen. Care would, however, need to be taken to ensure that any such change would not detract from the equality gains of more marginalized women.

B. Feminism and Tax

The fairness of an income tax system is typically judged with reference to four factors: neutrality, simplicity, equity, and efficiency.³⁵ Traditionally, equity is measured vertically between people of different income levels and horizontally between people at the same income level, but carrying out different activities.³⁶ A feminist critique of the tax system focuses on the principle of equity and examines the way the system affects people differently based on their gender.³⁷ The *Income Tax Act* as it stands is formally equal legislation, since it applies to taxpayers regardless of their gender. However, it is not necessarily substantively equal, since it produces unequal outcomes.

It should not be a surprise that the *Income Tax Act* has the potential to both address and create the conditions for substantive equality. The income tax system is a massive spending program, which has been described as “a most powerful social and economic tool.”³⁸ Tax expenditures have numerous potential social policy applications, such as redistributing income, encouraging economic behaviours, and delivering social programs.³⁹ Tax law was the centre of two prominent SCC equality cases in the mid-1990s: *Thibaudeau v*

34 Robin J Ely & Debra E Myerson, “Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change” (2000) 22 *Research in Organizational Behaviour* 103 at 132-133.

35 Status of Women Canada, *Women, Tax and Social Programs: The Gendered Impact of Funding Social Programs Through the Tax System* by Claire FL Young (Ottawa: Status of Women Canada Policy Research Fund, 2000) at 5 [Young, “Women, Tax”]; Claire Young, “Taxing Times for Women: Feminism Confronts Tax Policy” (1999) 21 *Sydney L Rev* 487 at 487-88 [Young, “Taxing Times”].

36 Tim Edgar & David Sandler, *Materials on Canadian Income Tax*, 13th ed (Toronto: Thomson Carswell, 2005) at 66.

37 Young, “Taxing Times”, *supra* note 35 at 487.

38 *Ibid* at 492; Young, “Women, Tax”, *supra* note 35 at 1.

39 Young, “Women, Tax”, *supra* note 35 at 5.

*Canada (MNR)*⁴⁰ and *Symes v Canada* (“*Symes*”).⁴¹ Tax law is not traditionally thought of as connected to political issues, but Lisa Philipps and Margot Young, legal scholars who study tax policy and equality law respectively, write that through these two cases, tax law has become a leading vehicle for presenting the judiciary with gender equality issues.⁴²

Symes dealt with the deductibility of childcare expenses in a business context and it illustrates some of the feminist critiques of the income tax system. In particular, *Symes* highlights the relationship between business and gender in a tax context. In *Symes*, the majority refused to classify childcare expenses as deductible business expenses. They relied on section 63 of the *Income Tax Act*, which allows some deduction of childcare expenses for all taxpayers, with a specific formula drafted to give the lower income spouse the majority of the deduction.⁴³ Elizabeth Symes also mounted a section 15(1) *Charter* challenge, but the majority focused on section 63 of the *Income Tax Act* and did not find a violation of the *Charter*.⁴⁴ Justice McLachlin (as she then was) and Justice L’Heureux-Dubé argued that Ms. Symes should have been able to deduct her childcare expenses. In her reasons, Justice L’Heureux-Dubé questioned whether the business deductions that already existed for cars, club dues, entertainment, dining, and charitable donations were “so obviously business expenses rather than personal ones.”⁴⁵

Justice L’Heureux-Dubé went on to examine the gendered foundations of the business world:

When we look at the case law concerning the interpretation of “business expense”, it is clear that this area of law is premised on the traditional view of business as a male enterprise and that the concept of a business expense has itself been constructed on the basis of the needs of businessmen. This is neither a surprising nor a sinister realization, as the evidence well illustrates that it has only been in fairly recent years that women have increasingly moved into the world of business as into other fields, such as law and medicine. The definition of “business expense” was shaped to reflect the experience of businessmen, and the ways in which they engaged in business.⁴⁶

Women’s move into the business world can no longer be considered recent, yet Justice L’Heureux-Dubé’s comments remain relevant 20 years later. The gendered effect of networking in the context of sex-entertainment expenses continues to place a burden on women. These concepts are explored in Part II, below.⁴⁷

40 *Thibaudeau v Canada (MNR)*, [1995] 2 SCR 627, 124 DLR (4th) 449. *Thibaudeau* was a section 15(1) *Charter* challenge. Suzanne Thibaudeau argued that by shifting the tax liability from the non-custodial to custodial spouse, her equality rights were violated. The court analysed section 15(1) by using a two-step framework, where the first step requires differential treatment that causes a burden. The majority did not find that shifting tax liability constituted a burden, while both Justice McLachlin (as she then was) and Justice L’Heureux-Dubé did.

41 *Symes v Canada* [Symes], [1993] 4 SCR 695, 110 DLR (4th) 470 [Symes]. In both cases, the only female judges on the SCC at the time, Justice McLachlin (as she then was) and Justice L’Heureux-Dubé, dissented in separate reasons.

42 Lisa Philipps & Margot Young, “Sex, Tax and the Charter: A Review of *Thibaudeau v. Canada*” (1995) 2:2 *Review of Constitutional Studies* 221 at 224.

43 *Supra* note 41 at 744-751.

44 *Ibid* at 771-72.

45 *Ibid* at 803.

46 *Ibid* at 798 [emphasis in original].

47 There is no equivalent to section 63 for sex-entertainment expenses. If a case about sex-entertainment expenses were to go before the SCC today, it would be interesting to see if the Court would continue to split along gender lines although we are back to only three women sitting on the bench. However, a more timely avenue for achieving policy change in this area is likely through the legislature and the *Income Tax Act*, which is addressed below in Part IV.

II. NETWORKING IN BUSINESS

A. Current State of Women in Business

Women's presence in Canada's paid labour force has steadily increased over the past 30 years. In 2009, women represented 48 percent of the paid labour force and 57 percent of 'Professional' occupations, including 51 percent of 'Business and Finance'.⁴⁸ Although women's average income is increasing more quickly than men's, as of 2008, men still out-earned women, averaging \$47,000 a year compared to women at \$30,100.⁴⁹

At the managerial level, women are better represented in lower levels than more senior ones. In addition, there tend to be more female managers in fields where more women are employed at all levels.⁵⁰ In 2009, 32 percent of senior managers were women, compared with 37 percent of managers overall.⁵¹ In 2001, only 12 percent of *Fortune 500* company board seats were held by women,⁵² and of the top seven ranks in organizations, women filled a mere 5 percent.⁵³

B. Importance of Networking for Career Advancement

Contemporary career success depends more on informal networks than official hierarchical channels. Such networks comprise an individual's social capital, which is bolstered by the nature and quality of one's personal relationships.⁵⁴ For those who have the opportunity to develop and exploit them, informal networks have a variety of benefits that have been documented since the 1970s.⁵⁵ The benefits of high-quality networks include upward mobility, career planning and strategizing, accomplishing tasks, personal and professional development, information exchange, and increased visibility.⁵⁶ A good network is one that benefits from informal interactions, which may involve favours, persuasion, and lead to other connections with people who are already influential.⁵⁷

C. The Gendered Nature of Networking

The benefits of networking and networks are no different for women than for men. Networks are advantageous because they provide information about job opportunities that might not otherwise be available, provide visibility, act as an important source of information about unwritten rules, and allow access to senior individuals and decision-

48 Statistics Canada, "Paid Work" in *Women in Canada: A Gender-based Statistical Report* by Vincent Ferrao, (Ottawa: Minister of Industry, 2010) at 5, 21, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf>>.

49 Statistics Canada, "Economic Well-being" in *Women in Canada: A Gender-based Statistical Report* by Cara Williams (Ottawa: Minister of Industry, 2010) at 6, online: Statistics Canada <<http://www.statcan.gc.ca/pub/89-503-x/2010001/article/11387-eng.pdf>>.

50 Janet Cooper Jackson, "Women middle managers' perception of the glass ceiling" (2001) 16:1 *Women In Management Review* 30 at 30.

51 Ferrao, *supra* note 48 at 21-23.

52 Douglas M Branson, *No Seat at the Table - How Corporate Governance and Law Keep Women Out of the Boardroom* (New York: New York University Press, 2007) at 89.

53 Ely & Myerson, *supra* note 34 at 104.

54 Savita Kumra & Susan Vinnicombe, "Impressing for Success: A Gendered Analysis of a Key Social Capital Accumulation Strategy" (2010) 17:5 *Gender, Work and Organization* 521 at 523.

55 See e.g. Margaret Hennig & Anne Jardin, *The Managerial Woman* (New York: Anchor Press/Doubleday, 1977).

56 Jia Wang, "Networking in the Workplace: Implications for Women's Career Development" [2009] 122 *New Directions for Adult and Continuing Education* 33 at 33-34; Jackson, *supra* note 50 at 32.

57 Wang, *supra* note 56 at 33-34.

makers.⁵⁸ However, structural inequalities make it much more difficult for women to succeed in building adequate social capital.

Inequality in the workplace is exacerbated because the structure of formal and informal social practices was created by and for men.⁵⁹ Yvonne Benschop, whose research focuses on how gender and diversity function in organizations, argues that networking invokes two aspects of gender.⁶⁰ The first is a more traditional view of gender, which she describes as gendering practices.⁶¹ Gendering practices constitute the repertoire of social actions that comprise masculine or feminine behaviour.⁶² The second dynamic that networking invokes is practising gender, which is the real-time implementation of gender in a social setting.⁶³ Men and women ‘do gender’ and construct their social gender identities through a process of reciprocal positioning.⁶⁴

One particularly poignant ad executive stated in 1988 that “[t]here are no female account directors on the really big accounts anywhere in advertising, because to get on in this business an individual has to be able to drink, fart and fuck with the best.”⁶⁵ More recent studies of women in international consulting firms continue to reveal a gendered dynamic. In one study, half of the women who were interviewed did not believe that the activity of networking came as naturally to women as it did to men.⁶⁶ Another study that interviewed 50 female managers revealed that they all perceived that there was an ‘old boys’ network in their organization and 86 percent thought there was not enough networking amongst senior female managers.⁶⁷ The interviewees believed that this lack of networking resulted in “blocked promotion and blocked career development, discrimination, occupational stress, and lower salaries.”⁶⁸ This gendered effect is present on Canadian corporate boards, where female directors still report the presence of the ‘old boys’ club.⁶⁹

D. Networking In the Context of Sex Entertainment

There is no place where the ‘old boys’ network is more pernicious than when networking takes place in homosocial settings, such as golf courses and strip clubs.⁷⁰ Sheila Jeffreys, an Australian political scientist who has written prolifically about gender, adds further nuance to this point by arguing that “the strip club is gendered in a way that golf is

58 Ines Wichert, *Where Have All the Senior Women Gone?: 9 Critical Job Assignments for Women Leaders* (Great Britain: Palgrave Macmillan, 2011) at 30-33.

59 Ely & Myerson, *supra* note 34 at 113.

60 Benschop, *supra* note 14 at 222.

61 *Ibid.*

62 *Ibid.*

63 *Ibid.*

64 Barbara Poggio, “Editorial: Outline of a Theory of Gender Practices” (2006) 13:3 *Gender, Work & Organization* 225 at 225.

65 Michele Rene Gregory, “Inside the Locker Rooms: Male Homosociability in the Advertising Industry” (2009) 16:3 *Gender, Work and Organization* 323 at 323.

66 Kumra & Vinnicombe, “A Study”, *supra* note 14 at S69-70.

67 Margaret Linehan, “Networking for female managers’ career development: Empirical evidence” (2001) 20:10 *Journal of Management and Development* 823.

68 *Ibid* at 825.

69 Patricia Bradshaw & David Wicks, “The Experiences of White Women on Corporate Boards in Canada” in Ronald J Burke & Mary C Mattis, eds, *Women on Corporate Boards of Directors: International Challenges and Opportunities* (Dordrecht, NL: Kluwer Academic Publishers, 2000) at 203, 208.

70 Homosocial refers to same-sex relationships that are not romantic or sexual in nature. See generally Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire* (New York: Columbia University Press, 1985).

not. Women cannot learn to be good at visiting strip clubs. Women are not able to join in the bonding that takes place.⁷¹ In many cases, women are explicitly excluded from these outings.⁷² In one study “the saleswomen...described over and over again being told not to come, not being invited, and even being deceived as the men snuck out to a strip club.”⁷³ The discomfort and reduced networking opportunities for women that result from sex entertainment constitute both direct and indirect sex discrimination.⁷⁴

Strip club networking has been documented in the United Kingdom, United States, and Australia. In the United Kingdom, almost half of lap dancing clubs target employers directly through online marketing.⁷⁵ The expansion of such clubs in the United Kingdom, since they were first allowed in 1995, has both increased and normalized their use in the business context.⁷⁶ In the United States, there are no official numbers, but industry insiders estimate that 33 to 40 percent of their revenue is sourced from business clients.⁷⁷ In Australia, where prostitution has been legalized, brothels market themselves directly to their corporate clients. One escort agency even attributes the ‘bulk’ of its business to clients being entertained by corporate hosts.⁷⁸ In addition, the use of strip clubs in business has been the subject of legal action in the United Kingdom⁷⁹ and United States.⁸⁰

There is little information regarding the prevalence of such business activities in Canada. However, strip clubs are legal and given the cultural closeness between Canada and the United States, United Kingdom, and Australia, it is reasonable to infer that networking in the context of sex entertainment also occurs here. For example, both Canada and the United States allow a 50 percent deduction of entertainment expenses.⁸¹ As a proportion of gross domestic product, Canada spends as much, if not more than the

71 Sheila Jeffreys, “The sex industry and business practice: An obstacle to women’s equality” (2010) 33:3 *Women’s Studies International Forum* 274 at 279.

72 Laurie A Morgan & Karin A Martin, “Taking Women Professionals Out of the Office: The Case of Women in Sales” (2006) 20:1 *Gender & Society* 108 at 116.

73 *Ibid* at 117.

74 Kat Banyard & Rowena Lewis, “Corporate Sexism: The sex industry’s infiltration of the modern workplace” (September 2009) at 15, online: Fawcett Society <www.fawcettsociety.org.uk>.

75 *Ibid* at 15.

76 *Ibid* at 13.

77 Jeffreys, *supra* note 71 at 276.

78 *Ibid* at 277.

79 Although she lost her case, Anna Atkins alleged sex discrimination and victimization against her superiors, who were senior bank executives, at a United Kingdom Employment Tribunal in 2009. See James Colasanti, “Loughton: Sexism claims rejected by employment tribunal”, *The Guardian* (13 March 2009). She stated that it was “not uncommon for off-site meetings to end up in strip clubs.” See David Brown, “City bank’s ‘strip club and cigars’ culture excluded woman executive, tribunal told”, *The Times* (11 February 2009).

80 In 2004, Allison Schieffelin, through the United States Equal Employment Opportunity Commission, settled her sex discrimination suit (*EEOC v Morgan Stanley*, No 01-8421 (SDNY)) against Morgan Stanley for \$54 million, with \$12 million to her personally. Before the settlement, the trial had expected to hear from more than 20 women, whose testimony would have included “lurid details about their colleagues’ entertaining clients at strip clubs.” See Patrick McGeehan, “Morgan Stanley Settles Bias Suit with \$54 Million”, *The New York Times* (13 July 2004). Schieffelin’s personal allegations included one instance where she was the primary host of a client dinner and was then told to go home so that the men could attend a strip club with that same client. See also Patrick McGeehan, “Wall Street Highflier to Outcast: A Woman’s Story”, *The New York Times* (20 February 2002).

81 *Income Tax Act*, *supra* note 15; Richard Schmalbeck & Jay A Soled, “Elimination of the Deduction for Business Entertainment Expenses” (2009) 123 *Tax Notes* 757 at 764.

United States on providing that deduction.⁸² If businesses in both countries are spending similar amounts on entertainment, and in the United States a substantial portion of such expenses is related to sex entertainment, we can assume that at least some Canadian business entertainment also occurs in sex venues.

III. THE EFFECT OF DECRIMINALIZING PROSTITUTION

Regardless of the extent to which sex-entertainment networking currently occurs in Canada, the decriminalization of prostitution will likely increase its prevalence in two ways. First, decriminalization will normalize the sex industry and increase the networking that occurs in venues that are currently legal. Second, it will permit networking in formerly illegal venues that are even more exclusive to women, such as brothels.

A. Normalization of the Sex Industry

The sex industry has increased in prevalence and acceptability in our society over the last 30 years. Not only has demand for commercial sexual services increased, but the services that are available have become even more specialized.⁸³ In her work, sociologist Elizabeth Bernstein argues that the merging of business and play (which includes sex), “is a feature of any society progressing through the late stages of capitalism.”⁸⁴

Traditionally, law and the content of legal doctrine are thought of as instrumental;⁸⁵ their main role is to codify the current state of social reality. However, there is some movement within the field of legal theory to view law as constitutive. From this point of view, the sense of consciousness that develops through exposure to existing legal categories shapes one’s understanding of law and affects one’s resulting identity.⁸⁶ Legal theorist Yvonne Zylan explains the constitutive tendency of law in terms of social desire: “Law defines our desires because we desire the discipline of law.”⁸⁷ When viewed through a constitutive lens, women’s studies scholar Janice Raymond’s argument that social and ethical barriers to prostitution will disappear after the legal barriers do is persuasive.⁸⁸ Therefore, changes in prostitution law could actually inspire a change in how society delimits the acceptability of sex work.

For example, if prostitution becomes more easily accessible, strip clubs no longer lie on the fringes of socially and morally agreeable behaviour, since brothels will occupy that space. Such a change will push strip clubs towards the mainstream, making them more plausible venues for business networking. Erotic dancers or sex workers could also be increasingly invited to provide entertainment at business parties and conferences. For

82 The United States’ gross domestic product (GDP) is \$14 billion and they spend \$4-\$5 billion on providing the entertainment deduction, which amounts to 28-35% of GDP. Canada spends \$450-\$600 million on providing the deduction, while GDP is \$1.3 billion, amounting to 35-46% of GDP. See *ibid* at 764; Department of Finance Canada, *Tax Expenditures and Evaluations 2011* (Ottawa: Department of Finance, 2011) at 19, 25, 28, online: Department of Finance Canada <<http://www.fin.gc.ca/taxexp-depfisc/2011/taxexp11-eng.asp>>; 2011 *Development Indicators* (Washington, DC: The World Bank, 2011) at 198, 200, online: The World Bank <<http://www.worldbank.org>>.

83 Elizabeth Bernstein, “The Meaning of Purchase: Desire, Demand and the Commerce of Sex” (2001) 2:3 *Ethnography* 389 at 392.

84 *Ibid* at 396.

85 Yvonne Zylan, *States of Passion: Law, Identity, and the Social Construction of Desire* (New York: Oxford University Press, 2011) at 12.

86 *Ibid* at 23, 29.

87 *Ibid* at 63.

88 Janice G Raymond, “Ten Reasons for Not Legalizing Prostitution and a Legal Response to the Demand for Prostitution” (2004) 2:3-4 *Journal of Trauma Practice* 315 at 322.

example, at an Australian climate change conference in 2006, the dinner entertainment included burlesque dancing, which caused many of the female scientists to walk out in protest.⁸⁹

The moral wrong envisioned by anti-prostitution laws has also changed from the 19th and 20th centuries. The wrong used to rest in the actions of the prostitute herself, while current views tend to sanction consumer behaviour (i.e. the male client).⁹⁰ Although this is largely viewed as a positive change for women's equality, Bernstein argues that this shift is linked with the normalization of the sex industry that is already occurring.⁹¹ A change in prostitution laws in the current social context will be more effective at normalizing behaviour since it will affect the demand side of the business. Were the wrong still to lie with the prostitute herself, the change in law would perhaps lead more women to choose sex work. However, when the wrong lies with the client, the change could create the space for more clients, which requires less investment and behavioural change than it does to become a sex worker, thus increasing the potential for sex work to be normalized.

B. Networking in Brothels

Decriminalizing prostitution not only threatens to normalize the sex industry, but also to facilitate networking in new environments that are even more exclusive to businesswomen, such as brothels. Brothels are more exclusive to businesswomen because of their limited ability to participate in the type of activity that takes place and the effect of brothels on businessmen. In the context of the mass media's portrayal of women, research establishes a link between the sexual objectification of women and male aggression. In a study of university students exposed to print advertising, psychologists Krya Lanis and Katherine Covell found that after male respondents viewed images that sexually objectified women, they were more accepting of sexual harassment, interpersonal violence, rape myths, and sex role stereotypes.⁹² One might reasonably expect that this effect would be exacerbated when the exposure is not only to images, but engagement in paid sexual activity.

There is evidence to suggest that networking in brothels is already occurring in places where prostitution is legal. In most of Australia, both brothels and escort prostitution are legal, which increases the possibilities for business use of the sex industry.⁹³ The marketing strategy of these brothels supports the proposition that they are used in a business context. Brothels market themselves directly to the corporate world, for a variety of business activities including meetings and networking, both inside and outside of business hours, as well as product promotions.⁹⁴

In Nevada, prostitution has been a legal aspect of the state's economy since the early 1900s. Recently, there has been a shift in the industry, with a number of brothels using more mainstream marketing strategies.⁹⁵ Such brothels are offering a wider range of services beyond selling sex. For example, they are adding souvenir shops, larger bars, restaurants, coffee shops, and small strip clubs.⁹⁶ One brothel owner, who renamed his

89 Jeffreys, *supra* note 71 at 278.

90 Bernstein, *supra* note 83 at 393.

91 *Ibid.*

92 Krya Lanis & Katherine Covell, "Images of Women in Advertisements: Effects on Attitudes Related to Sexual Aggression" (1995) 32:9/10 *Sex Roles* 639 at 646.

93 Jeffreys, *supra* note 71 at 277.

94 *Ibid.*

95 Barbara G Brents & Kathryn Hausbeck, "Marketing Sex: US Legal Brothels and Late Capitalist Consumption" (2010) 10:4 *Sexualities* 425 at 432.

96 *Ibid* at 432.

venue ‘The Resort at Sheri’s Ranch’, wants to be viewed “as just another business in the community.”⁹⁷ At Sheri’s, Budweiser sponsors a hot tub party room inside the brothel, and the complex includes a hotel and sports bar. The clientele of the sports bar often includes seniors, families, and groups of friends who are eating and drinking.⁹⁸ This type of brothel, offering a variety of services, could easily facilitate extensive business networking.

The combination of the global mainstreaming of the sex industry and the decriminalization of sex work in Canada could work together to form a new social order where networking occurs even more in strip clubs and in new modern brothels. The result could be women’s further exclusion from business opportunities. Although the decriminalization of prostitution would be a move towards equality for some women, the intersectional basis of inequality requires a more holistic view of the collateral consequences of this policy change. In the context of women and business networking, there are some tax policy options that could mitigate the potential negative effect of decriminalizing prostitution.

IV. TAX POLICY OPTIONS

A. Status of Sex-Entertainment Expenses

In Canada, deducting expenses in the computation of income from business is governed by a prohibition in subsection 18(1) of the *Income Tax Act*.⁹⁹ However, the general exception to this prohibition is found in paragraph 18(1)(a), which applies to expenses to the extent that they are incurred “for the purpose of gaining or producing income.” Currently, 50 percent of a given expense for food, beverages, or enjoyment of entertainment is deductible.¹⁰⁰ Prior to 1987, when the percentage changed to 80 percent, 100 percent of such expenses were deductible.¹⁰¹ In 1994, the deductible percentage was further reduced to 50 percent.¹⁰²

The only exception to the deductibility of entertainment expenses is found in paragraph 18(1)(l).¹⁰³ It prohibits the deduction of costs for the use or maintenance of yachts, camps, lodges, or golf courses,¹⁰⁴ as well as membership fees or dues for clubs whose main purpose is dining, recreation, or providing sporting facilities.¹⁰⁵ The Canada Revenue Agency (CRA), in its policy statements, explains that paragraph 18(1)(l) exists because the direct business purpose of such activities is marginal. A taxpayer can deduct dining expenses at a golf course restaurant as long as the meal is not consumed in conjunction with golf or any other activity.¹⁰⁶ Therefore, if entertainment is enjoyed in sex venues for the purpose of gaining or producing income, 50 percent of the amount spent is currently deductible.

If businesspeople in Canada are paying for illegal sex work, it is also deductible, as long as the expense was incurred for the purpose of gaining or producing income. The only two

97 Brents & Hausbeck, *supra* note 95 at 433.

98 *Ibid.*

99 *Income Tax Act*, *supra* note 15.

100 *Ibid.*, s 67.1(1).

101 Claire FL Young, “Deductibility of Entertainment and Home Office Expenses: New Restrictions To Deal with Old Problems” (1989) 37:2 Canadian Tax Journal 227 at 238.

102 Edgar & Sandler, *supra* note 36 at 389.

103 *Income Tax Act*, *supra* note 15 (applies to expenses incurred after 1971).

104 *Ibid.*, s 18(1)(l)(i).

105 *Ibid.*, s 18(1)(l)(ii).

106 Canada Revenue Agency, Interpretation Bulletin IT-148R3, “Recreational Properties and Club Dues” (21 July 1997) at para 4.

situations where ‘illegal’ payments are not deductible are payments relating to corrupt public officials¹⁰⁷ and expenses incurred for most fines and penalties.¹⁰⁸ As long as the taxpayer has documentation of the expense being incurred, all types of sex entertainment are currently deductible in Canada. The Canadian government spent \$455 million on the entertainment deduction in 2011, down from \$605 million in 2006.¹⁰⁹

B. Why Sex-Entertainment Expenses Should Not Be Deductible

Two traditional tax policy arguments against the deductibility of entertainment expenses apply in the context of sex entertainment. First, if the personal satisfaction resulting from entertainment equals its cost, it should not be deductible.¹¹⁰ Sex entertainment fulfills this criterion in two ways. A) Many men engaging in sex-entertainment experience personal satisfaction, and also acquire social capital, which is a personal benefit, by way of the networking and bonding that occurs. Women generally do not generally experience the same satisfaction, nor do they get the same personal benefit in the same situation. B) Strip clubs and brothels are not by their nature environments conducive to business. They are fundamentally personal activities. The second argument mirrors the policy rationale behind paragraph 18(1)(l).¹¹¹ Allowing deductions for luxury items decreases the moral acceptability of the tax system.¹¹² Paying for sex and sex-based entertainment is certainly as much of a luxury item as golfing or staying at a camp or lodge.

More importantly, given the gendered nature of networking, sex-entertainment expense deductibility offends the substantive equality of our tax system, specifically in relation to horizontal gender equity. While men and women have formally equal access to business expense deductions, the current scheme affects them differently. Men are able to gain significant career benefits through their networking experiences, and the government is subsidizing this activity. Women, on the other hand, either do not get the same level of subsidy when they are excluded from outings, or, if they are included, get less benefit from outings that objectify women and arguably contribute further to women’s disadvantage in the workplace. If a corporation is footing the entertainment expense bill, the current system rewards the corporation for giving a professional advantage to their male employees, while disadvantaging their female employees, even if such treatment is unintentional. The deductibility of sex-entertainment expenses exacerbates gender inequality. There are two potential policy solutions that could address the substantive inequality created for businesswomen by our income tax system.

C. Policy Solutions

i. Partial Ban

A more tempered policy response would be a partial ban on the deductibility of entertainment expenses, aimed specifically at removing sex-related entertainment expenses. This first option is one proposed by the Fawcett Society in the United Kingdom. In their study of the sex industry and the workplace, they found that 86 percent of London lap dancing clubs would provide receipts that did not include the name of

107 *Canadian Income Tax Act with Regulations, Annotated*, 94th ed by Joseph Frankovic et al (Toronto: CCH Canadian Limited, 2011), s 67.5 (covers expenses incurred after 1990).

108 *Ibid*, s 67.6 (covers expenses incurred after 2004).

109 Department of Finance Canada, *supra* note 82 at 19, 25, 28.

110 Neil Brooks, “The Principles Underlying the Deduction of Business Expenses” in B Hanson, V Krishna & J Rendall, eds, *Canadian Taxation* (Toronto: Richard de Boo, 1981) 198 at 201-03.

111 Canada Revenue Agency, *supra* note 106.

112 Brooks, *supra* note 110 at 201-03.

the club, so that they could be discreetly written off.¹¹³ They suggest the licensing of 'sex encounter venues'.¹¹⁴ This licensing requirement could apply to strip clubs, escort agencies, and brothels, so that they would have to clearly identify their status on receipts. If the *Income Tax Act* were amended to add 'sex encounter venues' to paragraph 18(1)(l) or to include it in its own section, taxpayers could no longer deduct expenses incurred in such locales. The advantage to this approach is that it would specifically target sex entertainment to mitigate its inequalities.

Although sex entertainment might be the extreme example of the gendered aspect of networking, it is certainly not the only issue for women in business. As Justice L'Heureux-Dubé articulated in *Symes*, the relationship between business and entertainment can be seen as structured by men for men. Another approach to target the larger inequality would be to eliminate the deductibility of all entertainment expenses. Food expenses could still be deducted since they are much more likely to have a legitimate business purpose.¹¹⁵

ii. Complete Disallowance

The biggest pitfall in both partial ban options is determining which expenses are deductible and which are not. The licensing option would be easy to implement once licences were issued, but it would be difficult to decide what venues would require such a licence. For example, if a theatre venue sometimes has nudity in its performances, does it need a licence? In addition, the line between food and entertainment is not always clear. What if there is entertainment during dinner? A ticket price will not necessarily differentiate between the two costs.

To solve these problems, another policy option is to prohibit the deduction of all food and entertainment expenses. Both Australia and Japan have taken this route, with Australia banning any food or entertainment expense deduction since 1986.¹¹⁶ The backlash from the food and entertainment industry would likely be significant, and such a measure could be viewed as a 'levelling down' equality measure, where benefits for women and men are eliminated to level the field. However, such a policy would effectively prevent the deduction of any sex-related business expense.

D. Recommendation

The existence of the glass ceiling for women in the business world is not a problem that is easy to fix. Nor will a simple amendment to the *Income Tax Act* solve the problem entirely. However, the current state of the system is one in which the government subsidizes discriminatory behaviour for some of the most privileged and powerful people in our society: businessmen. The potential decriminalization of prostitution will likely increase the dollar value of this subsidy as well as the discrimination it facilitates.

Although a complete disallowance is perhaps an ideal long-term solution, there are some significant benefits to the partial ban that make it the preferred policy alternative. With a licensing requirement, the tax scheme would be able to direct behaviour away from

113 Banyard & Lewis, *supra* note 74 at 13.

114 *Ibid* at 17.

115 Schmalbeck & Soled, *supra* note 81 at 759.

116 Walter F O'Connor, "A Comparative Analysis of the Major Areas of Tax Controversy in Developed Countries" (1992) 1:1 *Journal of International Accounting Auditing & Taxation* 61 at 67; Austl, Commonwealth, Australian Taxation Office, *Fringe tax benefits and entertainment*, online: <<http://www.ato.gov.au/businesses/content.aspx?menuid=0&doc=/content/52028.htm&page=17&H17>>; Cedric Sandford, "Worldwide Tax Reform 'How does Australia Compare?'" (1992) 25:1 *The Australian Economic Review* 22 at 27.

unwanted entertainment, towards more egalitarian forms. The partial ban might have to cover more luxury entertainment items than simply sex entertainment, but it would be an effective method to influence behaviour in a more equitable direction.

If no entertainment expenses are deductible, there is no longer an incentive for taxpayers to choose forms of entertainment that maximise their tax savings. Assuming that businesses will not suddenly stop entertaining clients if they can no longer deduct the expense, they may very well spend more money in sex-entertainment venues. The evidence from Australia shows that sex entertainment is still marketed to businesspeople even though entertainment expenses are not deductible.¹¹⁷ Thus, the partial ban with the licensing scheme would be the best policy choice to improve substantive equality for businesswomen in the face of decriminalized prostitution.

E. Effect on Sex Workers

If the partial ban has the desired effect to reduce discrimination against businesswomen, it will inevitably reduce business dollars spent in sex-entertainment venues including strip clubs and brothels. Depending on the percentage of venue revenue that comes from businesspeople, changing the *Income Tax Act* could have a significant effect on the economic profitability of the sex industry. This in turn will affect the women who rely on that industry for their economic sustenance, reducing their ability to exercise their newly acquired rights.

Although problematic, this is not a reason to continue the discrimination in the *Income Tax Act*. A system of allowing businesses to deduct sex-entertainment expenses is a form of government subsidy for such activity. If the government believes that the sex industry and sex workers require subsidization, it could create a direct granting program for employees or club owners. It is not the existence of sex-entertainment venues that is the issue, it is a question of their proper location in the business or personal sphere. A granting program could help clubs market themselves as personal pleasure institutions. Alternatively, the government could, as Pivot suggests, “challenge the social conditions that lead some women (and men) to get involved in sex work.”¹¹⁸ Thus, sex workers can be fully supported, whether they choose to remain sex workers or move into a different line of work.¹¹⁹

CONCLUSION

With the potential for sex work to be decriminalized in Canada, it is important to understand the implications of this decision more broadly within Canadian society. Decriminalization of sex work is very important for the women who currently experience violence and discrimination in the course of their employment. Nevertheless, policy makers should apply the principles of intersectionality and be aware that gains for female sex workers who live at one intersection of race, class, and gender, can be detrimental to women who live at another, such as businesswomen. To strengthen women’s equality throughout Canada, we need flexible policies that can respond to changes such as decriminalization.

In the business world, women are subject to the gendered effects of informal networking, as they are often unable to achieve the same quality or quantity of networks as their

117 Jeffreys, *supra* note 71 at 277.

118 Pivot Legal Society, *supra* note 31.

119 *Ibid.*

male peers. This effect is exacerbated when networking occurs in the context of sex entertainment, since women are either explicitly excluded or feel unwelcome when they do participate. If prostitution is decriminalized, businesswomen will be at more of a disadvantage, as sex entertainment becomes normalized and the range of sex-based activities in which businesspeople can legally engage grows. The best policy response to facilitate the substantive equality of women in business is an amendment to the *Income Tax Act*. By licensing sex-entertainment venues, the legislature can prevent sex-entertainment expense deductions even if they were incurred to gain or produce income.

A feminist perspective accounting for intersectionality highlights the difficulties inherent in creating a more equal society. Policy change affecting women who live at one intersection necessarily also affects women who live at another. An awareness of these different intersections and a flexible, forward-thinking policy approach can help us navigate these important issues. By combining the decriminalization of prostitution and the elimination of sex entertainment as a deductible business expense, we can take two steps forward for women's equality in Canada.