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# IMAGINING DECRIMINALIZATION OF SEX WORK IN CANADA

**Lo Stevenson \***CITED: (2023) 28 *Appeal* 53

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## ABSTRACT

Sex worker rights activists are calling for full decriminalization of sex work in post-*Bedford* Canada. Decriminalization raises complications for the inclusion of sex work in contemporary Canadian labour and employment law. A progressive basic income plan, alongside union organizing, would buttress decriminalization to improve sex worker autonomy and solidarity. This paper, rooted in Katie Cruz's critique of liberal economic approaches to sex work labour and employment law in the United Kingdom, maps a feminist basic income proposal onto a sex worker rights organization's proposal for law reform. Following Cruz, I find that sex work is "unmanageable" in mainstream Canadian labour and employment law. However, evidence and sex worker rights advocacy demonstrate that workers rights, with the safety net of a liveable basic income, can offer increased autonomy, dignity, and protection for those who engage in sex work.

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## INTRODUCTION

In October 2022, the Ontario Superior Court of Justice heard arguments in *Canadian Alliance for Sex Work Law Reform v Canada (CASWLR)*.<sup>1</sup> The case concerns the constitutionality of the anti-sex work Criminal Code provisions that Canada enacted in 2014, the *Protection of Communities and Exploited Persons Act (PCEPA)*.<sup>2</sup> These provisions were enacted to replace a similar set of laws struck down the year before in *Bedford*.<sup>3</sup> In the decade since that decision, some Canadian sex workers have been campaigning against the harms that the new anti-sex work laws create, arguing that the new provisions in many ways pick up where the pre-*Bedford* provisions left off.<sup>4</sup>

Bearing in mind the re-criminalization of sex work which occurred after *Bedford*, the present wave of litigation raises the question, “What happens if the Applicant wins?”. Several legislative pathways will be available to Parliament following a possible striking down of the impugned provisions, but creative and collective strategies focused on sex workers’ labour and human rights will be most beneficial.<sup>5</sup> I argue that to protect people from exploitation, as the *PCEPA* purports to intend, we should begin by ensuring that all people are able to organize to advance their goals and have the resources necessary to meet their basic needs.

The *PCEPA* criminalizes the *purchase* of sex, presupposing exploitation in the sex work transaction.<sup>6</sup> It does so without addressing the exploitation that arises from a lack of resources, which often contributes to the choice to enter the sex industry.<sup>7</sup> The Canadian Alliance for Sex Work Law Reform (CASWLR) challenge argues that the *PCEPA* unjustifiably violates *Charter* sections 7, 15, 2(b), and 2(d) rights to life, liberty, and security of the person; equality; freedom of expression; and freedom of association.<sup>8</sup> A global movement of sex worker rights activists is calling not for regulation through legalization, but for full decriminalization.<sup>9</sup> Both legalization and decriminalization, however, would raise novel concerns for the incorporation of sex work into existing labour and employment law. UK sex worker rights activist and legal scholar Katie Cruz has noted that,

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- 1 *Canadian Alliance of Sex Worker Law Reform v Canada (AG)*, (Factum of the Applicants) [CASWLR FOA], online (pdf): <ccla.org> [perma.cc/8M85-XH2B].
  - 2 *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [PCEPA].
  - 3 *Canada (AG) v Bedford*, 2013 SCC 72 [Bedford].
  - 4 CASWLR FOA, *supra* note 1.
  - 5 Tamara O’Doherty & Ian Waters, “Gender, Victimization, and Commercial Sex: A Comparative Study” (2019) 40:1 *Atlantis J* 18 at 26; Tuulia Law, “Licensed or Licentious? Examining Regulatory Discussions of Stripping in Ontario” (2014) 30:1 *CJLS* 31 at 32.
  - 6 *PCEPA*, *supra* note 2.
  - 7 Molly Smith & Juno Mac, *Revolted Prostitutes: The Fight for Sex Workers’ Rights*, 2nd ed (London, UK: Verso, 2020) at 43; Cecilia Benoit et al, “Would You Think About Doing Sex for Money? Structure and Agency in Deciding to Sell Sex in Canada” (2017) 31:5 *Work Employment & Society* 1.
  - 8 CASWLR FOA, *supra* note 1; *Canadian Charter of Rights and Freedoms*, ss 2(b), 2(d), 7, 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [Charter].
  - 9 Smith & Mac, *supra* note 7.

while advocates and case law indicate that sex workers are indeed seeking protection under employment law, the material conditions of sex work render it “unmanageable” under liberal frameworks of labour and employment.<sup>10</sup>

It seems clear that decriminalized or legalized employment would not, on its own, go far enough to address the risks which can arise in sex work. New frameworks are required to reconcile the incompatibility of controlling work conditions with sex worker rights advocates’ demands for dignity and autonomy. Ultimately, this may require the decoupling of survival resources and labour, as well as organizing and collective bargaining. Therefore, I argue that basic income and other creative strategies likely have more to offer sex workers than conventional labour and employment law. The combination of a progressive basic income plan, collective bargaining, empowered workplace negotiations, and decriminalization together could address or prevent exploitation in sex work much more effectively. Decoupling the provision of survival resources from work, as well as removing barriers to safety and autonomy through decriminalization, should increase the power that sex workers have when negotiating transactions.

This paper is a limited survey of sex worker rights and anti-poverty feminist advocacy. I highlight some of the theoretical frameworks at play, which illustrate the legal and social values underpinning the treatment of women and work in Canada. I note that while people of all genders work in the strip and sex trades, the majority of sex workers are women, who face greater barriers to safe working conditions<sup>11</sup> and the industry is heavily influenced by stigma and ideology which aim to control women.<sup>12</sup> As a person who has not worked in the sex industry, I focus my discussion on the voices of sex workers themselves as much as possible. The law and academia have long histories of paternalistic treatment towards sex workers. It is critical that outsiders and legal professionals interested in this subject centre their voices.

## I. SEX WORK & CRIMINALIZATION

### A. Sex Work, its Challenges, and Stigma

Because sex work is a deeply heterogeneous field, it is difficult if not impossible to describe a generalized set of conditions or challenges shared among *all* sex workers.<sup>13</sup> Cecilia Benoit describes the sex industry as “polymorphous” and “class stratified.”<sup>14</sup> As Chris Bruckert and Frédérique Chabot wrote in their report of community-based research by Prostitutes of Ottawa/Gatineau Work Educate Resist (POWER), “sex work is an occupational category rather than a job description or identity.”<sup>15</sup> Some sex workers strip, some work in porn,

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10 Katie Cruz, “Unmanageable Work, (Un)liveable Lives: the UK Sex Industry, Labour Rights and the Welfare State” (2013) 22:4 Soc & Leg Studies 486.

11 O’Doherty & Waters, *supra* note 5.

12 Chris Bruckert & Frédérique Chabot, *Challenges* (Ottawa: Prostitutes of Ottawa-Gatineau Work, Educate, and Resist, 2014) at 18; Chris Bruckert, *Taking it Off, Putting it On: Women in the Strip Trade* (Toronto: Women’s Press, 2002) [Bruckert, *Taking it Off*].

13 Bruckert & Chabot, *supra* note 12.

14 Benoit et al, *supra* note 7 at 4.

15 Bruckert & Chabot, *supra* note 12 at 16

some work out of their homes or in the homes of their clients, while some workers are street-based.<sup>16</sup> Some sex workers work independently or freelance, while other choose to work for an employer or manager.<sup>17</sup> A clear distinction does seem to exist between indoor and street-based work, wherein street-based workers seems to bear a higher risk of violence.<sup>18</sup> Elsewhere, Bruckert has described the central role that notions of harm, stigma, and misogyny play in shaping the dynamics of the sex industry.<sup>19</sup> While in many ways sex work is shaped by the same social forces that shape all work, these considerations must be factored in to law and policy debates about sex work.<sup>20</sup>

It is important to bear in mind that agency and personal choice are important factors which often inform the choice to enter the sex trade.<sup>21</sup> Cecilia Benoit et al found that while 86% of interviewed sex workers cited the need or desire for money as a reason they entered the sex trade, roughly half of those respondents also named at least one other reason, such as a critical life event or the personal appeal of the work.<sup>22</sup> To further shift legal discourses about sex work away from morality and towards workers' rights, it is useful to understand the risks of sex work as located not inherently in the sexuality of the work, but the criminalization and marginalization of work itself.<sup>23</sup> I argue that sex workers'—like all workers'—agency in the labour transaction can be improved with the support of solidarity mechanisms like collective bargaining and non-transactional social supports like basic income.

## B. Sex Work Law in the Canadian Context

The sex work transaction was not illegal in Canada *per se* until after the 2013 Supreme Court decision *Bedford*<sup>24</sup> struck laws which criminalized certain aspects of sex work, such as communication, to deter public nuisance. The claimant sex workers in that case argued that those provisions imposed risk, or created barriers to risk mitigation, in ways that violated their *Charter* protected right to security of the person.<sup>25</sup> In short, because sex work itself was a legal activity, and public nuisance was an insufficient justification for the imposition of risk, the Supreme Court agreed. The Harper-era Conservative Parliament filled in the legislative gap left by *Bedford* with the *PCEPA*, which criminalized the purchase of sex and indirectly criminalized the sale of sex. Parliament pledged \$20 million to support the goals of the *PCEPA*. Nearly half the funds were directed to policing, with the other half allocated to agencies which support sex workers to leave the trade.<sup>26</sup> In doing so, Parliament

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16 And some strippers do not describe themselves as sex workers, see Bruckert, *Taking it Off*, *supra* note 12.

17 Benoit et al, *supra* note 7.

18 Bruckert & Chabot, *supra* note 12 at 44.

19 Chris Bruckert & Stacy Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work" (2013) 28:1 CJLS 43; Chris Bruckert, "Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action" (2015) 30:1 CJLS 1 [Bruckert, "PCEPA"].

20 Bruckert & Chabot, *supra* note 12.

21 Benoit et al, *supra* note 7 at 13.

22 *Ibid* at 8.

23 Law, *supra* note 5 at 44; Bruckert, "PCEPA", *supra* note 19 at 1.

24 *Bedford*, *supra* note 3.

25 *Charter*, *supra* note 8 at s 7.

26 Bruckert, "PCEPA", *supra* note 19 at 2.

embraced the “Nordic Model,” which grants sex workers immunity from prosecution for most sex-work related offenses. While the letter of the law says that sex workers are not criminalized, the reality is quite different.<sup>27</sup>

The *PCEPA* penalizes sex workers’ attempts to practice harm reduction. It is now an offense to communicate about the sale of sex in a public space, or in a private space which is publicly visible.<sup>28</sup> This increases vulnerability by encouraging sex workers to screen clients quickly, delay screening, or negotiate in isolated areas.<sup>29</sup> Third parties are prohibited from profiting from sex work. “Legitimate” expenses such as accounting and rent are excluded, though certain safety practices like hiring bodyguards or sharing calls with colleagues are not.<sup>30</sup> Giving advice to peers, including advice on how to mitigate risk, is considered illegal “procurement.” It is illegal to help anyone make an advertisement for sex work or mention another sex worker in one’s own advertisement.<sup>31</sup> It is also an offense for sex workers to rent an apartment together or supervise each other’s calls—both actions which help sex workers conduct their work in relative safety.<sup>32</sup>

Meanwhile, other legal risks run parallel to sex work. For example, sex workers may face eviction or deportation following sex work charges. Together these risks may deter sex workers from reporting incidents of violence or seeking police intervention.<sup>33</sup> Furthermore, when *clients* are criminalized, they are given leverage to refuse to make themselves identifiable to sex workers.<sup>34</sup> Police ability to apprehend and hold accountable violent or exploitative clients is thereby reduced, intensifying the risks of sex work.<sup>35</sup> This intensification of risk has been cited in official reports by the Swedish and Norwegian governments, the first to implement the Nordic Model.<sup>36</sup>

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27 *R v NS*, 2022 ONCA 160 [NS].

28 *Criminal Code*, RSC 1985 c C-46, s 213.

29 Maggie’s Toronto Sex Workers Action Project, “Criminal Provisions That May Impact Sex Workers” *Maggie’s Toronto*, online (pdf): <maggiesto.org> [perma.cc/8665-PW5L].

30 *Ibid.*

31 *Criminal Code*, *supra* note 14, s 286.4.

32 *Ibid.*, ss 286.2-286.4.

33 Brenda Belak & Darcie Bennett, “Evaluating Canada’s Sex Work Laws: The Case for Repeal” (2016) Pivot Legal Society at 19, 42, online (pdf): <pivotlegal.org> [perma.cc/9FBG-SHEE].

34 Smith & Mac, *supra* note 7 at 147.

35 *Ibid* at 164.

36 *Ibid* at 145.

Table 1. Current criminal sex work laws in Canada

Criminal Code section	Description of Offense
213	Communication in public to sell sexual services
286.1(1)	Purchasing, or communicating to purchase sexual services
286.2(1)	Receiving compensation relating to someone else's sexual services
286.3(1)	Facilitating the purchase of someone else's sexual services
286.4	Advertising someone else's sexual services

### C. Critiques and Challenges Against the PCEPA

The Nordic Model's "denounce and deter" strategies are simply not effective at addressing exploitation, as shown by the countries who have adopted this model. For example, in the five months following the criminalization of purchase in Ireland, sex worker safety organisation Ugly Mugs experienced a 61% increase in reports of violent and abusive clients.<sup>37</sup> Smith and Mac's research shows that it is not the criminal laws on the books, but "*poverty* and people's access to resources"<sup>38</sup> which are the key determinants of the size of a country's sex industry, and that "denounce and deter" strategies have been shown to increase the stigmatization and social vulnerability of sex workers.

It is worth interrogating the proposition that sex work can be deterred through the criminalization of purchase. One of the objectives of the *PCEPA* is to decrease prostitution by reducing *demand* for sex work.<sup>39</sup> In this framework, sex workers are seen as the supply of a good. This characterization is erroneous. As the struggle to meet basic needs supplies the imperative to engage in sex work, we should characterize this exchange in the reverse. In fact, purchasers of sex function as the *supply* of necessary resources. As Smith and Mac have noted, "the person selling sex *needs* the transaction far more than the buyer does; this need makes the sex worker vulnerable."<sup>40</sup>

To the extent that the purchasers of sex can be deterred by criminal penalties, we must interrogate *which* purchasers are deterred. Continued violence against sex workers in Nordic Model countries demonstrates that "clients who remain [despite criminalization] are disproportionately likely to be impulsive, drunk, or violent."<sup>41</sup> The power dynamics of the worker-client relationship must be properly understood by law makers wishing to shape behaviour without amplifying the risk of violence.

37 *Ibid* at 147 (without equating rates of reporting to rates of violence, this statistic indicates a meaningful shift).

38 *Ibid* at 166.

39 *NS, supra* note 27 at para 21.

40 Smith & Mac, *supra* note 7 at 54.

41 *Ibid* at 144.

Prior to the CASWLR challenge, the *PCEPA* had already been the subject of judicial disagreement. In 2020 the Ontario Court of Justice issued a declaration in *Anwar* that the *PCEPA*'s material benefit (286.2), procuring (286.3), and advertising (286.4) provisions unjustifiably violate section 7 of the *Charter*.<sup>42</sup> The Crown did not appeal, and in February 2022 the Ontario Court of Appeal came to the opposite conclusion in *R v NS*.<sup>43</sup> At the trial level in *NS*, Justice Sutherland interpreted the *PCEPA* as legalizing the sale of sex. Sutherland therefore found the impugned provisions to unjustifiably infringe the section 7 'Bedford right' to mitigate legal risk. The Court of Appeal ruled, however, that the *PCEPA* only exempted sex workers from prosecution for most, but not all, sex-work related offenses. Therefore, the sale of sex was not a legal activity with legal protection for risk mitigation. Sutherland's decision was overturned, and a new trial was ordered.<sup>44</sup>

Because the *PCEPA* builds exploitation into the definition of prostitution and states its purpose as denouncing and deterring the practice of sex work, it necessarily implies that exploitation occurs not in the *work*, but in the *sex* of sex work.<sup>45</sup> This denies the reality that sex work is labour and reveals the law's underlying assumption that poor work conditions are not a source of exploitation. Ultimately, the harshness of the law belies its redemptive purpose. To protect people from exploitation, we should begin by ensuring that they have the resources necessary to meet their basic needs. Ineffective strategies of deterrence and denunciation should not be prioritized over preventing the very real harms being committed under the *PCEPA* and other Nordic Model regimes.

In light of these concerns, for years prior to launching their *Charter* challenge, CASWLR and other sex worker rights advocates have been calling on Parliament to improve the conditions of Canadian sex work. Importantly, CASWLR asserts that decriminalization alone is insufficient. Their main recommendations are 1) to repeal the *PCEPA*'s criminal provisions and rely on existing laws against coercion and violence; 2) to engage in broad immigration reforms to protect non-status sex workers; 3) to grant sex workers access to the *Employment Standards Act*<sup>46</sup> statutory complaints process; 4) to grant sex workers the right to form workplace associations; and 5) to expand existing government supports to improve material conditions of impoverished sex workers.<sup>47</sup>

It is important to note that while the violence experienced by sex workers is unacceptable, sex work is not inherently violent, and violence against sex workers is far from inevitable.<sup>48</sup>

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42 *R v Anwar*, 2020 ONCJ 103 [*Anwar*].

43 *NS*, *supra* note 27.

44 Alyshah Hasham, "Are Canada's Sex Work Laws Unconstitutional? Why That Open Question Has Thrown Ontario Law Enforcement into Chaos" *The Toronto Star* (1 October 2021), online: <[www.thestar.com](http://www.thestar.com)> [perma.cc/2PQF-PHMS].

45 *NS*, *supra* note 27 at para 22.

46 *Employment Standards Act, 2000*, SO 2000, c 41 [ESA].

47 Canadian Alliance for Sex Work Law Reform, "Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada" (March 2017), online (pdf): <[sexworklawreform.com](http://sexworklawreform.com)> [perma.cc/CF2U-WFJP].

48 Bruckert, "*PCEPA*", *supra* note 19 at 2.



Chris Bruckert rightly asserts that there is more commonality than difference among women experiencing violence in the workplace, regardless of the sector in which she labours.<sup>49</sup>

#### D. Global Sex Work Laws: Comparative Analysis

##### i. Decriminalization in Aotearoa New Zealand

To examine the consequences of decriminalization, we can look to Smith and Mac's descriptions of sex work in Aotearoa New Zealand.<sup>50</sup> While sex workers with citizenship or permanent resident status report drastically improved conditions since legalization, non-status sex workers are still criminalized. Because they are left to work illegally, they report intensified police interactions since decriminalization, including profiling and deportation targeting. In part because the criminalization of drug use and migration persists, vulnerability, stigma, and violence against sex workers continues.

The situation in Aotearoa New Zealand illustrates that increasing sex worker empowerment and income stability requires broad and progressive social supports. Specifically, exploitation in sex work cannot be addressed without significant immigration and drug law reforms to remove the barriers to social supports which increase vulnerability. Immigration laws relating to sex work, such as Canada's sex work prohibition for immigrant work permits, are attempts at limiting human trafficking.<sup>51</sup> Smith and Mac note that "the law facilitates the conditions that are required for trafficking by rendering the sex workers who are working as migrants illegal."<sup>52</sup> Furthermore, as CASWLR notes, "the conflation of sex work, human trafficking, and exploitation leads to overly-broad misuse of current anti-trafficking initiatives, [and] places sex workers at further risk of isolation, marginalization and violence."<sup>53</sup>

The position that decriminalization alone is not sufficient to address risk is supported by sex work researchers Pitcher and Wijers,<sup>54</sup> who also highlight the need to clarify the legal context of sex work which would arise upon decriminalization. Pitcher and Wijers note that it is important not to let sex workers fall into *de facto* employee status, without granting rights and benefits of employment. They also raise the critical need for diverse sex worker consultation in developing new legal and policy regimes, to avoid the harms of over-regulation and surveillance experienced in legalized regimes.

##### ii. Legalization in the UK, the Netherlands, Germany, and Nevada

Legalization is another approach to sex work regulation, which is practiced in the UK, Germany, the Netherlands, and parts of Nevada.<sup>55</sup> Under legalization, certain types of

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49 *Ibid* at 1.

50 Smith & Mac, *supra* note 7 at 193.

51 *Ibid* at 148.

52 *Ibid* at 199.

53 Canadian Alliance for Sex Work Law Reform, *supra* note 47 at 33. More information on human trafficking and sex work here: <butterflysw.org> and here: <swanvancouver.ca>.

54 Jane Pitcher & Marjan Wijers, "The Impact of Different Regulatory Models on the Labour Conditions, Safety and Welfare of Indoor-Based Sex Workers" (2014) 14:5 *Criminology & Criminal Justice* 560.

55 Smith & Mac, *supra* note 7 at 185; Bruckert, *Taking it Off*, *supra* note 12 at 55.

sex work are brought into the ambit of employment legislation. These frameworks were generally not designed to accommodate the different conditions of sex work. Sex work-specific rules, with criminal penalties, are often implemented to fill these gaps. Sex workers must therefore comply with a strictly controlling and invasive regime to avoid arrest. For example, Smith and Mac describe legalized conditions in Germany: sex workers must register with a publicly available government database and carry a sex worker ID card. Women with criminal records or drug dependency are not eligible. To qualify, workers must submit to regular drug use, pregnancy, and STI testing, and attend mandatory counselling. Failing a drug test or becoming pregnant are grounds for license revocation. Under these conditions, workers who do comply must sacrifice their privacy and autonomy. Workers who are not eligible must work in a criminalized system.<sup>56</sup> In Ontario, legal sex work requires a license for which people with criminal records and non-status immigrants are not eligible.<sup>57</sup>

Reports from legalized regimes indicate that inclusion in employment legislation is not a guarantee of protection.<sup>58</sup> Occupational health and safety laws rooted in stigma rather than harm reduction regulate the sex worker's body as a threat to public health, instead of providing resources for the worker's own benefit.<sup>59</sup> The requirement for public registration penalizes workers who seek to protect themselves from potentially violent clients by keeping their legal names and addresses private. Furthermore, indoor workers must work for managers or risk arrest. The level of dependence these laws create reduces managers' incentive to provide adequate work conditions and reduces workers' power to organize for improved conditions. Overall, legalized sex work exists in a complex web of regulation which does not leave much room for worker autonomy.<sup>60</sup>

### iii. The Trouble with Legal Classifications of Sex Work

Sex worker rights activism is shifting the discourse away from moral regulation and towards economics. In doing so, it implicitly favours the employment contract as an equitable exchange and model of individual agency and autonomy.<sup>61</sup> If we examine the regulation of already legal sex work in Canada, we can see the incompatibility of existing, mainstream employment frameworks and sex work. Neither employee nor independent contractor status reflect the nature of sex work, but it is possible that dependent contractor status and craft union organizing or, if possible, sectoral bargaining could create opportunities for building solidarity among sex workers.<sup>62</sup>

Business licensing reform may offer another innovative and promising option for improving the material conditions of sex work. Katie Cruz, Kate Hardy, and Teela Sanders have described

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56 *Ibid.*

57 Bruckert & Hannem, *supra* note 19 at 57.

58 Cruz, *supra* note 10 at 467.

59 Smith & Mac, *supra* note 7 at 185; Bruckert, *Taking it Off*, *supra* note 12 at 55.

60 *Ibid* at 180.

61 Cruz, *supra* note 10 at 468.

62 Jenn Clamen & Kara Gillies, "Will the Real Supporters of Workers' Rights Please Stand Up?" in Elya M. Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red Light Labour* (Vancouver: UBC Press, 2018) 305 at 313.

the potential for business licensing regimes to stipulate labour standards for workplaces in the sex industry.<sup>63</sup> If these standards were negotiated with organized sex workers, adequately reflecting their needs and concerns, such a regime could not only increase autonomy and solidarity for sex workers, but also reduce reliance on costly and time-consuming litigation. Because there would be oversight into any contractual changes, and licensing would be regularly reviewed, such a program may offer better proactive protection than employment law. Regulation at the business level may also ameliorate some of the problems with worker licenses discussed in the previous section.

Ontario considered the classification of legal sex work in *Burlesque v Algonquin*, a 1981 class action dispute between erotic dancers and the clubs where they performed.<sup>64</sup> The dancers were defined as independent contractors because their work was not sufficiently controlled by the alleged employers to qualify as employees. The dancers' shifts were mainly arranged by independent agents, the club did not closely supervise the dancers' acts, and none of the claimants regularly returned to the same clubs. The clubs however had demonstrated control by dismissing dancers who refused to perform certain acts, or whose physical appearance was not satisfactory. In deciding that the dancers were not employees, the Labour Board denied the dancers the right to form workplace associations.

The Board admitted that the dancers' work conditions were analogous to the construction industry, which allows for craft unions. However, the Board ultimately discounted this similarity because, in the Board's view, the dancer population turns over too quickly to sustain unionization. The Board did not address the possibility that this high rate of turnover may itself be caused by poor working conditions and lack of union protection. Ultimately, the Board's bias against the claimants was made clear in the decision by the statement that "...some verbal abuse, however distasteful, is probably inevitable," and "comes with the job territory."<sup>65</sup>

Interestingly, the Ontario Labour Board recently granted employee status to a male erotic dancer who made a claim of wrongful dismissal<sup>66</sup> under the *Occupational Health and Safety Act (OHSA)*,<sup>67</sup> alleging that his dismissal was retribution for accusing a colleague of harassment. The distinction between this claim and *Burlesque* seems to lie in the different conditions afforded to cis men and women in the sex trade. The scarcity of male dancers may make them more valuable, less interchangeable, and apparently more worthy of protection in the workplace than their female counterparts.<sup>68</sup> Nonetheless it is important to note that the Board was only able to classify the dismissed dancer as an employee due to the club's high degree

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63 Katie Cruz, Kate Hardy & Teela Sanders, "False Self-Employment, Autonomy and Regulating for Decent Work" (2017) 55:2 BJIR 274 at 290.

64 *Canadian Labour Congress (Canadian Association of Burlesque Entertainers, Local Union No. 1689) v Algonquin Tavern*, 1981 CanLII 812 (ON LRB), [1981] OLRB Rep August 1057 [*Burlesque*].

65 *Ibid* at para 34.

66 *Mazen Jamal Chams Eddin v 938088 Ontario Ltd*, 2019 ON LRB, 2019 CanLII 37953 (ON LRB) [*Peppermints*].

67 *Occupational Health and Safety Act*, RSO 1990, c O.1, s 50.

68 *Peppermints*, *supra* note 66 (for more on the impacts of gender in sex work, see O'Doherty & Waters, *supra* note 5).

of control.<sup>69</sup> This control is best exemplified by the club's requirement that dancers work fully nude, despite numerous employee objections. Indeed, the dancer's wrongful dismissal claim was denied because the Board decided that he quit voluntarily to avoid the full nudity requirement, despite his allegations of harassment. This result demonstrates the limits of claims for retroactive damages under employment law as a strategy for improving sex work conditions.

#### iv. "Unmanageability" of Legal Sex Work and the Need for Organizing

If employee status is not compatible with sex work, independent contractor status, or self-employment, may seem like a better fit. However, many sex workers, particularly those working indoors, experience a level of control in the workplace which is inconsistent with independent contractor status.<sup>70</sup> It is common for indoor sex workers to pay a fee to work and be charged commission, to commit to working on certain days, and to have their dress, appearance, and behaviour supervised. These workers are often required to purchase their own work clothes, are not permitted to arrange substitutes, and are implicitly or explicitly unable to refuse work.<sup>71</sup>

Even if indoor sex workers could be classified as independent contractors, this classification would shut them out of *ESA* and *OHSA* protections and the essential right to collective bargaining.<sup>72</sup> For these reasons, independent contractor status is not amenable to the demands of sex worker rights activists. Furthermore, access to Employment Insurance—an additional benefit of legalized work—is governed by stringent eligibility requirements. These requirements effectively exclude low-wage, part-time and precariously employed workers, as well as those who have left employment voluntarily.<sup>73</sup> This matrix of factors incentivizes workers to tolerate exploitative working conditions so as not to jeopardize their access to the resources they need.<sup>74</sup>

In light of these complexities, Katie Cruz characterizes legal sex work as “unmanageable”: incapable of being brought into mainstream employment law due to the high level of autonomy sought by sex worker rights activists.<sup>75</sup> She also notes that UK sex worker rights activists are not proactively seeking designation as employees.<sup>76</sup> Similarly, Chris Bruckert has noted that workers in the strip trade “do not expect protection from the state, since they are well aware that in practice, if not in policy, clubs operate outside of the security afforded by labour laws.”<sup>77</sup> The same is true for the CASWLR, who advocate for access to the statutory claims process, but not for proactive employee status.<sup>78</sup>

69 *Peppermints*, *supra* note 66 at paras 11-16.

70 Cruz, Hardy & Sanders, *supra* note 63; Bruckert, “PCEPA”, *supra* note 12 at 61.

71 Cruz, *supra* note 10 at 472; Bruckert, “PCEPA”, *supra* note 12 at 73.

72 Law, *supra* note 5 at 32.

73 Cee Strauss, “Basic Income & the Care Economy” (4 October 2021) at 27, online (pdf): *Women's Legal Education and Action Fund* <[www.leaf.ca](http://www.leaf.ca)> [perma.cc/2MYC-GEKQ].

74 This dynamic is already at play in the legal strip trade: Bruckert, *Taking it Off*, *supra* note 12 at 60.

75 Cruz, *supra* note 10 at 471.

76 *Ibid* at 472.

77 Bruckert, *Taking it Off*, *supra* note 12 at 64.

78 Canadian Alliance for Sex Work Law Reform, *supra* note 47.

## E. Addressing the Feminization of Poverty

While of course there are sex workers of all genders, it is important to note that sex work is a heavily feminized sector. Across employment sectors, women are a disadvantaged class of workers.<sup>79</sup> More than half of low-wage and precariously employed workers are women. Three quarters of part-time workers in 2015 were women, who often work part time out of a need to balance their unpaid care work obligations. These systemic factors contribute to the demand for resources, which often provide an impetus to sex work.<sup>80</sup>

Cruz describes several law reform models which have been developed to counteract the feminization of poverty in the last half century.<sup>81</sup> The caregiver parity model advocates that care work, including domestic work, be remunerated “on a par with paid employment.”<sup>82</sup> The breadwinner model incentivizes women’s equal participation in the labour market through improved access and benefits for childcare. Under either model, women must choose between worker and caregiver status. Both frameworks rely on the model of paid employment to conceptualize the redistribution of reproductive labour. However, as supported by this paper’s analysis thus far, we can understand that the employer relationship is not a sufficient source of protection.

Needs-tested social assistance programs are not effective solutions to the feminization of poverty, either. Eligibility for these programs currently requires applicants to drain their limited assets. This penalizes attempts to save for emergencies and extends precarity and poverty indefinitely into the future.<sup>83</sup> Additionally, current welfare benefits in Ontario are set to amounts well below the poverty line, especially in urban settings. In 2020 in Ontario an unattached adult considered employable received a welfare income of only \$10,385, while the 2020 Deep Income Poverty index was considerably higher, at \$18,542.<sup>84</sup> Note that the Deep Income Poverty index is 75% of the poverty line income.<sup>85</sup> Furthermore, welfare programs’ intense scrutiny and surveillance act as a barrier to sex workers. The stigma, criminalization, and vulnerability of sex work incentivize workers to avoid state surveillance. Thus, sex workers are effectively excluded from welfare programs. This need for privacy, as well as the burden of back taxes, can also act as a barrier to income tax participation, which effectively excludes sex workers from other social benefits.<sup>86</sup> Therefore, far from offering supportive alternatives to unwanted work, current needs-tested social assistance often contributes to the same financial necessity which frequently provides the main impetus for women engaging in sex work.<sup>87</sup>

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79 Strauss, *supra* note 73.

80 Law, *supra* note 5.

81 Cruz, *supra* note 10 at 476.

82 *Ibid.*

83 Strauss, *supra* note 73 at 47.

84 Jennifer Laidley & Mohy Tabbara, “Welfare in Canada, 2020” (December 2021) at 94, 100, online (pdf): *Maytree Foundation* <maytree.com> [perma.cc/FSZ5-6URE].

85 *Ibid* at 99.

86 Smith & Mac, *supra* note 7 at 181.

87 *Ibid* at 151.

## II. THE ROLE OF UNION ORGANIZING

To truly unlock the potential of CASWLR's recommendations, barriers to sex worker collective bargaining should be removed. In their research Smith and Mac have found that "the most important source of untapped power for sex workers is not sexual liberation, social rebellion, or even money, but solidarity."<sup>88</sup> Collective bargaining is an essential element in mitigating the risks of sex work while honouring the autonomy of sex workers. Collective bargaining and basic income together would have immense potential to address exploitation not just in sex work but in all workplaces.<sup>89</sup>

Sex worker organizing could take many forms, from craft unions to protests and solidarity actions. Craft unions in particular have enabled organization by workers who don't experience high levels of employer control, but are not fully independent either.<sup>90</sup> Broadening the scope of craft unionism to accommodate the sex industry could substantially empower sex workers. In addition, sectoral bargaining, a model not currently recognized in any Canadian province, would allow unions to organize workers by industry, rather than by individual workplace.<sup>91</sup> This would support organization of small sex industry workplaces with high turnover, as described above.

Should sex work be decriminalized in Canada, sex workers will very likely benefit from support from existing unions and organized labour movements. Already existing unions could play an important role by helping sex workers to organize, providing guidance in navigating labour and employment laws, and supporting negotiations with legislators and employers.<sup>92</sup>

Labour theorists have proposed that basic income would significantly increase bargaining power of unions by guaranteeing the provision of basic needs outside of labour transactions.<sup>93</sup> This would reduce worker dependence on employers and support resiliency during strike actions. Basic income could also weaken the financial incentive for other workers to cross picket lines. These changes would make room in sex workers' lives to organize for better conditions at work, and strengthen the union movement significantly.

## III. BASIC INCOME AS HARM REDUCTION

Basic income, a universal income transfer benefit, could vastly increase sex workers' power and security. A version of basic income was offered as emergency support during the first year of the COVID-19 pandemic. The program was targeted at tax-paying workers, meaning that undocumented, migrant, and sex workers either did not qualify or did not feel safe seeking access.<sup>94</sup> Learning from this predictable outcome, basic income should be implemented carefully to avoid these pitfalls.

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88 *Ibid* at 219.

89 Judy Fudge, "What Makes Labour Free? (And Why This Question Matters)" (24 May 2019), online: *Futures of Work* <futuresofwork.co.uk> [perma.cc/38D7-QRMX].

90 Cruz, *supra* note 10.

91 Clamen & Gillies, *supra* note 62 at 313.

92 *Ibid* at 313.

93 Edgar Manjarin & Maciej Szlinder, "A Marxist Argumentative Scheme on Basic Income and Wage Share in an Anti-Capitalist Agenda" (2016) 11:1 *Basic Income Studies* 49.

94 Strauss, *supra* note 73 at 47.

Basic income could improve autonomy for workers by offering a liveable alternative to unwanted or exploitative work conditions. The availability of alternatives may empower workers to refuse exploitative conditions, enabling them to seek or negotiate work on their own terms. A proposal which is especially useful for the context of sex work is the Women’s Legal Education and Advocacy Foundation’s (LEAF) 2021 report on the potential of basic income to ameliorate the feminization of poverty.<sup>95</sup> The LEAF proposal is premised on an intersectional feminist agenda aimed at providing fundamental supports for the broadest possible population.

### A. Progressive Basic Income Plan

LEAF’s basic income proposal is based on “universality, non-conditionality, security, autonomy, dignity, stability and reliability, adequacy, rewarding work effort, valuing care, complementing social services, and economic and gender equality.”<sup>96</sup> LEAF stipulates that an effective basic income plan must be income-tested, not needs-tested, and set at a liveable amount. The PEI Working Group for a Liveable Income describes a liveable amount as “means enough to pay rent or mortgage and monthly utility bills, to buy nutritious food and medicine, to use transportation, to continue learning, to access childcare or eldercare, to participate in the community, and to cover emergencies.”<sup>97</sup> Eligibility should require low- to no surveillance.<sup>98</sup> Additionally, LEAF notes that a basic income program must be codeveloped with Indigenous, First Nations, and Métis peoples to ensure that the program is “culturally appropriate and responsive to local needs.”<sup>99</sup>

The choice of whether to distribute basic income benefits to individuals or households seems to place two feminist priorities in opposition.<sup>100</sup> Individual distribution could improve individuals’ financial independence—a key feminist goal. This could be especially important for people wishing to leave abusive households. However, individual distribution would likely disadvantage single adults, whose cost of living is not reduced by collective or family living. This is especially true when singles are compared to couples without children, as benefits for couples without children are twice that of singles’, while their expenses, per person, are also lower than the expenses of singles.

In any formulation, basic income would not be a panacea for financial autonomy. As LEAF describes, labour and income are rarely distributed equally within households, and it would be practically impossible to prevent benefits from being controlled by abusers.<sup>101</sup> Furthermore, a basic income is likely not sufficient to cover the substantial costs of exiting an abusive relationship. Lump sum supports are likely to be required as additional support.

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95 *Ibid.*

96 *Ibid* at 41.

97 *Ibid* at 45.

98 *Ibid* at 39.

99 *Ibid* at 47.

100 *Ibid* at 56.

101 *Ibid.*

As such, the LEAF proposal offers a “middle ground position”<sup>102</sup> to balance the goals of financial autonomy while limiting the enrichment of higher-income households. Under this approach, benefit amounts are calculated by household, and shares of household benefits are distributed to individuals.

Finally, LEAF’s proposal stipulates that a successful basic income plan must be part of a broad reform network including “high-quality, affordable, accessible public care services; valuing paid caregiving work and other gendered occupations; and a shift in workplace norms to allow for flexibility and part-time work arrangements without significant financial penalty.”<sup>103</sup> LEAF unequivocally does not support the implementation of a basic income program in the absence of these conditions, since this would likely result in further vulnerability for non-status workers. As such, LEAF notes that permanent residency for all would make the program much easier to administer and thereby more effective. Otherwise, as a state-administered program, the benefits could not be accessible to non-status immigrants. However, with LEAF’s conditions, basic income has immense potential to create change for the better in feminized sectors such as sex work.

## **B. Arguments Against Basic Income**

Opposition to basic income is dispersed across the political spectrum and is generally based on cost. These critiques are based on beliefs of scarcity and austerity: states either cannot afford to, or simply will not invest in adequate social services. In fact, an austerity regime might implement basic income in order to “divest themselves of responsibility for providing social infrastructure more than they already have.”<sup>104</sup> As such, some critics would prefer to improve existing public services in lieu of basic income. For example, one estimate is that for half the annual cost of a basic income program, governments could instead expand affordable housing, improve childcare and public transit, and drastically reduce the user costs of prescription drugs, dental care, and higher education.<sup>105</sup> While these programs may reduce reliance on the labour transaction, I argue that they do not offer a sufficient “safety net” for workers seeking to reject exploitative work or negotiate for better terms.

Other critics worry that people receiving basic income will exploit social resources by refusing to work.<sup>106</sup> Ironically, those advocating this position might see former sex workers taking basic income as exploiters, not as exploited. In short, this point of view unjustly embraces income tax contribution as a transaction for the provision of basic needs. Feminist tax scholar

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102 *Ibid* at 57.

103 *Ibid* at 51.

104 *Ibid* at 10.

105 *Ibid* at 38.

106 Stuart White, “Reconsidering the Exploitation Objection to Basic Income” (2006) 1:2 *Basic Income Studies* 4.



Isabel Crowhurst has noted that “taxpayer status is an identity that tends to elevate those who uphold it to a higher position with respect to demanding citizenship rights,” and that in this context, those who do not pay taxes are “treated as if they have no earned rights.”<sup>107</sup>

By providing resources which have not been “earned,” basic income challenges a key tenet of contemporary Canadian culture, the moral investment in the provision of resources. This is especially legible in the public perception of welfare. Janet Mosher has noted that “recipients are characterized as lacking moral virtues that are integral to the constitution of the “model” citizen.”<sup>108</sup> This designation of welfare recipients as second-class citizens limits empathy across social classes and entrenches the conditions of inequality. This perception likely intensifies when coupled with the stigma of sex work.

### C. An Ongoing Debate with Continued Relevance

The idea of a social safety net as harm reduction is not new. Janet Mosher writes that the early social programs implemented in the aftermath of World War Two were aimed at removing “certain matters—often matters integral to social reproduction—from the play of market forces or regulat[ing] the market in order to minimise and/or socialise risk.”<sup>109</sup> Basic income could thus be seen as a means of socializing the risks of exploitative labour. More specifically, the idea of basic income as a tool against the feminization of poverty is not new either. As early as 1970, basic income was put forward as a means of addressing feminized poverty for single mothers.<sup>110</sup>

Basic income does have new and urgent relevance, however, as a subject of recent legislative debate. In the last two years, two provincial committees on basic income (In British Columbia and Prince Edward Island) have reached conclusions in favour of basic income. Federal Parliament has conducted two favourable basic income studies, and Liberal MP Julie Dzerowicz and NDP MP Leah Gazan have both introduced private members’ bills concerning basic income.<sup>111</sup> As well, Senator Kim Pate has introduced a basic income bill currently at its second reading in the Senate.<sup>112</sup> At the second reading, Senator Pate was careful to note that Bill S-233 would not cause cuts to other social support and income assistance programs.<sup>113</sup> With the recent wave of litigation against the *PCEPA*, decriminalization, too, is a timely subject.<sup>114</sup>

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107 Isabel Crowhurst, “The Ambiguous Taxation of Prostitution: The Role of Fiscal Arrangements in Hindering the Sexual and Economic Citizenship of Sex Workers” (2019) 16:1 *Sexuality Research & Soc Policy* 166 at 180.

108 Janet E Mosher, “Welfare Reform and the Re-Making of the Model Citizen,” in Margot Young, Susan B Boyd & Gwen Brodsky, eds, *Law and Society: Poverty, Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007) at 120.

109 *Ibid* at 50.

110 *Ibid* at 49.

111 Strauss, *supra* note 73 at 33.

112 Bill S-233, *An Act to develop a national framework for a guaranteed livable basic income*, 1<sup>st</sup> Sess, 44th Parl, 2022.

113 Bill S-233, *An Act to develop a national framework for a guaranteed livable basic income*, 2nd reading, *Senate Debates*, 44-1, 153:15 (8 February 2022) at 1550 (Hon Kim Pate).

114 Hasham, *supra* note 44.

Neither basic income nor needs-tested supports will, in isolation, effectively address coercion from a lack of resources. Without enabling solidarity and addressing the power imbalance in the labour relationship, social and income supports will not go far enough. However, since basic income directly undermines the employer relationship and is more efficient to administer, it has more potential than needs-tested supports to create change.

## CONCLUSION

Change is likely coming in the legal landscapes of sex work and social assistance. It is crucial for the safety and dignity of sex workers that these reforms do not, like the *PCEPA*, create more harm in their attempts to reduce exploitation. This research suggests that basic income, union organization, and decriminalization—if designed with the right conditions—together could improve worker autonomy and solidarity in the sex industry.

Further research would be necessary to explore 1) the possibility that dependent contractor classification or sectoral bargaining could offer protection through the essential right to collective bargaining, and 2) whether the justice system could recognize dependent status among sex workers despite bias and stigmatization.

Ultimately, these reforms would advance the fundamental goals being voiced by sex worker rights advocates around the world: autonomy, dignity, and leaving no one behind. This aspirational conclusion is strongly tempered by the dangers of increased marginalization, which could arise should basic income or decriminalization be implemented without radical immigration and drug law reforms. There is very real cause for concern that the exclusion of non-status immigrants and people who use drugs would exacerbate their risk of exploitation in sex work. Like LEAF, I do not recommend that a basic income plan should be applied in the absence of these reforms. Similarly, basic income should not be used as a substitute for robust social supports like healthcare and housing subsidies. However, the combination of these reforms together with basic income and decriminalization would drastically improve the material conditions of sex work.