

SECTION 2(B): FREEDOM OF EXPRESSION

Expression is a fundamental freedom protected in Canada's *Charter of Rights and Freedoms*.

The following analysis argues that s. 213(1)(c) of the *Criminal Code of Canada*, which prohibits communication for the purposes of prostitution, violates s. 2(b) of the *Charter*.

In their affidavits, sex workers unanimously opposed this section of the *Criminal Code*.

Participants argued they should be granted the same rights as other Canadians and specifically referred to their right to freely express themselves in the context of their profession.

I think that the communication law takes away sex worker's freedom of speech. People are going to do this no matter what the law is. It seems like it would take a police officer on every person, listening to what they are saying, to enforce this law. [Affidavit 057 at para. 3]

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I think that the communicating law is not effective and that communicating for the purposes of prostitution should be legalized. I have been charged with soliciting and communicating four times. I think that the law is obsolete, and that Canadian society is behind the times in keeping this law in the Criminal Code. [Affidavit 051 at para. 3]

Analysis

The *Canadian Charter of Rights and Freedoms* guarantees freedom of expression for all Canadians under section 2(b).

2. Everyone has the following fundamental freedoms:

...

b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

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

The limitations placed on communicating for the purposes of prostitution under s. 213(c) of the *Criminal Code*, “the communicating law”, violate the protections provided by s. 2(b) of the *Charter*.

In 1990, five years after the communicating law was introduced into the *Criminal Code*, the Supreme Court of Canada considered its constitutionality in two cases. In both cases, s. 213(c) (which was s. 195(1)(c) of the *Criminal Code* at that time) was found to infringe the right to freedom of expression guaranteed by s. 2(b). However, in both cases the infringement was justified under s. 1 of the *Charter*.

***Reference re Section 193 & 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52 [Prostitution Reference].**

***R. v. Skinner*, [1990] 1 S.C.R. 1235, [1990] S.C.J. No. 51 [Skinner].**

When determining a freedom of expression claim, courts follow *Irwin Toy Ltd. v. Quebec*, the leading authority on s. 2(b) analysis.

***Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 [Irwin Toy].**

Section 2(b) involves a two-stage analysis. The first stage determines whether the plaintiff’s activity is protected by the guarantee. If the activity falls within the protected sphere of conduct, the second stage examines whether the purpose or effect of the government action restricts freedom of expression.

DOES THE ACTIVITY FALL WITHIN THE SPHERE OF PROTECTED CONDUCT?

Case law favours a broad, inclusive approach when assessing the scope of protected conduct under s. 2(b). The court in *Ford v. Quebec* stated that "[g]iven the earlier pronouncements of this Court...the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation."

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712 at para. 59, [1988] S.C.J. No. 88 [*Ford*].

The scope of s. 2(b) is intended "to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."

Irwin Toy, *supra* at 968 as cited in the *Prostitution Reference*, *supra* at para. 75.

Section 2(b) of the *Charter* protects all content of expression "irrespective of the meaning or message sought to be conveyed." However, an activity that has no content of expression because it does not convey or attempt to convey a meaning, or an activity that conveys meaning through a violent form of expression, is not within the protected sphere of conduct

Irwin Toy, *supra* at paras. 41-42.

Prostitution Reference, *supra* at para. 75.

Retail, Wholesale and Department Store Union, Local 580 (R.W.D.S.U.) v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 at 588, 33 D.L.R. (4th) 174, [1986] S.C.J. No. 75.

Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, [1987] S.C.J. No. 10 [*Public Service*].

Communication between a sex worker and a potential client falls within the protected sphere of conduct because it conveys a message in a non-violent form. As discussed in *Irwin Toy*, "[e]xpression has both a content and a form, and the two can be inextricably connected." Thus,

any communication between a sex worker and another person for the purpose of negotiating sexual services has expressive content.

Irwin Toy, supra at para. 41.

Many affiants expressed a sense that their right to freely express themselves was unfairly limited by this law.

I think the communicating law should be changed. When I am working in prostitution, I am just expressing myself and it is not a criminal act. [Affidavit 030 at para. 3]

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I believe that girls should be able to communicate for the purposes of prostitution. Communication is important so that girls can tell one another who the bad dates are, the ones who are violent or who take their money or don't pay. When a girl is "communicating" she can take some time to check the guy out and decide if she thinks he is safe. A girl will pay attention to whether the guy is nice. She can also figure out what kind of sexual services he is looking for and decide if she is into it. He may pay more for different sexual acts and then a girl can decide if she is interested. [Affidavit 014 at paras. 4 and 5]

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I believe that the communication law is a problem because you cannot talk to anyone on the street. You have to watch everything you do and say. When I worked in the sex trade I had to watch everything I did and said. I sometimes had to be careful, not to look people in the face or say hello for fear of being charged. This made me feel isolated. It is unsafe because you have to be secretive and no one knows where you are and what you are doing. [Affidavit 029 at paras. 5-7]

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When I was working, I would never gesture. I would wait until a car stopped nearby to where I was standing and gestured, or flashed their lights. They would

pretty much have to come up to me and proposition me. This was partly because I was nervous to approach cars. [Affidavit 047 at para. 5]

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I think that the communicating law makes girls feel stressed, they feel overwhelmed. They feel like it's a violation of their rights. [Affidavit 049 at para. 4]

IS THE PURPOSE OR EFFECT OF THE GOVERNMENT ACTION TO RESTRICT FREEDOM OF EXPRESSION?

Since communicating for the purposes of prostitution falls within the protected sphere of conduct, the second step is to determine whether the purpose or effect of the government action is to restrict freedom of expression.

The majority in *Irwin Toy* held that "[i]f the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of freedom of expression." On the other hand, if the government aims only to control the physical consequences of a particular conduct, its purpose does not entrench upon the guarantee.

Irwin Toy, supra at para. 49.

In the case of s. 213(1)(c), the government's purpose is aimed specifically at the content of the expression between a sex worker and her or his client in a public place. If its purpose were to limit a physical activity, such as the presence of sex workers on the street, the law would more closely resemble the vagrancy laws that were repealed in the early 1970's.

Prostitution Reference, supra at para. 89.

How are you supposed to get a customer if you can't communicate? They gave us a little bit but hung us with it. For example, a couple of years ago I was arrested for soliciting, and one of the things brought up was how I communicated. Supposedly, my breaking-the-law was by eye contact. He drove by, I looked and he pulled over. The law means I can't look at anybody. [Affidavit 013 at paras. 3 and 4]

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I think that the communicating law is wrong. The decision to communicate is a decision between two adults. It is my business and it is outrageous that the government thinks that they can stick their noses into my business. The communicating law needs to be axed, it needs to be eliminated from the Criminal Code. Communicating for the purposes of prostitution does not harm anyone. [Affidavit 065 at paras. 21 and 22]

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I believe that any private conversation between two people is legitimate no matter where it takes place. I don't think what is spoken about between two people should be criminal. People can discuss anything else if they're outside and not be criminally charged. [Affidavit 009 at para. 4]

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I understand why the communicating law exists. They're worried about people selling sex in a public place. But prostitution isn't going to away [*sic*] and instead of focusing their time and money on busting people for communicating, they should be focusing on making women safer. [Affidavit 031 at para. 7]

The communication restricted by s. 213(1)(c) of the *Criminal Code of Canada* is fundamentally commercial expression. However, as the Court in *Ford* stated, "there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*."

***Ford, supra* at para. 59 as cited in the *Prostitution Reference, supra* at para. 83.**

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The Supreme Court of Canada held in *Skinner* that s. 213(1)(c) was a *prima facie* violation of s. 2(b). In addition, the judges unanimously concluded in the *Prostitution Reference* that the statute expressly limits an individual's freedom of expression.

Skinner, supra at para. 18.

Prostitution Reference, supra at paras. 1 and 117.

Consistent with the Supreme Court of Canada's findings in the *Prostitution Reference* and *Skinner*, s. 213(1)(c) is in violation of s. 2(b) the *Charter*. The next step is to examine whether, given the current understanding of the unintended negative consequences of the law, s. 213(1)(c) can be saved by s. 1 of the *Charter*.

Prostitution Reference, supra.

Skinner, supra.