

SECTION 15: THE RIGHT TO EQUALITY

The equality perspective means that Parliament cannot deliberately or recklessly worsen the condition of an already disadvantaged and vulnerable group.

Prostitutes are such a group. The prostitution laws single prostitutes out for criminal stigmatization and punishment, insuring that all will have criminal records, and perpetuating the marginalization and exploitation to which prostitutes are subject... In light of the equality perspective it is submitted that Parliament cannot use the criminal sanction as a substitute for appropriate social and economic measures...

Reference re ss. 193 and 195(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 (Factum of the Intervener, Canadian Organization for the Rights of Prostitutes) at paras. 3-4 [CORP Factum].

Equality is a constitutionally enshrined principle, and as such, is a mandatory consideration in sex trade law reform. Equality's legal meaning requires that Parliament prioritize the needs, capacities, disadvantages, human dignity and other interests of sex workers. Pivot Legal Society has collected expert evidence on Canada's failure to observe the equality rights of sex workers. This submission is an invitation to the Government of Canada to recognize that ss. 210, 212 and 213 breach s. 15 of the *Canadian Charter of Rights and Freedoms*, and adopt the recommendations herein so that sex workers can take their place as equal participants in Canadian society.

The criminal laws regarding prostitution violate the equality rights of low-income sex workers in particular. In the Downtown Eastside, sex workers are typically working to meet basic needs, and who has few or no other options to earn income. This is the group from which Pivot's affiants were drawn. These sex workers are among the most marginalized and discriminated against people in Canadian society. They endure substandard living conditions, violence and harassment, discrimination, poor health and economic need. Any legal reform dealing with the sex trade must

be drafted with their rights and needs as a central concern. The current laws criminalizing the sex trade fail in this respect. They are aimed at curbing the visible, street-level sex trade and thus have a disproportionate negative impact on this group.

Selling sex is legal in Canada. The following argument discusses the *Criminal Code* provisions regulating the sex trade as a unified regime of de facto criminalization, and focuses on ss. 210, 212 or 213 individually where appropriate.

It should be noted that s. 210 (the bawdy-house provision) and s. 213 (the communication provision) each infringe equality in their own right by placing a disproportionate burden on the shoulders of sex workers, a group that experiences social marginalization and extreme disadvantage in Canada. Section 212 (the procuring provision) also has indirect discriminatory effects, which are discussed further in the argument.

This section of the report will demonstrate how the current legal regime violates s. 15 of the *Charter* by applying the test for equality infringements and presenting evidence and reasoning under each arm of that test. The argument is based on three propositions:

1. Selling sex is not in itself illegal;
2. Criminal laws that punish sex workers for acts auxiliary to the sale of sex have discriminatory effects;
3. The personal characteristics of sex workers are an inappropriate basis for differential legal treatment because:
 - a. historically disadvantaged groups in need of human rights guarantees are over-represented among sex workers;

- b. this is a critical source of income for some individuals, the loss of which would have devastating effects; and
- c. “sex worker” is an occupational status that indicates social and political exclusion.

Analysis

The *Canadian Charter of Rights and Freedoms* guarantees equality to all Canadians in section 15:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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].

When deciding equality rights claims, Canadian courts follow the *Law* test. This is a framework found in the unanimous Supreme Court of Canada decision of *Law v. Canada (Minister of Employment and Immigration)*. It dictates that for a successful equality claim, three questions must be answered in the affirmative:

1. Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment than others on the basis of one or more personal characteristic?

2. Is the claimant subject to differential treatment based on one or more enumerated or analogous grounds?
3. Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of a presumed group of personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

***Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 88 [Law].**

The third question – whether or not the law is discriminatory – looks at four contextual factors to establish if the law undermines a person’s human dignity. This is from the perspective of the claimant and is evaluated using the standard of the "reasonable person". Subjective and objective information is considered in this regard. Contextual factors are used because the Court is aware that differential treatment is not always discrimination. The contextual factors suggested by Iacobucci J. in *Law* are:

- pre-existing disadvantage, stereotyping, prejudice, or vulnerability experienced by the individual or group at issue;
- the correspondence, or lack thereof, between the ground or grounds on which the claim is based and the actual needs, capacity, or circumstances of the claimant or others;
- the ameliorative purpose or effects of the impugned law upon a more disadvantaged person or group in society; and
- the nature and scope of the interest affected by the impugned law.

***Law, supra* at para. 88.**

The *Law* test has been re-affirmed as the guiding approach for section 15 cases in every recent equality decision from the Supreme Court of Canada.

Trociuk v. British Columbia (A.G.) (2003), 226 D.L.R. (4th) 1 at para. 9.

Nova Scotia (A.G.) v. Walsh, [2002] 4 S.C.R. 325 at para. 31.

Gosselin v. Quebec (A.G.), [2002] 4 S.C.R. 429 at para. 18.

A *Criminal Code* provision, like any other law, regulation or policy created by government, must comply with s. 15. Though equality rights challenges to the *Criminal Code* are infrequent, cases such as *R. v. M.C.*, *R. v. Roy* and *R. v. Roth*, demonstrate that criminal laws must meet *Charter* standards of equality. If an unjustified violation of equality rights is found, discriminatory criminal laws can and will be overturned.

Criminal Code of Canada, R.S.C. 1985, c. C-46 [Criminal Code].

R. v. C.M. (1995), 23 O.R. (3d) 629 (C.A.) [C.M.].

R. v. Roy, [1998] R.J.Q 1043 (C.A.) [Roy].

R. v. Roth (2002), 306 A.R. 387 (Q.B.) [Roth].

Application of the *Law* Test

PART A OF THE *LAW* TEST:

Q: Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment than others on the basis of one or more personal characteristics?

A: The impugned laws draw a distinction between sex workers and others, and fails to take into account the claimant's already disadvantaged position, resulting in substantively different treatment on the basis of personal characteristics.

Comparator groups are used to show differential treatment. This section compares low-income sex workers to other Canadians and then to other members of the sex trade generally.

Sex Workers and Other Canadians

Comparing the situation of sex workers and other Canadians not involved in sex work shows how substantively different treatment results from the current criminal laws. Although ss. 210-213 apply universally to all Canadians, it is presumed that all Canadians are equally positioned to avoid breaking those laws.

Special laws criminalizing aspects of sex work fail to consider the feminization of poverty. In other words, the ability of someone with an adequate income, education and housing to refrain from communicating for the purposes of selling sex is a matter of socio-economic position.

When someone lacking socio-economic advantage has decided that communicating in public with the purpose of selling sex is the best choice to survive, refraining from breaking the law comes at too high a cost. The criminalization of that decision fails to take into account that person's economic disadvantage, resulting in substantively different treatment.

The criminalization of sex work exposes those who engaging in it to many harms, risks and limits on freedom. Sex workers are subject to stigma, marginalization, state intervention and criminal sanction in a way that other members of Canadian society are not. Their physical presence and existence, communication and body language, personal lives, living arrangements, workplaces, relationships and livelihoods are subject to routine criminal and moral monitoring:

- They experience harassment, physical threats and violence from members of the public and state actors, including police, and receive less protection from such abuse than others;

- They experience negative stereotyping and/or insult when they seek medical attention and report experiences of violence; and
- Criminal sanction for prostitution offences exposes women to further state action, which can include prosecution for welfare fraud and state apprehension of minor children.

C. Benoit, & A. Millar, "Dispelling myths and understanding realities: Working conditions, health status, and exiting experiences of sex workers" (Victoria: PEERS, 2001), online: University of Victoria Homepage <<http://web.uvic.ca/~cbenoit/papers/DispMyths.pdf>> at 50-58. (date accessed: 28 July 2003) [PEERS report].

B.C., Ministry of the Attorney General, *Community consultation on prostitution in British Columbia: Overview of results*, (Victoria: Ministry of the Attorney General, 1996).

L. Cler-Cunningham, *Violence against women in Vancouver's street level sex trade and the police response* (Vancouver: P.A.C.E., 2001), online: P.A.C.E. Homepage <<http://www.pace-society.ca>> (date accessed: 28 July 2003) [PACE report].

S. Currie, *Assessing the violence against street-involved women in the Downtown Eastside/Strathcona community* (Vancouver: Downtown Eastside Youth Activities Society, 1995) at 37-47 [DEYAS report].

P. Erickson, J. Butters, P. McGillicuddy & A. Hallgren, "Crack and prostitution: Gender, myths and experiences" (2000) 30(4) *Journal of Drug Issues* 767 [Erickson].

J. Lowman, & L. Fraser, *Violence against persons who prostitute: The experience in British Columbia* (Ottawa/Vancouver: Department of Justice Canada, Research, Statistics and Evaluation Directorate, 1995).

Sex workers and people involved in other areas of the sex trade

This section compares the criminal law's treatment of low-income sex workers to the treatment of pimps/procurers, clients and people engaged in other aspects of the sex industry.¹

The criminalization of sex work has a different impact on those engaging in it from a position of poverty. Low-income sex workers are more likely to conduct their work in public. They are more likely to be subject to state scrutiny through past or present encounters with the justice system or social services. For these reasons in particular, the burden of criminal sanction is disproportionately placed on them.

The majority of prostitution charges in Canada are under s. 213, the “communication” provision. They comprise roughly 90 percent of charges in 2002, which includes people charged as clients. Sex workers who frequently work on the street, not all of whom are necessarily low-income, are much more likely to be charged than pimps, under s. 212, or people working indoors at massage parlours or escort agencies, under the bawdy-house provision at s. 210.

D. Duchesne, "Street Prostitution in Canada." (1997) 17(2) *Juristat* (Ottawa: Statistics Canada).

¹ Comparisons between sex workers are the subject of considerable controversy, but we make use of such a comparison here primarily because it illustrates the particular effects of the criminal laws on low-income sex workers, and in a court, this comparison would be especially powerful. Our chief concern is that comparing work in the street-level sex trade to other kinds of sex work (i.e. massage parlours, escort agencies, etc.) may be seen as legitimizing stereotypes about which sex workers are meritorious, deserving, or undeserving of concern, respect and consideration. The fact is that sex workers in all aspects of the sex industry will have well-founded equality claims, particularly on the basis of sex and race, on the basis of different evidence and argument. The scope of this project was limited to evidence about sex work in the DTES, and to some extent, differential treatment of the affiant group is demonstrated by looking at other groups of sex workers. However, such a comparison must not be regarded as nullifying the rights claims of sex workers from other aspects of the industry. For example, see *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, in which the exclusion of Aboriginal band members living off reserve from the band council voting scheme required that group to be compared to on-reserve band members. The Court acknowledged that the claimants experienced “double discrimination”: the discrimination in the voting scheme (the subject of the case), and discrimination against Aboriginal people common to band members as a whole (beyond the scope of the case).

R. Jones, Evidence given to the Subcommittee on Solicitation Laws, October 21, 2003, 16:25 [Evidence of R. Jones].

Sex workers convicted of prostitution offences under the *Criminal Code* face sentences ranging from summary conviction and fine under s. 213(1), as stipulated in s. 787(1), to a term of imprisonment up to ten years for procuring under s. 212(1). Failure to pay a fine can trigger imprisonment under s. 787(2) This is important to note because women living in poverty may lack the funds to pay fines. Roy Jones, Director of the Canadian Centre of Justice Statistics, Statistics Canada, summarized the differential impact of the communicating law on women before the Subcommittee on Solicitation Laws. He stated that "...women convicted of communicating offences are dealt with somewhat more severely than men... About 43 percent of women who were found guilty were sent to prison, compared with only 7 percent for men... Women were typically sentenced to longer periods of probation than men."

Criminal Code, supra ss. 212, 213, 787.

Evidence of R. Jones, *supra* at 16:35.

The affiants confirmed that custodial sentences have been issued for convictions under the communication provision:

The female police officer pushed me up against a doorway structure next to the shop I was trying to enter. She said that she was arresting me for solicitation. I spent 60 days in prison as a result. I had not been trying to solicit the gentleman that I had been talking to. [Affidavit 048 at paras. 4-5]

Alternatively, a sex worker convicted for a prostitution offence may be eligible for diversion programs or alternative measures under s. 717 of the *Criminal Code*. Section 718.2(e) also contains sentencing principles particular to Aboriginal offenders. Many of the terms set for

conditional sentences are insensitive to poverty. For example, it is not unusual for a "no-go" or "red-zone" to be issued if the offence has occurred in a neighbourhood where such offences are common. The offender is prohibited from entering that neighbourhood. This is problematic when, for a neighbourhood like the Downtown Eastside, the prohibited zone contains the offender's home, community, and support services such as women's centres, needle exchanges, and street nurses. If other conditions are set too strictly, such as meetings with a parole officer early in the morning or some distance from one's neighbourhood, an offender with an addiction or cannot afford public transportation will find it difficult to meet those conditions. Breaches of conditions can have serious ramifications, including arrest and escalating sentences.

Criminal Code, supra ss. 717 and 718.2.

Female sex workers with custodial sentences are also exposed to the differential treatment of women in Canada's correctional system. This includes:

- a security classification system that penalizes women from situations of disadvantage;
- a paucity of minimum security beds for women;
- use of maximum security segregation units for women prisoners in men's prisons, preventing access to services;
- fewer community release options than those available for men; and
- an overrepresentation of Aboriginal women, accompanied by disparate and culturally inappropriate treatment.

Canadian Association of Elizabeth Fry Societies, *Submission of the Canadian Association of Elizabeth Fry Societies (CAEFS) to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women* (Ottawa: CAEFS, 2003), online: CAEFS Homepage <<http://www.elizabethfry.ca/submissn/specialr/1.htm>> (date accessed 9 September 2003).

K. Pate, "Recent Issues Impacting Women's Imprisonment in Canada." *Position Paper for Canadian Association of Elizabeth Fry Societies (CAEFS)*. (Ottawa: CAEFS, 2003).

The treatment of sex workers stands in disturbing contrast to extra-judicial diversion programs set up in many Canadian cities for their arrested clients. Known as "John Schools", these are one-day sessions for men who hold no prior criminal record, are not "dangerous" and are willing to admit their guilt. John Schools are located in Vancouver, Toronto, Montreal, Edmonton and Ottawa. They provide information on sexually transmitted diseases, the victimization of female sex workers, the overall affect of prostitution on communities and the federal laws against aspects of prostitution. There is some emphasis on clients' possible sexual addictions. After attending John School the participants' criminal records are cleared of the prostitution-related charges.

S. Wortley, B. Fischer & C. Webster, "Vice lessons: A survey of prostitution offenders enrolled in the Toronto John School diversion program." (2002) 44(4) *Canadian Journal of Criminology and Criminal Justice* 369.

J. Marlowe, "What's wrong with John "school"?" (1996), online: Sex Workers Alliance of Vancouver <<http://www.walnet.org/csis/groups/swav/johnschool/johnschool.html> (date accessed 28 July 2003).

J. Lowman, "Prostitution law reform in Canada" in J. Lowman, ed., *Toward Comparative Law in the 21st Century* (Tokyo: Chuo University Press, 1998) at 919.

There are no diversion programs in Vancouver that are specifically oriented toward the needs of sex workers. The consequences of conviction for a prostitution offence are more severe for sex workers. Someone with a conviction is not bondable, and likely to be ineligible for jobs that

involve handling cash. If the conviction becomes known to an employer, discrimination can result:

It is a hinderance [*sic*] to have a criminal record when looking for work in certain fields. They judge you and don't consider the fact that you haven't been in trouble for a long time. In Edmonton I got a job with a cleaning company. Something had gone missing from the boss's house. Because of my criminal record they assumed it was me and I lost my job. They found what was missing later and I never got an apology for it and they didn't give me my job back [Affidavit 026 at para. 12]

Section 13 of the British Columbia *Human Rights Code* protects against discrimination in employment on the ground of conviction for a criminal or summary offence that is unrelated to the employment. This is, in practice, little protection for a sex worker. The reality of bringing a complaint is minimal, because there is insufficient legal aid for human rights cases and a lengthy tribunal process in British Columbia.

Human Rights Code, R.S.B.C. 1996, Ch. 210.

Legal Services Society, "What Problems are Covered by Legal Aid." online:
<http://www.lss.bc.ca/legal_aid/problems.asp> (date accessed 9 September 2003).

BC Human Rights Tribunal, online:
<http://www.bchrt.bc.ca/popt/rules_practice_procedure> (date accessed 9 September 2003).

There are other effects of a conviction for prostitution offences. This includes travel restrictions: "I was convicted and I have a criminal record. This means that I cannot travel," [Affidavit 017 at para. 6]. It may also seriously affect a woman's family:

This affected me because social services found out about my charge and came and apprehended my daughter. [Affidavit 030 at para. 11]

Once identified as a sex worker to the police, affiants reported harassment and a perception of selective enforcement of the provisions:

Getting caught communicating for the purposes of selling or buying sex can screw up peoples' names because they are then known to be a hooker. Police officers that come across me, know me as a street worker. It is scary because even if I am just waiting somewhere, not working, officers will come up to me and ask me if I am working. [Affidavit 025 at para. 2]

A special criminal regime for the sex trade, differential treatment in enforcement, and differential consequences from prostitution charges and convictions for sex workers are evidence of the differential treatment of sex workers for the purposes of an equality analysis.

PART B OF THE LAW TEST

Q: Is the claimant subject to differential treatment based on one or more enumerated or analogous grounds?

A: Yes. The differential treatment of sex workers is based on the analogous ground of "sex work", or in the alternative, on the enumerated grounds of "sex", "disability" and "race".

Sex workers deserve targeted constitutional protection of their equality. As a group, they meet the criteria for establishing a new analogous ground. For marginalized and silenced groups often defined by a single characteristic or activity, constitutional protection is a preliminary step to recognition as multi-dimensional members of Canadian society. Sex workers are stereotypically defined by their profession. Yet, the affiants described connections to their families, volunteer work, personal heritages and childhood experiences, along with visions for their futures and the

future of their communities. In this sense, they parallel the situation of lesbians and gay men, who have been defined by and discriminated against on the basis of their sexuality.

The ground of sexual orientation was established to protect a group of people set apart because of moral judgments about the same-sex aspect of their sexual activity. Sex workers are set apart in society because of moral judgments about the commercial element of their sexual activity, and historically, about sex between unmarried partners. Discrimination on these grounds is especially pernicious, because it is based on something that is extremely personal and intimate.

Furthermore, equality claims on the basis of sexual orientation have been quite successful since *Vriend v. Alberta*, not only in advancing the human rights entitlements of lesbian and gay Canadians, but asserting a more complex view of the relationships, work experiences, and social position of people in those groups. Recognizing sex work as an analogous ground would provide a similar, and critically needed, success.

***Egan v. Canada*, [1995] 2 S.C.R. 513.**

***Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 90.**

Low-income sex workers in the Downtown Eastside represent an intersection of the enumerated grounds of sex, disability and race. The *Corbiere* decision at the Supreme Court of Canada sets out the basic considerations used in determining a new analogous ground. The affiant group possesses the necessary factors.

[W]e look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

***Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13.**

The Intersecting Grounds Approach to a New Analogous Ground

The equality rights of the affiant group could be advanced on the enumerated grounds of sex, disability and race individually, but the fullest equality analysis is provided by denoting the group as sex workers. Among the group are many people with multiple characteristics recognized as traditional grounds of discrimination, such as sex, disability and race. All of these are protected under the *Charter* and statutory human rights codes. This intersection of classic grounds provides a solid base on which to denote a new analogous ground. The cases of *Sparks* and *Falkiner* provide examples of where compounded classic grounds and the additional factor of poverty crafted a new ground.

***Dartmouth/Halifax County Regional Housing Authority v. Sparks* (1993). 119 N.S.R. (3d) 91 (C.A.).**

***Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)* (2002), 59 O.R. (3d) 481, leave to appeal to S.C.C. granted, [2002] S.C.C.A. No. 297 [*Falkiner*].**

Sex workers can bring a claim based on the enumerated ground "sex". Since the *Brooks* decision, it is valid for a class of women to bring a claim of sex discrimination even if the discrimination is experienced by just that class and not all women. As described by the Court, "[t]he fact that discrimination is only partial does not convert it into non-discrimination." Sex workers are predominantly women who experience the differential treatment previously detailed, solidly founding a claim on the ground of "sex".

***Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 at 1248.**

Furthermore, that women are not the only workers in the sex trade does not invalidate their claim: see *Falkiner*. Male and transgendered sex workers, who also experience severe social disadvantages, violence and negative stereotypes in the course of their work, would also benefit from law reform designed to improve the situation of women sex workers. This will be

particularly true if law reform places a premium on the *Charter* values of security of the person and equality.

I was raped three times. I told the police but they said they couldn't help because I was gay. I think that police attitudes toward homosexuals and especially male prostitutes are awful. The police drive by sex workers in Boystown and shout obscenities. They're supposed to protect us but they degrade us and mistreat us.
[Affidavit 077 at para. 5]

Falkiner, supra.

The affiant group can bring a claim based on the enumerated ground "disability". Many reported serious illnesses, including HIV/AIDS, hepatitis C, and/or drug addiction. There is considerable documentation that sex work under the current conditions leads to mental health problems, ranging from anxiety to post-traumatic stress disorder similar to that experienced by soldiers in combat situations.

I was originally put on the streets by my brother when I was 15 years old, to support his drug habit. I soon became addicted to drugs myself. I have been clean from drugs and alcohol now for two and a half years. As a result of my involvement in the sex trade, I have Hepatitis C and post-traumatic stress and anxiety disorder. I was diagnosed with bi-polar disorder and depression a year ago. Over the past 20 years I have frequently been suicidal. I avoid many of the areas I used to work in so that I can stay clean and mentally healthy.
Unfortunately, I still need to work in the sex trade, and can't avoid all the areas.
[Affidavit 076 at para. 2]

The health conditions detailed in this quotation and in the affidavits could constitute disabilities in an equality challenge.

Affidavits reporting addiction or drug use: 001, 002, 003, 004, 006, 010, 011, 012, 015, 019, 021, 022, 026, 027, 030, 032, 035, 036, 037, 038, 039, 043, 045, 046, 047, 048, 051, 052, 055, 056, 058, 059, 060, 062, 063, 065, 067, 069, 070, 071, 072, 074, 075, 080, 082, 083, 084, 085, 086, 088.

Affidavits reporting health problems, including HIV, hep C, depression or other conditions: 002, 003, 004, 010, 013, 015, 019, 021, 023, 026, 032, 035, 036, 037, 043, 047, 049, 050, 051, 052, 054, 057, 059, 061, 069, 070, 071, 072, 073, 074, 075, 076, 080, 081, 084, 085, 092.

M. Farley & H. Barkan, "Prostitution, Violence Against Women and Posttraumatic Stress Disorder." (1998) 27(3) Women & Health 37.

PEERS report, *supra* at 8.

N. Quastel, "Addiction as a Disability." (2001), online: Pivot Legal Society <http://www.pivotlegal.org/research/memo_addiction-as-disability.shtml> (date accessed 19 August 2003).

Sex workers in the Downtown Eastside can bring a claim based on the enumerated ground "race". Many affiants identified themselves as Aboriginal. The PEERS report found Aboriginal people were over-represented in their study as well. The DEYAS report identified 70 percent of adult female sex workers who participated in their Vancouver study as Aboriginal. The latest statistics available from the Greater Vancouver Regional District Policy and Planning Department report that self-identified Aboriginal persons comprise only 1.8 percent of the total population of the Greater Vancouver area, yet almost 30 percent of the population of Vancouver's Downtown Eastside. Sixty-six percent of Vancouver's total Aboriginal population live in poverty.

Affidavits reporting Aboriginal heritage: 001, 002, 006, 008, 010, 014, 017, 018, 019, 021, 022, 027, 029, 031, 036, 037, 040, 042, 043, 044, 050, 052, 053, 056, 058, 059, 060, 061, 067, 069, 072, 074, 080, 082, 085, 087, 092, 093.

PEERS report, *supra* at 6.

DEYAS report, *supra* at 37-47.

GVRD Policy and Planning Department, 2001 Census bulletin #7 – Aboriginal population (Vancouver: Policy and Planning Department, 2003), online: Greater Vancouver Regional District Homepage <<http://www.gvrd.bc.ca>> (date accessed 28 July 2003).

K. Lee, *Urban poverty in Canada: A statistical profile* (Ottawa: Canadian Council on Social Development, 2000), online: Canadian Council on Social Development Homepage <<http://www.ccsd.ca>> (date accessed 28 July 2003).

The interaction of these three characteristics (sex, disability and race) in the affiant group suggests that they could bring a successful claim for *Charter* protection as sex workers.

The Occupational Status Approach to a New Analogous Ground

Occupational status can denote an analogous ground. The concurring opinion of L'Heureux-Dubé J. in *Dunmore v. Ontario (Attorney General)* assists in determining why sex work should be considered an analogous ground. She argues that occupational status can, in the right circumstances, denote a protected group. She notes that courts have recognized the fundamental nature of employment to an individual's life and human dignity. She also notes that the Supreme Court of Canada has never declared that a certain occupational status cannot constitute an analogous ground.

In *Delisle*, while the majority concluded that RCMP officers did not satisfy this prong of the *Law* test, it left the door open for the possibility that other occupationally oriented forms of discrimination could fall under the scope of s. 15(1) by limiting its holding to RCMP officers only (see *Delisle, supra*, at para. 44). In my concurring reasons in that case, I expressed my belief that an occupational status could constitute a suspect marker of discrimination, at para. 8:

[O]ccupation and working life are often important sources of personal identity, and there are various groups of employees made up of people who are generally disadvantaged and vulnerable. Particular types of employment status, therefore, may lead to discrimination in other cases, and should be recognized as analogous grounds when it has been

shown that to do so would promote the purposes of s. 15(1) of preventing discrimination and stereotyping and ameliorating the position of those who suffer social and political disadvantage and prejudice.

...In this case, there is no doubt that agricultural workers, unlike the RCMP officers in *Delisle*, do generally suffer from disadvantage, and the effect of the distinction is to devalue and marginalize them within Canadian society. Agricultural workers "are among the most economically exploited and politically neutralized individuals in our society" and face "serious obstacles to effective participation in the political process..."

***Dunmore v. Ontario (A.G.)*, [2001] 3 S.C.R. 1016 at paras. 166-168 [Dunmore].**

Sex work is a matter of personal identity for many workers. This is evident from the work of peer advocacy and outreach organizations such as WISH, PACE, PEERS and the International Union of Sex Workers. All of these groups involve sex workers working for their own interests in an advisory/advocacy capacity.

International Union of Sex Workers, online: <www.iusw.org>.

Prostitutes Empowerment Education Resource Society, online: <www.peersvancouver.org>.

Prostitution Alternatives Counselling Education, online: <www.pace-society.ca>.

Women's Information Safe House (WISH), online: <www.wish-vancouver.net>.

Sex workers are also devalued, marginalized, and thwarted from effective and full participation in the political process. As will be discussed in the "social citizenship" section below, public exposure as a sex worker is a serious risk. Fear of criminal and social consequences can prevent sex workers from fully participating in Canadian society.

For these reasons, it is in line with L'Heureux-Dubé J.'s reasoning in *Dunmore* and *Delisle* to recognize sex work as an occupation that attracts protection as an analogous ground of discrimination in s. 15.

The Immutability Approach to a New Analogous Ground

A final characteristic of an analogous ground was explained in *Corbiere*. An analogous ground is a personal characteristic that can only be changed as a result of unacceptable personal cost:

It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity. This suggests that the thrust of identification of analogous grounds at the second stage of the *Law* analysis is to reveal grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are actually immutable, like race, or constructively immutable, like religion...

***Corbiere, supra* at para. 13.**

“Constructive immutability” is understood by looking at the enumerated ground of religion.

Although one’s religion may be a matter of choice, it is a choice that is so deeply embedded in one’s personal life that the state has no legitimate interest in interfering with it. Work in the sex trade, particularly from a position of poverty, is a similar mix of deeply embedded personal conditions and circumstances and personal agency (i.e. choosing to be a sex worker as opposed to choosing other less acceptable or inadequate options).

As such, one's participation in sex work is an inappropriate basis for differential treatment under the criminal law. Being a sex worker can be viewed as constructively immutable, especially when focusing on low-income sex workers without other realistic options.

Exiting sex work can be very difficult, particularly for women who have experienced trauma, drug addictions, and/or poverty.

I am hoping to exit the sex trade. I think that I need counseling [*sic*] and detox. I also would like to get involved in an employment program where I could get my GED and try to get back in the workforce. I used to do secretarial work and would like to get back into that kind of work. I would also like to move home where I can be clean. [Affidavit 002 at para. 16]

.....

I have found it difficult to leave the drug trade and the sex trade because of my addiction. [Affidavit 17 at para. 6]

Those who do leave may have tried unsuccessfully to do so at other times in the past. Sometimes a violent event at the hands of the client is a precipitating factor in their decision to exit.

I worked in the sex trade until I had a bad date. I stopped after that. [Affidavit 018 at para. 2]

.....

Something could have happened to me that night in the car when he tried to scare me. I got out of the car and walked away, and it slowed me down after because I got scared and my boys wouldn't have known what happened to me [Affidavit 046 at para. 12]

The criminal laws governing the sex trade worsen the situation. A criminal record, such as past conviction(s) for prostitution charges, make it difficult for someone to exit, even if she is trying to move into another area of the sex trade such as massage parlours or escort services.

I think that the fact that it is criminal means that it makes it a lot harder for girls to exit. Especially if you get a criminal record for prostitution. [Affidavit 066 at para. 16]

.....

A criminal record would make getting out a lot more difficult. [Affidavit 050 at para. 4]

Ceasing to work in the sex trade may not effectively end differential treatment and disadvantage. A former sex worker can still be stigmatized in seeking work, accessing services and housing, or entering stores in her neighbourhood. For example:

In Edmonton in 1996 I was trying to rent two rooms with my ex-boyfriend. We were asked if we had a criminal record, I told him I did. We didn't get the place because of that. I was told by my lawyer that legally I did not have to give that information on a lease. [Affidavit 026 at para. 9]

.....

When you apply for housing they make it really hard for you and that makes it hard to get into good housing. [Affidavit 066 at para. 17]

See also PEERS report, *supra* at 50-58.

Canada, Federal/Provincial/Territorial Working Group on Prostitution, *Report and recommendations in respect of legislation, policy and practices concerning prostitution-related activities* (Ottawa: Department of Justice, 1998).

Exiting the sex trade should not be a requirement to avoid the effects of discriminatory criminal laws. This is especially so in a context of reduced social supports, such as a lack of access to drug rehabilitation programs, inadequate social assistance, reduced eligibility for social assistance and other financial aids, social assistance regulations that do not permit recipients to attend post-secondary education, and cutbacks to women's services and child care. All of these factors

accurately describe the current situation women face in British Columbia, as well as other provinces.

I am hanging on to my sanity — what's left of it. I really want to get off this merry-go-round [*sic*] but there are not enough support or services available. There should be greater access to treatment centers. There is no real encouragement from the community to leave the trade. I need to feel that there's hope. It needs to be recognized that most sex-trade workers have been sexually abused, that they are hurting, and that they most likely have addictions. We are not in the sex trade for the fun of it. Therefore there should be a lot more support services for us, such as counselors [*sic*] and treatment centers. We need experts to help us heal.

[Affidavit 080 at para. 7]

Pivot Legal Society. "Pre-Budget Submission to the Standing Committee on Finance." September 29, 2003 [Pivot Finance Submission].

B.C. CEDAW Group, *British Columbia Moves Backwards on Women's Equality: Submission of the B.C. CEDAW Group to the United Nations Committee on the Elimination of Discrimination Against Women on the occasion of the Committee's Review of Canada's 5th Report* (British Columbia: B.C. CEDAW Group, 2003) [B.C. CEDAW Group].

As described, the affiants meet all of the analogous ground criteria. Given the intersection of classic grounds of discrimination within the group of low-income sex workers, the parallel between their occupation and that of the appellants in *Dunmore*, and the constructive immutability of their position, they comprise a group analogous to the protected grounds under s. 15. The state bears a responsibility not to discriminate against them. This can be achieved by lifting the criminal sanctions attached to sex work and supplying the support measures within its jurisdiction that sex workers require.

PART C OF THE LAW TEST

Q: Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

A: The differential treatment of sex workers bears all the hallmarks of discrimination. It imposes of a burden, applies stereotypes, and promotes the view that sex workers are less worthy of recognition and value as human beings and members of Canadian society.

Part A established that sex workers are subject to differential treatment, and Part B further established that this differential treatment is on the basis of analogous or enumerated grounds. The last element of the test considers whether that differential treatment is in fact discriminatory. The *Law* test suggests the discrimination inquiry be undertaken with reference to four contextual factors, which are considered to be hallmarks, or badges, of discriminatory state conduct. They are:

1. Whether pre-existing disadvantage is in evidence for the group;
2. Whether the law fits with the actual needs, capacities and circumstances of the claimant group;
3. Whether there is an ameliorative purpose behind it; and
4. Whether important interests such as human dignity are affected.

The affiants experience pre-existing disadvantage in society

Sex work from a position of poverty is a manifestation of women's economic inequality in Canada.

The feminization of poverty is well documented by Statistics Canada, and by academic researchers. Women are more likely to live in poverty, be employed part-time and work in

positions that do not have access to advancements, benefits or unionization. They are more likely to be the recipients of social assistance and are more likely to be reliant on social housing.

B.C. CEDAW Group, *supra*.

R. Cox, *Welfare Rights are Women's Rights* (Ottawa: National Association of Women and the Law, 2001).

L. Davies, et al., *Social Policy, Gender Inequality and Poverty* (Ottawa: Status of Women Canada, 2001).

K. Hadley, *And We Still Ain't Satisfied: Gender Inequality in Canada, A Status Report for 2001* (Toronto: CSJ Foundation for Research & Education and National Action Committee on the Status of Women, 2001).

C. Lochhead & K. Scott, *The Dynamics of Women's Poverty in Canada* (Ottawa: Status of Women Canada, 2000).

Statistics Canada, *Women in Canada: Work Chapter Updates* (Ottawa: Statistics Canada, 2003).

Engaging in sex work is one of the ways Canada's most impoverished women try to make a sufficient livelihood for themselves, and in many cases, their families.

This work is really important to me financially. Those of us getting cut off of services are having a hard time. It's truly a financial need. We're only getting so little to survive on and we're lucky to even get it, to pay bills or to get food in the house. Sometimes I'm able to make enough to meet my needs. Sometimes it's good, but sometimes it isn't. [Affidavit 046 at para. 8]

.....

I currently work in the sex trade in order to have enough money to feed myself and buy cigarettes. I do this because I don't like to take charity. I like to be able to take care of myself. [Affidavit 076 at para. 2]

.....

They assume we are doing this for the drugs. Sure we are. But we also do it for food, shelter and clothing. [Affidavit 036 at para. 3]

.....

I am not currently employed. I am on employment insurance. The sex trade used to be my main source of income. [Affidavit 056 at para. 3]

According to the PEERS report, for many, sex work is their primary source of income.

PEERS report, *supra*.

While not always the case, low-income sex workers may live with multiple health disadvantages, including addiction to drugs and/or alcohol, HIV/AIDS, hepatitis C, chronic respiratory illnesses and other serious conditions. They may also bear physical signs of violence experienced in their work, such as bruises, scars, missing teeth, or swelling. Any or all of these could present significant impediments to finding and maintaining other sources of income.

Affidavits reporting health problems, including HIV, hep C, depression, or other conditions: 002, 003, 004, 010, 013, 015, 019, 021, 023, 026, 032, 035, 036, 037, 043, 047, 049, 050, 051, 052, 054, 057, 059, 061, 069, 070, 071, 072, 073, 074, 075, 076, 080, 081, 084, 085.

Work in criminalized economies may be the only employment options available to women with criminal records, limited formal education or job training and otherwise constrained choices.

I have had to find alternate work. Instead, I am working for a drug trafficker and I am trafficking in cocaine. I sell cocaine for him. This puts me at risk of getting busted for trafficking. This is not something that I wanted to get into. But I had to because I need to get by and since I can't make money in prostitution [because of threat of arrest], this is my other alternative. [Affidavit 047 at para. 10]

.....

I have a grade 7 education, and no formal training, and I don't feel I have any alternative to working in the sex trade. Financially, I am always struggling, and don't have the resources to find alternative. [Affidavit 076 at para. 2]

Finding another job is not currently a realistic option for most low-income women engaging in sex work.

PEERS report, *supra* at 8 and 43.

Canadian Council on Social Development, *2002 Poverty lines* (Ottawa: Canadian Council on Social Development, 2003). online: Canadian Council on Social Development Homepage <http://www.ccsd.ca/factsheets/fs_lic02.htm> (date accessed 28 July 2003).

Erickson, *supra*.

Special Committee on Pornography and Prostitution (The Fraser Committee), *Pornography and prostitution in Canada* (Ottawa: Department of Supply and Services, 1985) at 376.

The poverty of women, particularly Aboriginal women and women with disabilities, is in itself a serious human rights violation. Pivot Legal Society made submissions to the federal Standing Committee on Finance in October 2003, demonstrating that poverty, inadequate social assistance, and lack of affordable housing increase the vulnerability of sex workers to violence and harm.

Pivot called upon the federal government to increase transfer payments to the provinces, to attach conditions governing the quality of social programs to those transfer payments, and to renew and increase its investment in social housing.

Pivot Finance Submission, *supra*.

Sex workers experience severe forms of gendered violence and receive limited public protection from those harms.

It is a matter of public record that at least 60 women are missing from the Downtown Eastside of Vancouver. Many of them were involved in the sex trade and many of them met violent ends.

Robert William Pickton has been charged with homicide in relation to over twenty of their deaths. Many of the affiants are grieving for women they knew and are working in fear as a result of the murders:

I stopped working in the sex trade because the streets were getting too crazy and dangerous. I was scared because of the number of girls that were going missing.

[Affidavit 014 at para. 2]

Affidavits mentioning missing women: 014, 024, 026, 027, 042, 047, 060, 063, 075, 081, 082, 084, 087, 092.

P. Saunders & J. Thompson, "Backgrounder: The Missing Women of Vancouver" (2003) *CBC News Online*, online: [CBC Homepage <http://www.cbc.ca/news/features/bc_missingwomen.html>](http://www.cbc.ca/news/features/bc_missingwomen.html) (date accessed 20 July 2003).

When the families and friends of the missing women initially tried to report them missing, they encountered reluctance and indifference on the part of police. The police force's reticence in investigating the disappearances is allegedly based in part on stereotypes about the presumed transience of low-income sex workers.

In 1998-99 I went missing for a few days. My boyfriend went to the police to report me missing. The police officer took down my description. When my boyfriend told him I was a prostitute, the officer put his pen down and told him there was nothing he could do. [Affidavit 26 at para. 10]

.....

I think about all the girls that have lost their lives because of the political bullshit. I think that the government was negligent when women started to go missing and their superior complex got in the way of actually caring about the human lives that were being taken... If the police had listened or cared at all about the girls that were going missing, I am sure the numbers of murdered women would have been cut down to a few... What if it was your daughter that was working on the street and going missing? Would you change the laws then? Would it matter what her genealogy or race was? Would it matter what she used for anti-depressants? [Affidavit 082 at paras. 13, 16-17]

See also Affidavits 081 at para. 17, 047 at para. 13, and 060 at para. 10.

See also D. Jardine, "My Complaint to the Police Complaint Commissioner" online: *Vanished Voices* Homepage <<http://www.vanishedvoices.com/complainttoPolice.html>> (date accessed 21 August 2003).

In Edmonton, sex workers have been found dead in fields surrounding the city. Between September 2002 and 2003, the bodies of women known to be sex workers were discovered, raising suspicions of a serial murderer. The Edmonton murders were cited by an affiant:

The idea to put working girls in an industrial area is an extremely unsafe idea. That is where most of the women in Edmonton got killed. I knew one of them. The cops aren't doing anything about it. It is not safe at all. Something should be done. [Affidavit 026 at para. 3]

Canadian Broadcasting Corporation (CBC), "Police Identify another Sex-trade worker victim in Edmonton," (28 August 2003) online: CBC Homepage <http://www.cbc.ca/stories/2003/08/27/edmontonmurder_030827> (date accessed 9 September 2003).

Research studies, including those undertaken by PACE and criminologist Dr. John Lowman of Simon Fraser University, document the stunning degree of violence that sex workers experience in their work. Their research indicates an escalation of sex worker murders has occurred since the current criminal laws came into force.

J. Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada.” (2000) 6(9) Violence Against Women 987.

PACE report, *supra*.

Service groups in the Downtown Eastside, including PACE and PEERS routinely publish “Bad Date Sheets”. These publications detail incidents of violence experienced by sex workers at the hands of their clients, some of which go unreported to police. The bad date sheets are distributed to advise other sex workers to avoid these clients.

I have had one bad date but I did not go to the police. I do not have a record and I did not want to go up to the police and tell them I am a prostitute. I was too afraid to go to the police. Instead, I reported it to WISH and they posted it on their bulletin board so that the other working girls would be aware. [Affidavit 047 at para. 18]

One such sheet details a violent assault, including the strangulation, rape and abandonment without clothing of a sex worker. This was committed by a man described as having a "lazy right eye" and driving a stolen car. In August 2003, following the sort of intensive investigation typically reserved for homicides, Vancouver police arrested a 25-year-old man fitting that description for car thefts and for the serial rapes of local sex workers.

See also Affidavits 043 at para. 10, and 066 at para. 13.

PEERS Vancouver, online:

<<http://www.peersvancouver.org/BadDatePostings.html>>.

"Unprecedented police effort nabs rape suspect: violent rapes of prostitutes treated like homicide investigation." *The Vancouver Sun*, (28 July 2003) B3.

Affiants expressed concern that similar assaults are ignored or inadequately investigated by police:

There is a man on the bad date sheet, named Randy, who sets fire to the girls with lighter fluid and they know what he looks like and his tattoos, and they can't find him. Yeah right. They aren't trying. They figure hookers are dirt, they treat us worse than dirt. They could have found the Pickton guy way sooner. Every time this happens to girls you never hear it in the papers. And they never get caught except for this pig farmer guy. They had to do something because people were getting too pissed off. No one was saying anything about it before. [Affidavit 084 at para. 14]

In 1996, a 33-year-old sex worker from the Downtown Eastside was severely assaulted by a man named Michael Steven Leopold. At Leopold's lawyer's behest, a British Columbia psychiatrist interviewed the man. During the interview, Leopold disclosed detailed plans about killing women working in the Downtown Eastside sex trade, including a proposed test run on one woman to gauge how comfortable he would be committing murder. The psychiatrist successfully challenged the solicitor-client privilege that protected the interview in a 1999 Supreme Court of Canada case cited as *Smith v. Jones*. The identities of the psychiatrist and the accused were protected by publication ban. The decision in the case provides a chilling example of the ways sex workers are preyed upon:

Dr. Smith [the psychiatrist] reported that Mr. Jones [the accused Leopold] described in considerable detail his plan for the crime to which he subsequently pled guilty. It involved deliberately choosing as a victim a small prostitute who could be readily overwhelmed. He planned to have sex with her and then to kidnap her. He took duct tape and rope with him, as well as a small blue ball that he tried to force into the woman's mouth. Because he planned to kill her after the sexual

assault he made no attempt to hide his identity. Mr. Jones planned to strangle the victim and to dispose of her body in the bush area near Hope, British Columbia. He was going to shoot the woman in the face before burying her to impede identification. He had arranged time off from his work and had carefully prepared his basement apartment to facilitate his planned sexual assault and murder. He had told people he would be going away on vacation so that no one would visit him and he had fixed dead bolts on all the doors so that a key alone would not open them. Mr. Jones told Dr. Smith that his first victim would be a "trial run" to see if he could "live with" what he had done. If he could, he planned to seek out similar victims. He stated that, by the time he had kidnapped his first victim, he expected that he would be "in so deep" that he would have no choice but to carry out his plans.

***Smith v. Jones*, [1999] 1 S.C.R. 455 at paras. 37-39.**

Leopold was sentenced to 11 years by a trial judge, who elected not to declare him a dangerous offender. The British Columbia Court of Appeal overruled the trial judge, and deemed Leopold a dangerous offender, converting his sentence to an indeterminate term.

***R. v. Leopold* (2001), 155 C.C.C. (3d) 251.**

Consistent with this, many of the affiants described personal experiences of violence in the course of their work, which they did not feel safe reporting to the police. They have documented these experiences in support of their opinions about how prostitution laws should be reformed.

One time, I was working and this ... man picked me up. We had our date and he said he didn't have any money and so we went to the bank machine. He still said he had no money. He wanted to have sex again in all sorts of ways that I did not want to. He was aggressive and I was not able to get away until after he did all sorts of nasty things to me. That is why I think that working indoors would be safer. I never reported it to the police. I never thought to. I just wanted to get it out of my mind. I am not sure if I would ever report a bad date. I am too

embarrassed and scared of the cops. I have heard too many nasty things about the police. [Affidavit 002 at paras. 9-10]

.....

Four years ago, a man took me to Strathcona Park in a car and made me take all my clothes off. He hit me. He threw me out of the car with nothing on. I was screaming, for about thirty minutes, but nobody heard me. Someone eventually phoned the police and they came. I went to the hospital and the police made a record of what happened to me. The police gave me a business card and told me to phone them. I didn't phone them right away. I was stopped on the street by police a long time later and was told that one police officer wanted to talk to me. They wrote down his name and his number. When I did phone he told me to phone back because he was busy. He told me to phone back in a week or two. I didn't phone back. I feel like I wasn't important enough, like they forgot about me or something. [Affidavit 018 at paras. 9-13]

.....

When I was about 23 or 24 years old, I was raped by someone I met in my work and I told the police. The police told me to go home and sober up and then to come back the next day and tell them about it, to file a complaint then. I was really upset about this. It made me very mad because they didn't do anything about it. The next day I woke up and showered and changed and I just stayed home and felt really bad because the police just shrugged me off. I believe this happened because I was native. They said to me that they had heard all this before and it was nothing new to them. I said this was the first time this ever happened to me. My sister said I should go to the hospital and get checked, but I just went home and stayed home and I never went out for about two or three weeks. The police seemed not to care about anything like that. They could at least have written some of the details down, or told me to go to the hospital and be checked out so that there would be something down on file in case I wanted to lay charges. Instead they made me feel like it was nothing. They should have picked him up and held him until I could get there. They should have kept him until I went there to lay charges. [Affidavit 039 at paras. 5-7]

.....

I have experienced violence at the hands of clients but have never gone for help. I would not approach the police because I am afraid that it will backfire on me, I am afraid the police will find out I am involved in prostitution... I've had a gun stuck to my head and told to do whatever the guy wants or else. I was tied up for 2 days when I was 20 years old and he raped me repeatedly and burned me with cigarettes. I did not go to the police afterwards. I saw a counselor [sic] at the Native Friendship Centre after that and had some counselling. [Affidavit 056 at paras. 11, 17]

.....

Overall, my life has been fairly good in the last ten years with only a few bad dates. I was beaten up twice by male dates in that time. I reported these incidents to the police but I felt that my complaints were not taken seriously. The police officers seemed to only be pretending to fill out the complaint forms. I also felt that they spoke to me with disrespect and were biased against me because of my work and my First Nations status. In or about the summer of 1999, I was having two beers at the bar at about 1:00 p.m. with a potential date who told me his name was Tom. At about 5:00 p.m., I woke up in a hotel about one block away from the bar. My pants were partly off and my pubic hair was shaved off. I had no recollection of what happened in the intervening four hours and presumed that I was a victim of a drug rape. I went to the hospital and contacted the police. The police refused to believe me at first and then they blamed me for the incident. [Affidavit 061 at paras. 6-7]

.....

I was cut across my stomach. I had a man and he took me into a car and had his way with me. Then he beat me up and slit me in the stomach and threw me out. I have a huge scar now. I am lucky because I could have been really hurt. It happened about 17 years ago in Calgary. I went to the hospital but did not know what to say. I didn't know what to say to the police either. They probably would have charged me, so I said I was just hitch-hiking. [Affidavit 073 at paras. 14-15]

See also Affidavits 001 at para. 9, 059 at para. 10, and 065 at para. 27.

There are many reasons why the police are not viewed as providing adequate protection to sex workers, who are often the targets of undercover police operations, in which officers pose as clients, inquire about prices, and arrest the worker when she responds or agrees to provide services. This is particularly true for sex workers who lack adequate economic resources to conduct their work in discreet, private locations.

A recent Nova Scotia case demonstrates how police and courts treat sex workers differently than other accused. A young sex worker got in a car with an officer and asked him directly if he was a police officer. When he answered, "no," she asked him to prove it by opening her pants and touching her in the pubic area, which he did. The officer's conduct was not found to be an abuse of process, a sexual assault, or conduct attracting a charge of communication for the purposes of engaging in prostitution. The judge permitted this because the officer had engaged in the conduct for the purposes of executing a "prosecution sweep" in the city of Halifax. Considering the *Charter* implications of the officer's acts, the judge found that touching the young woman in the course of posing as a client would not "offend the community's sense of fair play... Detection and conviction of offenders would be rare indeed if undercover operations such as that employed here were not available to combat this nuisance." The young woman's conviction was upheld. It seems unfathomable that sexual touching of a suspect during the course of an investigation would be condoned or tolerated in any other context.

R. v. P. (N.M.) (2000), 146 C.C.C. (3d) 167 at 181 (N.S.C.A.).

The above case is one example of sex workers' experience with police and the way it was considered by the courts. It is uncommon for courts to scrutinize police operations such as this one. Affiants described instances of sexual and racial harassment by police, in arrest situations and street interactions that went unreported:

I had a cop say that I could give him a blow job instead of being charged. I told him to “fuck off”. He didn’t charge me... When I was 11 a cop took me to his home, I didn’t know he was a cop until I got there. It was a normal date, he was giving me extra money to go to his place. He started beating me, he raped me, and he showed me his badge and gun. He picked me up in Vancouver and his home was in Burnaby. I didn’t do anything about it because he was psychotic and he was a cop. [Affidavit 084 at para. 9]

.....

He told me I was under arrest. Then I was taken to the police station, was put in cell and asked by the police officer who arrested me to show him my chest. He said, “lift up your top.” I told him no. When he [was] writing up the arrest report he kept commenting and antagonizing me about the size of my chest. This made me feel very uncomfortable. [Affidavit 026 at para. 4]

See also Affidavits 061 at para. 10, and 080 at para. 3.

Police tactics in interactions with sex workers are often invasive and questionable in other respects as well. For example:

I used to work at Gore just off Hastings. About a month ago, I was stopped by two undercover officers. They were in a car. They stopped me, asked me for ID, and ran my name. When they ran my name, nothing came up. They took a Polaroid of me. They did not ask me for permission, they just told me to stand up against the wall and move towards the light. They did not tell me what the Polaroid was for. I did not ask them because I was afraid... I asked a lot of other girls if they had been told to get off Gore. No other girls had been told to move. The other girls said it might have been because I don’t have a criminal record and they wanted to have a record of me. [Affidavit 047 at paras. 6 and 8]

.....

On one occasion they stopped and cut me off. I was stopped between the police car and the wall of a building. They wanted to know where I was coming from. I told them I was coming home from a friend's place. I had been walking all the way from Nanaimo and Hastings and was walking slowly. They wanted to see the contents of my pockets to see if I was carrying any money, because if I had money they would have thought I had been doing sex work. [Affidavit 033 at para. 15]

.....

Police come to my door at all hours of the night. They check the register at the front desk of my hotel to see how many guests I have had during the day or at night. I have to pay a ten-dollar guest fee to bring anyone into my room. The police come to check if I still have company who I have registered to bring into my room. [Affidavit 033 at para. 6]

Affiants report that the police enforce *Criminal Code* laws arbitrarily against them, either at the discretion of individual officers or pursuant to "crackdown" orders.

When I worked on Broadway, near Main about ten years ago, I was told by the police that there were times and places where I could work. If I worked at other times, like even a minute before midnight, I was told that I'd be busted. I was told to stay off Broadway itself. Generally, the police left me alone. They were good, unless there was a crackdown. [Affidavit 045 at para. 4]

See also Affidavits 058 at paras. 3-5, 046 at para. 7, and 065 at para. 24.

Sex workers may also experience violence at the hands of police. When pursuing a complaint against an officer, a sex worker's fear of police and the risk of exposure can be a serious impediment.

[The cop] would park his car where I stood around Pacific and Main. I couldn't make any money. I told him off. He said I had a "nigger pimp at home". He jumped out of the car and took me to alley at the back of the Stratford hotel and

started beating me with his gun. Another cop came and the first cop told him I had tried to attack him with my umbrella. The cop laughed and left. The other cop let me go. I told him I was going to turn him in. I had blood dripping on my dress and I went to the station and he was behind the counter and they were all laughing. I had to get 17 stitches. They sent the cop to get the person I was supposed to talk to and he came back and said he could not find him. I felt he was making a mockery of it. After that when he wasn't on duty he would park at my house and follow me around [Affidavit 084 at para. 10]

Sex workers routinely experience negative stereotyping, social stigma and marginalization.

Affiants described the nature of the stereotypes applied to them in detail:

Society sees sex workers as a homogeneous group of drug-using, street-working, HIV-positive individuals with no potential. Society no longer takes responsibility for those, such as myself, that find themselves in this position without money and with nowhere to turn besides sex work. [Affidavit 088 at para. 10]

It is not uncommon for sex workers to be treated poorly or to meet indifference in interactions with police when they are involved in issues apart from their work:

I was hitch hiking in the DTES a few weeks ago and a police officer stopped me and asked me what I was doing. I told him I was looking for a boyfriend. The police officer responded very rudely and was verbally abusive to me. The police officer grabbed me roughly by my breast and told me to go home. I felt emotionally and sexually harassed by the police officer. After awhile he let me go and I went directly to a bus stop and went home. [Affidavit 012 at para. 3]

It is not unusual for police to act on stereotypes and intervene when sex workers are involved in social interactions unrelated to their work. They often assume women are communicating for the purposes of selling sex:

Less than a year ago, I saw a man in a car pull up next to a sex worker at the corner of Main and Hastings. He was looking for one of his daughter's friends. The worker was trying to show him where to find the person he was looking for, and police drove up behind him while they were speaking and asked what they were doing and told her to step away from the car. The man in the car reached into the backseat of his car to get something and the police officer opened the back door and reached in and put a strangle hold on him. I told the police officer that he had no reason to be strangling the man in the car, and he said, "Mind your own fucking business." [Affidavit 024 at para. 3]

.....

One night about a year ago, I was with a guy that I had met. He wasn't a customer. We had met each other at a bar and we were sitting in his car deciding whether or not to go home together. We were both fully dressed and sitting in our own seats. Two police officers pulled up and ordered me to get out of the car. One officer said, "I hope you got your money because you're outta here." I left and walked home. It was a normal date and I don't even do "car-tricks. I have never been charged with any prostitution-related offence. [Affidavit 009 at para. 6]

Participation in sex work is commonly used as a reason for the state to apprehend a woman's child, or to deny her access to a young relative, such as a grandchild. It must be noted that this subject was one that caused affiants great pain to discuss. While some made mention of children, many were not prepared to put details in their statement, so as not to risk losing custody of children in their care, or to avoid revisiting the trauma of their child's apprehension by the state.

I lost my daughter to the government because I am a prostitute. She was healthy and happy, but the Ministry of Child and Family Services apprehended her because I am a sex worker. [Affidavit 052 at para. 8]

.....

My daughter lives in care in Abbotsford. [Affidavit 044 at para. 2]

The phenomenon is especially prevalent among women engaging in sex work from a position of poverty. It is cast as the result of a woman's poor judgment. The following comes from a court decision in a child apprehension case. It is one of many where a woman's status as a sex worker went against her when she sought custody of or access to her child or grandchild. The judge openly adopts stereotypes about sex work, and about a worker's capacity to make good judgments.

Prostituting oneself for money does not disqualify one from being a parent, in my view. However, street prostitution is an inherently dangerous line of work. In this case, M.L.M.M. is exposing two lives to those inherent dangers: her own and that of her foetus. ...it is the profound lack of judgment that attracts the attention of the court.

Children's Aid Society of Toronto v. M.M., [2001] O.J. No. 1817 at para. 23.

N.F. v. H.L.S. (1998), 60 B.C.L.R. (3d) 283.

British Columbia (Director of Family and Child Services) v. R.P.F.M., [2003] B.C.J. No. 780.

Children's Aid Society of Hamilton-Wentworth v. B.M., [1998] O.J. No. 6499.

Sex workers are frequently defined by stereotypes and prejudice when accessing health services, particularly the stereotype that all sex workers have addictions:

About ten years ago, a girl came to me after being pushed out of a moving car. I thought that she had had a stroke because half of her face was paralyzed and she was dragging her leg. I called for an ambulance and the paramedics treated me very badly. I started to tell him what had happened and said, "She had a bad date..." Right then, the paramedic turned around and said to his partner, "Oh she's

is a working girl.” I could not believe that they treated her like that. I had been told that the paramedics treated working girls very badly but didn’t believe it until I saw it. Eventually they did take her to emergency. [Affidavit 081 at para. 18]

See also Affidavits 070 at para. 8, and 081 at para. 19.

The laws do not correspond with the actual needs, capacities and circumstances of sex workers.

Criminal laws must fit with actual needs, capacities and circumstances of the claimant group. Successful challenges to the *Criminal Code* under section 15(1) have involved situations where the law did not adequately address the actual situation of the individuals and groups affected. See *C.M., Roy, and Roth, supra*, all of which were successful s. 15(1) challenges to s. 159 of the *Criminal Code*. The courts found that s. 159 resulted in discriminatory treatment of minor homosexuals, as it prohibited anal intercourse except between married partners and people over the age of 18. The Court determined this was based on unconstitutional legislative objectives. The purported rationale behind the law in question (for example, regulating the health risks associated with anal intercourse, limiting the same-sex sexual activity of minors, and maintaining some of the moral objectives of the older laws prohibiting sodomy) did not justify the imposition of the rule on a group of people whose actual needs were quite different from the law's purported aims.

The sex trade laws do not fit with the actual needs of sex workers.

The affiants have been clear about their actual needs on a general level. These were overwhelmingly identified as protection from harm, access to safe places to work, adequate housing and other anti-poverty measures, and the elimination of barriers to accessing health and policing services for their own benefit.

I would ask the government for more funding for housing for us, and more money on the cheque so we don't have to risk our lives for the rest. Women are trying to get money for food. The housing is really bad — we need more of that. Look at the people living in tents. They don't want them at Victory Square, they don't want them at Woodward's. But we really need it. It's terrible. [Affidavit 046 at para. 11]

Many affiants provided information about simple needs that must be met in order to provide them with a level of human dignity similar to that enjoyed by other sexually active Canadians.

Foremost among these was the need for a safe space in their community. Other needs include the availability of bathrooms, towels, sheets, soap, shampoo, clothes, and cleaning products.

Criminal sanctions imposed for working inside or in public, coupled with acute poverty, mean women are deprived of these basic amenities, unless service organizations make an effort to provide them (i.e. free condoms are usually available from DERA, Vancouver Native Health or the Downtown Eastside Women's Centre: Affidavits 002 and 074). Affiants detailed what items should be on hand to bring more dignity to sex work:

In the safe house, there would be bedrooms with beds. They could have a certain floor with so many suites on it, with beds, nightstands, a sink. In the working room, have the drawers supplied with the condoms and whatever sex workers need for safe sex. I would like to see some posters up there on the walls that the clients could see, with all the safety information written down in bold letters. They might hear it a lot, but it would be nice for them to have that written bold, that it is society's regulation that everyone be safe regardless of what they do... There should be spray bottles with bleach to spray things before the next person came in... The safe house would also supply water and safe kits for women who use drugs [Affidavit 042 at paras. 6-7 and 12]

See also Affidavits 039 at paras. 9-12, and 067 at paras. 6-7.

There is no fit with actual capacities of sex workers.

The criminal laws actually limit the capacities of sex workers to conduct their personal lives, to take part in non-criminalized areas of the economy, and to make decisions about their own futures. See paragraphs on “constructive immutability,” *supra*.

There is no fit with actual circumstances of sex workers.

The actual circumstances created by the existing sex trade laws are harmful and dangerous. Working in alleys, cars, and remote industrial areas of the city in order to avoid arrest is extremely unsafe.

I continually move around because when I stand still, I am more likely to get busted by police. I end up working in dark locations, like by the Drake Hotel. These spots are dark and there are less police. I feel more fear when I am working in these dark hidden locations. I am afraid of getting jumped by other girls or weird men. [Affidavit 030 at para. 5]

.....

Because of police, we end up moving to places that are darker and more secluded. It's more dangerous for girls. For example, we are forced to work in the industrial area at the foot of Victoria. It's really bad because it's so dark down there. [Affidavit 043 at para. 3]

.....

Getting in a car is dangerous because once you are in the car with the doors locked, you are at risk. And then once you get to a parking lot, you are in great danger because you are so isolated. If you look at the bad date lists, they often state the incidents happened in a car and a parking lot. [Affidavit 081 at para. 7]

.....

When girls work on the street they aren't safe. Girls don't use the buddy system and don't record the license plate numbers for their friends because if they wait on the streets they could get arrested. [Affidavit 028 at para. 4]

See also Affidavits 013 at para. 6, 025 at para. 4, 062 at para. 15, 083 at para. 5.

In addition, the current laws create a nonsensical and frustrating climate for sex workers. Although selling sex is legal in Canada, the laws as they stand lead to de facto criminalization of the sex trade. While the *Prostitution Reference* justified the communication law by citing the public nuisance created by the sex trade, the bawdy-house law makes it illegal to work indoors and away from the public eye. The communication law does not outlaw selling sex per se, but it limits the private interactions and personal expression of sex workers as even eye contact or body language can trigger an arrest.

[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. The justice system can twist everything you do or say to fit into that law for their benefit [Affidavit 013 at paras. 3-4]

Reference re ss. 193 and 195(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 [Prostitution Reference].

The sex trade is one of the only economies in which a colleague cannot refer a client. It is prohibited by s. 212 (procuring). Referring safer clients is one way sex workers can increase each other's safety. It is also unique to sex workers that partners, children, relatives or roommates might be prosecuted for entering into a relationship of economic interdependence with them (also caught by s. 212). While the main set of acts that define the trade (that is, sex acts) are not illegal

per se, the current regime renders illegal daily acts that more privileged Canadians do without a second thought.

There is no ameliorative equality purpose to the sex trade laws

The *Criminal Code* provisions are not designed to improve the social position of any other disadvantaged group, as in *Lovelace v. Ontario*. It is not “affirmative action” legislation.

Therefore this factor does not apply.

***Lovelace v. Ontario*, [2000] 1 S.C.R. 950 at paras. 84-87.**

It is likely that one of the asserted purposes for the bawdy-house and procuring laws, particularly “living off the avails,” will be protection of sex workers from exploitation. Criminal laws that lead to the arrest of individuals in the group intended to receive protection are in fact no protection at all. There is nothing in the bawdy-house or procuring provisions that limit their application to pimps or other coercive and exploitive situations. As such, s. 210 and s. 212, as currently drafted, do not ameliorate sex workers’ social inequality.

Human Dignity and other interests are seriously affected

Sex workers have an interest in human dignity, well-being and health, safety and inclusion. An examination of recent equality claims demonstrates that an offence against human dignity is a key factor for the claim’s success. There is no question that the conditions and public perceptions of the sex trade result in a deprivation of dignity. In a group discussion held with members of the affiant group, participants described incidents when they have been deprived of dignity by the conditions and public perceptions of their work. They detailed being treated with a “total lack of respect”, especially when they were yelled at, “hooted and hollered at,” or pushed

into the street by a man passing on the sidewalk. They told of having pennies thrown at them, or bleach-filled squirt guns turned on them from passing cars.

Trociuk, supra.

Vriend, supra.

It is Pivot's position that the conception of human dignity used by the state must place the highest premium on women's well-being, health, safety, and social inclusion in considering law reform options dealing with sex work. This is supported by the affiants, who viewed the current state of the criminal laws as a matter of diminished human dignity.

We pay taxes, we pay for their paycheques [referring to police]. I contribute to the CPP. To strip the dignity from the person, that's what it's telling me and I don't like that feeling. [Affidavit 036 at para. 12]

.....

The laws relating to prostitution need to be improved. Sex workers have value, and are currently treated like trash. The laws should be focused on helping the sex workers instead of making them feel like criminals. The laws should be made fairer, because the laws as they are now just make sex workers feel ashamed and put down. [Affidavit 048 at para. 11]

See also Affidavit 074 at para. 6.

Human dignity includes the provision of public services, including adequate social assistance, that are responsive to experiences of trauma, the colonization of Aboriginal peoples, gender oppression and social marginalization. Human dignity includes actual safety and freedom from harm or violence.

Something could have happened to me that night in the car when he tried to scare me. I got out of the car and walked away, and it slowed me down after because I got scared and my boys wouldn't have known what happened to me. I wish this wasn't in my life. I wish I could just stop, and the government could just help more with these needs that we have, instead [Affidavit 046 at para. 12]

This further includes sensitivity to the complex health issues faced by sex workers.

I would like to see something like a safe injection site, but for girls who are working in the sex trade. A place where girls could go with their dates and pay a fee and use the services and their safety would be taken care of and they could also wash up and protect their health. Health care services could be provided, like a doctor and a homeopathic doctor and a street nurse. Someone who could treat their medical problems right there and then. Also I think some emotional support would be good. Especially to help girls who are just going to run out and buy dope. It's a vicious cycle. [Affidavit 063 at para. 6]

See also Affidavit 019 at para. 18.

The detrimental effects of stereotypes about sex workers on their interests in health and human dignity are documented by the Canadian HIV/AIDS Legal Network:

Sex workers have been considered vectors of transmission rather than persons who, for many reasons, including legal reasons, are vulnerable to contracting HIV. Although there may be a legitimate community concern with regards to solicitation, coercive measures against sex workers, such as mandatory HIV testing, are discriminatory and counterproductive. In Canada and many other countries, prostitution is criminalized in such a way that may promote the oppression of sex workers and impede the fight against HIV/AIDS.

**Canadian HIV/AIDS Legal Network. "Prostitution and HIV/AIDS" online:
Canadian HIV/AIDS Legal Network Homepage
<[http://www.aidslaw.ca/Maincontent/ issues/prostitution.htm](http://www.aidslaw.ca/Maincontent/issues/prostitution.htm)> (date
accessed 14 September 2003).**

This emphasis on human dignity must be regarded as non-negotiable when dealing with competing social-policy interests. In the past, community concerns, economic policies and the maintenance of the status quo have been prioritized above sex workers' right to human dignity (see the *Prostitution Reference*). The following excerpt is from an intervener submissions at the Supreme Court of Canada arguing for the equality of sex workers:

Canadian prostitutes are socially and economically marginalized. Their lives are endangered and dehumanized. They are victims of murder, physical abuse and verbal ridicule propagated by customers, pimps and the police; they bear special stigma fortified by the criminal law; their net incomes are very low and they have little opportunity for movement up the status ladder. Prostitutes come largely from vulnerable groups, women and youth, and from vulnerable, exploitative backgrounds. Prostitutes lack access to basic governmental services of health, social services, counselling and policing available to others. Government applies little or no resources or encouragement to the special problems of prostitutes...
[CORP Factum at para. 1]

The Court in the *Prostitution Reference* ignored the evidence of sex workers' profound inequality. As a result, women are dying. Women are being raped. Women are put in jail. Women are losing their children.

Prostitution Reference, supra.

CORP Factum, supra.

Government protection of human dignity in accordance with the *Charter* would also work to reinforce other areas of the *Charter*, such as the protection of life under s. 7, where dignity is also a consideration.

Gosselin, supra, per Arbour J. at para. 346.

Sex workers have interests in addition to human dignity. They have an interest in livelihood. The government must remedy the systemic obstacles in the economy that create the need for an income from the sex trade, and must also acknowledge the significance of sex work as a livelihood for poor women. This was critiqued and outlined in detail in Pivot Legal Society's submission to the Standing Committee on Finance.

Pivot Finance Submission, *supra*.

The Supreme Court of Canada has consistently recognized the importance of one's work as an element "of essential human dignity," and the seriousness of discrimination with respect to employment (see *Martin/Laseur*, *Lavoie* and *Meiorin*). By criminalizing a core source of income for a group that faces restricted access to other employment opportunities, the state fails to respect sex workers' real interest in their livelihood and the exercise of their personal agency in selling sex, an act that is not itself illegal.

Nova Scotia (Worker's Compensation Board) v. Martin; Nova Scotia (Worker's Compensation Board) v. Laseur, 2003 SCC 54 at para. 104 [*Martin/Laseur*].

British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (BCGSEU), [1999] 3 S.C.R. 3 [*Meiorin*].

Lavoie v. Canada, [2002] 1 S.C.R. 769.

Laws that cause economic deprivation infringe human dignity, where the deprived individual has few or no other options for obtaining a sufficient income. Recently, the Supreme Court of Canada in *Martin/Laseur* unanimously confirmed this proposition at para. 103:

In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely-held negative attitudes towards the claimants and thus reinforce the assault on their dignity.

The current prostitution laws cause dignity infringements resulting from both economic deprivation and stereotyping. The criminalization of the sex trade puts sex workers at risk of losing their income for a period of time upon arrest. Further, a critical source of income is criminalized as a symptom of "widely-held negative attitudes" about sex workers and what they do to obtain their income. Both of these infringements compromise sex workers' livelihoods, and are, following *Martin/Laseur*, legitimate s. 15 concerns.

Martin/Laseur, supra at para. 103.

Furthermore, by ignoring the employment nature of sex work, the government ensures that no workplace standards or possibilities of unionization and benefits are available to this group.

If it was legal we could pay into a pension and benefits. It might help them stay off welfare because they had benefits and were better taken care of. [Affidavit 084 at para. 20]

.....

I would like to see a union formed for sex workers. [Affidavit 065 at para. 15]

Many hazardous jobs are legal. Often, they are unionized to ensure appropriate standards are pursued and maintained for the workers. Workers are compensated in accordance with the risk and provided a realistic array of employment options to validate the choice. In this way, the hazardous conditions are minimized. A similar approach to the hazards of sex work is necessary, in which sex workers' safety is accorded just as much concern as the safety of firefighters, RCMP officers and taxi drivers.

Finally, sex workers have an interest in social citizenship. The advent of the *Charter's* equality provision in 1985 has provided one way to ensure all Canadians enjoy their personal form of social citizenship as equals. Equality is closely tied to our most cherished visions of and aspirations for Canadian society. Most notably, as Justice Iacobucci stated in *Law*, "the purpose of s. 15(1) is... to promote a society in which all Canadians enjoy recognition at law as human beings or *as members of Canadian society, equally capable and equally deserving of concern, respect, and consideration.*"

Law, supra at para. 51.

See also D. Schneiderman & J. Bakan, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) at 8.

Social citizenship has been a factor in other cases. For example, the *Falkiner* decision explained that undue interference with the privacy interests of a disadvantaged group set them apart from other Canadians. In that case, the impugned government behaviour discriminated against the claimants by excluding them from understanding that all are free to form relationships and determine the course of those relationships for themselves. Similarly, to avoid arrest, sex workers are required to monitor their bodies, their behaviour, their speech and their sex lives in ways that others would find intolerable. Privacy and sexual decisions are aspects of Canadian social citizenship, yet criminalization deprives sex workers of these basic entitlements.

Falkiner, supra.

Social citizenship also includes the ability to participate in public processes and use public services. Sex workers are deprived of this as well. For example, when collecting affidavits it was necessary to assure sex workers of their confidentiality as a condition of their participation. The usual format of hearings, which allows media access and uses hotel spaces in privileged areas, is

a considerable impediment to hearing from low-income sex workers. In the absence of measures to reduce barriers to participation, it is possible the hearings of the Subcommittee on Solicitation Laws would proceed without direct submissions from current workers in the Vancouver sex trade, despite the fact that the outcome of the hearings would directly affect them.

The reasons a sex worker might not participate in public processes, such as the hearings, are multi-fold. They include fear of police reprisal, embarrassment about public exposure as a sex worker, past experiences with the judicial system and other government entities, potential harassment at the hands of community groups, the possibility of child apprehension by the state, eviction, loss of social assistance eligibility or being charged or investigated for welfare fraud due to unreported income.

R. Capler & J. Shugarman, *Breaking Down Barriers: Taking Steps to Improve Sex workers' Access to Parliamentary Hearings on Sex Work*. Submitted to the Subcommittee on Solicitation Laws, (Vancouver: Pivot Legal Society, 2003).

Finally, many public services are considered definitive of Canadian society, such as universal health care and the social safety net. Sex workers are denigrated by health care professionals, subjected to invasive testing without explanation or informed consent, or cannot access addiction or trauma support. They may not get the care they need and may feel threatened by people in positions of medical authority. As such, they are less likely to return to this fundamental public institution.

I believe there is discrimination in health services. At the hospitals they always ask me if I am an alcoholic or a drug addict because I am Native. They also ask if I am a prostitute. At the clinics too when they see my needle marks or when I say that I drink they right away want me to go to detox and counseling [*sic*]. They put prostitutes, drug addicts and alcoholics all in one character. They assume you do

all of this. They want to do blood tests, TB tests, syphilis [*sic*] and gonorrhoea tests. I feel really unhealthy and degraded. They didn't even ask if I was having sex without condoms. Sometimes they do these tests without even asking or letting you know. They make a lot of assumptions. When I complained about my stomach they right away thought it was because of alcohol, they don't know how much I drink. When they smell alcohol, they automatically think you were drinking all night. [Affidavit 019 at paras. 17-18]

The same can happen if low-income sex workers try to obtain social assistance, educational opportunities, parenting assistance or protection from violence. By revealing themselves as sex workers, as may occasionally be necessary, they risk not only criminalization, but further discrimination and denial of their social citizenship.

Society has always looked down on working women. You can't tell anybody about it. You can't tell the doctor or the police. You should be able to tell doctors so you are medically safe and the police so you can be protected physically. It is the same as real estate or banking. It serves the public and should be protected by the police and society, not the other way around. [Affidavit 069 at para. 23]

The affiants expressed that they fear or feel excluded by the police, and would be unable to seek police assistance in their own interests.

If they rob us, the cops don't care. All they see is a working girl. We're not second-class citizens. [Affidavit 070 at para. 10]

.....

The police officer came up to us and said, "Smoking crack on my turf? Don't you dare smoke crack on my turf." He pushed my pipe out of my hand. I was wearing a dress. He pushed me down on the ground and made me lie in the pool of urine. He asked me for my name and ran my name in his computer. He stepped on my

pipe and my rock and then let me go. The front of my dress was soaked in urine. I felt really low and like piece of dirt. It made me feel like I used to feel when my husband would beat on me, gave me really low self-esteem. I don't feel like I can go to the police for help. I am afraid of them. [Affidavit 030 at paras. 16-18]

See also Affidavits 026 at para. 4, and 084 at para. 10.

A low-income sex worker who is humiliated by police officers, discriminated against in the provision of health services, and adversely affected by the preferred form of political processes is not enjoying her full interest in social citizenship. The criminal laws contribute to this situation because they imply sex work is worthy of criminal sanction and social condemnation. This is not the case.

Conclusion on s. 15

GIVING LIFE TO THE EQUALITY RIGHTS OF SEX WORKERS

Many equality claims go forward because the claimant views the case as a matter of principle, as a way to send a message about how people should and should not be treated. It is a way of affirming the social importance of an undervalued group. In this case, there is such a principle at stake.

As a matter of principle, it must be stated that the affiants who contributed their expert opinions and their supporting experiences are all members of a community. In that community, people worry when their friends go missing, when their friends are violently assaulted, when their friends are robbed, when their friends are arrested for the first time or the tenth time. They worry when their friends' children are seized by the state, and when their friends fall deeper into addiction. They worry because they understand it, because they have seen it before, and because they are aware how delicate the balance of survival can be at the margins. The community in

question is not just the Downtown Eastside. Sex workers are legitimate members of the Canadian community, and this community has received a hard-hitting lesson about how dangerous, how fatal, the situation for sex workers has become.

It must also be stated that the people who have seen these things and experienced them for themselves have an unparalleled level of understanding in these matters. There is no valid reason why those with narrower and more privileged experiences should doubt their expertise. Sex workers told us that they are subject to discrimination and inequality, and they must be believed.

Their experience, and the supporting evidence, research, case law and constitutional requirements for equality all point to one conclusion: we cannot continue to criminalize the existence of sex workers. Concrete efforts must be undertaken to make their human dignity and social inclusion normative values for Canada. The current criminal laws are harming sex workers, who are a severely disadvantaged group in Canadian society. The ongoing failure to recognize their human dignity is a violation of their equality rights.

Not every equality claim is a matter of survival – for an example of this, we need only see a recent winner, a father who claimed sex discrimination when he was not acknowledged on his children’s birth certificate (*Trociuk, supra*). Equality and human dignity *can* and *should* be invoked when survival is at risk. Parliament must send a strong message to this effect. The considerable resources of the government and the remedial powers of the courts must be immediately exercised to make the women we met and others like them as safe as possible, free from criminal sanction and discrimination as a result of their social position/work, and ensure their ability to claim police and human rights protections in their own interest. Further, beginning immediately, yet endorsed as a long-term project, the federal government must seek human

rights-based ways to alleviate their poverty, including the urgent provision of social support and health services.

As a group's inequality deepens, the proper response of the state is to take substantive, careful action. In the case of sex workers, the state response must first recognize sex workers as the best experts and the primary partners in the discussion.

A commitment to equality starts by a commitment to sex workers' expertise, their safety, their social citizenship, and their dignity. Laws and policies adopted in relation to the sex trade will fail to respect the equality rights of sex workers, and therefore be constitutionally invalid, unless they are premised on:

- the reduction and elimination of the harms experienced by sex workers, including criminalization;
- the affirmation and reinforcement of the human dignity of sex workers, which includes their well-being, safety, and social inclusion; and
- the recognition of the sex trade as a function of extreme poverty disproportionately experienced by women, Aboriginal people and people with disabilities.