Doubts about the streetwalking law

It's working, but anti-hooker C-49 may be unconstitutional

According to Canadian law, society objects to prostitution not because of the exchange of sex for money, which has never been illegal, but because prostitutes are a nuisance. Thus in 1978 the Supreme Court of Canada emasculated the Criminal Code's anti-soliciting provisions with a ruling that a prostitute's approaches had to be "pressing and persistent" to constitute an offence. That left police without an effective weapon to control the streets. Ottawa thought it was correcting that problem last December when it passed Bill C-49, an amendment to the Criminal Code. It made the mere attempt to communicate in public "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute" an offence punishable by up to six months in jail. Armed once again with a legal streetsweeper, police began charging prostitutes, and to a lesser extent their customers, nightly.

By all accounts former hooker haunts are at least one-third less crowded these days. But in a Vancouver courtroom two weeks ago, a British Columbia provincial court judge handed down a decision that, if upheld, will destroy the new-found powers of the police. At a pre-trial hearing for his client, 19-year-old Michelle Lee McLean, defence lawyer Anthony Serka attempted to persuade Judge Keith Libby to toss out the new law as unconstitutional. While the judge did not find the entire law unacceptable, he did strike down a key section on the grounds that it is too broadly worded.

The judge took his cue from Justice Minister John Crosbie, who stated before Bill C-49 was passed that its purpose was to control prostitution in public, as opposed to that occurring in a private home, for example. Thus the judge concluded that the law's prohibition of discussions about prostitution in "any place open to public view" went far beyond the law's stated purpose. "The legislation would on any logical construction of the words be so broad as to include one's own home or apartment or any place into which the public could see," wrote Judge Libby in his 10-page decision. "Clearly these words cannot be seen to restrict the section's operation only to street prostitution."

Miss McLean, who was charged with communicating for the purposes of prostitution (with an undercover police officer in his car on Seymour Street in Vancouver), would have been the first person to face trial under the new law; all others to come to court have so far pleaded guilty. But Judge Libby later dismissed the charge against her on the basis of his own decision, since the entire conversation took place in a car. Although Bill C-49 specifically mentions cars as public places, in Judge Libby's opinion they may also be private places and therefore immune from the law.

TIM CALLAGHER

A Vancouver prostitute on the street
The problem was the phrase 'any place open to public view.'

Reaction from prostitutes and police was measured. "We're not jumping up and down and yelling yahoo yet," says Marie Arrington, spokesman for Prostitutes and Other Women for Equal Rights (POWER), who believes the law will simply force hookers to get pimps to do their negotiating for them. "But this is a step in the right direction." The police, meanwhile, are waiting to see whether Judge Libby's decision is upheld on an appeal already announced by B.C crown prosecutor Peter Stabler.

Even though he's handled only three such cases in his entire 16-year career, Mr. Serka has made a reputation for himself as a prostitute defender. It was he who in 1978 took to the Supreme Court of Canada the case of Vancouver prostitute Debra Hutt, charged under the old law which decreed that "every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence." That case brought the landmark rulings that have hamstrung the police and the courts ever since. In addition to the "pressing and persistent" ruling, the Supreme Court held that the car where Miss Hutt and her police officer client made their deal was not a public place. After that, virtually no one in Canada was charged with soliciting since proving pressing or persistent behaviour was almost impossible for police.

The law that replaced the useless anti-soliciting legislation began its journey into the Criminal Code in May 1985, when the federally appointed Fraser Commission, headed by Vancouver lawyer Paul Fraser, released its 753-page two-volume report on prostitution and pornography. Its goal, too, was to eliminate the nuisance of street prostitution. To accomplish it, the commission made two recommendations: tougher laws against streetwalking and the legalization of home brothels where prostitutes could ply their trade without disturbing the public.