

Memorandum

TO: Pro Bono Students Canada / The Sex Workers of Winnipeg Action Coalition

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DATE: 13 April 2021

SUBJECT: Sex Work & *The Safer Communities and Neighbourhoods Act*

INTRODUCTION & PURPOSE OF MEMO:

The Sex Workers of Winnipeg Action Coalition is a non-profit organization carrying out advocacy activities in Manitoba. Some community members have contacted the organization regarding evictions or threats of eviction they have received pursuant to *The Safer Communities and Neighbourhoods Act* (“the Act”). The Act provides Manitoba Justice with the authority to target, investigate, and suppress sex work, despite the fact sex work is no longer illegal.

We have been asked to research the Act and its application, to identify possible avenues for recourse sex workers may have if targeted, and to assess the validity of the Act as it relates to the *Charter of Rights and Freedoms*. In addition to this memo, a practical, plain-language brochure was created.

OVERVIEW OF LEGISLATION:

Manitoba enacted *The Safer Communities and Neighbourhoods Act*¹ in 2001. The Act targets properties that are regularly used for activities that may threaten or disturb other community members.²

¹ SM 2001, c 6 [SCAN].

² Manitoba Justice, “The Safer Communities and Neighbourhoods Act”, online: *Government of Manitoba* <<https://www.gov.mb.ca/justice/commsafe/scna.html>>.

If a Manitoba Justice investigation concludes that a property is being habitually used for certain activities (specified by the Act), the property may be legally closed for an extended period during which it is inaccessible to the owner, tenants, and/or other visitors. Such an investigation will only occur if the Director³ receives a complaint from a community member who believes a property is being regularly used for one or more specified uses, and that their community or neighbourhood is adversely affected by those activities.⁴

The Act defines “specified use” as the consumption, growth, sale, or exchange of a controlled substance; prostitution and activities related to prostitution; sexual abuse or exploitation of a child; possession or storage of illegal or stolen firearms; and the commission or promotion of organized criminal offences.⁵ Sex work is the only non-illegal activity targeted under the Act.

If a Community Safety Order (“CSO”) is granted against the property, it may be closed for up to 90 days.⁶ A CSO may also require a termination of a tenancy agreement for the property.⁷ A court will only grant a CSO “if it is satisfied that (a) activities have been occurring on or near the property that give rise to a reasonable inference that it is being habitually used for a specified use; and (b) the community or neighbourhood is adversely affected by the activities.”⁸ CSOs are not very common in Manitoba. From 2001-2009, the Director only applied to the courts for 3 CSOs under the Act, all of which were granted.⁹

Manitoba is not unique in enacting *The Safer Communities and Neighbourhoods Act*. Analogous legislation exists in Saskatchewan, Nova Scotia, Yukon, Alberta, New Brunswick,

³ “Director” meaning the person appointed under *The Civil Service Act* as the Director for the purposes of *The Safer Communities and Neighbourhoods Act*: *SCAN*, *supra* note 1, s 1(1).

⁴ *Ibid*, s 2(1).

⁵ *Ibid*, s 1(1).

⁶ *Ibid*, s 6(2)(c).

⁷ *Ibid*, s 6(2)(b).

⁸ *Ibid*, s 6(1).

⁹ *Manitoba v Manaiigre*, 2009 MBQB 113 at paras 4, 51 [*Manaiigre*].

Newfoundland and Labrador, and British Columbia. Despite parallel legislation existing in many provinces and territories in Canada, there is little jurisprudence that challenges property closures, or the validity of these acts more broadly. This is generally unsurprising, as the main recipients of these closures typically are not well-positioned to engage in a legal challenge.

OVERVIEW OF JURISPRUDENCE:

Two cases from the Saskatchewan Court of Queen's Bench demonstrate the importance of evidence of adverse impact when a Director submits an application to the courts for a CSO. These cases stem from Saskatchewan's analogous *The Safer Communities and Neighbourhoods Act*,¹⁰ which was enacted in 2004.

In *Saskatchewan (Director of Community Operations) v. Carroll*,¹¹ the Court inferred from the Director's evidence that the respondent habitually possessed large amounts of marijuana that the respondent acquired with a view to selling. As the Court noted, simple possession and possession for the purposes of trafficking are activities which fall within the purview of the Act.¹² However, the Court refused to grant a CSO because it was not satisfied on the evidence that the community or neighbourhood was being adversely affected by the respondent's actions.¹³

The strong emphasis on adverse impact established in *Carroll* was later followed in *Saskatchewan (Director of Community Operations) v. Orr*.¹⁴ The property at issue in *Orr* was known to police and had been searched on warrant three separate times from 2007 to 2012. In each search, the police seized drugs, drug paraphernalia, and cash.¹⁵ Following the third police search,

¹⁰ SS 2004, c S-0.1.

¹¹ 2006 SKQB 360.

¹² *Ibid* at para 12.

¹³ *Ibid* at para 15.

¹⁴ 2012 SKQB 213.

¹⁵ *Ibid* at paras 3-6.

the Director applied for a CSO against the property. The Court accepted that the property was being habitually used for the possession, use, consumption, sale, transfer or exchange of a controlled substance.¹⁶

In *Orr*, the Director put forth the argument that proof that a property is being habitually used for specified uses constitutes proof in and of itself that the community or neighbourhood is adversely affected.¹⁷ However, the Court rejected this presumption: “The onus is on the Director to adduce evidence which proves adverse impact. The relevant evidence could include, among other things, evidence as to the extent, nature, timing and effect of the activities. That evidence may be or include the same evidence that proves the specified and habitual use. It may include other evidence, such as evidence as to the knowledge and reaction of others in the neighbourhood or community to the particular activities at issue.”¹⁸ In the end, the Court said that the evidence offered by the Director in this case was not sufficient to establish adverse impact. Accordingly, the application was dismissed and the CSO not granted.¹⁹

The only jurisprudence in Manitoba we could find relating to the Act is *Manitoba (Aboriginal and Community Law Enforcement, Director) v Manaigre*.²⁰ In *Manaigre*, the Court issued a CSO because of the pattern of drug use and drug trafficking occurring on the property at issue. Video evidence showed that over a 5-day period, 203 people entered, and 184 people left the property.²¹ In one incident, the police were investigating a break and enter nearby, and tracked the perpetrators to the property.²² The Court accepted the Director’s argument that “the activities are not consistent with normal residential use and will not stop without intervention...the

¹⁶ *Ibid* at para 11.

¹⁷ *Ibid* at para 7.

¹⁸ *Ibid* at para 17.

¹⁹ *Ibid* at paras 20, 23.

²⁰ *Manaigre*, *supra* note 9.

²¹ *Ibid* at para 13.

²² *Ibid* at para 14.

neighbourhood is being adversely affected by such an illicit drug trafficking house in that the drug culture and low level trafficking are controlled by gangs and criminal groups, violence is commonly related to it, and drug traffickers and users commit many other crimes.”²³

In *Manaignre*, the Court issued the CSO despite some reservations about the evidence of adverse impact. The Court accepted that the community or neighbourhood was being adversely affected by the activities occurring at the property, but it noted that the full extent and severity of the adverse impact were difficult to ascertain from the evidence.²⁴ In the end, the Court justified the CSO as a means of “stopping the activities and preventing its further use as a crack house.”²⁵

CHALLENGING OR VARYING A CSO:

Challenging an Application –

In Manitoba, the Director may only seek a CSO against a property by application to the Manitoba Court of Queen’s Bench.²⁶ The court will only make a CSO if the Director has adduced evidence that demonstrates that the property at issue is habitually used for a specified use, and that the community or neighbourhood is adversely affected by those activities.²⁷ The application must name the property owner as the respondent.²⁸ Wherever possible, the owner and/or tenant should attend the hearing and contest the application.

The lack of jurisprudence relating to *The Safer Communities and Neighbourhoods Act*, and especially the lack of jurisprudence relating to CSOs and sex work specifically (we could not find

²³ *Ibid* at 22.

²⁴ *Ibid* at 40.

²⁵ *Ibid* at 50.

²⁶ *SCAN*, *supra* note 1, s 4.

²⁷ *Ibid*, s 6(1).

²⁸ *Ibid*, s 5(2).

any), means it is somewhat difficult to predict what a court may decide if a sex worker challenges an application for a CSO, in Manitoba or elsewhere.

Varying a CSO –

Under the Act, a respondent may, on motion, ask the court to set aside the CSO.²⁹ The Court may set aside or vary a CSO if it is satisfied that the activities have stopped and are unlikely to resume.³⁰

As noted, the respondent of a CSO is the owner of the property.³¹ However, the Act also gives residents of the property the opportunity to apply to the court for a variation of the CSO within 14 days of the CSO being served.³² A resident is “an individual who has a right to occupy a residential property as her or her residence, or who had a right to occupy it as his or her residence when he or she was required by an order to vacate it, but who does not own the property.”³³ These sections of the Act give tenants of a property an opportunity to vary a CSO against their home. Unfortunately, we were unable to find very little information about this avenue for recourse.

POTENTIAL AVENUES FOR CHALLENGING THE LEGISLATION:

As previously noted, the only non-illegal activity included as a specified use under *The Safer Communities and Neighbourhoods Act* is prostitution or activities related to prostitution. This has been true since 2013, when the criminal laws around prostitution were changed in Canada

²⁹ *Ibid*, s 6(4).

³⁰ *Ibid*, s 6(5).

³¹ *Ibid*, s 5(2).

³² *Ibid*, ss 12(2)-12(3).

³³ *Ibid*, s 12(1).

by *R v Bedford*.³⁴ In *Bedford*, the Supreme Court of Canada (“the SCC”) declared that the criminal prohibitions on keeping a bawdy-house, living off the avails of prostitution, and soliciting for the purpose of prostitution were invalid due to inconsistencies with section 7 of the *Canadian Charter of Rights and Freedoms*³⁵ (“the Charter”).

We believe *The Safer Communities and Neighbourhoods Act* is also vulnerable to potential Charter inconsistencies. The avenue with the most potential is a section 7 challenge relating to life, liberty, and security. Section 7 of the Charter states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”³⁶ In this context, being in accordance with principles of fundamental justice means that a law is not arbitrary, overbroad, or grossly disproportionate.³⁷

In *Bedford*, the SCC held that the criminal prohibition on keeping a bawdy-house engaged and infringed sex workers’ section 7 Charter rights. This decision was grounded in three specific points: (1) the prohibition prevented sex workers from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations; (2) it interfered with the provision of preventative health checks and measures; and (3) it prevented the establishment and/or maintenance of safe houses, to which sex workers working on the streets could take clients.³⁸

These three points apply similarly to the situation created by *The Safer Communities and Neighbourhoods Act*. That a CSO can be issued against a property where prostitution or prostitution-related activities habitually occur means sex workers are discouraged from working

³⁴ 2013 SCC 72 [*Bedford*].

³⁵ *Ibid* at paras 164-165.

³⁶ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁷ Department of Justice Canada, “Section 7 – Life, liberty, and security of the person” (25 January 2021), online: *Government of Canada* <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-cddl/check/art7.html>>.

³⁸ *Bedford*, *supra* note 34 at para 64.

in a fixed indoor location. This restricts their ability to take precautions and heightens their chances of victimization. A CSO also represents a serious threat to the health and security of a sex worker who may become homeless as a result of a property closure.

Furthermore, in *Bedford* the SCC concluded that the purpose of the criminal prohibition against keeping a bawdy-house was to prevent community harm in the form of nuisance, but that the harms suffered by sex workers were grossly disproportionate with this objective.³⁹ The purpose of the Act is “to relieve neighbourhoods from the adverse effect of drugs, prostitution and related activities, booze cans and solvent abuse from particular premises”⁴⁰ (or in other words, to suppress civil nuisance). The law does seem to have a rational connection between its purpose and effects. However, the similarity between the Act and the former criminal law prohibiting bawdy-houses suggests that the impugned legislation is grossly disproportionate.

COMMENTARY / AREAS FOR FUTURE INQUIRY:

Our research felt quite limited in scope this year. A lot of our work centred around just one example of a Notice to Vacate received by a sex worker that was forwarded to us by the Sex Workers of Winnipeg Action Coalition. It was also difficult in our research to determine just how prolific CSOs really are, or if the property for which the sex worker received a Notice to Vacate was also closed under a CSO. Based on these limitations, we suggest the following areas as a good place to start if the project is able to continue:

1. How many CSOs have been granted in Manitoba generally?

³⁹ *Ibid* at paras 132-136.

⁴⁰ “Bill 10, The Safer Communities and Neighbourhoods and Consequential Amendments Act”, 2nd reading, *Legislative Assembly of Manitoba Debates and Proceedings*, 37-2, vol 51 No 34 (23 May 2001) at 2133 (Hon Gord Mackintosh).

- This information may be ascertained from the experiences of those in the community or by contacting the government department(s) that file and/or resolve the complaints. Getting this information may require a request to the Manitoba government via the *Freedom of Information and Protection of Privacy Act*.⁴¹
- Our only clue came from the 2009 *Manaignre* case: “Since being proclaimed in 2001, the Director has only sought two other CSO's, neither of which was controversial. Three hundred and forty other complaints were resolved without court proceedings.”⁴²

2. How often are sex workers negatively affected by the Act?

- As mentioned, we received only one example of a Notice to Vacate that had been received by a sex worker in Manitoba. Further community engagement – finding more sex workers who have been negatively impacted – is likely to be an important next step in future research.

3. What are the interplays of *The Safer Communities and Neighbourhoods Act* and the *Residential Tenancies Act*?⁴³

- The Notice to Vacate received by the sex worker said: “Your tenancy agreement is terminated due to a breach of section 73 and/or a breach of section 74 of the RESIDENTIAL TENANCIES ACT. You are required to move out within 5 (five) days. We have been advised by MANITOBA JUSTICE, PUBLIC SAFETY

⁴¹ SM 1997, c 50.

⁴² *Manaignre*, *supra* note 9 at para 4.

⁴³ SM 1990-91, c 11 [*Residential Tenancies*].

INVESTIGATIONS UNIT, that they have conducted an investigation pursuant to the SAFER COMMUNITIES AND NEIGHBOURHOODS ACT and that unlawful activities have been occurring which constitute an unreasonable disturbance and/or a safety risk to other residents, or residents of surrounding properties.”

- There is a lot to unpack and analyze here. *The Safer Communities and Neighbourhoods Act* authorizes the Director to “attempt to resolve the complaint by agreement or by informal action.”⁴⁴ This Notice to Vacate may be the result of the Director attempting to resolve the issue with the owner of the property by working to have the tenant removed rather than seeking a CSO to close the property.
- The sections of the *Residential Tenancies Act* relied on in terminating the tenancy agreement relate to tenant obligations: a duty not to interfere or impair the safety or enjoyment of others, and the duty not to engage in unlawful behaviour.⁴⁵ This legislation may be a very important piece of the puzzle that we are missing from our research and analysis this year.

CONCLUSION:

The Safer Communities and Neighbourhoods Act has a negative effect on the lives and security of sex workers. The Act gives the government the authority to investigate and suppress a non-illegal activity, and offers few meaningful options for recourse if someone is targeted with a property closure. Furthermore, the Act raises serious questions about compliance with the *Charter of Rights and Freedoms*. Overall, this is an important topic that requires further research.

⁴⁴ *SCAN*, *supra* note 1 at s 3(1)(d).

⁴⁵ *Residential Tenancies*, *supra* note 34 at ss 73-74.1.