

EVALUATING CANADA'S SEX WORK LAWS:

The Case For Repeal



Let's
open
the
discussion

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Acknowledgements

Thank you to everyone who provided information and insightful feedback and comments through the process of creating this report. Special thanks to our legal intern, Leila Geggie Hurst, and our articling student, Caitlin Shane, for assistance with proofreading and editing.

Thank you to our funders

The logo for MAC AIDS FUND, featuring the letters 'MAC' in a stylized, bold, black font, followed by 'AIDS FUND' in a smaller, orange, sans-serif font.

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Executive Summary

It is time for Parliament to reform Canada's laws on sex work. The *Criminal Code* provisions introduced by the *Protection of Communities and Exploited Persons Act* (PCEPA) are unconstitutional and should be repealed. This report provides a history of the litigation that struck down previous laws and the approach taken in drafting the PCEPA. It gives an overview of the impacts that the PCEPA is having on sex workers across Canada and why the law is unconstitutional. Finally, it draws from advocacy by sex workers to make key recommendations for creating laws that respect and promote the human rights of sex workers.

BACKGROUND

In December 2013, after a lengthy legal battle initiated by Canadian sex workers, the Supreme Court of Canada (SCC) issued its landmark decision in the case of *Canada (Attorney General) v. Bedford, Lebovitch, and Scott (Bedford)*. The SCC struck down the *Criminal Code* provisions that prohibited sex workers from communicating with clients in public and working from fixed locations, and prohibited others from receiving sex workers' earnings. These provisions were found to be unconstitutional, because they violated sex workers' rights to security of the person under Section 7 of the *Charter*. On the whole,

the SCC concluded that working indoors from known locations was safer for sex workers.

It has never been illegal to sell sex in Canada, but the *Criminal Code* provisions at issue in *Bedford* together made it virtually impossible to engage in sex work without breaking the law. In the face of the SCC's unanimous decision, the federal government was left with two choices: either remove the sections that had been found to be unconstitutional from the *Criminal Code* or introduce new criminal laws that could withstand constitutional scrutiny. Although sex workers, public health experts, and human rights groups argued for the first approach, the federal government committed to drafting new criminal laws almost immediately.

The resulting PCEPA introduced a host of new *Criminal Code* provisions aimed at sex workers, their clients, and third parties involved in the sex industry. Most notably, for the first time in Canadian history, the new law outlawed paying for sex. There are now five broad categories of sex work-related offences in Canada's *Criminal Code*:

- paying for sexual services
- communicating to exchange sexual services
- profiting as a third party from someone else's sexual services
- procuring (hiring or inducing) someone to provide sexual services
- third party advertising to provide sexual services

Along with new *Criminal Code* provisions, the PCEPA introduced a new rationale for laws regulating sex work. According to the federal government, the legislation “reflects a significant paradigm shift away from the treatment of prostitution as ‘nuisance,’ as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls.” The PCEPA is a variant of asymmetrical criminalization, also known as the “Nordic model,” which ostensibly aims to eliminate prostitution by making it illegal without punishing sex workers themselves, who are considered to be the “victims” of prostitution.

FINDINGS

The PCEPA has been mischaracterized as targeting only those who harm or exploit sex workers, without criminalizing sex workers and others who may enhance their safety. Analysis of the *Criminal Code* provisions in the PCEPA shows that the legislation has resulted in sweeping criminalization of the sex industry, threatening the physical and economic security of sex workers, even though they are immunized from prosecution in certain circumstances. The PCEPA violates sex workers’ rights to freedom of expression and association, security of the person, and equal treatment under the law.

Sex Workers Continue to Fear Arrest

The PCEPA retains provisions on communicating that specifically

target some of the most vulnerable street-based sex workers, who continue to be harassed by police in many communities.

Sex Workers Focus on Avoiding Detection Instead of on Safety

As a result of increased police surveillance on sex workers and clients, sex workers are still working in isolated and unsafe conditions. Street-based sex workers are under pressure to work in less populated areas and to get into cars before they have properly screened prospective clients. With clients focused on avoiding police detection, indoor sex workers are also motivated to work in more hidden locations.

Fear of Enforcement Inhibits Sex Workers’ Access to the Justice System

Prohibiting the purchase of sexual services means that sex work remains a clandestine activity and that sex workers actively shun police contact. This increases sex workers’ vulnerability to violence from predators posing as clients, who target sex workers precisely for this reason.

Sex Workers Cannot Legally Negotiate Consent to Conditions of Sexual Services

A principle tenet of Canadian sexual assault law is the importance of voluntary and affirmative consent to any sexual act. Because of broad restrictions on communicating, it is impossible to engage in discussions to establish

the acts that sex workers are willing to perform – and those they are not – without breaking the law.

Laws are a Barrier to Working Indoors and Working Collectively

The material benefit and procuring provisions of the PCEPA have been framed as capturing relationships of exploitation, yet in reality they criminalize managers, receptionists, bouncers, and other security personnel who screen clients onsite at sex work businesses. They also effectively prevent any business offering sexual services from operating legally. These restrictions, coupled with the prohibition on advertising, make it more difficult for sex workers to work indoors and with the support of others.

Sex Workers are Excluded from Workplace Protection Regimes

Sex workers employed at indoor businesses frequently complain of unfair labour practices: unpaid wages, fines for arbitrary workplace rules, sexual harassment, and shifts longer than employment laws permit. Criminalization of sex work as an industry excludes sex workers from the workplace protections and remedies available to other workers in Canada.

Sex Workers Continue to Experience Stigma and Discrimination

The PCEPA inculcates stigma and cuts sex workers off from legal protections, perpetuating conditions that have

allowed predators to murder, rape, and abuse sex workers with impunity.

Conclusion

Despite the PCEPA's avowed aim of protecting vulnerable people from exploitation, bans on purchasing sex, communicating for the purposes of selling or purchasing sex, working collectively, and advertising sexual services replicate many of the dire consequences for sex workers' health and safety identified in Bedford. There is little doubt that the PCEPA is unconstitutional and actively prevents people who sell or trade sexual services from exercising their fundamental Charter rights.

RECOMMENDATIONS

Laws prohibiting the exchange of sex for compensation between consenting adults are not the way to end endemic violence against women or to address inequality and systemic poverty. Instead, we urge lawmakers and police to work with sex workers to take the following steps to create a safer sex industry:

Repeal the Laws that Criminalize Sex Work

Ensuring that sex workers' rights are protected requires the repeal of the PCEPA and all criminal laws that prohibit the purchase of sexual services and prevent adults selling sex from working with others in non-coercive

situations. Changing the law would not just make sex work safer; it would be a first step towards undoing the stigma experienced by people who do sex work.

Use Existing Laws to Prosecute Perpetrators of Violence

Instead of a being governed by a separate legal regime that sets them apart, sex workers need to be able to access the police and to enjoy the full benefit of legal protections theoretically available to everyone in Canada, including Criminal Code provisions to punish perpetrators of violence.

Work with Sex Workers to Ensure Access to Provincial Employment Protections and Create Appropriate Municipal Bylaws

Decriminalizing sex work would not necessarily mean that there are no restrictions on sex work – however, any regulations should be developed together with sex workers, who are the experts in their own business. Sex workers should have access to the protections afforded all other workers by provincial employment standards and occupational health and safety legislation. They should be engaged in the drafting of any local bylaws governing where and how sex work occurs.

Invest in Supports for Low Income Sex Workers

Using criminal laws to eliminate people's sources of income is not the

way to ensure their genuine autonomy. Low-income sex workers need access to more substantial income assistance benefits, safe and affordable housing, and culturally appropriate educational opportunities and health services. Non-judgmental services and resources need to be made available to those who require them most, whether they want to continue in sex work or to pursue other work.

Don't Conflate Sex Work and Trafficking

The human trafficking provisions in the *Criminal Code* and the *Immigration and Refugee Protection Act* can and should be applied in bona fide situations of coercive labour. At the same time, law enforcement and government must recognize that sex work is not trafficking. The misuse of anti-trafficking laws to investigate sex work businesses and individuals endangers sex workers by making them wary of accessing health care services and reporting crimes to police.

Learn from Other Jurisdictions

New Zealand fully decriminalized adult sex work in 2003 and instituted a system that puts much of the responsibility for regulating sex work in the hands of local municipalities in cooperation with sex workers. New Zealand's sex workers report much greater confidence in police protection, as well as access to employment protections.

Work on Undoing the Stigma that Surrounds Sex Work

The greatest commonality between sex workers in Canada is the stigma they face. Although more education is needed, changing the federal law would be a first step towards undoing the stigma and treating people who do sex work as full members of our communities.

Sex workers remain hopeful that the current federal government will repeal the PCEPA and other laws that criminalize sex work. In the event that this does not happen, Canadian sex workers are prepared to bring a new constitutional challenge to this legislation.

List of Terminology & Acronyms

Butterfly – an organization in Toronto offering support and services to migrant and immigrant sex workers

DTES – Downtown Eastside, a low income area of Vancouver

Im/migrants – persons who have come to Canada, including immigrants, refugees and migrants, regardless of documented status

IRPA – *Immigration and Refugee Protection Act*

MWCI – Missing Women Commission of Inquiry

MP – Member of Parliament

MSM – men who have sex with men

NDP – New Democratic Party of Canada

PACE – a peer-driven sex worker advocacy organization in Vancouver

PRA – *New Zealand's Prostitution Reform Act, 2003*

PCEPA – *Protection of Communities and Exploited Persons Act*

SCC – Supreme Court of Canada

SPOC – Sex Professionals of Canada

STI – sexually transmitted infection

SWUAV – Sex Workers United Against Violence, an organization run by and for current and former sex workers in the DTES

SWAN – SWAN Vancouver Society, an organization in Vancouver offering support and services to indoor sex workers

UNAIDS – a global organization leading and supporting international response to HIV and AIDS.

VPD – Vancouver Police Department

WISH – a sex worker support organization in Vancouver offering a range of services to street-based sex workers, including the MAP (Mobile Action Project) van outreach project

A note on terminology:

In its 2016 policy, Amnesty International defines *sex work* as “the exchange of sexual services, involving sexual acts, between consenting adults for remuneration, with terms agreed between buyer and seller.” We adopt the same definition, and we refer to the people who earn income through exchanging sex as *sex workers*. In doing so, we recognize not everyone who sells or trades sex identifies as a sex worker.

When we use *prostitution*, it is in reference to previous laws that used that term. Current Canadian laws refer to *obtaining, communicating to obtain, materially benefitting from, procuring a person to provide, and advertising sexual services for consideration*.

Opening the Discussion

On December 20, 2013, after a lengthy legal battle initiated by Canadian sex workers, the Supreme Court of Canada (SCC) issued a landmark decision in the case of *Canada (Attorney General) v. Bedford, Lebovitch, and Scott*.¹ The SCC struck down the *Criminal Code* provisions that prohibited sex workers from communicating with clients in public and working from fixed locations, and prohibited others from receiving sex workers' earnings.

It has never been illegal to sell sex in Canada, but taken together, the *Criminal Code* provisions at issue in *Bedford*² made it virtually impossible to engage in sex work without breaking the law. The SCC found that those laws made a legal activity significantly more dangerous by preventing sex workers from effectively screening clients, working indoors, working collectively, and accessing police protection. Accordingly, the SCC ruled that the laws violated sex workers' rights to life, liberty, and security of the person guaranteed by Section 7 of the

Charter of Rights and Freedoms.³

The SCC gave the government one year to determine whether new, *Charter*-compliant prostitution laws should be enacted. Sex workers' rights groups and allied groups across Canada urged the federal government to consider sex work as a labour rights issue and not to introduce new criminal laws. Instead, the government responded to the *Bedford* decision with the *Protection of Communities and Exploited Persons Act* (PCEPA). This sweeping piece of legislation introduced a host of new *Criminal Code* provisions aimed at sex workers, their clients, and third parties involved in the sex industry and criminalized the purchase of sex in all circumstances for the first time in Canada.

The PCEPA is a modified form of asymmetrical criminalization. Asymmetrical criminalization, also referred to as the "Nordic model" because it is the basis for the laws in Sweden, Norway, and Iceland, aims to decrease demand for sex work and ultimately abolish it. Criminal sanctions target clients and third parties working in the sex industry instead of sex workers themselves, who are assumed to be women and considered the "victims" of prostitution, irrespective of sex workers' own personal narratives and experiences. There is little evidence from any country to support the claim that prohibiting the purchase of sex stops the demand for sex

1 2013 SCC 72 [*Bedford* SCC].

2 In cases with multiple parties, courts follow the practice using only the first-named applicant or plaintiff and defendant to create a short form of the case name.

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [the *Charter*].

work or reduces the number of people engaged in sex work.⁴

The PCEPA diverges from asymmetrical criminalization by continuing to target street-based sex workers for communicating with clients in specific public spaces, although these spaces are poorly defined in the law. While some people in Canada engage in sex work through situations of constrained choice, criminalizing those who are marginalized by poverty does not increase their options, improve their relationships with police, or make them safer. Indoor workers, who were virtually invisible to law enforcement under previous laws, are also feeling the impact of enforcement under the PCEPA. The use of criminal laws to regulate sex work puts those in the sex industry in conflict with the law and perpetuates the stigma and discrimination they face.

Historically, using the blunt instrument of criminal law to regulate sex work has primarily been justified in the name of controlling public nuisance, although regulation of morality has always been

a factor as well.⁵ The PCEPA reflects a significant paradigm change, from treating prostitution as nuisance to recasting it as form of exploitation of vulnerable women and girls. When the PCEPA was enacted, the federal government stated its concern was for vulnerable women and girls. This rang particularly hollow alongside the government's refusal to support an inquiry into the epidemic of missing and murdered Indigenous women in Canada.⁶ The government also disingenuously equated sex work with human trafficking, an offense already captured by existing criminal laws. Laws and narratives that fail to distinguish between sex work involving consenting adults and sexual exploitation or trafficking have been identified by the United Nations as undermining efforts to address those critical human rights issues.⁷

The PCEPA is unlikely to withstand constitutional scrutiny because it infringes sex workers' rights to freedom of expression, freedom of association,

4 S. Dodillet and P. Östergren, "The Swedish Sex Purchase Act: Claimed Success and Documented Effects," (paper presented at the International Workshop: Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 2011), http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf; D Kulick, "Sex in the New Europe: The Criminalization of Clients and Swedish Fear of Penetration," *Anthropological Theory* 199, no.3(2) (2003); Amnesty International, *Policy on State Obligations to Respect, Protect and Fulfill the Rights of Sex Workers*, POL 30/4062/2016, 26 May 2016.

5 Parliament of Canada, *The Challenge of Change: a Study of Canada's Prostitution Laws* (Ottawa: House of Commons Standing Committee on Justice and Human Rights, 2006), http://www.parl.gc.ca/content/hoc/committee/391/sslr/reports/rp2610157/391_just_rpt06_pdf/391_just_rpt06-e.pdf [Challenge of Change].

6 Note that the current government has initiated a Missing and Murdered Women Inquiry, which started work in the fall of 2016.

7 Joint United Nations Programme on HIV/AIDS, *UNAIDS Guidance Note on HIV and Sex Work* (Geneva: UNAIDS, 2012). http://www.unaids.org/sites/default/files/sub_landing/files/JC2306_UNAIDS-guidance-note-HIV-sex-work_en.pdf [Guidance Note on Sex Work].

security, liberty, autonomy, and equality and is therefore unlikely to withstand constitutional scrutiny. The PCEPA's one-size-fits-all approach applies a uniform set of assumptions to an extraordinarily diverse set of activities and circumstances, and in doing so, reinforces the stigma surrounding sex work.

Sex workers and their allies call on Canada's federal government to decriminalize sex work and to demonstrate leadership by implementing evidence-based policies grounded in sex workers' human rights and lived experiences. Finally, we call on all levels of government to invest in programs that protect and support all vulnerable people, regardless of whether they may be involved in sex work.

Overview of This Report

The first chapter of this report, *The Downfall of Canada's Prostitution Laws* focuses on past challenges to Canadian criminal prostitution laws by sex workers. It summarizes the SCC's unanimous decision in *Bedford*, which struck down three provisions of the *Criminal Code*, from the particular perspective of Pivot Legal Society's clients, sex workers in Vancouver's Downtown Eastside.

Back to the Future: The Protection of Communities and Exploited Persons Act looks at the federal government's response to the SCC *Bedford* ruling and the ideological agenda that drove the drafting and adoption of the PCEPA.

Broken Laws: The PCEPA in Practice examines each of the primary offences under the PCEPA, focusing on their implications for sex workers' rights. It analyzes how bans on purchasing sex, communicating for the purposes of selling or purchasing sex, working together with others in sex work, and advertising sexual services replicate many of the dire consequences for sex workers' health, safety, and human rights identified in *Bedford*. The constitutional analysis considers evidence from Sweden and Norway as well as Canada suggesting that asymmetrical criminalization undermines sex workers' abilities to control their working conditions or enjoy equality under the law. It may be useful when reading this chapter to refer to Appendix 1, which provides brief descriptions of the *Charter* rights potentially infringed by the PCEPA and the legal tests courts would apply in adjudicating claims.

False Equation: The Conflation of Trafficking and Sex Work assesses the human trafficking provisions in the *Criminal Code*, which were slightly modified by the PCEPA, and the harms arising when trafficking law enforcement is used to target sex work.

Better Options: A Human Rights Approach to Sex Work focuses on the future of sex work laws in Canada. We conclude that laws prohibiting the exchange of sex for compensation between consenting adults are not the way to end endemic violence against women or dismantle the economic and social barriers affecting people who have been disadvantaged by poverty,

disability, Canada's legacy of colonial oppression, immigration status, or discrimination based on their sexual orientation or gender identity. We urge lawmakers and police instead to work together with sex workers and other community members and to put resources and attention where they belong: into social programs that will genuinely protect communities and exploited persons.

The Downfall of Canada's Prostitution Laws

Prior to the introduction of the PCEPA, the sale of sexual services between consenting adults⁸ had always been legal in Canada. However, the *Criminal Code* placed a number of limitations on how and where sex work could take place. Until they were found to be unconstitutional, these limits included prohibitions on communicating in public for the purpose of engaging in prostitution; being found in, occupying, keeping, or transporting a person to a common bawdy house; and living off the avails of prostitution.

These prohibitions made it illegal for sex workers to work outside, to work from a fixed location, and to work together with others. One of the results was that over the past several decades, many sex workers (and their clients) faced criminal consequences for engaging in an otherwise legal activity. Another was that, in order to avoid police detection, sex workers were forced to work clandestinely, preventing them from implementing their own safety strategies and

compromising their security and health.

In order to fully evaluate the potential safety, human rights, and *Charter* implications of the current laws brought in by the PCEPA, it is critical to understand the circumstances that led sex workers to challenge the previous laws. This section describes the complex, intertwined legal proceedings of the two previous challenges to Canada's prostitution laws and the SCC's reasons in its unanimous decision invalidating the laws.

CRIMINAL LAWS AND SEX WORKER SAFETY IN VANCOUVER'S DOWNTOWN EASTSIDE

Criminal Code provisions related to adult prostitution have always deeply affected street-based sex workers. In order to avoid police detection, sex workers have had to work alone, conduct business outdoors in isolated areas, and rush into vehicles before they have had the opportunity to screen clients or negotiate the terms of the transaction, including price, types of sexual services, and condom use.⁹

8 *Adult* is defined by the *Criminal Code* as a person over the age of 18. *Criminal Code*, RSC 1985, c. C-46, s 212(4).

9 *Bedford SCC*, paras. 71-72.

How Do Laws Endanger Sex Workers?

Displacement and Client Screening

Although it is estimated that less than 20% of all sex workers in Canada work outdoors, because of their visibility, street-based sex workers have consistently borne the brunt of enforcement efforts. The vast majority of criminal charges laid to date – estimated to comprise 90% of the total sex work-related charges since 1980 – have involved communicating in public, meaning that criminalization has disproportionately impacted sex workers who worked on the street.¹⁰ After the communicating law was enacted in 1985 to reduce “nuisance”, the number of missing and murdered sex workers in Canada rose dramatically.¹¹

In *Bedford*, the SCC identified *client screening* as one of the most important tools available to sex workers to protect their safety and health and found that the law prevented street-based

sex workers from using screening techniques.¹² For street-based sex workers, these include, among other things, referring to “bad date sheets” that provide descriptions of predators and their vehicles, assessing the client’s sobriety, negotiating terms such as the services to be offered and the use of condoms, and scanning the interior of a vehicle to ensure that door handles are in place and that nothing is hidden in the back seat. If communication with clients is illegal, sex workers are rushed to get out of public view quickly and do not have time for screening. The likelihood of detection and arrest was found to increase with the amount of time spent on the street before getting into a car.

For indoor workers, screening can include requiring that clients provide names, references, and verifiable call back numbers, and that they call from unblocked numbers. Sex workers may correspond with clients through email, meet them first in a public place, or use web cameras to chat with and visually assess clients before meeting in person. Commercial sex work businesses similarly may require different types of client information, including credit cards and call back numbers, before booking appointments. Premises with a front desk provide an opportunity to assess clients in person before they meet with sex workers.

10 *Challenge of Change*, 9.

11 John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada,” *Violence Against Women* 6, no.9 (2000): 987, doi: 10.1177/10778010022182245.

12 *Bedford SCC*, para. 71.

The vulnerabilities and stigma created by these laws have led to unnecessary suffering and loss of life. Nowhere have those harms been more fully felt than in Vancouver's Downtown Eastside (DTES). Before recent gentrification, the neighbourhood was thought to have the lowest per capita income of any urban postal code in Canada. A disproportionate number of residents live with disabilities, the effects of intergenerational involvement in the residential school and child welfare systems, and challenges associated with addiction.

The DTES community includes a sizable population of people, predominantly cis- and transgender women,¹³ who exchange sex for money, drugs, shelter, or other commodities. These women are disproportionately Indigenous. Research conducted by the BC Centre for Excellence in HIV/AIDS's AESHA Project has found an alarming prevalence of gender-based violence against sex workers engaged in survival sex work.¹⁴ AESHA has also found that the social, economic and legal

pressures on outdoor sex workers affect their abilities to engage in risk reduction practices, such as condom use.¹⁵

From the mid-1980s to the early 2000s, many women went missing from the DTES. In 2007, a serial killer was convicted of the second-degree murder of six of these women,¹⁶ but he is believed to have been responsible for the deaths of more than 30. Throughout this period, police actively enforced policies to relocate outdoor sex workers from residential neighbourhoods into isolated, dimly lit areas where they were more vulnerable to violence.

The Missing Women Commission of Inquiry (MWCI) examined police failures to investigate and prosecute the disappearances of 70 women from the DTES, most of whom were outdoor sex workers. Commissioner Wally Oppal, QC, found:

... there is a clear correlation between law enforcement strategies of displacement and containment of the survival sex trade to under-populated and unsafe areas in the period leading up to and during the reference period and violence against the vulnerable women. This was an unintentional but foreseeable result.¹⁷

13 *Cisgender* denotes a person whose self-identified gender conforms with their biological sex at birth; *transgender* denotes someone whose self-identified gender differs from their biological sex at birth or does not conform unambiguously with conventional binary male and female genders.

14 *Survival sex work* is defined as exchanging sex to supply basic needs such as food or shelter, in situations where there are few other options. The phrase has been used by John Lowman in various articles, including "Prostitution Law Reform in Canada" (1998), "Violence and the Outlaw Status of (Street) Prostitution in Canada" (2000), and other publications available at <http://mypage.uniserve.ca/~lowman/>. See also: K Shannon, T Kerr, SA Strathdee, J Shoveller, JS Montaner, and MW Tyndall, "Prevalence and structural correlates of gender based violence among a prospective cohort of female sex workers," *BMJ* 2009; 339:b2939, doi: <http://dx.doi.org/10.1136/bmj.b2939>.

15 K Shannon, V Bright, K Gibson, and MW Tyndall, "Sexual and drug-related vulnerabilities to HIV infection among women engaged in survival sex work in Vancouver, Canada," *Canadian Journal of Public Health* 98, no. 6 (2007): 465-9. For a complete list of AESHA publications, see: <http://www.gshi.cfenet.ubc.ca/publications/5>.

16 *R. v. Pickton*, 2010 SCC 32.

17 The Honourable Wally Oppal, QC, *Forsaken: The Report of the Missing Women Commission of Inquiry: Executive Summary*, vol. 1 (2012): 110.

Despite the at times overwhelming personal challenges facing this community of sex workers, women from the Downtown Eastside have played a major leadership role in Canada's sex workers' rights movement over the past decade. In the early 2000s, 94 sex workers from the Downtown Eastside swore affidavits outlining the very difficult circumstances of their lives as part of Pivot's Voices for Dignity project.¹⁸ The affidavits painted a grim picture of how Canada's criminal laws impacted their ability to perform their work more safely, as well as their relationships with police and other service providers. These sex workers resoundingly called on the government to repeal the harmful criminal laws related to adult prostitution.

During this period, the House of Commons ordered the Standing Committee on Justice and Human Rights "to review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers."¹⁹ To that end, the Parliamentary Subcommittee on Solicitation Laws was formed. In 2005, Pivot presented the affidavits collected for Voices for Dignity to the Subcommittee on Solicitation Laws and set up a private meeting for Subcommittee members with sex workers in the DTES. The

18 Pivot Legal Society Sex Work Subcommittee, *Voices for Dignity* (Vancouver: Pivot Legal Society, 2004), http://www.pivotlegal.org/voices_for_dignity.

19 *Challenge of Change*, 2.

Subcommittee reviewed compelling evidence demonstrating the impact of criminalization on sex worker safety, finding that "the social and legal framework pertaining to adult prostitution in Canada does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities."²⁰ The Subcommittee found that the status quo was unacceptable, but ultimately did not recommend reforms to the *Criminal Code*.

SEX WORKERS UNITED AGAINST VIOLENCE SOCIETY'S CHARTER CHALLENGE

The sex workers who took part in the Voices for Dignity incorporated in 2007 as a non-profit society, Downtown Eastside Sex Workers United Against Violence Society (SWUAV). SWUAV's bylaws stipulate that full members, who comprise more than 90% of the organization, must be current or former sex workers who identify as women and who have lived or worked in the DTES. Throughout its history, the majority of SWUAV's members have been Indigenous, and all SWUAV members describe having experienced violence at some point in their lives.

Disappointed by the outcome of the Subcommittee on Solicitation Laws, SWUAV retained Pivot as legal counsel and launched a *Charter* challenge to

20 *Challenge of Change*, 86.

Canada's prostitution laws in August 2007. The lawsuit alleged that the prostitution laws prohibited sex workers from taking a range of steps that would significantly improve their safety, such as working indoors, working collectively, having clear negotiations with clients, and accessing police protection. As a result, the laws violated sex workers' rights to freedom of expression and association, life, liberty, security, and equality.²¹

The SWUAV legal challenge targeted four provisions of the *Criminal Code*:

- Sections 210 and 211, which prohibited being found in, occupying, keeping or transporting a person to a common bawdy house; and
- The aspects of Section 212 that prohibited procuring persons over the age of 18 to engage in prostitution and living on the avails of adult prostitution; and
- Section 213, which prohibited communication in public for the purpose of engaging in prostitution.²²

The court system in Canada is a highly public process with limited privacy protections or supports for litigants. For the members of SWUAV, and for sex workers in general, publicly divulging information about their work can have

severe consequences. Sex workers can face eviction from their homes or workspaces, be denied social assistance benefits, and lose custody of and access to their children. They can face increased discrimination from police, the medical system, and other social programs. They can also lose clientele and face retaliation from community members because of their involvement in a legal process. For some, the revelation may irreparably harm family and personal relationships. Aware of these risks and challenges, SWUAV members decided that they would name the organization as a single plaintiff in the case, as opposed to naming one or more individuals. That decision had unanticipated impacts on the course of litigation over the next five years and resulted in a significant victory that altered common law rules to determine who has access to Canadian courts.

Not long after SWUAV filed its case, their counsel received a letter from the government stating its position that SWUAV did not have "standing." Standing refers to the legal right to bring an action before the courts. It is an important aspect of Canadian law, meant to ensure that courts do not become overburdened with marginal or redundant cases and that they have the benefit of hearing from those most directly affected by the laws or government action in question.²³ The law of standing acts as a gatekeeper to the courts, but it must also accord with

21 These rights and freedoms are protected by Sections 2(b), 2(d), 7 and 15 of the *Charter*. See Appendix 1 for fuller explanations.

22 SWUAV and Kiselbach's constitutional claim challenged the following specific section of the *Criminal Code*: Sections 210, 211, 212(1)(a), (b), (c), (d), (e), (f), (h) and (j) and (3), and 213.

23 *Finlay v Canada (Minister of Finance)* (1986), 2 SCR 607, para 631; *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45.

access to justice principles so that the courts can fulfil their proper role.

Eager to avoid a procedural battle, SWUAV's counsel wrote to the government outlining the many barriers faced by individual members in initiating a legal claim. SWUAV's claim was emblematic of the significant restrictions on access to justice experienced by marginalized individuals. Those most heavily impacted by criminal laws are often barred from raising violations of their rights in court. Despite the explanation of the risks and difficulties SWUAV members would face in trying to embark on litigation as individuals, the government was not willing to change its position.

At that point, Sheryl Kiselbach, an activist, outreach worker, and former sex worker joined the litigation as an individual applicant directly affected by the laws. Kiselbach had done sex work in a variety of circumstances and venues for 30 years, including on the streets of Vancouver. Despite Kiselbach's history and experiences of violence, and her criminal convictions for prostitution-related offences, the government took the position that Kiselbach was not affected by the laws at issue, because she was not currently engaged in sex work and did not have outstanding charges. The government filed a motion to strike the case on the basis that the applicants lacked standing, and in the alternative, that the pleadings did not disclose a

reasonable cause of action.²⁴ If the court agreed, the case would come to an end.

In 2008, the BC Supreme Court ruled that neither SWUAV nor Kiselbach had standing to challenge the laws.²⁵ The following year, however, the majority of the BC Court of Appeal found that SWUAV and Kiselbach were entitled to public interest standing given the systemic and broad nature of their claim. The Court found that it would be nearly impossible to challenge all the provisions individually in the context of a criminal defence. Furthermore, the comprehensive nature of the case, which focused on the way the laws as a scheme collectively caused harm, weighed in favour of granting SWUAV public interest standing.²⁶

The government appealed this decision to Canada's highest court, which had the final word on whether the test for establishing public interest standing in Canada²⁷ should be altered. By 2012, after a five-year legal battle, it was clear to the applicants and their counsel that the law on standing created substantial barriers for public interest litigants.

24 A *cause of action* is the combination of facts that would allow the court to find one party had a valid legal claim.

25 *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726.

26 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2010 BCCA 439, paras 58-62, 66.

27 *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236.

Counsel for SWUAV and Kiselbach were joined by interveners from across Canada representing social justice organizations, who argued that the arbitrary preference for litigation by individuals in cases of broad systemic impact impeded access to justice.

Nine months later, SWUAV and Kiselbach received the SCC's judgment. Not only had they been granted public interest standing, the SCC had also reformulated the standing test, greatly reducing the barriers for marginalized litigants bringing forward public interest claims. However, because of the 5-year procedural delay, SWUAV had still not had the opportunity to argue the main issue in court: namely, the harms caused by Canada's prostitution laws

CANADA (ATTORNEY GENERAL) V. BEDFORD, LEBOVITCH AND SCOTT

At the same time as SWUAV and Kiselbach's case was before the courts on the issue of standing, another group of sex workers in Ontario decided to take aim at Canada's prostitution laws and launched their own challenge, now known as *Bedford*.

Street-based sex work is among the most visible and dangerous forms of sex work, and has historically drawn the majority of police attention and criminal charges in Canada. Despite this, it is estimated that the street level sex trade comprises less than 20% of Canada's complex and

multi-faceted sex industry.²⁸ The three applicants in the Ontario case, Terri Jean Bedford, Amy Lebovitch, and Valerie Scott, represent some of the diversity that exists in the sex industry.

Terri Jean Bedford has worked as a sex worker and professional dominatrix, and formerly operated a sadism and masochism dungeon. In the 1990s, she was convicted of operating a bawdy house. Amy Lebovitch has done sex work for over 18 years on the street, independently in indoor locations, and with an agency. She has also studied criminology, psychology, and social work at a post-secondary level, and is a published author and activist with Sex Professionals of Canada (SPOC). Valerie Scott entered the sex trade when she was 24 and has worked on the street, as an independent doing indoor and escort work, and in massage parlours. Scott became an activist in 1985 when she joined SPOC,²⁹ where she also served as the Executive Director and the Legal Coordinator.

The *Bedford* applicants challenged three of the same provisions targeted in SWUAV and Kiselbach's litigation: the

28 Cecelia Benoit and Alison Millar, *Dispelling myths and understanding realities: working conditions, health status, and exiting experiences of sex workers* (Victoria: Prostitutes Empowerment, Education and Resource Society, 2001), <http://web.uvic.ca/~cbenoit/papers/DispMyths.pdf>; *Challenge of Change*, 5; *Bedford v Canada*, 2012 ONSC 4262, para 119 [*Bedford* ONSC].

29 Known as the Canadian Organization for the Rights of Prostitutes at the time.

bans on communicating, operating a bawdy house, and living on the avails of prostitution.³⁰ In September 2010, Justice Himel of the Ontario Superior Court struck down all three provisions, stating:

The living on the avails provision targets the exploitation of prostitutes, prohibiting others from gaining financially from prostitution. This objective is to be balanced against my conclusion that, by preventing prostitutes from legally hiring bodyguards, drivers or other security staff, the provision places prostitutes at greater risk of harm and may make it more likely that a prostitute will be exploited [by a pimp]. ...

The provision represents a severe violation of the applicants' Charter rights by threatening their security of the person. The law presents them with a perverse choice: the applicants can safeguard their security, but only at the expense of another's liberty. In my view, the living on the avails of prostitution provision is, in effect, grossly disproportionate to its objective.³¹

... [The communicating and bawdy-house provisions] endanger prostitutes while providing little benefit to communities. In fact, by putting prostitutes at greater risk

of violence, these sections have the effect of putting the larger society at risk on matters of public health and safety. The harm suffered by prostitutes carries with it a great cost to families, law enforcement and communities, and impacts upon the well-being of the larger society. In my view, the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance.³²

Justice Himel ruled that because the danger faced by prostitutes greatly outweighed any harm faced by other members of the public, the declaration of invalidity should take effect immediately; but she provided a 30-day period in which parties could make submissions on the possible consequences of an immediate declaration.³³

The government appealed the decision. SWUAV sought the Ontario Court of Appeal's permission to intervene in the case, jointly with Pivot and PACE, an organization that promotes safer working conditions for sex workers, and Pivot. An intervention is a process through which an individual or a group who is not a party to litigation can play a role in the hearing of the case. The rationale for allowing interventions is that the outcome of a particular case may affect the rights of people beyond the parties to the litigation. The SWUAV, PACE, and Pivot coalition argued that

30 SWUAV and Kiselbach also challenged the offence of procuring under Section 212(1) and 212(3) of the *Criminal Code*, with the exception of Sections 212(1)(g) and (i), whereas the *Bedford* applicants did not.

31 *Bedford* ONSC, paras. 429-431.

32 *Bedford* ONSC, para. 434.

33 *Bedford* ONSC, para. 539.

street-based sex workers in the DTES had a unique perspective to bring, given the history of tragic violence and the impacts of rigorous enforcement of the prostitution laws there. They were granted leave to intervene.³⁴

The Ontario Court of Appeal agreed that the bawdy house and living on the avails laws were unconstitutional as written, but the Court reversed Justice Himel's decision on the communicating law. The government appealed the decision invalidating the two laws to the SCC, and the *Bedford* applicants cross-appealed the ruling on the communicating law, with the SWUAV, PACE, and Pivot Coalition again intervening.

THE *BEDFORD* DECISION AND ITS IMPLICATIONS

On December 20, 2013, the Supreme Court of Canada rendered its landmark unanimous decision in *Bedford*, striking down all three challenged provisions of the *Criminal Code*. The SCC found that these three provisions violated sex workers' rights to security of the person under Section 7 of the *Charter*,

34 In general, it is within the discretion of the court to allow or refuse an application to intervene. The basic test for when the court should grant leave to intervene is that the person or organization has a genuine interest in the matter under review by the court, that the court believes the intervener will make submissions that are pertinent and useful to the proceedings and that those submissions will differ from those of the parties to the appeal, without *expanding* the issues under review in the case.

individually and together, because they imposed dangerous conditions on sex work, preventing sex workers from working in safe conditions and from legally taking steps to protect themselves from risk.

- **Section 210 (keeping or being found in a common bawdy house):** The SCC found that the bawdy house law's impacts on sex workers were grossly disproportionate to its aim of deterring community disruption. This law prevented sex workers from working at a fixed indoor location, which was shown in evidence to be safer than working on the street or meeting clients at different locations, such as their residences or hotel rooms. The SCC found that when sex workers did "in-calls", offering services at premises over which they had a measure of control, they were more able to establish a regular clientele roster, employ preventive health and safer sex measures, work together with other staff, and use security protocols such as audio room monitoring. The SCC therefore concluded that prohibiting in-calls increased risk to sex workers.³⁵ While the SCC did not strike down the bawdy house provision in its entirety, because some aspects dealt with gambling and other activities that are still criminalized, the word "prostitution" was removed from the definition of a bawdy house in s. 197 of the *Criminal Code*.³⁶

35 *Bedford* SCC, paras. 61-65.

36 *Bedford* SCC, para 164.

- **Section 212(1)(j) (living on the avails of prostitution):** The SCC found that this part of the procuring law was unconstitutionally overbroad because it did not distinguish between parasitic and beneficial relationships: “The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (such as controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards)”.³⁷
- **Section 213(1)(c) (communicating in public for the purpose of prostitution):** The SCC found that the impacts of the prohibition on public communicating were also grossly disproportionate to its aim of controlling public nuisance.³⁸ The law interfered with sex workers’ abilities to screen prospective clients for intoxication or propensity to violence and to set terms for transactions (including regarding condom use), actions that could reduce the risks sex workers face. Enforcement of this law also displaced sex workers from familiar areas to more isolated areas, thereby increasing their vulnerability.³⁹

The SCC determined that the legislative objectives of all three laws were far outweighed by the negative impacts of these offences on sex workers’ safety and security and concluded

that the provisions were therefore unconstitutional and void.⁴⁰ Chief Justice McLachlin, writing for the unanimous court, declared:

[T]he applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution – itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks.⁴¹

The declaration of invalidity of the laws did not, however, take effect immediately. The Court gave the government one year to contemplate whether new laws should be enacted, and if so, what form they should take.

37 *Bedford* SCC, para. 142.

38 *Bedford* SCC, para. 159.

39 *Bedford* SCC, paras. 68-72.

40 *Bedford* SCC, para. 164.

41 *Bedford* SCC, para 60.

Vancouver Police Department's Sex Work Enforcement Guidelines

Even before the *Bedford* decision and the release of the findings from the Missing Women Commission of Inquiry, the Vancouver Police Department (VPD) embarked on a process together with sex worker and community organizations, including WISH, PACE, and Pivot, to draft new guidelines for how to enforce sex work laws. The Sex Work Enforcement Guidelines⁴² were released in 2013.

42 Vancouver Police Department, *Sex Work Enforcement Guidelines*, Adopted January 2013, <http://vancouver.ca/police/assets/pdf/reports-policies/sex-enforcement-guidelines.pdf>.



Watch the video:

www.youtube.com/watch?v=-gKafib7TN4

They explain that the dignity and safety of sex workers is a VPD priority; enforcement of the law in instances of sex between consenting adults is not. The Guidelines set out that VPD officers will use their discretion to focus on enforcing the laws primarily in cases where there are reports of violence, exploitation, or involvement of underage persons or organized crime. The Guidelines are assisting police to build trusting relationships with sex workers and community organizations and could serve as a model for police forces in other areas of the country.

...the **dignity and safety** of sex workers is a VPD **priority;** enforcement of the law in instances of sex between consenting adults is not.

Back to the Future: The Protection of Communities and Exploited Persons Act

In the face of the SCC's unanimous decision in *Bedford*, the federal government, then a Conservative majority, was left with two choices for regulating adult sex work. The first option was to simply remove the sections that had been found to be unconstitutional from the *Criminal Code*, which would have left sex work largely decriminalized in Canada, a solution similar to that adopted by the government when Canada's abortion laws were struck down in the 1980s.⁴³ The second option was to introduce new criminal laws that comply with the *Charter*. Sex workers, public health experts, human rights groups, and allied organizations argued for the first approach. However, the federal government immediately committed to drafting new laws.

43 See *R v Morgentaler*, [1988] 1 SCR 30 [Morgentaler].

Developing the PCEPA – A Predetermined Outcome

Shortly after the *Bedford* decision was released, then Justice Minister Peter McKay expressed his support for the Nordic model of asymmetrical criminalization.⁴⁴ One month later, on February 17, 2014, the federal government announced that, for a 30-day period, any interested member of the public could complete an online survey providing comment on options for new sex work laws.⁴⁵ The online format was inaccessible to many marginalized sex workers, and the closed-ended questions directed respondents towards a limited number of responses, leading many sex workers and allies to believe that a decision about the content of new legislation had already been made. While a number of sex worker-serving organizations used the portal to make online submissions, there were concerns that the survey gave equal weight to the opinions those without knowledge or first-hand experience in sex work.⁴⁶

44 Alison Crawford, "Peter MacKay faces balancing act with justice agenda, court rules," *CBC*, January 26, 2014, <http://www.cbc.ca/news/politics/peter-mackay-faces-balancing-act-with-justice-agenda-court-rulings-1.2511220>

45 Department of Justice Canada, Research and Statistics Division, *Online Public Consultation on Prostitution-Related Offences in Canada: Final Results* (Ottawa: Queen's Printer, 2014), http://www.justice.gc.ca/eng/rp-pr/other-autre/rr14_09/rr14_09.pdf.

46 Erika Tucker, "Canadians split on sex worker policy, survey says," *Global News*, June 2, 2014, <http://globalnews.ca/news/1368274/buying-sex-should-be-illegal-but-selling-it-shouldnt-be-an-offence-survey/>.

On June 4, 2014, Minister MacKay introduced the proposed legislation, Bill C-36: *The Protection of Communities and Exploited Persons Act* (PCEPA).⁴⁷ As expected, among the changes it made to the *Criminal Code*, the new bill outlawed paying for sexual services. The federal government stated that the legislation “makes prostitution between adults a de facto illegal activity for the first time in Canada’s history,”⁴⁸ as parties could no longer exchange sex for money without at least one of the individuals involved committing a crime. Additionally, Bill C-36 amended and reworked the *Criminal Code* provisions that had been struck down in *Bedford*, adding new criminal offences pertaining to advertising sexual services. While the PCEPA borrows heavily from the Nordic model of asymmetrical criminalization, it retains provisions that specifically target some of the most vulnerable street-based sex workers, an issue that is discussed in more detail in the next chapter.

The bill was the subject of heated debate at second reading, which was limited by time allocation. Conservative MPs supported the bill as an effective way to end exploitation of socio-economically vulnerable groups. They explicitly discussed the

need to end human trafficking as a reason for adopting the proposed legislation. According to Bob Dechert, a Conservative MP who spoke to the bill at second reading, “Prostitution is an inherently exploitative activity that always poses a risk of violence.”⁴⁹

Opposition parties were harshly critical of the bill, although they were not always unanimous even within their parties about their concerns. Many Liberal MPs said that they did not support decriminalization of sex work, but denounced the bill as infringing the *Charter* rights of sex workers in ways very similar to the laws that had been struck down by the SCC. NDP MPs also expressed a range of personal opinions about sex work, but condemned the bill as unconstitutional and advocated for a harm reduction approach. Some MPs suggested that empowering sex workers was a more effective way of assisting them to get out of dangerous situations. The Green Party explicitly recommended that Canada adopt a model similar to that of New Zealand, decriminalizing all aspects of adult sex work, including purchasing sexual services, as the best way to reduce stigma experienced by sex workers.⁵⁰

After second reading, two special committees heard evidence from a range of individuals identified as

47 Minister MacKay’s speech on second reading may be found here: <https://openparliament.ca/debates/2014/6/11/peter-mackay-4/>.

48 Lynne Casavant and Dominique Valiquet, *Legislative Summary of Bill C-36* (Ottawa: Library of Parliament, 2014), http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=c36&Parl=41&Ses=2.

49 House of Commons, 2nd reading, June 12, 2014, <https://openparliament.ca/debates/2014/6/16/procedural-3/> [2nd reading].

50 Elizabeth May, comments at second reading of Bill C-36, <https://openparliament.ca/bills/41-2/C-36/?page=6>.

“experts” about the proposed legislation. The Parliamentary Standing Committee For Justice and Human Rights sat for several days in July 2014, hearing from more than 60 witnesses.⁵¹ Further Senate Committee hearings took place in September 2014.

Although both these committees heard from sex workers, including from the applicants in the *Bedford* case, many sex workers who appeared said later that they did not feel they were taken seriously or consulted in a meaningful way, particularly because questions from Conservative members were adversarial,⁵² and the chairs did not always control spectators in the gallery, many of whom heckled and jeered during presentations.⁵³ The committees also heard from academics who identified as “radical feminists” and from representatives of Christian organizations, both in favour of legal prohibitions on sex work. Throughout this period, sex workers across the

country rallied publicly and circulated petitions against the bill, asserting that Bill C-36 would leave sex workers more vulnerable to abuse than past legislation.⁵⁴ Despite the legislation’s avowed aim of protecting the vulnerable, Senator Donald Plett said explicitly, “We don’t want to make life safe for prostitutes. We want to do away with prostitution.”⁵⁵

Sex workers, allied organizations, lawyers, and public health experts took every opportunity to speak out against the PCEPA.⁵⁶ Despite widespread concerns about both the safety ramifications and the constitutionality of the PCEPA, on December 6, 2014, slightly less than a year after the historic SCC decision in *Bedford*, the PCEPA became law.

51 Andrew Thomson, “Committee holds summer hearings on C-36,” *CPAC*, July 3, 2014. To watch videos of the hearings, see: <http://www.cpac.ca/en/highlight/committee-holds-summer-hearings-on-c-36/>

52 Kady O’Malley, “Prostitution bill critics treated as hostile witnesses at committee,” *CBC*, July 16, 2014, <http://www.cbc.ca/news/politics/prostitution-bill-critics-treated-as-hostile-witnesses-at-committee-1.2704434>

53 Kerry Porth, “Justice Committee on Bill C-36 ignored sex workers,” *Pivot Legal Society*, July 14, 2014, http://www.pivotlegal.org/justice_committee_ignored_sex_workers; additional personal communications with Kerry Porth (who testified on behalf of Pivot Legal Society along with lawyer Elin Sigurdson), August 18, 2016.

54 See, for example: Selena Ross, “Sex worker bill built on ‘false consultation,’” *Chronicle Herald*, June 14, 2014, <http://thechronicleherald.ca/metro/1215019-sex-worker-bill-built-on-false-consultation>; Charlie Smith, “Bill C-36 brings out Vancouver protesters who oppose Conservative crackdown on sale of sex,” *The Georgia Straight*, June 14, 2014, <http://www.straight.com/news/87581/bill-c-36-brings-out-vancouver-protesters-who-oppose-conservative-crackdown-sale-sex>; “Sex worker supporters dance against new prostitution bill,” *CBC News*, June 14, 2014, <http://www.cbc.ca/news/canada/montreal/sex-workersupporters-dance-against-new-prostitution-bill-1.2675934>.

55 Senate Hearings, November 12, 2014, <https://www.youtube.com/watch?v=q18rMJ01YKw>

56 “Open letter: 300 researchers call for decriminalization of sex work in Canada,” *The Georgia Straight*, March 27, 2014, <http://www.straight.com/news/73741/open-letter-300-researchers-call-decriminalization-sex-work-canada>

Does Criminalizing Clients Reduce the Number of Sex Workers?

The claim by proponents of the Nordic model that asymmetrical criminalization reduces demand for sexual services and therefore reduces the number of women doing sex work is a matter of debate. Securing reliable statistics on the make-up of a group of people who are often mobile and dispersed and who are highly stigmatized and fearful of authority is difficult. Criminalization itself, whether of sellers, buyers, third parties or all three, complicates attempts to get a clear picture of sex industry demographics. As a result, reliable data is scarce.

In Norway, immediately prior to the introduction of the ban on buying sex, the Norwegian government commissioned a detailed study carried out by the Institute for Labour and Social Research (Fafo). Fafo estimated in 2008 that around 3,000 people sold sex annually, with just under half (45%) operating from the street.

In 2014, the Norwegian government

commissioned Vista Analysis to evaluate figures after the purchasing ban, but without the same comprehensive mapping Fafo had employed. The study used projections to arrive at a mean of 2,482 people selling sex in 2014, a potential reduction of 20 to 25%. Vista estimated that 1,517 sex workers (61%) operated in indoor locations, while 965 (37%) were street-based. These findings have been questioned by academics and social service providers working in the field,⁵⁷ with some suggesting that the apparent reduction is simply a result of reduced visibility. Technological advances have changed how and where sex is sold in Norway and around the world. Evidence from Sweden also suggests that an immediate decrease in street-based sex work there was followed by increased indoor sex work, in part as a result of the growth of internet communications.⁵⁸

The eradication of sex work has yet

57 The authors of the 2008 baseline study publicly stated that they elected not to bid for the role carrying out the evaluation because they considered that “the mandate and funding was insufficient for sound research”. They pointed to “too many uncertainties in the data produced by the Vista evaluation on both outdoor and indoor markets”, which the Vista report authors themselves acknowledge in the body of the report, but do not fully elaborate on in the overall conclusions.

58 Lansstyrelsen Stockholm, *Summary: The Extent and Development of Prostitution in Sweden* (2014) at 2, <http://www.lansstyrelsen.se/stockholm/SiteCollectionDocuments/Sv/manniskaoch-samhalle/jamstalldhet/prostitution/SUMMARY-Prostitutionkartlaggning-2014.pdf>.

to be achieved in any of the countries using asymmetrical criminalization. Unsubstantiated benefits of decreased demand need to be carefully weighed against real, documented harms experienced by current sex workers.

A number of the Norwegian social service providers interviewed by Amnesty International suggested that the purchasing ban had discouraged some men from buying sex, resulting in the emergence of a “buyer’s market.”⁵⁹ Prices for sexual services in Norway are reportedly lower than before the ban on purchasing. Norwegian social service providers have expressed concerns that “customers can to a greater extent set the agenda for which sexual services they want to buy, price, place for performing the sex act and use of condoms. This results in greater vulnerability for sex workers.”⁶⁰ This trend was predicted by the authors of the 2008 Fafo baseline study, who anticipated that risk-reduction strategies would become more difficult

“**The eradication of sex work has yet to be achieved in any of the countries using asymmetrical criminalization.**”

for sex workers to implement if the customer base was weakened.

By contrast, New Zealand, which decriminalized sex work in 2003, did not see any significant increase or decrease in the number of sex workers as a result of decriminalization, according to a government review undertaken five years after the *Prostitution Reform Act, 2003* (PRA) was passed.⁶¹ The committee mandated under the law to conduct the review reported in 2008 that, despite slower progress in eliminating exploitative employment conditions,

On the whole, the PRA has been effective in achieving its purpose, and the Committee is confident that the vast majority of people involved in the sex industry are better off under the PRA than they were previously.⁶²

59 Amnesty International, *Norway: The Human Cost of Crushing the Market*, POL 30/4062/2016, May 26, 2016, 65, <https://www.amnesty.org/en/documents/eur36/4034/2016/en/> [*The Human Cost of Crushing the Market*].

60 *The Human Cost of Crushing the Market*, 66.

61 For further research from New Zealand, see: New Zealand Parliament, *Prostitution Law Reform in New Zealand*, (NZ: Parliamentary Library, 2012). <https://www.parliament.nz/resource/en-NZ/00PLSocRP12051/c62a00e57bd36e84aed237e357af2b7381a39f7e>. [*Prostitution Law Reform in New Zealand*].

62 *Prostitution law reform in New Zealand*, 5

Broken Laws: The PCEPA in Practice

The PCEPA regime effectively criminalizes every aspect of sex work except the acts of selling one's own sexual services and theoretically of independently advertising those services. There are now five broad categories of sex work-related offences in Canada's *Criminal Code*:

- paying for sexual services
- communicating to exchange sexual services
- profiting as a third party from someone else's sexual services
- procuring (hiring or inducing) someone to provide sexual services
- third party advertising to provide sexual services⁶³

In this chapter, we examine the impacts and constitutionality of the criminal laws from the perspective of sex workers. Our analysis of the available evidence suggests that the major offences in the PCEPA, individually

63 It is important to note that for most of the offences under the PCEPA, there are specific provisions pertaining to acts involving people under the age of 18. The analysis below looks only at the *Criminal Code* provisions relating to adults.

and in combination, undermine the human rights of sex workers and are therefore unconstitutional. In each of the following sections, we investigate what the *Criminal Code* provisions say, what effects they are having on how sex workers do business, and what *Charter* rights they violate. This is a complex endeavour, since the provisions of the PCEPA work together, and a single provision can result in several *Charter* violations at once. In order to streamline discussion, the legal tests that courts consider and apply in evaluating *Charter* breaches appear separately in Appendix 1 at the end of this document.

A Note on Data & Evidence

By the time the *SWUAV* and *Bedford Charter* challenges were launched, sex workers, advocates, and academics had amassed decades of evidence demonstrating how Canada's prostitution laws impacted sex worker safety. The evidentiary record for the *Bedford* case alone amounted to more than 25,000 pages. We rely on some of this evidence as well as other research conducted between 2008 and 2013, particularly as it pertains to stigma and poor relations between sex workers and police.

Because the PCEPA is relatively new, despite its similarities to previous laws, the full picture of how it is shaping sex workers' experiences is just starting to emerge. Enforcement has been uneven across Canada. With few prosecutions to date, there is almost no judicial interpretation to draw from. As it is too soon for many

of the ongoing quantitative studies to publish results, much of our information comes from sex workers' accounts of their experiences, as told to service organizations and in qualitative academic research. This chapter also references the substantial body of research from Nordic countries that employ asymmetrical criminalization to inform analysis of our *Criminal Code* provisions. In particular, we rely on rigorous research and consultations conducted by Amnesty International in 2015 during the development of its global organizational position on sex work, which favours decriminalization as the best way to protect sex workers' human rights.⁶⁴ The Amnesty policy brief explains,

Amnesty International calls for the decriminalization of all aspects of adult consensual sex work due to the foreseeable barriers that criminalization creates to the realization of the human rights of sex workers. ... Amnesty International considers that to protect the rights of sex workers, it is necessary not only to repeal laws which criminalize the sale of sex, but also to repeal those which make the buying

64 Amnesty International, *Policy on State Obligations to Respect, Protect and Fulfil the Rights of Sex Workers*, POL 30/4062/2016, May 26, 2016 [*Policy on State Obligations*]; Amnesty International conducted primary research in four jurisdictions (Norway, Hong Kong, Papua New Guinea, and Argentina), with different legal regimes, and consulted extensively with sex workers and with international experts in a broad range of fields, before arriving at its position.

of sex from consenting adults or the organization of sex work (such as prohibitions on renting premises for sex work) a criminal offence. Such laws force sex workers to operate covertly in ways that compromise their safety, prohibit actions that sex workers take to maximize their safety, and serve to deny sex workers support or protection from government officials. They therefore undermine a range of sex workers' human rights, including their rights to security of person, housing and health.⁶⁵

Ideological Underpinnings – the PCEPA's Preamble

The Preamble to the PCEPA appears in the bills that were before the House of Commons and in the version of the law that received royal assent, but it is not part of the *Criminal Code*. Nonetheless, the Preamble is important because it sets the tone and provides the law's objectives. It is what the government would use to justify alleged rights infringements and one of the factors that a court would look to in the Section 1 phase of a constitutional assessment, when the merit of the law's aims are measured against its effects.⁶⁶

65 *Policy on State Obligations*, 2.

66 Department of Justice Canada, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act*, March 2015 update (Ottawa: Department of Justice, 2015), <http://www.justice.gc.ca/eng/rp-pr/otherautre/protect/p1.html> [*Technical Paper*].

Along with new *Criminal Code* provisions, Bill C-36 introduced a new rationale for laws regulating sex work. According to a Department of Justice technical paper that accompanied Bill C-36, the new legislation “reflects a significant paradigm shift away from the treatment of prostitution as ‘nuisance,’ as found by the Supreme Court of Canada in *Bedford*, toward treatment of prostitution as a form of sexual exploitation that disproportionately and negatively impacts on women and girls.”⁶⁷

It should be noted that in a Section 1 analysis, the government must defend the specific objective of the challenged provision, not the objective of the law as a whole. Historically, different aspects of Canada’s sex work laws developed separately and for different purposes and were located in different parts of the *Criminal Code*. While arguably moralistic in tone, they were not united by a cohesive purpose. Previous challenges to the laws on communicating and keeping of bawdy houses established that these provisions aimed to address nuisance⁶⁸ in communities – interpreted as disruption on public streets – even

when governments argued that they targeted other objectives.⁶⁹ The living on the avails provision was conceived of as protecting women particularly vulnerable to violence from control by pimps, characterized as a “cruel and pervasive social evil” and “abusive and exploitative malevolence.”⁷⁰ It is only with the PCEPA that the government attempted to consolidate these provisions under a new heading in the *Criminal Code*, Commodification of Sexual Activity.

The reasons given in the Preamble for the law include:

- concerns that “exploitation ... is inherent in prostitution,” as is the risk of violence;
- recognition of the “social harm caused by the objectification of the human body and the commodification of sexual activity;”
- desire to protect human dignity and equality, particularly with respect to women and children;
- desire to denounce and prohibit the purchase of sexual services because the availability of these services creates a demand for them;
- desire to “denounce and prohibit the procurement of persons for

67 Canada, Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act*, last modified March 10, 2015 [Technical Paper], <http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html>

68 Regulation of morality has been an aspect of the laws noted in previous decisions, and some interveners in the *Bedford* case, notably the Christian Legal Fellowship, Catholic Civil Rights League, and Real Women of Canada, argued that the laws regulate an immoral practice; however, the SCC made no mention of morality in its decision.

69 For example, in the [*Prostitution Reference*], the SCC rejected the argument that the laws were in any way intended to combat exploitation or degradation of women. See *Reference re ss. 193 and 195(1.1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123 [*Prostitution Reference*].

70 *R v Downey*, [1992] 2 SCR 10. [*Downey*]

the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;”

- the desire to encourage sex workers to report violence and to stop selling sexual services; and
- the intent to protect communities from the “harms associated with prostitution.”⁷¹

The PCEPA’s new legislative purpose contrasts noticeably with the pre-*Bedford* objectives, which the SCC found insufficient to justify the harms they caused for sex workers. However, if forced to defend the PCEPA in court, it would not be enough for the government to simply declare its reliance on these objectives. Evidence would have to be produced to “demonstrably justify” that the law is actually capable of delivering on its objectives.

Does the PCEPA Promote Equality?

Both supporters and opponents of the PCEPA have grounded their positions in arguments for equality. Sex work prohibitionists – and the law’s drafters – claim that the PCEPA’s aim is to enhance women’s equality by eliminating a harmful, discriminatory practice.⁷² Historically,

71 *The Protection of Communities and Exploited Persons Act*, SC 2014, c 25.

72 More cynical commentators might believe that the Preamble’s sweeping aims are in part a tactical maneuver to preclude another constitutional challenge.

women have always been the majority of those doing sex work, although a significant portion of sex workers are men. Advocates for asymmetrical criminalization therefore interpret sex work as an expression of men’s power over women and take the position that it symbolizes male sexual access to female bodies. They assert that sex work is inherently violent, resulting in physical, psychological, and emotional harm to those who engage in it.⁷³ They believe that the exchange of money for sex invalidates consent. Some go so far as to call sex work (“prostitution”) a form of rape.

Many sex workers vehemently object to this characterization and its denial of their agency as not reflective of their own experiences. They view sex work as a form of labour. They contend that treating all exchanges of sex for compensation as rape denies sex workers their bodily autonomy, because it depicts sex workers as unable to give or, significantly, to withdraw consent. Many leading academics who study sex work also argue that harms cannot be generalized as inherent to the broad range of activities that we identify as sex work.⁷⁴

73 See, for example, the website Prostitution Research and Education, which provides a variety of anti-prostitution resources: <http://prostitutionresearch.com/>

74 Cecelia Benoit and Leah Shumka, *Sex Work in Canada* (2015), http://www.understandingsexwork.com/sites/default/files/uploads/2015%2005%2007%20Benoit%20%26%20Shumka%20Sex%20Work%20in%20Canada_2.pdf [Benoit and Shumka]; Chris Bruckert and Tuulia Law, “Beyond Pimps, Procurers, and Parasites: mapping third parties in the incall/outcall sex industry,” *Rethinking Management in the Adult and Sex Industry Project* (Ottawa: Social Sciences and Research Council of Canada, 2013), <http://www.powerottawa.ca/ManagementResearch.pdf> [Bruckert and Law].

Not All Sex Workers Are Women

The focus on sex work as a symptom of women's inequality & sexual availability erases the approximately 25% of sex workers in Canada who do not identify as women – men who have sex with men (MSM), men who have sex with women, and folks who are trans, two spirit, or who identify as gender non-binary.⁷⁵

Selling sex may resonate differently or have different significance outside of the cisgender, heterosexual framework often presumed in discussions of sex work. For people who are queer, transgender or gender non-binary or non-conforming, sex work may be both a form of income and a way of exploring their gender

75 Benoit and Shumka; Health Initiative for Men, *Sex Work Law Reform: Implications for Male Sex Workers in Vancouver and Beyond*, October 2016, <http://checkhimout.ca/wp-content/uploads/2013/07/HIM-Position-Paper-Sex-Work-Law-Reform-2.pdf> [*Implications for Male Sex Workers*].

identity and sexuality and experiencing others' appreciation for them, sometimes for the first time.⁷⁶ Sex work may also be more culturally accepted and prevalent in these communities.

Recent research conducted in Vancouver found that at least one sixth and up to 25% of interviewees, all self-identified MSM, had sold sex at some time during their lifetimes.⁷⁷ Acknowledging and exploring the experiences of people selling or trading sex who are not cisgender women may help to expand our understanding of sex work and undo the perception that it is inherently a form of gender exploitation.

APPROXIMATELY

25%

OF SEX WORKERS
IN CANADA DO NOT
IDENTIFY AS WOMEN

Don't Erase Them

76 Premela Matthen, Tara Lyons, Matthew Taylor, James Jennex, Solanna Anderson, Jody Jollimore, Kate Shannon, "I Walked into the Industry for Survival and Came Out of a Closet," *How Gender and Sexual Identities Shape Sex Work Experiences among Men, Two Spirit, and Trans People in Vancouver*, *Gender and Sexual Health Initiative* (2015), doi: 10.1177/1097184X16664951.

77 Elena Argento Matthew Taylor, Jody Jollimore, Chrissy Taylor, James Jennex, Andrea Krusi, Kate Shannon, "The Loss of Boystown and Transition to Online Sex Work: Strategies and Barriers to Increase Safety Among Men Sex Workers and Clients of Men," *Gender and Sexual Health Initiative* (2015), doi: 10.1177/1557988316655785 [*The Loss of Boystown*]; [*Implications for Male Sex Workers*].

A recent qualitative study of sex workers across Canada that spanned previous and current sex work laws found that the rates at which indoor sex workers experienced violence had much more to do with pre-existing structural inequities they experienced, such as poverty, racism, and mental illness, than engagement in sex work. Although many study participants reported having conflicts with clients or experiencing theft, non-payment, or client refusal to wear a condom, the majority (68%) did not experience physical or sexual violence in their work.⁷⁸ Other research conducted with both sex workers and clients suggests that among indoor workers, sex workers are more likely to be perceived as holding power and control during a date than clients.⁷⁹

78 Tamara O’Doherty, “Victimization in the Canadian Off-street Sex Industry” (Doctoral Dissertation, Simon Fraser University School of Criminology, 2015), 276 [O’Doherty]. The author also notes, “Various forms of privilege insulate some individuals from vulnerability, which in turn insulates some sex workers from violence.” (160) Participants’ average self-reported income in this study was estimated to be \$68,000 per year and 87% were born in Canada (274).

79 Raven R. Bowen, Vicky Bungay and Catherine Zangger, *Making SPACES: Advancing Recommendations from the Off-Street Sex Industry in Vancouver*, 2015, www.spacesstudy.com [Making SPACES]; Chris Atchison, Dalia Vukmirovich and Patrick Burnett, “Executive Summary of the Preliminary Findings for Team Grant Project 4 – Sex, Safety and Security: A Study of the Experiences of People who Pay for Sex in Canada”, Canadian Institutes of Health Research, June 2015, http://www.sexsafetysecurity.com/docs/executive_summary_report_full-sample_1_june_2015.pdf.

Sex workers and human rights advocates say that rather than promoting equality, the PCEPA instils and reinforces stigma and disregard for sex workers. It cuts them off from the legal protections and rights that should be accessible to everyone in Canada.⁸⁰ Because our society continues to view those who have multiple sexual partners, especially women, with disdain, sex workers are perceived as deviating from gender norms. This perception of sex workers as deviants, and therefore literal outlaws, ultimately results in denial of the legal protection owed them under Section 15 of the *Charter*, including the right to equal treatment under and equal benefit of the law when they are victims of crime, as described in more detail below. Apart from their common engagement in engaging in sex for compensation, the single factor that binds sex workers together as a community is their experience of stigma, and with it, discrimination.

Status as a sex worker has never been recognized as an “analogous ground”⁸¹ of discrimination under Section 15, although given the persistence of stigma, which follows sex workers

80 See Appendix 2 for examples of laws of general application that should apply in situations of violence and exploitation.

81 Section 15 of the *Charter* guarantees equality of everyone not only on the grounds listed (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability, which are often referred to as “enumerated grounds”), but also on grounds that are shown in legal argument to be similar, such as citizenship or sexual orientation. These are usually referred to as “analogous grounds.” See Appendix 1.

even when they engage in other forms of work,⁸² a strong case can be made that it should be. Many of those who engage in sex work do it precisely because of structural disadvantages that have excluded them from or made it more difficult to keep other work, leaving them without the experience or employment history needed to compete in the job market. Gender is an obvious contributor to employment exclusion, and the overrepresentation of women in sex work is a symptom of that. Sex work is also one of the few jobs in which women consistently earn more than men do.⁸³ For those who provide care for other family members, sex work also offers more flexible hours than many other types of employment.

Being gender queer or in the process of transitioning or affirming gender identity can also result in exclusion from many kinds of employment. Other factors that act as barriers to formal work include experiencing racism, particularly as an Indigenous person or an im/migrant⁸⁴ to Canada; or living with a disability such as chronic pain or addiction, which again can be easier to accommodate within the flexibility offered by sex work. It would be incorrect to assert that all sex workers

experience intersectional discrimination, but it is likely all sex workers would identify “whore stigma” as a significant issue in their lives, with the most serious impacts falling on those who are already marginalized. With the very premises upon which the PCEPA was constructed so at odds with sex workers’ realities, it is not surprising that the law increases discrimination rather than promoting equality.

The Labaye Case: Jurisprudence on Sexuality, Criminality, & Harm

When courts determine cases concerning issues of sex and sexuality, they must put aside attitudes born out of personal experiences, religious beliefs, and moral views, and arrive at solutions that are just and fair for everyone. Judicial decisions that shape our laws and policies must be firmly rooted in evidence. This is certainly true in constitutional challenges, where rights infringements must be “demonstrably justified.”⁸⁵ Courts also draw on legal principles from past decisions. In addition to *Bedford*, there are other SCC judgments stating that ideology and morality alone are not sufficient bases for criminalizing activities.

In the 2007 decision *R v Labaye*,⁸⁶ the SCC ruled that, in situations where sexual acts are potentially criminalized, sexual morality cannot serve as a proxy for political morality and actual evidence of individual harms. In *Labaye*, the owner of a private

82 Raven Bowen, “They Walk Among Us: Sex Work Exiting, Re-entry and Duality” (Master’s Thesis, Simon Fraser University School of Criminology, 2013).

83 O’Doherty, 104-105.

84 We use this term to denote anyone who has traveled to Canada and now does sex work here, whether they are citizens or permanent residents, are on temporary work visas, or are undocumented in terms of their immigration status.

85 *Charter*, Section 1.

86 *R v Labaye*, 2005 SCC 80.

club where patrons paid to engage in sex with each other, sometimes in groups, was charged with running a bawdy house under Section 210 of the *Criminal Code*⁸⁷ for permitting acts of indecency on the premises. It should be noted that the two formulations of the bawdy house provision under the old law – using premises for the purpose of prostitution and using premises for practices of indecency – required different evidentiary bases and were not interchangeable, so the reasoning in the decisions cannot be applied directly to sex work cases.⁸⁸ The *Labaye* case also was not argued on constitutional grounds. Nonetheless, the SCC's discussion of sexuality and its explanation of how to quantify harm in *Labaye* is instructive, especially in terms of how courts assess laws that police sexual acts.⁸⁹

In *Labaye*, the SCC said that to rise to the level of criminality, a behaviour or act would have to cause palpable harm that undermined or threatened to undermine a fundamental constitutional value, such as interfering with the liberty and autonomy of others, predisposing others to demonstrably anti-social behaviour, or

physically or psychologically harming those directly involved in the activity. Moreover, in order to merit criminalization, the risk of these harms would have to be incompatible with the proper functioning of society.⁹⁰ The SCC explained that for activities with potentially very serious consequences, even a slight risk that the harms would occur may be enough; whereas, when the consequences were less significant, there might be a need for greater probability or certainty of harm before an activity could attract criminal sanctions.⁹¹

The SCC found there was no “indecency” in the circumstances at issue in *Labaye*. The premises were private and not open by invitation to the public, thus acts within would not disturb unwitting bystanders. None of the behaviours were likely to predispose others to socially destructive acts, and there was no evidence of “anti-social attitudes towards women.” Finally, all

87 As noted previously, it is still illegal to run a bawdy house. The *Bedford* SCC decision changed the definition of a bawdy house under s. 197 by removing reference to the keeping of premises for “the purpose of prostitution,” but premises may still constitute an illegal bawdy house if they are kept, occupied or resorted to for “acts of indecency.” [Craig]

88 *R v Tremblay*, [1993] 2 SCR 932.

89 The analysis in this section relies heavily on arguments put forward by Elaine Craig, “Re-Interpreting the Criminal Regulation of Sex Work in Light of *Labaye*,” *Canadian Criminal Law Review* 1 (2008): 327.

90 *Labaye*, paras. 61-62.

91 *Labaye*, para. 61: “Where actual harm is not established and the Crown is relying on risk, the test of incompatibility with the proper functioning of society requires the Crown to establish a significant risk. Risk is a relative concept. The more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law. Sometimes, a small risk can be said to be incompatible with the proper functioning of society. For example, the risk of a terrorist attack, although small, might be so devastating in potential impact that using the criminal law to counter the risk might be appropriate. However, in most cases, the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct.” The Court also cited *R v Butler*, [1992] 1 SCR 452, at para. 70: “Butler is clear that criminal indecency or obscenity must rest on actual harm or a significant risk of harm to individuals or society.”

the sex engaged in was consensual and not injurious to the individual participants. The Court concluded that this activity – where money was exchanged with the club owner in order for the patrons to engage in sex – was not harmful to Canadian social values, because we tolerate an array of sexual attitudes and tastes. “Consensual conduct behind code-locked doors can hardly be supposed to jeopardize a society as vigorous and tolerant as Canadian society.”⁹²

It is reasonable to anticipate that the SCC would bring a similar analysis to examination of the PCEPA and require evidence of the social and individual harms of allowing the purchase of sexual services. At present, Canadian law still assumes in a variety of situations that the exchange of money for sex is not inherently harmful: for example, in the production of pornography depicting sexual acts, which is legal in Canada, with certain limitations, and in swingers’ clubs like the one in *Labaye*.⁹³ As one legal commentator has observed,

A legal approach that starts from the premise that women, because of social realities such as economic deprivation or social conditioning and false consciousness, can never truly consent to, for example, loveless sex, or involvement with pornography or sadomasochism or prostitution is dogmatic, paternalistic and silencing for many women.⁹⁴

To unequivocally equate sex in exchange for money or goods with sexual exploitation undermines women’s sexual agency and license in our society. Recognizing that sexual diversity is not necessarily harmful does not erase the reality that violence, sexual and otherwise, can and does occur in a variety of circumstances, including in sex work. Rather, it recognizes that those who do sex work are experts in their own lives and allows them to name their own experiences.

Requiring that the law’s effects be substantiated in evidence would realign the legal view of sex workers from victims of objectification to agents operating in multi-dimensional social realities. It would allow the court to consider circumstances in which sex work is not only benign, but in fact is a positive and private experience between individuals that neither fits with nor creates stereotypes.

92 *Labaye*, para. 71.

93 Sensual massage and lap dancing are quasi-legal: while superior courts in different provinces have issued conflicting judicial interpretations as to whether these activities constitute sexual services in exchange for money, municipalities continue to license premises offering these services, and police continue to target workers, clients, and owners of these businesses. For jurisprudence, see *Alexandre c. R.* [2007] JQ No. 11152 (Mun Ct) and *Marceau c. R.*, 2010 QCCA 1155, which held that lap dancing was a form of prostitution; and *R. v. Mara*, [1997] 2 SCR 630, which held that it was not a form of indecency under the pre-*Labaye* formulation. In *Adult Entertainment Association Of Canada v. Ottawa (City)*, 2005 CanLII 30850, the Ontario Superior Court discussed at length bylaws prohibiting touching of dancers, including that they were never followed in practice, without ever considering whether lap dancing constituted prostitution.

94 Craig, 333.

THE BAN ON PURCHASING SEX

Obtaining sexual services for consideration

286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
 - (i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
 - (A) for a first offence, a fine of \$2,000, and
 - (B) for each subsequent offence, a fine of \$4,000, or
 - (ii) in any other case,
 - (A) for a first offence, a fine of \$1,000, and
 - (B) for each subsequent offence, a fine of \$2,000; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months and a minimum punishment of,
 - (i) in the case referred to in subparagraph (a)(i),
 - (A) for a first offence, a fine of \$1,000, and
 - (B) for each subsequent offence, a fine of \$2,000, or
 - (ii) in any other case,
 - (A) for a first offence, a fine of \$500, and
 - (B) for each subsequent offence, a fine of \$1,000.

What Does the Law Say?

It has never been an offence for a sex worker to sell sexual services, and that remains the case. However, Section 286.1(1) of the *Criminal Code* now makes it an offence for a client to pay for sexual services (or to communicate to do so, which is discussed below), with more serious penalties in certain places (near a park, school, or religious institution) and lesser penalties in any other location.⁹⁵

What are Sexual Services?

The term “sexual services” is not defined anywhere in the law; therefore it is not clear exactly which services are captured under the ban on purchasing sexual services.⁹⁶ Under the previous laws,

95 The communicating aspect of this provision is addressed in the next section of this report. It is likely the two offences were combined into one provision because communications about sexual transactions are more easily detectable than exchanges of money or sexual acts, which usually occur in private.

96 NDP MP Francoise Boivin asked the Justice Minister repeatedly for a definition of “sexual services” during the second reading of the bill, but did not receive any answer. A government technical paper produced to accompany Bill C-36 states that, in evaluating whether an act constitutes “sexual services for consideration,” “the court will consider whether the service is sexual in nature, ... whether the purpose of providing the service is to sexually gratify the person who receives it [and]... that the consideration must be contingent on the provision of a particular sexual service...” *Technical Paper*, 3, with citations to case law in footnotes 25-30. The same paper at 3 notes that based on previous case law, lap dancing, masturbation of a client in a massage parlour, and sado-masochism would be considered sexual services; however, the jurisprudence on these acts across Canada is not consistent.

oral and penetrative sex, which both involve direct touching, were captured as acts of prostitution; stripping and web camera performances were not. As noted previously, under the previous laws, courts in different provinces varied in their interpretations of whether lap dancing — an erotic dance performed on or close to the lap of a patron, sometimes with direct physical contact — was considered prostitution.. BDSM (bondage, domination, sadism, and masochism) acts are usually not considered to be sexual services, even when intended to be sexually titillating (although courts have considered these acts indecent in some circumstances). Erotic massage has to date occupied a grey area of the law, where some forms are interpreted as sexual services and others not. Many municipalities in Canada license massage parlours and spas that provide erotic massage, but these licensed premises and their workers are also often subject to raids or police surveillance.

What are the Impacts?

Sex workers face very tangible dangers when their clients risk arrest for approaching them. Fear of active surveillance by police creates distrust at the very least, and ultimately means that sex workers do not experience the same protective benefits of the criminal law available to others in our society. Outlawing sex work also works to further stigmatize an already stigmatized occupation.

a) Forces Sex Workers to Avoid Detection Instead of Focusing on Safety

Clients who are legitimately focused on avoiding police detection are wary

of attending sex workers' places of business, whether on the street or indoors. This encourages clients to seek out street-based sex workers working in more isolated areas and to pressure them to get into cars quickly, or to look for more hidden indoor workers. It deters businesses that offer sexual services from operating openly and transparently. Individual sex workers or sex work businesses that screen potential clients by requiring they call from unblocked telephone numbers and provide identification, employment references, or referrals from other sex workers are less likely to be able to get this information easily. Regardless of the particular work environment, criminalizing clients often means fewer customers and longer hours in riskier environments.

In the wake of a number of police operations carried out on sex work "strolls" (streets frequented by sex workers), sex workers in Ottawa have reported that clients are so nervous about police "stings" that they are now probing sex workers' identities to ensure they are not police.⁹⁷ This shifts the onus for demonstrating that the transaction is safe onto sex workers and takes critical time away from screening, thereby recreating the harmful conditions that led the SCC to strike down the prostitution laws in *Bedford*.⁹⁸

97 Yadgar Karim, "Ottawa Street-based Sex Workers and the Criminal Justice System: Interactions Under the New Legal Regime" (Master's Thesis, University of Ottawa, 2016), 64 [Karim].

98 Karim, 84-85.

b) Increases Police Surveillance and Monitoring of Sex Workers

While police surveillance of locations where sex work takes place is ostensibly focused on clients, Amnesty International found evidence that many sex workers in Norway are still subject to a high level of policing and are targeted by police in multiple, intersecting ways to reduce and/or eradicate commercial sex: through public nuisance policing, anti-sex work and anti-trafficking operations, and immigration enforcement. One social service provider told Amnesty International:

No other group in society has this much police attention and has to live with it – even though they are not doing anything illegal. This attention isn't warranted even by the offence the clients are charged with, let alone the fact the sex workers are not breaking the law.⁹⁹

A similar trend is emerging in some Canadian jurisdictions under the PCEPA. In early 2016, street-based sex workers in Ottawa reported that they were under greater scrutiny by police, who "run their names" (check their identities) on police databases – even when they are not doing anything illegal.¹⁰⁰ These sex workers also said police seize their harm reduction supplies, including equipment used to prepare or consume drugs and

99 *The Human Cost of Crushing the Market*, 8.

100 Karim, 72-75.

condoms, a practice also employed by police in Sudbury.¹⁰¹ In municipalities across Canada throughout 2015, bylaws enforcement officers, sometimes accompanied by RCMP or local police and Canadian Border Services Agency Officers, regularly visited massage parlours to check for infractions, even though no charges were typically laid during these “visits.”¹⁰² This pervasive and invasive monitoring of sex workers belies claims that the law is intended to treat them as “victims.”

During a national investigation called Operation Northern Spotlight, five waves of coordinated “anti-trafficking” raids were carried out throughout the country in 2015 and

2016 by 53 municipal police forces and several RCMP detachments.¹⁰³ Some municipalities focused on street-based sex workers, while others targeted indoor independent sex workers and massage parlour and spa workers. Overwhelmingly, police statements to media emphasized that police used the possibility of arresting clients and third parties to monitor and approach sex workers, entering sex workers’ work spaces and homes in order to “build trust” and “develop relationships” with the ultimate hope of convincing them to leave sex work.¹⁰⁴

c) Inhibits Access to Police Protection and the Justice System

Prohibiting the purchase of sexual services ensures that sex work remains a clandestine activity and that sex workers actively shun police contact. This increases their vulnerability to violence from predators posing as clients, who target sex workers precisely for this

101 Jim Moodie, “Sudbury police address prostitution scene,” *The Sudbury Star*, January 15, 2015, <http://www.thesudburystar.com/2015/01/15/sudbury-police-address-prostitution-scene>

102 Shaamini Yogaretnam, “Police raid residential erotic massage parlours, leading to 76 human trafficking charges for alleged ringleader,” *National Post*, September 16, 2015, <http://news.nationalpost.com/news/canada/residential-erotic-massage-parlour-police-raid-leads-to-76-human-trafficking-charges>; Doug Hempstead, “11 women face possible deportation after massage parlour raids,” *Ottawa Sun*, May 8, 2015, <http://www.ottawasun.com/2015/05/08/11-women-face-possible-deportation-after-massage-parlour-raids>. See also Butterfly Asian and Migrant Sex Workers Support Network, [Journey of Butterflies] 2016, April 2016, http://media.wix.com/ugd/5bd754_b53167612529491a8b30dae89f71bf55.pdf [Journey of the Butterflies]; SWAN Vancouver Society, *Im/migrant Sex Workers, Myths and Misconceptions: Realities of the Anti-Trafficked*, 2015, <http://swanvancouver.ca/wp-content/uploads/2014/01/Realities-of-the-Anti-Trafficked.pdf> [Realities of the Anti-Trafficked].

103 “32 people charged with 78 offences in Canada-wide human trafficking investigation,” *Global News*, October 18 2016, <http://globalnews.ca/news/3010667/32-people-charged-with-78-offences-in-canada-wide-human-trafficking-investigation/>

104 Michael Lumsden, “Operation Northern Spotlight: Escorts met by police instead of dates in Calgary hotel room,” *Calgary Herald*, October 18 2016, <http://calgaryherald.com/news/local-news/operation-spotlight-escorts-met-by-police-instead-of-dates-in-calgary-hotel-room>

reason.¹⁰⁵ Sex workers from SWUAV have described this as feeling like the law paints a target on their backs.

The Norwegian government, which criminalized the purchase of sex in 2008, funded surveys in 2007, 2009 and 2012 of women who sell sex in Norway. A 2012 report on these surveys concluded that: "...women selling sex in Oslo comprise a group that has been the victim of severe violence... The high frequency of this severe violence in such a small group of people is rare in the city of Oslo." The study found that 59% of the 123 women surveyed had experienced violence in the period between 2009 and 2012. This compared to 52% of respondents in the previous 2007 survey who reported experiencing violence over the entire

course of their time doing sex work.¹⁰⁶

Amnesty International also found that sex workers in Norway have to risk eviction, police surveillance, loss of livelihood and/or deportation if they engage with police. It is not surprising then that nearly all of the women Amnesty International interviewed said that they would only consider voluntarily engaging with police as a last resort – often only in extreme circumstances, where there was an immediate threat to their lives.

In New Zealand, where sex work has been decriminalized since 2003, sex workers have reported improved relations with police, with greater abilities to access legal protections –

105 Under the previous prostitution laws, the MWCI examined the root causes of police failure to catch a serial killer and found that police forces exhibited an institutional bias against sex workers, resulting in a failure to prioritize and investigate these cases and to listen to victims of violence and take them seriously. The police's failure to respond contributed to a sense of impunity for perpetrators. The MWCI also found that sex workers who experienced violence evaded police instead of seeking their help. Considerable work has been done by the VPD to repair relations between police and sex workers, but one of the most significant elements contributing to this new relationship is the police commitment not to enforce sex work laws unless there are reports of violence, coercion, organized crime, or youth involvement.

106 The organization conducting the research, Pro Sentret (Norway's largest service provider for sex workers and a recognized centre of expertise), found significant increases in experiences of violence were particularly pronounced amongst migrants who sold sex. In the 2007 survey, 33% of the Nigerian respondents said they had experienced violence in the course of their time in commercial sex, compared with 83% who said they had experienced violence between 2009 and 2012. The Pro Sentret study also recorded a near-doubling in experiences of violence among women of Thai origin who sold sex, with 21% of Thai women reporting having experienced violence over the course of their time in commercial sex in 2007 compared with 40% between 2009 and 2012. The only group that reported any reduction in violent experiences were ethnic Norwegian women in commercial sex (72% in 2007 compared with 55% in the 2012 survey). See: Ulla Bjorndahn, *Dangerous Liaisons: A report on the violence women in prostitution in Oslo are exposed to* (Oslo: Municipality of Oslo, 2012), 37-38, <http://prosentret.no/en/publikasjoner/pro-sentrets-reports-in-english/>

as well as the power to tell police to leave them alone while they are working.¹⁰⁷ In 2005, a client was fined for removing a condom against a sex worker's will during sex.¹⁰⁸ In 2007, 90% of sex workers who responded to an independent survey commissioned by the government felt that they had greater legal protection after decriminalization.¹⁰⁹ Sixty percent said it was easier to get help from authorities.¹¹⁰ In 2014, a sex worker recovered substantial damages from a brothel manager for sexual harassment.¹¹¹

When purchasing sex is criminalized, sex workers are unwilling or unable to access police to report violent offenders and cannot benefit from the civil law

107 Lynzi Armstrong, "From Law Enforcement to Protection? Interactions between Sex Workers and Police in a Decriminalized Street-Based Sex Industry," *British Journal of Criminology*, (2007), doi: 10.1093/bjc/azw019, <http://bjc.oxfordjournals.org/content/early/2016/02/16/bjc.azw019.full?keytype=ref&ijkey=ggNgTPWUiMW22RY>.

108 Gillian Abel, Lisa Fitzgerald, Catherine Healy, Aline Taylor, eds., *Taking the Crime out of Sex Work: New Zealand sex workers' fight for decriminalization* (Great Britain: The Policy Press, 2010), 78. [*Taking the Crime out of Sex Work*].

109 Gillian Abel, Lisa Fitzgerald and Cheryl Brunton, *The Impact of the Prostitution Reform Act on The Health and Safety Practices of Sex Workers: Report to the Prostitution Law Review Committee*, 2007, 12, <http://www.otago.ac.nz/christchurch/otago018607.pdf> [*Impact of the Prostitution Reform Act*].

110 *Impact of the Prostitution Reform Act*, 15.

111 *DML v Montgomery and M&T Enterprises*, [2014] NZHRRT 6, <https://www.justice.govt.nz/assets/Documents/Decisions/2014-NZHRRT-6-DML-v-Montgomery-and-MT-Enterprises-Ltd.pdf> [*DML v Montgomery*].

protections available to others engaged in legal for-profit activities. Even though sex workers are specifically exempted from prosecution for profiting from their own sale of sexual services, in practice, they have no legal remedies available to recoup losses when they are not paid. It is difficult to hypothesize how a court would respond under the PCEPA, even if a sex worker were motivated to pursue a breach of contract claim, since the common law forbids enforcement of any contract to achieve an illegal end.

d) Promotes Stigma and Discrimination

When sex work is criminalized, all sex workers face social censure, because they are engaging in an illicit activity perceived as detrimental to Canadian society. As tenants, they fear being evicted, including from social housing that prohibits occupants from engaging in unlawful acts on the premises. As parents, they fear ostracism, reputational damage, custody challenges during spousal separation, and apprehension of their children by child protection services. There is a large body of academic literature addressing stigma, and research conducted with indoor workers working in a variety of situations across Canada suggests that they fear "outing" more than they fear violence or victimization (defined in the study as, for example, non-violent theft or refusal to provide payment) from clients.¹¹² Sex workers who simultaneously experience discrimination on multiple grounds (because they are racialized, particularly

112 O'Doherty.

if they are Indigenous people or immigrants; because they are disabled, including by mental health challenges or by addiction; or because they are queer or gender non-conforming, especially if they are young) also face heightened surveillance by police and government agencies and greater likelihood of violence from members of the public.¹¹³

Service providers in Norway and many of the sex workers interviewed by Amnesty International expressed concern that attitudes towards people who sell sex have hardened in recent years. Research by the main provider of services to sex workers in Oslo indicates that more sex workers report being harassed by members of the public more frequently now than before the ban on buying sex was introduced.¹¹⁴ Similarly, a Swedish study published in 2010 looked at the impact the ban on purchasing sex had on public attitudes towards the sale and buying of sex in Sweden. It compared the findings of four surveys conducted in 1996, 1999 (the year the Swedish ban was introduced), 2002, and 2008. Support among respondents for criminalization of *buying* sex grew over

the course of the surveys between 1996 and 2002 and remained high in 2008. However, the same study also found that support for the criminalization of *selling* sex had increased, particularly among Swedish women.

These studies indicate that laws can be used to effect changes in public attitudes towards buying sex, suggesting that criminalization produces greater condemnation of people who sell or trade sex:

Punitive attitudes towards sex workers are an indicator of increased stigma and are a driver of discrimination against sex workers. The extent to which states can selectively stigmatize one side of the sex work transaction without also increasing stigma against the other group involved – namely people who sell sex – is therefore in doubt.¹¹⁵

What Rights Are Infringed?

The ban on purchasing sex directly impacts sex workers' safety, engaging the rights to liberty, life, and security of the person under Section 7 of the *Charter*, as well as Section 15, the guarantee of equality under the law.

In a Section 7 analysis, it is likely the prohibition on purchasing sex would be found to violate the principles of

113 Prostitutes of Ottawa/Gatineau Work, Educate and Resist (POWER), *The Toolbox: What Works for Sex Workers*, ed. Frederique Chabot, (2012), 33-47, http://www.powerottawa.ca/POWER_Report_TheToolbox.pdf. Note that the situation is somewhat different for sex workers who are MSM, who often report feeling invisible both in queer communities and in society at large.

114 Amnesty International, *Sex Workers at Risk: A Research Summary on Human Rights Abuses Against Sex Workers*, 26 May 2016, 11, <https://www.amnesty.org/en/documents/pol40/4061/2016/en/>

115 *The Human Cost of Crushing the Market*, 89-90.

fundamental justice, because the effect of the law is to put those engaged in a technically legal activity in danger, in ways that evoke the findings in *Bedford*. The ban is arbitrary in the sense that it functions at cross purposes to many of the stated objectives in the PCEPA's Preamble. Use of asymmetrical criminalization in other countries has not been shown to reduce the incidence of sex work. Rather than enhancing human dignity and promoting gender equality, the criminalization of sex work actively contributes to discrimination against sex workers and exposes them to greater danger. The ban on purchasing sex is also overbroad, in that it prohibits all sex work, not just the small number of transactions in which some form of violence or exploitation actually occurs. It is therefore difficult to see how this provision could be considered beneficial and justified under Section 1.

Outlawing sexual transactions also creates a distinction that sets sex workers apart and prevents them from enjoying the full protection and benefits of the law that they are guaranteed under Section 15 of the *Charter*. This is true for all sex workers, but is experienced most acutely by those who have historically been targets of racial and gender discrimination. The prohibition on purchasing sex therefore perpetuates dehumanizing stereotypes. If the law's objective is ameliorative, aimed at promoting gender equality and protecting those who are rendered vulnerable by pre-existing inequity, it is not just abysmally ineffective but actually counter-productive. The prohibition on purchasing sex is therefore not rationally connected to its avowed aims and not justifiable.

BANS ON COMMUNICATING TO SELL OR PURCHASE SEX

Offences in Relation to Offering, Providing or Obtaining Sexual Services for Consideration

Stopping or impeding traffic

213 (1) Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,

- (a) stops or attempts to stop any motor vehicle; or
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.
- (c) [Repealed, 2014, c. 25, s. 15]

Communicating to provide sexual services for consideration

(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

(2) In this Section, *public place* includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

What Does The Law Say?

The PCEPA introduced one communicating provision for sex workers and another for clients. Given that consenting to a sexual act is by definition a two-way exchange, these two provisions must be considered together.

The PCEPA altered the offence of publicly communicating to provide sexual services for consideration by narrowing the public places in which communications *by sex workers* are criminalized. Section 213(1)(c) (struck down by the SCC in *Bedford*) was replaced by Section 213(1.1), which stipulates that sex workers cannot communicate to provide sexual services at, next to, or in view of a *school, playground or daycare centre*. In other words, the new law targets sex workers who communicate “at, or next to” particular places where children might be expected to be present.¹¹⁶ Section 213(1.1) is in, wording and effect, a marginally narrower version of its unconstitutional predecessor.

The provision criminalizing the purchase of sexual services (Section

286.1(1), reproduced in its entirety in the previous section above) also makes it illegal for a *client to communicate with a sex worker* about purchasing sexual services. Client communications are prohibited in all places and at all times: in person, in writing, by telephone, by email, or through any kind of web-based messaging service. The offences carry more serious penalties for communications that happen at, next to, or in view of a school, park, or religious institution (perplexingly, these are not the same as the locations where sex worker communication is criminalized). While sex workers can communicate with their clients legally, provided they are not in a prohibited public place, clients can never legally respond to or initiate communications.

The *Criminal Code* provisions that prohibited a sex worker from stopping a motor vehicle (Section 213(1)(a)) or impeding access to premises (Section 213(1)(b)) were not modified by the PCEPA. These provisions were not constitutionally challenged in *Bedford*, and until recently they were rarely used.

What Are The Impacts?

Many of the impacts that sex workers experience as a result of the communicating laws are similar to those stemming from the ban on purchasing sexual services and the resulting desire to avoid police detection. Street-based sex workers are still subject to arrest under the communicating laws and continue to

116 The draft of the bill tabled in July 2014 prohibited communicating for the purpose of selling sexual services “in a public place, or in any place open to public view, that is, or is next to a place where persons under the age of 18 could reasonably be expected to be present.” This provision was the subject of considerable criticism during debate in the House as potentially as unconstitutional as the previous law and was subsequently amended to designate specific places in which communicating is an offence. It can be contrasted with s. 161 of the *Criminal Code*, prohibition orders, which is considerably more precise.

face charges in some municipalities. The ban on communication by clients affects all sex workers and has significantly changed the way many do business. The complete ban on communications by clients also has the effect of preventing parties from legally reaching mutual understanding of the sexual acts they intend to engage in.

a) Ongoing Arrests and Harassment

Police from different parts of Canada stated publicly during the Senate hearings that they found the communicating laws useful tools that allowed them to intervene to remove sex workers from situations and thereby help them.¹¹⁷ News stories suggest that police in some communities actively use Section 213 to harass sex workers, primarily in response to nuisance complaints, but also allegedly as a way of making contact with sex workers, to encourage them to leave the sex trade.¹¹⁸

Police in St. Catharines, ON, continued to lay charges against sex workers under Subsections 213(1)(a) and (b) in 2015¹¹⁹ and 2016.¹²⁰ In July 2016, police in St. Catharines conducted a sweep of street-based sex workers using undercover officers posing as potential clients. Sex workers were arrested and taken into custody for stopping traffic under s. 213(1)(a) – even though police stopped their vehicles to make initial contact. Known as Operation Red Light, this sting was part of an intensified effort by the police to eliminate street-based sex work in the area. A Staff Sergeant with the Niagara Regional Police (the St. Catharines local police force) was quoted in the local paper stating, “It is frustrating for the police and the citizens that have businesses down here or live down here,” and that he does “feel for the women. They are victims, but the women – and the johns – are breaking the law, and we

117 Testimony of Chief Eric Jolliffe, Detective Thai Truong, and Chief Rick Hanson before the Standing Justice Committee on Justice and Human Rights, July 9, 2014, at <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=2&DocId=6687033>.

118 Jim Moodie, “Sudbury Police Address Prostitution Scene,” *The Sudbury Star*, January 15, 2015, <http://www.thesudburystar.com/2015/01/15/sudbury-police-address-prostitution-scene/>; “Sydney prostitution crackdown will continue, says Cape Breton Police Chief,” *CBC*, September 9, 2015, <http://www.cbc.ca/news/canada/nova-scotia/sydney-prostitution-crackdown-will-continue-says-cape-breton-police-chief-1.3220927>; Terrence McEachern, “Regina prostitution enforcement back on track,” *Regina Leader-Post*, November 27, 2015, <http://leaderpost.com/news/crime/regina-prostitution-enforcement-back-on-track>.

119 14 persons, 5 women and 9 men, were arrested on “prostitution charges” in October 2015, but it is not clear from news articles which *Criminal Code* provisions were used. See for example: “Police arrested 14 in prostitution/john sweep,” *Niagara This Week*, October 30, 2015, <http://m.niagarathisweek.com/news-story/6063294-police-arrested-14-in-prostitute-john-sweep>

120 Bill Sawchuk, “Undercover cops take aim at the sex trade,” *St Catharines Standard*, July 20, 2016 <http://www.stcatharinesstandard.ca/2016/07/20/undercover-cops-take-aim-at-sex-trade/> [“Undercover cops take aim at the sex trade”]. See also St. Catharines News Release, “Mayor Sendzik meets with Chief McGuire to discuss Queenston Street community response,” July 26, 2016, <http://www.stcatharines.ca/en/governin/resources/Mayor-Sendzik-meets-with-Chief-McGuire-to-discuss-Queenston-Street-community-response.pdf>

are the cops. This is what we do.”¹²¹ The sex workers were released on conditions that included “no-go orders” prohibiting them from entering the area of the city where the support services many access are located; reportedly some were offered diversion if they agreed to attend a study program about exiting sex work. In September 2016, after initial appearances, the Crown withdrew all the charges that had been laid in July.¹²²

b) Renews Displacement and Obstructs Client Screening

As a result of increased police surveillance, street-based sex workers are still resorting to using alleys, side streets, and isolated areas and thus are forced to work in unsafe conditions¹²³ – the same conditions that were brought to the Court’s attention in *Bedford*. In urban settings, particularly in densely populated neighbourhoods, the laws make large swathes of the city inaccessible: communications prohibitions prevent sex workers from working near playgrounds, daycares, and schools, and clients face increased penalties for interacting with sex workers around schools, parks, and religious institutions. In densely populated urban neighbourhoods, including Vancouver’s DTES, often the social housing in which sex workers and their children live also houses daycare and pre-school facilities,

121 “Undercover cops take aim at the sex trade.”

122 Personal communication with Maija Martin, criminal defence lawyer representing eight of the sex workers, September 26, 2016.

123 Karim, 23.

or is located next to playgrounds, theoretically making these areas off limits. This displacement encourages sex workers to work in business centres and industrial areas less frequented at night and often poorly lit. As with the previous communicating provisions and the prohibition on purchasing sex, the pressure to avoid detection prevents street-based sex workers from engaging in their client screening routines, making them more vulnerable to predators posing as clients.

c) Prevents Negotiating Consent to Conditions of Sexual Services

A principle tenet of Canadian sexual assault law is the importance of consent. Consent is what separates sex from sexual assault. Our sexual assault laws say that consent to sexual activity must be voluntary and affirmative, and that consent can never be assumed or given on behalf of another person. Consent to sexual activity can also be withdrawn at any time.¹²⁴ Talking about how to engage in and continue sexual activity is fundamental to maintaining physical safety as well as emotional and bodily integrity.

Because of sweeping restrictions on communication, it is even more difficult now than under the previous laws for sex workers to clearly establish which acts they are willing to perform – and those they are not. This is not just true for street-based sex workers. All sex workers

124 *Criminal Code*, s. 271, and *R v Ewanchuk*, [1999] 1 SCR 330.

are constrained by the ban on client communications, with many reporting significant anxiety as a consequence. The uncertainties attendant on ambiguous communications are an issue for indoor workers who rely on the internet to communicate with clients, and who previously appreciated the ease of making initial contacts, screening, and reaching agreements this way. This is discussed further below in the analysis of the ban on advertising, which serves much the same function for indoor workers that outdoor communications do for outdoor workers.

What Rights Are Infringed?

The communicating provisions clearly inhibit sex workers' free speech under Section 2(b) of the *Charter*. They prevent sex workers and their clients from discussing and agreeing to the terms of a sexual transaction that would be legal, but for the payment of money. The SCC has found that freedom of expression includes the rights to transmit and receive expression.¹²⁵ For sex workers doing street-based work in certain settings, both aspects of the Section 2(b) right are potentially infringed.

The justification put forward for Section 213 is two-fold. As with the previous version of the communicating laws, it aims to ensure traffic safety and prevent nuisance, including street noise. The PCEPA's Preamble and the rewording of Section 213(1.1) also indicate that the law aims to

keep children from being exposed to adults discussing transactions for sex. Speeches during second reading of the bill refer to protecting children from exposure to the "dangers associated with prostitution, such as the presence of drugs, pimps, and persons associated with organized crime."¹²⁶ These are highly stigmatizing characterizations of sex work. These are highly stigmatizing characterizations that scapegoat sex workers for activities that may have nothing to do with them.

In 1990 the SCC considered whether the communicating provision banning public communications was a justifiable infringement of the right to free speech in the *Prostitution Reference*, when the provincial government of Manitoba asked the SCC for guidance in interpreting a *Criminal Code* provision on communicating identical to Section 213(1)(c) struck down in *Bedford*. At that time, the SCC held that although Section 2(b) was infringed, the infringement was justifiable, in part because it characterized communicating as expression for an economic purpose, something that was "not at, or even near, the core of the guarantee of freedom of expression."¹²⁷

The understanding of the function that communicating serves has changed significantly since the *Prostitution*

125 *Vancouver Sun (Re)*, 2004 SCC 43, para. 26.

126 Bob Dechert, MP for Mississauga-Erindale, ON, <https://openparliament.ca/debates/2014/6/12/bob-dechert-4/>

127 *Prostitution Reference*, 1136.

Reference. The evidence put before the court in *Bedford* greatly expanded judicial understanding of what sex work actually entails and what risks sex workers typically face in their work. It has been recognized that, for sex workers, communicating prior to a sexual act is much more about sexual consent and safety than it is about money. In fact, Section 213(1)(c) was struck down in *Bedford* not for violating Section 2(b) but rather Section 7, security of the person. The new communicating provisions simultaneously engage both these rights.

Given that the current communicating laws actively impede the negotiation of consent and prevent sex workers from making intimate decisions about their bodies, it would be difficult to see how they could be found to uphold the principles of fundamental justice.¹²⁸ The previous communicating law was found to be grossly disproportionate, because the aim of the law was to eliminate nuisance in communities, but its impact was to put street-based sex workers' lives at risk. The present laws, Sections 213(1.1) and 286(1) go further – they endanger not only street-based sex workers but all sex workers, by obstructing the essential communication that allows sex workers to decide and convey whether they will consent to sexual relations with individual clients. The fact that they do this in the name of eliminating gender-based discrimination, when

consent and sexual assault have figured so prominently in advocacy for women's equality, suggests that they are also not rationally connected to their aim.

The communicating provisions are also impermissibly broad, because they criminalize communicating in all situations, targeting communications even in the most private of circumstances – for example, in email communications between two individuals or in sex workers' own homes. If the aim of Section 213(1.1) is preventing children from being exposed to sex work, the provision overreaches by declaring public spaces off-limits, even at night, when it is unlikely that children would be present.¹²⁹ In cases of real inconvenience or perceived social harm, issues of noise and traffic would be better addressed through municipal dialogue and zoning than through criminalization.

These laws are being actively used by some police forces to arrest sex workers, and by others to harass them, which means that the conditions described in the *Bedford* decision are being replicated. There is particular urgency in ensuring these provisions are repealed.

128 *Morgentaler; Carter v. Canada (Attorney General)*, 2015 SCC 5 [Carter SCC].

129 Other cases have found similar provisions applying to possession of drugs for the purpose of trafficking to be unconstitutionally vague and overbroad: see *R v Dickey*, 2016 BCCA 177, involving three plaintiffs convicted of making drug transactions near schools, although the cases were ultimately decided on s. 12, not on s. 7.

BANS ON WORKING WITH OTHERS

Material benefit from sexual services

286.2 (1) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

Material benefit from sexual services provided by person under 18 years

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit

- (a)** in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
- (b)** as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
- (c)** in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or
- (d)** in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

- (a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;
- (b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;
- (c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;
- (d) engaged in conduct, in relation to any person, that would constitute an offence under Section 286.3; or
- (e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Aggravating factor

(6) If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Procuring

286.3 (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

What Does The Law Say?

There are two separate types of offences in the PCEPA that impede sex workers from working with others: the material benefits offences and the procuring offences. These provisions replace the previous procuring provisions in the *Criminal Code*, including the "living on the avails" provision (Section 212(1)(j)), which appeared under Procuring. They aim to prevent any commercialization of the provision of sexual services, making it a crime to profit or receive anything tangible from someone else's sex work.

The material benefits offence is one of the longest and most convoluted parts of the PCEPA. Section 286.2(3) contains a reverse onus¹³⁰ that presumes, in the absence of proof to the contrary, that anyone associating with a sex worker is an exploiter. Section 286.2(4) sets out a list of exceptions to this presumption, then provides further exceptions to those exceptions. Apparently drafted in an effort to be more precise than the previous overbroad law, the presumption of exploitation does not apply to those who receive a benefit from sex worker as a result of "legitimate living arrangements" or "legal or moral obligations." Neither of these terms is defined in the law, but according to a Department of Justice

technical paper,¹³¹ they are taken from previous case law that defines relationships with family including children and intimate partners as not parasitic.¹³² Presumably this could also include roommates, as found in the *Downey* case, as well as those who have business dealings with sex workers as creditors.¹³³ The new provisions also exempt from charges people who are paid to perform a service for a sex worker that is offered to the general public -- for example, as a taxi driver or an accountant. Anyone who offers a service only to the sex worker, but at a cost proportionate to the value of the service and without encouraging sex work -- perhaps by driving an individual worker to a date, for example -- is also not liable.

None of these exemptions applies if the person benefiting from another's sex work used violence or coercion or abused a power differential in any way in the relationship. The exemptions also do not apply to anyone who supplies a sex worker with drugs or alcohol as an inducement or encourages or recruits that person to do sex work.

Perhaps most critically for the vast majority of sex workers in Canada who work indoors, none of the exemptions apply in any context that could be deemed a "commercial enterprise". "Commercial enterprise" is also not

130 A "reverse onus" law requires the accused to prove their innocence instead of requiring the prosecution to prove their guilt. For more, see Appendix 1.

131 *Technical Paper*.

132 *R v Grilo*, [1991] 64 CCC (3d) 53 (ONCA) [Grilo].

133 *Grilo*.

defined in the law, but it appears that this exclusion from the exemptions effectively criminalizes all businesses where sexual services are offered and, by extension, the staff who work there. In fact, it is an aggravating factor to obtain a material benefit in the context of a commercial enterprise, giving rise to the possibility of a longer sentence to anyone convicted under this provision. Section 286.5(1)(a) provides immunity to any sex worker obtaining a material benefit in regard to their own sexual services, but there is nothing in the law to suggest that a sex worker could not be charged for money earned or other benefits obtained in part from work done by other sex workers. This potentially criminalizes sex workers working together -- for example, performing "duos" or dates where two sex workers see clients together, or alternately booking appointments, cleaning facilities, or performing any number of rotating duties that sex workers often share in indoor premises -- unless they intentionally establish a collective model for equal profit sharing.¹³⁴

Even though most of the clauses under Procuring were not the subject of a constitutional challenge in *Bedford*, the PCEPA made minor changes to the procuring offence. Under the new section, it is an offence to arrange for or persuade a person to offer or provide sexual services for payment, or to facilitate the purchase of sexual services by a client by recruiting,

holding, concealing, or harbouring a person, or exercising control, direction, or influence over their movement.¹³⁵ Because "recruiting" a person to do sex work is prohibited, this provision could apply to anyone in a management or administrative position responsible for hiring staff at a business that offers sexual services, including a massage or body-rub parlour or a "micro-brothel," a term commonly used to refer to unlicensed businesses employing a small number of sex workers run out of condominiums or other residential premises.

What Are The Impacts?

a) Skews Representation of Sex Workers' Personal Relationships

While these provisions prohibiting working with others may have been intended to prevent exploitation, they have their roots in exaggerated and often racist stereotypes of "pimps" as violent, controlling racialized men and of sex workers as drug-addicted

and helpless. Academic sex work researchers have observed,

135 It is notable that the wording of the remaining procuring provisions mirrors that of s. 279.01 of the *Criminal Code*, trafficking in persons. The procuring provisions do not contain any references to transporting, transferring or receiving persons, and the trafficking provisions do not reference the sale of sexual services, but both offences criminalize anyone who "recruits, holds, conceals or harbours a person" or "exercises control, direction or influence over the movements of that person."

134 *Technical Paper*.

Stereotypes based on stigmatic assumptions persist in part because, in spite of renewed academic interest in sex work and the personal and professional lives of sex workers, there is a dearth of evidence-based knowledge about third parties – those individuals involved in commercial sex transactions who are neither sex workers nor clients.¹³⁶

The material benefits and procuring provisions continue to essentialize sex workers' lives and reduce their relationships to one-dimensional interactions based only around their work. For example, Section 286.2(5) (c) could potentially be used to charge friends, co-workers, and intimate partners who share alcohol with sex workers prior to their meetings with clients. The provision refers to substances provided for "the purpose of aiding or abetting that person to offer or provide sexual services for consideration." However, in the case of people sharing the profits of a sex work transaction, including because they live together, it is not difficult to see how it could be applied even in situations involving no coercion or exploitation. While not all sex workers use substances, as with other aspects of the law, this provision draws a distinction based on stereotype. Typically, what this means is not that sex workers eschew personal or safety-enhancing

relationships, but that they live and work with anxiety and fear that those they associate with could be arrested, and that they could lose their jobs. This intensifies the social isolation that many sex workers experience because of stigma.

Section 286.2(5)(a), which nullifies any exemption from the presumption of exploitation if someone receiving a benefit uses threats or violence, also has a deterrent effect on the reporting of domestic or intimate partner violence. When sex workers do experience coercion or violence, it is not necessarily directly caused by doing sex work; like others, they may experience discord in the context of a relationship with a family member, an intimate partner, or a drug dealer for reasons unconnected to their work.¹³⁷ In some cases, interventions using the ordinary provisions of the *Criminal Code* (for example, concerning assault, criminal harassment, extortion, or applications for restraining orders) are appropriate. Sex workers who already distrust the justice system are extremely unlikely to call police during an altercation or seek a restraining order against an abusive partner or family member if doing so could result in their own "outing" as a sex worker and in the aggressor potentially being charged with receiving a material benefit – an offence carrying a maximum

136 Bruckert and Law, 7.

137 Bruckert and Law, 12.

penalty of 10 years imprisonment.¹³⁸

b) Disadvantages Those Who Lack Resources to Work Independently

Although the material benefit provisions have been framed as capturing relationships of exploitation, in reality they criminalize managers, receptionists, bouncers, and other security personnel who screen clients onsite at sex work businesses, as well as drivers who take sex workers to out-call dates. This effectively prevents any business offering sexual services from operating legally. Sex workers rely on these businesses for premises in which to work, support in dealing with intoxicated or abusive clients, and regular wages. Many businesses have established practices and venue safety policies that contribute to safer work environments, including having procedures for dealing with situations of potential aggression, maintaining “bad client” lists, employing security measures, and facilitating access to sexual and reproductive health supplies including barrier contraceptives.¹³⁹

138 Compare this, for example, to assault under Section 266 of the *Criminal Code*, with a maximum penalty of 18 months imprisonment if the Crown proceeds on summary conviction and five years if charged as indictable.

139 P Duff, J Shoveller, G Ogilvie, J Montaner, J Chettiar, S Dobrer, and K Shannon, “The Impact of Social Policy and Physical Venue Features and Social Cohesion on Negotiation of Barrier Contraceptives Among Sex Workers: A Safer Indoor Work Environment Scale,” *Journal of Epidemiology and Community Health*, 2014. [A Safer Indoor Work Environment Scale]

The criminalization of all businesses selling sexual services means sex workers who want to work legally must work alone. Not only does this mean potentially greater isolation and less community for sex workers, it also privileges those who are better resourced. While independent indoor sex workers are also feeling scrutinized and fearful under the PCEPA, some are still able to work alone in relative safety, particularly if they have regular clients. To work independently, they must have a phone, a reliable internet connection, and their own facilities, including a residence or other premises from which to work. More marginalized sex workers who cannot afford these essential business tools, and who may lack the connections, confidence, or language skills to arrange for and acquire them, do not have the same options.

c) Excludes Sex Workers from Workplace Protection Regimes

It is impossible to generalize about the wide variety of conditions that exist in different sex work businesses across Canada. Still, the research on sex workers employed in indoor businesses suggests that the workplace issues and abuse they encounter are unfair labour practices common to unregulated industries: unpaid wages, fines for arbitrary workplace rules, sexual harassment, and shifts longer than employment laws permit.¹⁴⁰ Since sex work businesses survive by avoiding interaction with authorities, workers are excluded from

140 Bruckert and Law; *Making SPACES*.

provincial workers' rights protections, including occupational health and safety regulations and employment standards. Making their working arrangements illegal makes it impossible for workers to bring forward complaints and to access labour and employment tribunals and benefits available to other workers.

Additionally, as was found in *Bedford*, doing sex work together with others is generally safer. One study from Vancouver has also found that experienced owners of indoor establishments are more likely to encourage safer sex practices, provide condoms, and protect sex workers from dangerous clients. Sex workers in these studies preferred working in larger venues where co-workers could (and did) intervene to de-escalate situations with difficult clients.¹⁴¹

What Rights Are Infringed?

Drafters of the PCEPA may argue that the procuring and material benefits provisions were designed to protect sex workers from exploitation. In fact, their effect is just the opposite – they replicate pre-*Bedford* conditions by stripping sex workers of the opportunity to create and maintain supportive work environments where they can expect fair labour practices. Sex workers in these situations could be subject to charges themselves.

The net effect of the material benefits

and procuring provisions is to make it illegal to run a business with the aim of providing sexual services, unless you are a sole proprietor. While the living on the avails provision was struck down as unconstitutional for isolating sex workers and thereby creating vulnerability, the new material benefits provisions accomplish essentially the same thing. The new Section 286.2 (material benefits) and 286.3 (procuring) provisions rework the previous *Criminal Code* provisions, but they still impair the ability of sex workers to enjoy the assistance of working legally with other employees who help to mitigate workplace risks, thereby infringing sex workers' right to security of the person under Section 7. They are inconsistent with the principles of fundamental justice because they are overbroad: like the previous living on the avails provision, they capture positive and protective relationships, as well as exploitative ones, and rather than lessening the risk of harm to sex workers, they increase it.

The presumption that anyone living or working with a sex worker is guilty of exploitation, absent evidence otherwise, is a clear violation of Section 11 of the *Charter*, which presumes everyone is innocent until proven guilty. This applies equally to sex workers who work together.

The laws that prevent this kind of cooperative engagement may violate sex workers' Section 2(d) rights to associate with each other and work collectively. This is an area in which the law is rapidly evolving, and while most cases involving Section 2(d) to date have occurred in the

141 *A Safer Work Indoor Work Environment Scale*.

context of organized labour, there is a particular concern for ensuring that vulnerable and marginalized workers have opportunities for collective organization.

As noted above, these provisions make it more difficult for those without resources to work indoors, resulting in particular disadvantages for sex workers who are poor, racialized, or living with disabilities. Thus these provisions are also implicated as violating equality rights under Section 15 of the *Charter*.

As with the previous provisions discussed, and for the same reasons, the material benefits provisions are unlikely to be saved by Section 1 of the *Charter*. The ostensible aim of these provisions is to prevent parasitic relationships. As noted previously, the best way to achieve this is to ensure sex workers have access to justice. In terms of violence, this includes unbiased access to police to report sexual and physical assault, seek a restraining order against a potential aggressor, or pursue an action against someone engaging in technology-facilitated violence such as cyberstalking or internet blackmail.¹⁴² It is possible to detect, report, and eliminate labour exploitation and sexual harassment when those reporting do not fear jeopardizing their livelihood and income. This means providing workers access to occupational health and safety regulations and employment standards that prioritize the wellbeing and safety of workers. Cases of actual coercion could be dealt with using existing trafficking laws, which are

discussed in more detail in the chapter *False Equation: The Conflation of Trafficking and Sex Work*.

BAN ON ADVERTISING

Advertising sexual services

286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.

What Does The Law Say?

Section 286.4 criminalizes any person or entity knowingly advertising the offer of another person's sexual services. The advertising ban has yet to be judicially interpreted, thus there is some uncertainty as to what this provision actually prohibits. On its face, it appears to prohibit any print or online entity – any newspaper, magazine, website, blog, online message board, or electronic platform – from carrying sex workers' ads. The law could also be used to charge any business like an escort agency or a massage parlour that advertises its employees' services. Section 286.5(1)(b) provides immunity to sex workers who are advertising only their own sexual services, but there is nothing to suggest

142 See Appendix 2.

this immunity extends to third parties who carry or facilitate placement of those ads.

What Are The Impacts?

a) Creates an Additional Barrier to Working Indoors

The challenges facing sex workers who want to work indoors (discussed above) are exacerbated by the prohibition on advertising, which makes it all but impossible for sex workers to legally apprise clients of their services. Increasingly, sex workers situated in all parts of the industry use online methods to connect with clients; even street-based sex workers may arrange to meet dates in particular areas using online messaging tools.

Escorts and independent workers rely heavily on online advertising to attract and communicate with clients. In recent research in Vancouver, sex workers who are MSM described how important online tools had become after outdoor sex work strolls had been shut down, particularly the ability to follow up on initial email responses to ads with webcam meetings to screen potential clients before meeting them in person.¹⁴³ The restrictions on third party advertising are also a particular problem for im/migrants, irrespective of immigration status, who rely on others because their English literacy is limited.

b) Stymies Boundary-Setting, Effective Communication, and Screening

143 *The Loss of Boystown; Implications for Male Sex Workers*, 12-13.

Like communicating on the street or by phone, advertising fulfills a screening function, providing sex workers with a way to describe their appearances, specialties, and prices before ever engaging with a client. This allows the sex worker and the client to set expectations and reach agreements in advance, rather than having to negotiate in person, potentially at the client's residence in an environment unfamiliar to the sex worker.¹⁴⁴ In the past, sex workers advertising online typically offered a menu of services using acronyms. Some had very direct descriptions of what they would not do (for example, that they did erotic massage but did not allow clients to touch them, or that they would engage in vaginal but not anal sex).¹⁴⁵

In response to the advertising law, some websites have informed sex workers that they will no longer allow explicit advertising of sexual services in order to protect themselves from liability. Many sites have forbidden both acronyms and more straightforward descriptions, forcing sex workers to resort to euphemistic descriptions of

144 Chris Atchison, Cecilia Benoit, Patrick Burnett, Mikael Jansson, Mary Clare Kennedy, Nadia Ouellet, and Dalia Vukmirovich, "The Influence of Time to Negotiate on Control in Sex Worker-Client Interactions," *Global Network of Sex Work Projects' Research for Sex Work*, No. 14, (September 2015): 1-2.

145 This is apparent on review boards and confirmed by many sex workers and sex worker serving organizations, including SWOP. See, for example, Emma M. Wooley, "New prostitution law could force sex workers off the internet," *Globe and Mail*, July 16, 2014, <http://www.theglobeandmail.com/technology/digital-culture/new-prostitution-law-could-force-sex-workers-off-the-internet/article19630815/>

what they offer. At least one Canadian men's site, *squirt.org*, informed site users in 2015 that the website would no longer tolerate any advertising of sexual services for sale.¹⁴⁶ (Several Canadian print publications that advertise sexual services, including Toronto's *NOW Magazine* and Vancouver's *Georgia Straight*, continue to defy the advertising ban.)

Attempts to skirt the advertising prohibition revive dated measures, with some sex workers reverting to posting ads that say they seek compensation in exchange for their time and companionship only. Others have turned to personal ads and dating sites, instead of platforms that explicitly allow posting of adult entertainment or sexual services ads, where they risk being flagged and taken down if their postings are too explicit. In all these situations, the potential for poor communication and client misunderstandings is heightened, generating anxiety and making it more difficult for sex workers to mitigate risks.

c) Increases Isolation and Decreases Access to Service Providers

Review boards are websites that carry sex workers' ads, along with message boards where clients can communicate with each other and rate services they have received. These boards also usually have a sex workers-only area

where sex workers can communicate with each other, including about good and bad dates and tips on how to work more safely. They are important platforms for creating community among independent sex workers, who often work in isolation.

Sex workers with individual pages on review board websites have until recently supported one other by using banner ads on the tops of pages to recommend other sex workers they know. Banner ads assisted sex workers in getting "good" clients – clients who were pre-screened and reputable – and more work. Many sex workers have stopped this practice for fear of attracting third-party advertising charges and are now seeing decreased earnings. Some also no longer advertise that they will work together with others.¹⁴⁷

Non-profit sex worker-serving organizations also use these boards (and other non-sex work specific sites like *craigslist.com*) to publicize their services and sometimes to advertise workshops, clinics, publications, social events, legal advice, and other information about free and low-cost goods and services available.¹⁴⁸ With the prohibition on advertising of sexual services across

146 Nathaniel Christopher, "Squirt pulls escort services from gay hook up site," *Daily Xtra*, October 21, 2015, <http://www.dailyxtra.com/world/news-and-ideas/news/squirt-pulls-escort-services-from-gay-hookup-site-179138>

147 Personal communication with Andrea Sterling, PhD candidate, School of Criminology and Sociolegal Research, University of Toronto, regarding ongoing research, October 30, 2016.

148 SWAN Vancouver Society (2015), *Outreach in the Age of Information and Communication Technologies: A Manual for Sex Work Support Organizations* www.swanvancouver.ca/education/.

a range of Internet platforms, these organizations are afraid that they will lose outreach opportunities. Some organizations that provide information about safer sex practices and tips for managing client expectations also fear they could be targeted for encouraging people to engage in sex work.

What Rights Are Infringed?

The actual impact of Section 286.4 is to make it more difficult for sex workers to enjoy the safer conditions of indoor work and to set boundaries with clients about the conditions they work under and the services they offer. This flies in the face of the SCC decision in *Bedford*.

Because of the communicating and screening functions that advertising serves, the advertising ban results in infringements of sex workers' *Charter* rights under Section 2(b), (freedom of expression), and Section 7, (right to life liberty and security of the person), in essentially the same manner as the violations caused by the communicating provisions.

If the aim of banning advertising of sexual services is to reduce public exposure to sexually explicit materials, Parliament could have chosen to use existing obscenity provisions in the *Criminal Code* to tailor the advertising law to specific circumstances, or to allow for the use of local bylaws to control things like signage, as is done in New Zealand. Banning all advertising, including advertising that is not offensive, only available to those actively seeking it, and not accessible

to children, is unjustifiably overbroad. Statements made when Bill C-36 was introduced indicate that the actual aim of this provision is the elimination of sex work as a viable occupation, on the basis that it is an inherently harmful practice. Instead of reducing harm to those who sell sexual services, prohibiting the advertisement of sex work interferes with client negotiations and thereby has the potential to put them at greater risk. The prohibition on advertising is therefore arbitrary and not rationally connected to its ultimate goal. It is difficult to see how this could be justifiable under Section 1 of the *Charter*.

EXEMPTION FOR SEX WORKERS

Immunity: material benefit and advertising

286.5 (1) No person shall be prosecuted for

- (a) an offence under Section 286.2 [material benefit from sexual services] if the benefit is derived from the provision of their own sexual services; or
- (b) an offence under Section 286.4 in relation to the advertisement of their own sexual services.

Immunity – aiding, abetting, etc.

(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of Sections 286.1 to 286.4 or being an

accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

What Does the Law Say?

Sex workers are explicitly granted immunity from charges for benefitting from the sale of their own services, and from charges for advertising their own sale of sexual services as discussed above. Section 286.5 of the law explicitly grants “immunity” to sex workers and says that they “will not be prosecuted,” reinforcing the understanding that the acts described are wholly illegal and sex workers are simply in a special category in regard to them. This is an extraordinarily unusual formulation in criminal law, where immunity is normally granted on a rare and discretionary case-by-case basis, most frequently to encourage participation in a prosecution. It is worth emphasizing that the law makes an otherwise legal activity – consensual sex between adults – a crime when money or something of value is exchanged, even if coercion of any kind is absent and neither party experiences any physical emotional, or psychological injury.

Conclusion

The PCEPA has been mischaracterized as targeting clients and exploitive third parties without criminalizing sex workers and others who may enhance their safety. In fact, the new law has resulted in sweeping criminalization of the sex

industry, putting sex workers under increased scrutiny and increasing their physical and economic insecurity. Under the new law, working outside is just as dangerous as it was in the past, and working inside is not viable for anyone wanting to do sex work who is not already well-resourced and established.

It is difficult to square this reality with the *Bedford* decision and *Charter* guarantees of our rights to freedom of expression and association, liberty, safety, the presumption of innocence, and equality. There is little doubt that the PCEPA is unconstitutional and actively prevents people who sell or trade sexual services from enjoying their fundamental *Charter* rights. Sex workers remain very hopeful that the current federal government will engage in law reform and repeal the PCEPA and other laws that criminalize sex work.¹⁴⁹ In the event that this does not happen, Canadian sex workers are preparing to bring a new constitutional challenge to this legislation.

149 For example, ss. 213(1)(a) and (b) of the *Criminal Code* prohibit sex workers from impeding vehicular traffic or pedestrians entering premises in order to speak with potential clients.

False Equation: The Conflation of Trafficking and Sex Work

Human Trafficking Is Not Sex Work

“Human trafficking” figures prominently in the public discourse about sex work in Canada. In media reporting and government policies, trafficking is often conflated with sex work and used to equate all transactions involving sex with forced sexual services and child sexual exploitation. This discourse ignores the fact that the vast majority of people who sell sex in Canada do so of their own volition as a way of earning income. They are not “trafficked,” according to the definitions provided under international or Canadian law. The reframing of consensual sex work as trafficking endangers sex workers, particularly those who are im/migrants to Canada, by subjecting them to intensified scrutiny from law enforcement and immigration officials and by putting legal tools for prosecuting labour exploitation beyond their reach. All of this is occurring at a time when hundreds of millions of dollars in government funding is being channelled into anti-trafficking programs, most of them aimed at eliminating sex

work.¹⁵⁰ This chapter looks at the legal definitions of trafficking and examines how the politicization of trafficking enforcement in Canada has impacted those involved in sex work.

International Recommendations on Enforcement

For more than two decades, sex workers and human rights activists have strived internationally to disentangle the discourse around sex work from trafficking in order to achieve real progress in protecting sex workers’ rights and preventing trafficking as a human rights abuse.¹⁵¹ The UN Global Commission on HIV and the Law recommends that States “enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work and ensure human trafficking laws are used to prohibit sexual exploitation, as opposed to consensual sex work.”¹⁵² The UN Special Rapporteur on Violence against Women has noted the need to ensure that “measures to

150 A Clancey, N Khushrushahi & J Ham, “Do Evidence-based Approaches Alienate Canadian Anti-Trafficking Funders?” *Anti-Trafficking Review*, No. 3 (2014): 87-108 [Clancey, Khushrushahi, and Ham]; *Realities of the Anti-Trafficked*.

151 GAATW, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (Bangkok: Global Alliance Against Trafficking in Women, 2007), http://www.gaatw.org/Collateral%20Damage_Final/singlefile_CollateralDamagefinal.pdf

152 *Guidance Note on Sex Work*,

address trafficking in persons do not overshadow the need for effective measures to protect the human rights of sex workers.”¹⁵³

Canada’s Trafficking Definitions Do Not Match International Standards

Trafficking is defined in international law by the Palermo Protocol, a United Nations instrument that commits states to take action to eliminate trafficking in persons and transnational activity involving organized crime.¹⁵⁴ The Palermo Protocol sets out three constituent elements of trafficking: 1) the act of transporting or receiving persons; 2) through means involving some form of force, coercion, deception, or enticement; 3) with the purpose of exploiting another person’s labour. The Protocol was drafted to apply to all forms of exploitative labour, including agricultural, domestic, and factory labour.

Under Canadian law, there are two sets of provisions that address trafficking in

exploitative labour situations of all kinds: *Immigration and Refugee Protection Act* (IRPA) provisions that apply when people are moved across international borders, and *Criminal Code* provisions that address coercive labour within Canada. None of these laws were created to police sex work. They exist to ensure that no one is coerced or exploited to perform forced or bonded labour.

Section 118 of the IRPA was introduced in 2002, before the *Criminal Code* provisions, and applies to trafficking across international borders. This provision makes it a crime to knowingly organize the entry into Canada of persons by means of abduction, fraud, deception, or use or threat of force or coercion. Committing the offence for profit or subjecting a person to humiliating and degrading treatment, including with respect to work, health conditions, or sexual exploitation, are considered aggravating factors in sentencing.

The *Criminal Code* provisions were enacted in 2005 and 2010, in partial fulfillment of Canada’s obligations as a signatory to the Palermo Protocol; they appear in the part of the *Criminal Code* devoted to restraint of persons, including through kidnapping and abduction. Sections 279.01 and 279.011 of the *Criminal Code* make it an offence to recruit, transport, transfer, receive, hold, conceal, or harbour a person, or exercise control over a person, with a minimum sentence of five years and the possibility of life imprisonment

153 United Nations General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences*, Rashida Manjoo, April 1, 2014, A/HRC/26/38/Add.1, 19.

154 The full name is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children*, and the full text is available here: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>. The Protocol supplements the United Nations *Convention Against Transnational Organized Crime*.

on conviction.¹⁵⁵ Section 279.02 proscribes receiving a material benefit from trafficking in persons, and 279.03 penalizes withholding or destroying a person's identification documents. For each of these offences, there is a parallel offence with heavier penalties if the person trafficked is under the age of 18. Section 279.04 sets out the factors that comprise exploitation and establishes an objective/subjective test that looks at whether a reasonable person in the position of the allegedly trafficked person would have felt fear. Before a court, the person's actual experience of fear, as well as their actual consent, are irrelevant to a finding of liability.

EXPLOITATION

279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

¹⁵⁵ This is very similar to the s. 286.3 procuring provisions, with the exception that the trafficking provision includes reference to transportation, and the procuring provision explicitly references sexual services for consideration.

The PCEPA made minor additions to these *Criminal Code* provisions:

- It added mandatory minimum sentences to the offence of trafficking in persons (Section 279.01), when there are aggravating circumstances present (five years) and in all other cases (four years).
- It modified the offence of obtaining a material benefit from trafficking in persons (Section 279.02) by adding the phrase "directly or indirectly" and added a new offence for trafficking of minors with a mandatory minimum sentence of two years.
- It added an offence (Section 279.03(2)) for concealing, removing, withholding, or destroying a travel document, whether that document originated in Canada or elsewhere.

The very inclusion of these changes in the PCEPA, a law that is otherwise wholly devoted to criminalizing sex work, is evidence of the conflation of trafficking and sex work in legislators' minds.

So Many Provisions, So Few Convictions

A recent study reviewing all trafficking charges that have proceeded to trial in Canada in the 10 years following the enactment of *Criminal Code* trafficking provisions reveals relatively few trafficking convictions generally. A total of 374 trafficking in persons charges have been laid in all of

Canada since 2005, resulting in only 33 prosecutions (29 domestic and 4 involving cross-border travel or non-citizens) – an average of just over three prosecutions per year and only in the provinces of Quebec, Ontario, Alberta, and BC. There have been less than 20 convictions over this period under either the *Criminal Code* or the IRPA provisions.¹⁵⁶

Most cases have not involved provision of sexual services, but rather domestic or other labour. The largest prosecution concerned young Hungarian men held as bonded labourers.¹⁵⁷ The study found only one conviction involving cross-border movement and exploitation of sexual services under the IRPA (*R v Ng*),¹⁵⁸ and 15 convictions on domestic trafficking into sexual exploitation, all of them in Ontario and Quebec. This finding is consistent with reports by organizations serving current im/migrant and Indigenous sex workers that most

do not identify as “trafficked” and find the term inconsistent with their lived experience.¹⁵⁹ According to one study informant, a government employee in the criminal justice system,

If you have 200-300 investigators working on this issue across Canada over a period of multiple years, you would think we would have come up with a few more cases by now, if it is as big of a problem as presented.¹⁶⁰

Researchers hypothesize that there are a number of reasons for the small number trafficking convictions, including those involving sexual exploitation, some of which are further discussed below.¹⁶¹ One contributing factor may be the definition of trafficking, which omits the explicit element of coercive means found in the international definition. This makes “trafficking” less conceptually precise and, ironically, potentially more difficult to prove in court, because the

156 H. Millar & T. O’Doherty in collaboration with SWAN Vancouver Society, *The Palermo Protocol and Canada Ten Years On: The Evolution and Human Rights Impacts of Anti-Trafficking Laws in Canada*, 2015, p. 34 [Miller and O’Doherty]. Information collected by Statistics Canada corroborates these findings: Of the 53 completed adult human trafficking cases, the majority (58%) were stayed or withdrawn, while close to one-third (30%) resulted in a guilty finding.” See <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14641-eng.pdf>, p. 4.

157 *R v Domotor*, [2011] OJ No 6357 (QL).

158 2008 BCCA 535. High profile cases in BC and Ontario of “sex trafficking” have not involved cross border movement, and often convictions have been on “trafficking related” offences including procuring, or charges concerned drugs or violence.

159 *Journey of the Butterflies; Realities of the Anti-Trafficked*.

160 Millar and O’Doherty, 56.

161 These include the relative difficulty of investigating trafficking, the fact that victims are sometimes unprepared or inadequately supported for trial, the novelty of trafficking charges, and the paucity of jurisprudence to inform prosecutions, and the high burden of proving beyond reasonable doubt that the victims did not consent. The authors examine these in considerable detail, but also provide evidence from focus groups conducted by SWAN, a community organization serving im/migrant sex workers, indicating that in the organization’s 12-year history in Metro Vancouver, outreach workers have only encountered one case of trafficking.

elements of the offence are unclear to prosecutors and judges alike.¹⁶²

Impacts Of Conflating Sex Work And Trafficking

a) Deters Reporting of Actual Violence By Those Who Do Not Identify As "Trafficked Victims"

Investigations for trafficking that focus on raiding indoor sex work establishments such as massage parlours and spas, ostensibly to rescue "trafficked victims," increase the fear that im/migrant sex workers have of police, because these raids can result in deportations. This creates a situation in which im/migrant sex workers hesitate to report crimes against them that might draw attention to their immigration status. These fears are real. In 2006, police in Vancouver raided 18 massage parlours to identify victims of trafficking. None of the 78 women arrested were reported to have been trafficked.¹⁶³

As noted above, from 2015 to 2016, Operation Northern Spotlight mobilized police forces across Canada to search for trafficking victims. In an

April 2015 sting in Ottawa, 11 people were arrested, held without contact, and ultimately deported, without having received any assistance from community organizations.¹⁶⁴ Because police have deceived sex workers by setting up fake dates to gain access to their workplaces (which are oftentimes their homes), Operation Northern Spotlight continues to generate fear and mistrust on an ongoing basis.

Anti-trafficking enforcement makes it more difficult for sex workers and clients to report labour exploitation, since sex workers risk the loss of their income and arrest of their clients. Fear of being exposed as sex workers dissuades many migrant sex workers from accessing vital services such as health care and makes them hesitant to seek protection through the justice system when they are victims of crimes, including theft, which occurs commonly.

Additionally, more than 40% of the women contacted by the Toronto-based organization Butterfly report having experienced abuse at the hands of police. The seizure of condoms as

162 Julie Kaye and Bethany Hastie, "The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and within the Law," *Social Inclusion* 3, no. 1 (2015): 1-15, <https://www.kingsu.ca/public/download/documents/33771> [Kaye and Hastie].

163 Kim Bolan, "18 massage parlours raided, 100 arrested," *Vancouver Sun*, December 9, 2006, cited in Clancey, Khushrushahi, and Ham, 87-108.

164 Carmelle Wolfson, "Eleven women face deportation following human trafficking investigation in Ottawa," *Canada OH&S News*, May 19, 2015, <http://www.ohscanada.com/health-safety/eleven-women-facedeportation-following-human-trafficking-investigation-inottawa/1003347142/>; Catherine McIntyre, "Migrant sex workers caught up in Ottawa sting facing deportation, further exploitation: activists," *National Post*, May 13, 2015, <http://news.nationalpost.com/news/canada/migrantsex-workers-caught-up-in-ottawa-sting-facing-deportation-furtherexploitation-activists>.

evidence is common, and in some cases, police have pulled up sex workers' dresses to see if they were wearing underwear.¹⁶⁵ Not surprisingly, a survey conducted by SWAN in Vancouver in 2013 found that 95% of the im/migrants they work with would not contact law enforcement if they experienced a violent crime.¹⁶⁶ There have been three murders of migrant sex workers in Ontario since 2014, and all remain unsolved.

b) Reinforces Dangerous Assumptions of Guilt By Association

Im/migrant sex workers, particularly those whose English or French language skills are limited, depend on the assistance of others in very specific ways to make their work safe and viable. They rely on others, informally and in managerial positions, to help them place ads and to find workspaces. Yet under the trafficking and procuring laws, they fear implicating their friends and coworkers, who could face serious charges merely for being associates.

Butterfly provided assistance to one woman who was detained for two weeks by police as a "trafficked person", despite her insistence that she was working voluntarily. Although she was never

criminally charged, her phone was seized as evidence, and she was forbidden from making calls to anyone, including legal counsel. Police seized \$10,000 of her money as evidence and as part of their "ongoing investigation." It has not been returned. After a search of her hotel room, the police came across a photo of her and a friend, and swiftly arrested her friend. Although she was eventually released, the woman also lost her housing. During the process, the woman told police that she had recently been sexually assaulted and robbed. No investigation was undertaken.¹⁶⁷

c) Makes Conviction in Bona Fide Cases of Coercion More Difficult

Researchers and criminal justice system personnel have suggested that the anti-trafficking narrative has paradoxically created false expectations among prosecutors and courts about what exploitation looks like, and has contributed to a lack of conceptual clarity about the elements of offences. When judges and prosecutors are conditioned to associate trafficking and exploitation with atypical stories of young women forcibly confined and sexually assaulted, it may be harder to get convictions for labour abuses that involve elements of deception or coercion, but not necessarily egregious violence or personal indignity. As an example, migrant workers in a

165 Personal communication with Butterfly support person, June 6, 2016.

166 SWAN, Zi Teng & ACSA, *Chinese Sex Workers in Toronto and Vancouver*, 2015, p. 28, <http://swanvancouver.ca/wp-content/uploads/2015/05/Chinese-sex-workers-in-Toronto-amp-Vancouver-Ziteng-SWAN-amp-ACSA.pdf>

167 Canadian Alliance for Sex Work Law Reform, "Migrant Sex Workers Live Under Constant Police Threat," (Part 5 of Series) *Ricochet*, https://ricochet.media/en/1421/migrant-sex-workers-live-underconstant-police-threat?post_id=1485165438479137_1677972789198400#=_

variety of industries who do not have work visas are threatened that if they complain about work conditions, their immigration status will be reported. Acts of blackmail like this, which are common, can amount to trafficking, but they are less salacious than stories of sex trafficking, and they rarely get media attention. Heavy dependence on testimony by victims about their perceived fear also makes it harder to meet the criminal burden of proof beyond a reasonable doubt, particularly when complainants' credibility is questioned.¹⁶⁸

d) Misconstrues the Real Experiences of Racialized Women Doing Sex Work

"Anti-trafficking" campaigns contribute to racial profiling and are often used as a pretext for investigating indoor establishments employing racialized women, particularly Asian women with non-Western accents and Indigenous women. Law enforcement agencies often presume that visible minority women working in massage or body-rub parlours are "trafficked," when in fact they have Canadian citizenship or permanent resident status or have otherwise migrated legally. Some immigrants have limited English skills, education credentials that are not recognized here, or other barriers to employment in Canada; they may also simply choose to do sex work because they have experience in it or because it offers more attractive remuneration than other work. Restrictions on work visas prohibit women coming to Canada from

engaging in work considered sexually exploitative,¹⁶⁹ including escort work and exotic dancing, meaning that disclosure of sex work may jeopardize the legal immigration status of someone holding a temporary work visa or student visa.

Canadian Border Services Agency, which has broader powers of entry than municipal police, often accompanies other police or local by-law officers to raid indoor establishments, under the guise of "rescuing" the "foreign" women working there. When this does not result in deportations or immigration charges for the sex workers employed there, it serves to drive clients away, meaning that those who are paid per-client rather than per-hour work longer; it also leaves sex workers with pervasive anxiety about their work. This form of racism denies the agency of adult sex workers capable of making decisions in their own best interests.

According to organizations whose mandate it is to provide services and support to im/migrant women doing sex work, including SWAN in Vancouver and Butterfly and the Migrant Sex Workers Project at Maggie's in Toronto, the descriptions of exploitation and of trafficked persons propagated by the anti-trafficking movement do not match people's lived experiences. SWAN, which has operated in Vancouver for

168 Millar and O'Doherty; Kaye and Hastie.

169 Section 30(1.4) of the *Immigration and Refugee Protection Act* empowers the Minister of Citizenship and Immigration to enact regulations or issue instructions to "protect foreign nationals who are at risk of being subjected to humiliating or degrading treatment, including sexual exploitation."

more than a decade offering services to im/migrant indoor sex workers, has only encountered one case of sex trafficking in its history. In focus groups conducted with SWAN members, a participant described im/migrant sex workers as the opposite of trafficked victims: not as “passive, subservient, uneducated, backwards, and unable to speak for themselves,” but rather as “go getters. Despite all the barriers that they have in the Canadian labour market, they still find a way to provide for their families.”¹⁷⁰

e) Domestic “Trafficking” of Indigenous Women and Girls

Claims that large numbers of Indigenous women and girls are being trafficked in Canada (in the sense that they are coerced or that they do sex for fear of their safety) are also not supported by empirical data or by the experiences of sex worker-serving organizations. Indigenous self-identified women and two-spirit people are overrepresented in street-based sex work across Canada, although they also participate in indoor sex work, particularly as independent workers, and informally exchange sex for transportation and other necessities in areas with poor infrastructure.¹⁷¹ The Indigenous women Pivot has

worked with who trade and sell sex openly acknowledge that they do so because of their limited options for income generation, but they also work for themselves – not for pimps or traffickers.

Some Indigenous activists argue that the direct criminalization of Indigenous persons in street-based sex work is an act of continued oppression,¹⁷² and that the racist stereotypes of Indigenous women’s sexuality underpinning the law serve to normalize violence against Indigenous women.¹⁷³ The focus in government and media stories on “traffickers” deflects attention from the systemic causes of Indigenous women’s migration from home communities to urban settings, rooted in colonization and racist cultural assimilation policies: substandard education on reserve, extreme poverty, insufficient and insecure housing, inadequate health care, lack of vocational opportunities, violence, intergenerational trauma caused by Canada’s residential school program, and forcible removal of Indigenous children from their families through so-called “child protection” programs into abusive foster care

170 *Realities of the Anti-Trafficked*, 12.

171 Sarah Hunt, “Decolonizing Sex Work: Developing an Intersectional Indigenous Approach,” *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada*, Emily van der Muellen, Elya M. Durisin and Victoria Love, eds. (Vancouver: UBC Press, 2013), 92.

172 N. Sayers, *Canada’s Anti-prostitution Laws: A Method for Social Control*, 2013, accessed at: <http://kwetoday.com/tag/canadas-anti-prostitution-laws/>

173 S. Hunt, *Colonial Roots, Contemporary Risk Factors: a cautionary exploration of the domestic trafficking of Aboriginal women and girls in British Columbia, Canada* (Bangkok: Global Alliance Against Trafficking in Women, 2010), 27.

and adoption situations.¹⁷⁴

It is unquestionable that Indigenous women face violence at much higher rates than the rest of the population, and that Indigenous street-based sex workers experience extraordinary violence, further evidence that they are devalued by society.¹⁷⁵ It is undoubtedly true for some Indigenous sex workers that engagement in sex work is experienced as violence and further colonization of their bodies. At

174 Some activists have referred to the Government's role in displacing Indigenous women and girls through both inadequate and misguided "service provision", child apprehensions, and land seizures for natural resources exploitation as a form of trafficking: Colleen Hele, Naomi Sayers and Jessica Wood, *What's Missing from the Conversation on Missing and Murdered Indigenous Women and Girls*, accessed at <http://the-toast.net/2015/09/14/whats-missing-from-the-conversation-on-missing-and-murdered-indigenous-women/>

175 Maryann Pearce, "An Awkward Silence: Missing and Murdered Vulnerable Women and the Canadian Justice System," Doctoral Dissertation, Common Law Section, University of Ottawa, 2013; Amnesty International, "No More Stolen Sisters," 2004, <https://www.amnesty.ca/sites/amnesty/files/amr200032004enstolensisters.pdf>, Inter-American Commission on Human Rights, *Missing and Murdered Indigenous Women in British Columbia, Canada*, OEA/Ser.L/V/II. Doc. 30/14 21 December 2014, <http://www.oas.org/en/iachr/reports/pdfs/indigenous-women-bc-canada-en.pdf>; CEDAW Committee, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, March 2015, CEDAW/C/OP.8/CAN/1, http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/CEDAW_C_OP-8_CAN_1_7643_E.pdf.

the same time, the structural inequities arising from poverty and colonization that intensify vulnerabilities to violence are not remedied by using the blunt tool of criminal law. For Indigenous women working in constrained circumstances, especially those who use substances to cope with physical and psychological trauma,¹⁷⁶ removing their source of income by criminalizing their clients does not make them safer, help meet their immediate needs, or increase their future options. Indigenous members of SWUAV, who staunchly support decriminalization, advocate for social programs including higher income assistance rates, better housing, access to detox facilities, appropriate health care, and support systems and policy development grounded in Indigenous traditions, as more meaningful and lasting supports.¹⁷⁷

Conclusions and Recommendations

We do not advocate for doing away with the trafficking provisions, either in the *Criminal Code* or the *Immigration and Refugee Protection Act*. In the rare circumstances that bona fide trafficking occurs, legal mechanisms to address and

176 Brittany Bingham, Diane Leo, Ruth Zhang, Julio Montaner and Kate Shannon, "Generational Sex And HIV Risk Among Indigenous Women In A Street-Based Urban Canadian Setting," *Culture, Health & Sexuality Journal* 16, no. 4 (2014): 440-452 <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4038328/>

177 Statements made by members of SWUAV to Justice Minister Jody Wilson-Raybould, at a meeting in Vancouver, July 18, 2016.

penalize it are necessary. Use of these provisions is entirely appropriate in cases of exploitation, provided they do not become a catch-all for enforcement in situations of consensual sex work, and provided they protect the rights of trafficked persons.

guaranteeing them labour protections and mechanisms to facilitate access to provincial human rights codes.

The current misuse of our trafficking laws by police to justify actions against establishments where consensual adult sex work occurs is deeply problematic. Education is required to change attitudes among justice system personnel, including law enforcement officers, so they are used in situations of actual coercion and not to terrorize people who are simply trying to support themselves and their families. Additionally, sex workers are best placed to recognize exploitation when it does occur. Creating an environment where sex workers could enjoy respectful relationships with law enforcement would facilitate the identification and prosecution of genuine trafficking cases. It would also allow clients to report concerns to police without being charged. Sanctuary City policies – that protect im/migrants against deportation or immigration when accessing needed health care, community service providers, and municipal police services – are needed to guarantee that the human rights of all are respected.

Finally, there are situations of labour exploitation that do not involve deception or coercion and fall short of trafficking, but still require fair remedies. A more practical and effective approach to eliminating exploitative conditions for sex workers would be to start by

Better Options: A Human Rights Approach to Sex Work

Regardless of its legal status, there will always be people who do sex work because it is a relatively low-barrier option that offers flexibility in terms of hours and higher remuneration relative to other jobs. Sex workers need immediate access to safer working conditions. The recommendations that follow would lay the groundwork to facilitate sex workers' access to healthy and safe working conditions, to address violence and abuse in the sex industry, and to ensure that sex workers' choices and autonomy are respected.

Repeal the Laws That Criminalize Sex Work

The PCEPA is an unconstitutional set of laws that imposes more danger and more criminalization on sex workers and leaves them with fewer safe options. We recommend repealing all criminal laws that prohibit the purchase or sale of sexual services by adults and that limit adults selling sex from working with others in non-coercive situations. This includes the PCEPA and provisions such as Section 213(1)(a) and (b), which were not constitutionally challenged in *Bedford*.

Use Existing Laws to Prosecute Acts of Violence

The best way to eliminate exploitation is not to create a highly stigmatizing set of laws that set sex workers apart from the rest of society, but rather to use existing *Criminal Code* provisions to punish perpetrators of violence and exploitation and ensure that sex workers enjoy full and equal access to police and labour protections that are theoretically available to everyone in Canada. (See Appendix 2, Existing)

Don't Conflate Trafficking and Sex Work

The trafficking provisions found in the *Criminal Code* and the *Immigration and Refugee Protection Act* should be maintained as laws of general application and applied in all situations of labour exploitation. Sex work (the consensual exchange of sexual services for money) is not trafficking, and trafficking laws should not be used as a reason to investigate sex workers and sex work businesses unless there is compelling evidence of debt bondage, violence, deprivation of liberty, or similar exploitation.

Create Appropriate Provincial Laws and Municipal Bylaws in Consultation with Sex Workers

Decriminalizing sex work would not necessarily mean that there are no

restrictions on sex work – however, the boundaries on sex work should be developed with sex workers, who are the true authorities in their lives and work. Ensuring that sex workers have access to the protections afforded all other workers by provincial employment standards and occupational health and safety legislation, along with other laws regulating provincial businesses, could help to eliminate workplace injustices. Using municipal bylaws created through community dialogue processes that prioritize a human rights approach to when and where sex work takes place is essential, because using criminal sanctions only serves to reinforce stigma.

Invest in Non-Judgmental Support Services for Sex Workers

When introducing the PCEPA, the federal government also announced that \$20 million in funding over five years¹⁷⁸ would be made available to support grassroots organizations dealing with “the most vulnerable,” including “those who want to leave this dangerous and harmful

activity”, referring to sex work.¹⁷⁹ Despite the promise of funding for programs that can help individuals transition out of sex work into other work, most sex worker-led and sex worker support organizations across the country that applied were denied funding. In the intervening year, at least one organization (Big Susie’s in Hamilton, ON) had to close its doors. Many others have struggled through major funding cutbacks.

Funding to support “exiting” programs should never be prioritized above funding to meet sex workers’ current needs. Harm reduction mechanisms, including bad date lists and provision of safer sex supplies and secure working spaces¹⁸⁰ reduce the risks experienced by sex workers. Evidence from Sweden has shown that when social service provision is contingent upon sex workers exiting the sex industry, harm reduction activities are curtailed. This undermines sex workers’ access to information and safer sex supplies, and reduces contact between sex workers and service organizations, making it much harder to identify those in situations

178 Josh Wingrove, “Canada’s new prostitution laws: Everything you need to know,” *Globe and Mail*, July 15, 2014, <http://www.theglobeandmail.com/news/politics/canadas-new-prostitution-laws-everything-you-need-to-know/article19610318/>.

179 Archived – Statement by the Minister of Justice Regarding Legislation in Response to the Supreme Court of Canada Ruling in Attorney General of Canada v. Bedford et al, *Canada News Centre*, June 14, 2014, <http://news.gc.ca/web/article-en.do?nid=853709>

180 A Krusi, J Chettiar, A Ridgway, J Abbott, S Strathdee, K Shannon, “Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Environments: A Qualitative Study,” *AM J Public Health* 102, no. 6 (2012): 1154-9.

of exploitation.¹⁸¹ Researchers also found that the prohibitionist narrative underpinning the prostitution laws has informed the attitudes of service providers, resulting in increased stigma and isolation for sex workers who do not wish to transition out of sex work. In short, when exiting is prioritized, crucial non-judgmental services and resources are unavailable to those that require them the most.

Invest in Supports for Low Income Sex Workers – Whether They Want to Do Sex Work or Not

Poverty, discrimination, and stigma are constants in the lives of many sex workers. Using criminal laws to deny people their income sources is not the way to ensure genuine autonomy. Instead, like all people experiencing poverty or discrimination, low-income sex workers – whether they wish to seek other work or not – need access to more substantial income assistance benefits, safe and affordable housing, and culturally appropriate educational opportunities and health services, which in some cases may include mental health supports, drug treatment, and harm reduction services.

It is often said that leaving sex work is not an event but rather a process that requires adapting the skills learned in sex work to other work environments, overcoming social prejudice, and explaining gaps in work history.¹⁸² For those who do wish to transition out of sex work, the \$20 million fund nationally is not nearly enough. More funding should also be made available to support transitioning and skills training programs run by current or former sex workers, who best understand the challenges.

Recognize the Complex Realities of Indigenous People Who Sell and Trade Sex

Narratives about Indigenous people in sex work tend to focus on their overrepresentation and the violence they face. Indigenous people *are* disproportionately represented among those who do street-based sex work and engage in transactional sex; Indigenous sex workers Pivot has worked with say this is due to their lack of economic opportunities and the fact that sex work is an occupation that does not require formal training. Indigenous people across Canada also have a great diversity of experiences and may use sex work as a way of resisting the colonization of their communities

181 Jay Levy, “Impacts of the Swedish Criminalisation of the Purchase of Sex on Sex Workers” (paper presented at the British Society of Criminology Annual Conference, Northumbria University, July 4, 2011) Available at: <http://cybersolidaires.typepad.com/files/jaylevy-impacts-of-swedishcriminalisation-on-sexworkers.pdf>

182 See Julie Ham, “We all have one: Exit plans as a professional strategy in sex work,” *Work Employment & Society*, (2016), doi: 10.1177/0950017016666198, <http://wes.sagepub.com/content/early/2016/09/27/0950017016666198>. Abstract

perpetuated through displacement from lands and the repercussions of the residential school program.

Across Canada, funding for education and supports for Indigenous people on- and off-reserve are grossly inadequate. Provincial systems for youth in care, also disproportionately Indigenous, often do not meet their needs.¹⁸³ As a result, Indigenous youth often struggle to support themselves when they try to escape abusive circumstances. The federal government should increase broad-based supports, including through funding to Indigenous communities for self-administered education, vocational training, housing programs, income assistance, employment programs, and health and addictions services, based in Indigenous traditions. This would position Indigenous people to decide whether they want to participate in the sex industry, and if so, under what conditions.

Learn from Other Jurisdictions

New Zealand provides a model for decriminalization of sex work that

was developed in consultation with sex workers and that respects and promotes their human rights and safety. New Zealand fully decriminalized adult sex work in 2003 and instituted a system that places much of the control over the conditions under which sex work takes place in the hands of local municipalities.

Over the past decade, Research over the past decade has suggested that this legal regime has resulted in sex workers having greatly enhanced control over the conditions of their work, including their abilities to refuse clients and to insist on condom use. New Zealand sex workers report much greater access to police protection, with vastly increased “solve” rates in violent crimes involving sex workers. They also have access to employment protections, including mechanisms to address workplace conflicts; the opportunity to work in small sex worker-run collectives; and the ability to leave sex work having experienced little or no violence, and without a criminal record. New Zealand sex workers have successfully initiated cases against managers for sexual harassment¹⁸⁴ and against clients for wilfully removing condoms.¹⁸⁵

Because New Zealand has a unitary legal system that is different from Canada’s federal system, (which divides law-making powers between the federal and provincial governments) decriminalization in Canada would

183 Reports by the BC Representative for Children and Youth, including *The Placement of Children and Youth in Care in Hotels in BC*, May 13, 2016; *A Review of Youth Substance Use Services in BC*, May 26, 2016; *A Tragedy in Waiting: How BC’s mental health system failed one First Nations youth*, September 8, 2016; *Too Many Victims: Sexualized Violence in the Lives of Children and Youth in Care, An Aggregate Review*, October 4, 2016, all available at <https://www.rcybc.ca/reports-and-publications/reports>

184 *Taking the Crime Out of Sex Work*.

185 *DML v Montgomery*.

necessarily look somewhat different. Furthermore, care would need to be taken to ensure that municipalities do not enact bylaws that replicate the harms of the criminal laws. Any law reform program should only be undertaken with the direct involvement and input of sex workers, who are the experts in their own health and safety.

Work on Undoing the Stigma That Surrounds Sex Work, Through Law Reform and Education Programs

The greatest commonality between sex workers in Canada is the stigma they face. Most sex workers live in fear that their work will be revealed to family and neighbours. This stigma perpetuates conditions that have allowed predators to murder, rape, and abuse sex workers with impunity, because police failed to investigate and prosecute these crimes. Education is also needed to dismantle negative stereotypes about sex workers, but law reform is essential. Changing the law would be a first step towards undoing the stigma and accepting sex work as an occupation and people who do sex work as full members of our communities.

Appendix 1: Key Provisions from the *Charter of Rights and Freedoms*

Human rights protections are entrenched in the *Charter of Rights and Freedoms*,¹⁸⁶ a part of Canada's *Constitution*. Because all laws in Canada must comply with the principles set out in the *Constitution*, laws that do not conform with the *Charter* can be challenged through litigation. Canadian courts are empowered to strike down unconstitutional laws and to order the government to take other remedial actions to rectify the harms caused by the laws.

When courts evaluate the constitutionality of laws, they look to evidence of the impacts of those laws and to the stated objectives of the laws. A law's negative impacts on individuals and their rights are balanced against its objectives and any social value derived from the law. Criminal laws are used not just to control and regulate social behaviour, but also to denounce specific actions

¹⁸⁶ *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].

and express moral condemnation. The penalty of incarceration does not end when a convicted person regains their liberty. The stigma of a criminal sentence leaves a lasting imprint on a person's life, potentially barring them from participating in a variety of activities and careers. Because of the gravity of criminal sanctions, criminal laws are held to a high standard. In order to justify depriving someone of liberty or tainting their reputation, the purpose of a criminal law must be of sufficient importance.

The *Charter* rights that may be engaged by the PCEPA are set out below. Section 1 of the *Charter*, which establishes the balancing test for evaluating rights breaches, is described last, as it is applied last in *Charter* cases, only after the rights infringement has been made out.

Section 2(b) – The Right to Freedom of Expression

2. Everyone has the following fundamental freedoms:

...

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

The right to freedom of expression has been historically viewed as one of the most essential elements of Canadian democracy. Expression has been construed broadly to encompass any act that conveys or attempts to convey

meaning through the use of words, gestures, or actions, with the exception of acts and threats of violence.¹⁸⁷ Canadian courts have generally taken an expansive approach to interpreting expression. For example, the Ontario Court of Appeal in 2007 found that lap dancing could be considered a form of expression; however, it also concluded that the government had a justifiable reason for infringing the right to freedom of expression by enacting bylaws that restricted lap dancing.¹⁸⁸

A law that limits expression either through its purpose or its effects may be found to violate Section 2(b). Unacceptable limits to expression can take the form of restrictions on content or form. Courts have stated that the Section 2 assessment should remain neutral about the content of expression at the infringement phase, leaving any evaluation of expression to the Section 1 justification, but that approach has not always been evident in individual judgments. In one of Canada's seminal freedom of expression cases, the SCC found that commercial expression, including advertising, is protected.¹⁸⁹ However, commercial expression has not been valued as highly as non-commercial expression by the courts.¹⁹⁰

Section 2(b) also protects a general right to receive communications.¹⁹¹ The SCC has recognized a right to receive commercial information, subject to restrictions to protect vulnerable members of the public;¹⁹² it has also recognized the right to access government information, albeit in a limited manner, under the right to freedom of expression.¹⁹³

The test for a Section 2(b) violation asks:

1. Is the act for which a restriction is claimed expression under Section 2(b)?
2. Did the government limit that expression?
3. If yes, is the limitation justifiable under Section 1 of the *Charter*?

A limitation on expression may be unacceptable because it frustrates "the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing,"¹⁹⁴ however, limitations on forms of expression with mundane consequences have also been declared unconstitutional. Generally, the SCC has recognized the limitations on expression as reasonable and justified when speech has been used to

187 *Irwin Toy v Quebec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*].

188 *Adult Entertainment Association of Canada v. Ottawa (City)*, 2007 ONCA 389.

189 *Irwin Toy*.

190 *Irwin Toy*.

191 *R. v. National Post*, 2010 SCC 16, [2010] 1 SCR 477, at para. 28

192 *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232. This ruling is similar to *Irwin Toy*.

193 *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23.

194 *Irwin Toy*.

promote violence¹⁹⁵ or otherwise impact the rights of others.

Section 2(d) – The Right to Freedom of Association

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

Section 2(d) protects the rights of everyone to form associations or organizations, provided those groupings are not otherwise illegal, and to work together. In essence, the right to freedom of association guarantees that any act that can be done individually can be done collectively or in association with others.¹⁹⁶ This section has been applied mostly in the context of the formal collective organizing and bargaining activities of trade unions, so jurisprudence on the rights of individuals working together more informally is scant. However, the SCC in *Mounted Police Association of Ontario v. Canada (Attorney General)*¹⁹⁷ reiterated that a fundamental purpose of Section 2(d) is to protect the individual from “state-enforced isolation in the

pursuit of his or her ends.”¹⁹⁸ The Court in *Mounted Police* went on to say,

... In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

In *Ontario (Attorney General) v Fraser*,¹⁹⁹ a case about separate legislative schemes for migrant farm workers, the majority of the SCC unambiguously held that the test to find an infringement of Section 2(d) in the labour relations context is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals.

Section 7 – The Right to Life, Liberty and Security of the Person

7. 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.

Section 7 of the *Charter* guarantees the right to life, liberty and security

195 *R v Keegstra*, [1990] 3 SCR 697 [Keegstra].

196 *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 SCR 157.

197 [2015] 1 SCR 3, at para. 58

198 *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015] 1 SCR 3, para. 58 <https://scc-csc.lexum.com/scc-csc/scccsc/en/item/14577/index.do>.

199 *Ontario (Attorney General) v. Fraser*, 2011 SCC 20.

of the person – the rights to be safe, including from threat of death,²⁰⁰ to be free from arbitrary arrest and detention, and to exercise autonomy in making fundamental life decisions,²⁰¹ particularly those that concern bodily integrity.²⁰² These include choices that are “fundamentally or inherently personal... going to the core of what it means to enjoy individual dignity and independence.”²⁰³ The right to liberty may engage quality of life issues, although these have mostly been explored to date in the health context, as in the recent *Carter* case on assisted suicide.²⁰⁴ The right to security of the person involves control over one’s bodily integrity free from state interference,²⁰⁵ but at a more basic level, it also involves safety. It can be engaged by government regulations or actions that impact upon an individual’s wellbeing, including any state action that causes physical

or serious psychological suffering.²⁰⁶ Increasingly, Section 7 is being viewed as “the new Section 15,” since more decisions recognizing the rights of marginalized people have been made on the basis of Section 7 than on the equality rights section of the *Charter*.

There are circumstances in which governments are permitted to engage in violations of the right to life, liberty and security of the person to uphold justice and maintain public order. As an example, a person may be sentenced to imprisonment, but only if they have been convicted following a fair trial. These infringements are only allowed when they are in keeping with the principles of fundamental justice. For example, laws cannot infringe Section 7 rights: when the provisions are “arbitrary,” meaning there is an insufficient causal connection between what the law prohibits and what it aims to achieve; when the provisions are “overbroad,” meaning they criminalize activity beyond what they are intended to prohibit; and when the harmful effects of the challenged provisions on life, liberty or security of the person are “grossly disproportionate” to the beneficial objectives intended by the law, meaning the punishment is too harsh in relation to the activity penalized.

The test for a Section 7 breach requires

200 *Carter* SCC.

201 *Blencoe v. British Columbia (Human Rights Commission)*, [2002] 2 SCR 307 [Blencoe]; see also *Carter* SCC, with respect to medical decision-making at para. 30, citing with approval *Carter v. Canada (Attorney General)*, 2012 BCSC 886, para. 1302.

202 *Godbout v. Longueuil (City)*, [1997] 3 SCR 844, para. 66. See also *Morgentaler*, 402.

203 *Godbout*, para. 66.

204 *Carter* SCC.

205 *Rodriguez*, at pp. 587-88 per Sopinka J., referring to *Morgentaler*.

206 *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, para. 58; *Blencoe*, paras 55-57; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, para. 43, per Deschamps J.; para. 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and LeBel JJ.).

that claimants show:

1. that the law interferes with, or deprives them of, their life, liberty or security of the person, and
2. that this deprivation does not accord with the principles of fundamental justice.

In theory, the government must respond by providing a Section 1 justification. In fact, it is unusual that a Section 7 violation is found to be justified under Section 1, since law or actions that violate the principles of fundamental justice are rarely found to be in the public good. There often appears to be an overlap between the Section 7 fundamental justice analysis and the Section 1 justification analysis, because upholding justice and the rule of law is a fundamental consideration of democracy and social equity. As a result, after courts consider both aspects of the Section 7 test, they often engage in a somewhat cursory Section 1 analysis.

Section 11 – Presumption of Innocence

11. Any person charged with an offence has the right ...

- (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

The right to the presumption of innocence is a fundamental and fairly self-explanatory tenet of our justice system. Any reverse

onus clause – any legal provision that puts the burden on an accused to prove their innocence, instead of requiring the state to prove guilt – is in breach of this principle. Canada’s criminal law contains only a few reverse onus provisions, mostly to do with bail conditions when an accused has a prior criminal record. Previous reverse onus provisions concerning possession of drugs and precious metals have been struck down for offending Section 11(d).²⁰⁷

Section 12 – Cruel and Unusual Treatment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Section 12, the right not to be subjected to cruel and unusual punishment, sets limits on how the state may punish offenders. Traditionally under the common law, judges were given discretion to consider both the crime and the individual’s personal circumstances when they sentenced convicted persons to prison terms. Mandatory minimum sentences associated with certain offences require that any person convicted of a particular crime – usually one that involves violence or use of a fire-arm, or that is a repeat offence – serve a certain minimum time in prison. Sections 286.1(2), 286.2(2) and 286.3(2) – all offences involving provision of sexual services by persons under the age of 18 – prescribe mandatory minimum sentences.

207 The material benefits provision, s. 286.2 of the PCEPA, contains a reverse onus clause.

Mandatory minimum sentences have been successfully challenged as unconstitutional in Canada. In *R v Nur*²⁰⁸ and *R v Lloyd*,²⁰⁹ the Supreme Court of Canada ruled that “one size fits all” mandatory minimum formulations could be unconstitutional when they resulted in incarceration for infractions that were minor and caused little harm (as in the case of *Nur*, where the accused possessed but did not use a loaded weapon, and in the case of *Lloyd*, where the accused possessed a quantity of drugs greater than designated for personal use). Mandatory minimums engage equality rights by also disproportionately affecting offenders who are Indigenous and who are disadvantaged in terms of personal resources and education. A sentence is cruel or unusual when the average Canadian would find it abhorrent or intolerable in the circumstances. The SCC ruled that those circumstances were met in these two cases.

Section 15 – The Right to Equality

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

Section 15(1) of the *Charter* guarantees the rights of everyone in Canada to be treated equally under the law and not denied enjoyment of benefits as a result of arbitrary or irrelevant factors. In particular, it seeks to eliminate discrimination based on stereotypes by laying out a number of grounds on the basis of which differential treatment is prohibited: race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Jurisprudence has expanded these grounds to include other “analogous” or similar grounds,²¹⁰ for example, sexual orientation.

Equality law in Canada recognizes substantive discrimination: laws or government actions disproportionately affecting one segment of the population, even though they may appear to be neutral, discriminate in effect. If a law treats everyone formally the same, but overwhelmingly impacts an identifiable group without a bona fide reason for doing so, it is discriminatory.

After years of grappling with complicated formulations about how

208 2015 SCC 15 (*Nur*).

209 2016 SCC 13 (*Lloyd*).

210 *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143; *Egan v Canada*, [1995] 2 SCR 513.

to weigh discrimination and its effects, Canadian courts have settled on a test for Section 15 designed to assess whether claimants have been denied substantive equality and if so, whether that denial can be justified. Previously, those bringing Section 15 claims were required to demonstrate the type of discrimination they had experienced by comparing themselves to similarly situated groups, who differed in respect of a single identifying factor or trait. The SCC abandoned the use of “mirror comparator groups” because it resulted in artificial and formulaic analyses that often produced a finding of formal equality, but failed to capture the real intersectional discrimination that complainants experienced. The current Section 15 test²¹¹ requires a contextual analysis that asks:

1. Does the law create a distinction based on an enumerated or analogous ground, either directly or through its disparate impacts on a particular group of persons?
2. Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?
3. If the answer is yes, does the distinction arise from an affirmative action or other program designed to ameliorate pre-existing disadvantage? Section 15(b) explicitly allows such programs in the name of promoting equality.

211 *Withler v Canada (Attorney General)*, [2011] 1 SCR 396.

4. If not, can the Section 15 infringement be justified under Section 1?

Until now, marginalized groups have not fared well in Section 15 claims. In fact, the majority of Section 15 claims have been rejected. No court in Canada has yet accepted economic circumstance or poverty as an analogous ground for discrimination.²¹² Homelessness has also been rejected as an analogous ground.²¹³ In *Nova Scotia (Workers' Compensation Board) v. Martin*,²¹⁴ the Court acknowledged that economic disadvantage may be related to dignity, but ruled that the claimant must provide some explanation as to how dignity was engaged in the individual case. Occupation has never been recognized as a prohibited ground for discrimination. Thus, discrimination is usually not easy to prove, even in intuitively appropriate cases.

Section 1 – Limits on Rights Must Be Justifiable in a Free and Democratic Society

1. The Canadian *Charter of Rights and Freedoms* guarantees the stated rights and freedoms subject only to such

212 *Gosselin v Quebec (Attorney General)*, 2002 SCR 84.

213 *Polewsky v Home Hardware Stores*, (2003), 66 OR (3d) 600 (ONCA); *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852, leave to appeal to SCC denied June 25, 2015.

214 *Nova Scotia (Workers' Compensation Board) v Martin*; *Nova Scotia (Workers' Compensation Board) v Laseur*, 2003 SCC 54.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As noted previously, the *Charter* does not protect rights absolutely; it allows the government to restrict some rights when necessary to protect other rights or when allowing unregulated exercise of rights could cause harm to others. For example, the courts have found that restricting hate speech²¹⁵ and creating bubble zone laws to prevent anti-choice protesters from blocking abortion clinic entrances²¹⁶ do infringe the right to freedom of expression. However, those infringements are considered justifiable in our society, because they protect vulnerable minorities and ensure that women can enjoy bodily autonomy and reproductive rights.

Courts undertake the Section 1 analysis only after a rights violation has been found. The test is essentially a weighing of the rights of the individual against the values of society as a whole. This balancing test has two primary parts. The first considers whether the legislation or government action in question has a pressing and substantial objective. The second assesses proportionality by comparing the object and its actual effect, asking three questions of the legislation (or government action):

1. Is it rationally connected to the goal it seeks to achieve?

This can be measured in part by how effective a legislative provision is in achieving its goals.

2. Is it minimally impairing of the right in question or well tailored to its target, or does it go too far?
3. Do the benefits from the law or action outweigh its negative impacts, or is the net result greater harm than good?

The standard for legislative drafting is not perfection; it is reasonableness. Courts must accord legislatures a high degree of deference in terms of the laws they enact. There may be a number of possible solutions to a particular social problem, and courts may decline to interfere with a “complex regulatory response” to what is perceived as a social ill.²¹⁷

215 *Keegstra*.

216 *R v Spratt; R v Watson*, 2008 BCCA 340, leave to appeal to SCC denied June 2009.

217 *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, para. 37.

Appendix 2: Existing Criminal Code Provisions on Violence and Exploitation

There is nothing novel in asserting that creating special sex work laws does not effectively enhance sex workers' safety. The Special Committee on Pornography and Prostitution (the Fraser Committee) in 1985 stated:

The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second class citizens.²¹⁸

218 Special Committee on Pornography and Prostitution, Pornography and Prostitution in Canada, *Report of the Special Committee on Pornography and Prostitution* (Ottawa: The Committee, 1985), Vol. 2, 392.

The Subcommittee on the Solicitation Laws of the Parliamentary Standing Committee on Justice and Human Rights in 2006 set out the range of criminal laws that should protect sex workers from abuse by third parties and others in its report, *The Challenge of Change*.²¹⁹ Among the provisions they identified were:

- uttering threats (section 264.1),
- intimidation (section 423),
- theft (section 322), robbery (section 343),
- extortion (section 346),
- kidnapping and forcible confinement (section 279),
- bodily harm (section 269), assault (sections 265 - 268),
- sexual assault (sections 271 - 273), and
- criminal harassment, colloquially known as stalking (section 264)
- trafficking in persons (section 279.01 - 279.03)

The Subcommittee also identified a host of existing *Criminal Code* provisions dealing with disturbances, indecency, and organized crime intended to protect communities from crime.

219 *Challenge of Change*, Appendix D: Non-Exhaustive List Of Generic Provisions Within The Criminal Code Available To Protect Prostitutes, Children and Youth, and Communities.

Justice Himel, the trial judge in the 2010 *Bedford* decision, referred to these reports and their suggestions that more needs to be done using existing criminal laws to address exploitation of sex workers. She rejected the idea that striking down the laws would create a “legal vacuum” or expose the public to harm, finding rather that “the danger faced by prostitutes greatly outweighs any harm which may be faced by other members of the public.”²²⁰

²²⁰ *Bedford* ONSC, paras. 518 – 534.



ABOUT THE RED UMBRELLA

The red umbrella was first used as a symbol for sex worker solidarity at the 49th Venice Biennale of Art, Italy, 2001. Italian sex workers marched through the streets of Venice with red umbrellas as part of the "Prostitute Pavilion" and CODE:RED art installation by Slovenian artist Tadej Pogacar. The red umbrella march drew attention to the bad work conditions and human rights abuses they faced. Four years later the red umbrella was adopted by the International Committee on the Rights of Sex Workers in Europe where it became the emblem for resistance to discrimination. Since then the red umbrella has become the international icon for sex worker's rights around the world. It symbolises protection from the abuse and intolerance faced by sex workers everywhere, but it is also a symbol of their strength.

<http://www.nswp.org/timeline/event/red-umbrella-first-used-venice-italy-symbol-sex-worker-solidarity>