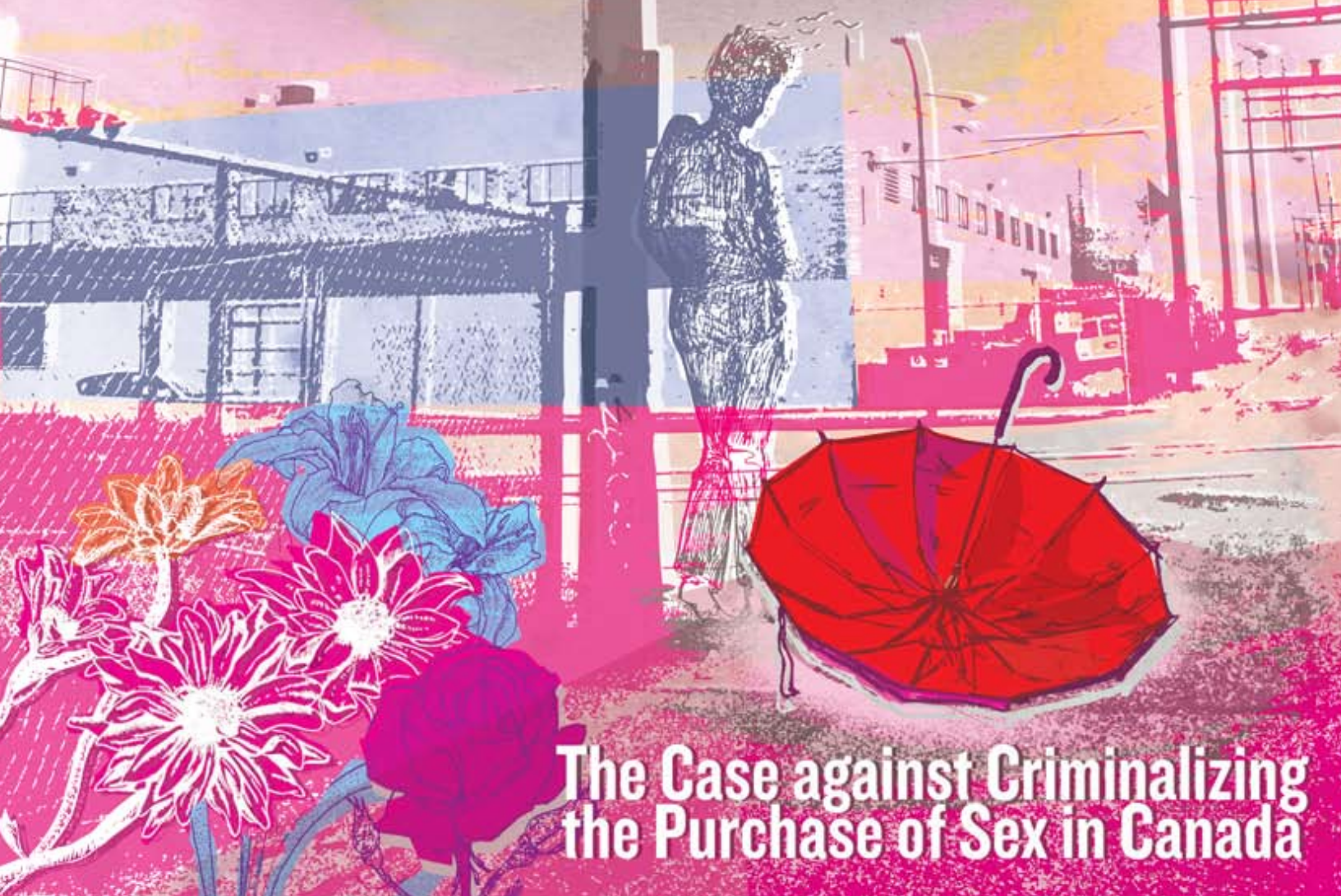


WHY WOULD  
SHOULD NOT COST  
ME MY LIFE



**The Case against Criminalizing  
the Purchase of Sex in Canada**

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### Pivot Legal Society

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equality lifts everyone

Pivot's mandate is to use the law to address the root causes of poverty and social exclusion. Our name is a metaphor for our approach to social change – by making the most tangible violations of human rights the focal point of our efforts, we exert maximum pressure in order to shift society toward greater equality and inclusivity.

### Sex Workers United Against Violence



Sex Workers United Against Violence is a peer-based organization of active and former sex workers who live and/or work in the Downtown Eastside of Vancouver. SWUAV came together in 2005, seeing a need for an organization that could speak directly from the perspective of women who do sex work about issues of their health and safety, as well as general living and working conditions.

### Gender and Sexual Health Initiative



The Gender and Sexual Health Initiative (GSHI) is a core program of the BC Centre for Excellence in HIV/AIDS with the overall mission to ensure research of the highest scientific and ethical standard informs evidence-based policy and practice in gender, sexual health and HIV/AIDS and reduces health and social inequities among marginalized populations in Canada and globally.

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This report and the *BMJ Open* report by Krusi et al. are available for download at [www.pivotlegal.org](http://www.pivotlegal.org) and [www.gshi.cfenet.ubc.ca](http://www.gshi.cfenet.ubc.ca)

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*In my opinion harassing the clients is exactly the same as harassing the women. You harass the clients and you're in the exact same spot you were before. It's exactly the same thing. Exactly. I'm staying out on the streets. I'm out there. I'm, I'm at risk. I'm in jeopardy of getting raped, hurt.<sup>1</sup>*



## EXECUTIVE SUMMARY

On December 20, 2013, the Supreme Court of Canada rendered a landmark decision that substantially reshaped Canada’s legal framework regarding adult prostitution. The case of *Bedford v. Canada* resulted in the striking down of three provisions of the *Criminal Code*: the communication, bawdy-house and living on the avails laws. The Court found that these three provisions violate section 7 of the *Charter of Rights and Freedoms* (the “*Charter*”) given their negative impact on sex workers’ security of the person. The declaration of invalidity of the laws did not, however, take effect immediately. The Court gave the government one year to contemplate whether new prostitution laws should be enacted.

The *Bedford* decision has brought Canada to a critical juncture. Will Canada shift away from the criminalization of adult sex work? Or will the government continue to criminalize sex work in other ways? The Canadian government has indicated its interest in the approach taken in Sweden, which enacted a law in 1999 prohibiting the purchase of sexual services. Given the active debate that is occurring in Canada and around the world regarding Sweden’s approach to criminalization, it is an important time to examine and evaluate the evidence regarding the impact of this model. For this report, Pivot Legal Society collaborated with Sex Workers United Against Violence (“SWUAV”) to produce a report which draws on a newly published peer reviewed report in *British Medical Journal Open* by Krusi et al., entitled “*Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada. A Qualitative Study.*” (“*Krusi et al. report*”).<sup>2</sup> The research for the *Krusi et al. report* was conducted by the Gender and Sexual Health Initiative (GSHI) of the BC Centre for Excellence in HIV/AIDS and the University of British Columbia (“GSHI/UBC research”) as part a larger ongoing research study on the health and safety of street and off-street sex workers throughout Metro Vancouver. The *Krusi et al. report* is available at [www.gshi.cfenet.ubc.ca](http://www.gshi.cfenet.ubc.ca).

Pivot Legal Society, in partnership with SWUAV, drew on the findings of the *Krusi et al. report* as the evidentiary basis for an analysis of the constitutionality of a prohibition on the purchase of sexual services. Pivot and SWUAV, as community partners and co-authors in the GSHI/UBC research, provided legal/policy input on the *Krusi et al. report* and, as such, had advance access to the research. This research was used to prepare this constitutional analysis.<sup>3</sup>

The GSHI/UBC research was conducted in Vancouver, which is an important site for an evaluation of the effects of law enforcement targeting purchases of sexual services. Over the past five years or so, the Vancouver Police Department (“VPD”) has gradually shifted away from arresting street-based sex workers, while still actively arresting clients. In January 2013, this practice became official policy with the approval of the VPD’s Sex Work Enforcement Guidelines (“VPD Guidelines”). Under the VPD Guidelines, the police continue to actively target clients of sex workers through undercover stings and patrols of areas where street-based sex work takes place. The experience of sex workers in this city is instructive and should be a key consideration as government designs Canada’s prostitution laws in the post-*Bedford* environment.

### I. FINDINGS FROM THE *BMJ OPEN* REPORT BY KRUSI ET AL.

While sex workers who participated in the GSHI/UBC research felt that the shift away from arresting sex workers has been a positive step forward, their narratives clearly illustrate that the overall impact of the change has been severely curtailed by the continued dangerous conditions created by police efforts to target clients. The report concludes that criminalization of clients impacts sex workers’ safety by exposing them to significant safety and health risks, including: displacement to isolated spaces; inability to screen clients or safely negotiate terms of transactions; and inability to access police protection.

The harms identified in the *Krusi et al. report* mirror findings from Sweden and other countries that have instituted a ban on the purchase of sexual services.

## DISPLACEMENT

The significant harms of displacement are well documented in Vancouver, where sex workers have historically been forced into dark, isolated and industrial areas of the city where they were extremely vulnerable to violence. The vast majority of sex workers who took part in the GSHI/UBC research reported that when the police target clients, both clients and sex workers have to take steps to avoid police detection. They move out of familiar and populated areas to areas where sex workers face greater risk because of the degree of isolation. The presence of police, therefore, has a destabilizing effect on their work, with far-reaching consequences on sex workers' health, safety and control over their work.

## INABILITY TO SCREEN CLIENTS AND NEGOTIATE TERMS OF TRANSACTIONS

When sex workers are focused on avoiding police detection, whether due to their criminalization or the criminalization of their clients, they are forced to rush or forgo client screening and negotiation of the terms of a transaction. This directly increases the risk of violence, abuse and HIV. In the *Krusi et al. report*, the majority of sex workers not only felt rushed to get into vehicles, but they also explained that their first interaction with a potential date is usually focused on convincing them that they are not an undercover police officer rather than screening for safety or negotiating the terms of the transaction.

## INABILITY TO ACCESS POLICE PROTECTION

Sex workers in the GSHI/UBC research note that over the past several years there has been some improvement in the way that Vancouver police officers treat sex workers. Despite the increased rapport with police and the important policy shifts away from arresting sex workers, the *Krusi et al. report* suggests that criminalization of clients results in an adversarial and counterproductive relationship between sex workers and police, thereby hindering sex workers' ability to access police protection.

## CONSTITUTIONAL ANALYSIS

Given that the harms identified in the GSHI/UBC research mirror the harmful conditions created by the laws that were challenged in the *Bedford* case, a prohibition of the purchase of sex is likely to be found to violate sex workers'

right to security of the person, as protected by section 7 of the *Charter*. The evidence of displacement to unsafe areas, lack of time to screen clients and diminished ability to access police protection all lead to the conclusion that the criminalization of clients creates dangerous conditions for sex workers and prevents sex workers from taking steps to protect themselves from risk. The rights of sex workers to security of the person are therefore engaged. In our opinion, such a law would not withstand constitutional scrutiny.

## II. RECOMMENDATIONS

The evidence from Sweden and Norway indicates that prohibiting the purchase of sexual services does not result in increased safety and protection for sex workers, nor does it eliminate prostitution. In fact, violence and stigma against sex workers increases. Public health and legal experts from around the world, including the Global Commission on HIV and the Law, have come to this same conclusion, stating that “the law has not improved—indeed, it has worsened—the lives of sex workers.”<sup>4</sup> Given the Swedish and Norwegian experiences, and given the new evidence from Vancouver documenting the harmful and dangerous conditions experienced by sex workers under the city's current policing strategy, it is clear that criminalizing the purchase of sexual services will recreate the same devastating harms as the current prostitution laws.

With this knowledge, it would be unconscionable to enact such a law and then wait for a constitutional challenge to wind its way through the courts. Sex workers need immediate access to safer working conditions. Given this reality, the following four recommendations would lay the groundwork for sex workers to have access to healthy and safe working conditions, to address law enforcement concerns about violence and abuse in the sex industry and to ensure that sex workers' choices and autonomy are respected.

1. Canada's laws should not prohibit the purchase or sale of sexual services by adults.
2. Ensure sex workers are in a leadership position in all future law and policy development.
3. Use existing criminal laws to target violence and abuse in the sex industry.
4. Invest in government programs that support sex workers' rights and safety and alleviate poverty and discrimination.

## CHAPTER ONE – INTRODUCTION

On December 20, 2013, Canada's sex workers' rights movement celebrated a momentous victory. For seven years, the case of *Canada v. Bedford, Lebovitch and Scott*<sup>5</sup> had been making its way through the various levels of court. The case looked at the constitutionality of three sections of the *Criminal Code*<sup>6</sup> that prohibit aspects of adult prostitution. The communication,<sup>7</sup> bawdy-house<sup>8</sup> and living on the avails<sup>9</sup> laws were challenged on the basis that they threaten the security of the person of sex workers, as protected by section 7 of the *Charter of Rights and Freedoms* (the "Charter").

On an historic December morning, when the Supreme Court was due to render its decision, sex workers and allies gathered in cities across the country to receive the ruling. When the Court announced its unanimous decision to strike down three laws that had devastated the lives of so many Canadian sex workers, an incredible wave of elation and relief could be felt across the country.<sup>10</sup>

The *Bedford* decision represented the culmination of decades of work by sex workers, human rights advocates, legal experts and academics who have been calling on Canada to repeal laws that criminalize street-based sex work, indoor sex work and working collectively. In her reasons for judgment, Chief Justice McLachlin provided a clear rationale for striking down the law, firmly grounded in safety principles:

*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.*<sup>11</sup>

The Court's declaration of the laws' invalidity was suspended for one year, during which time the federal government will consider whether to enact new criminal laws regarding adult prostitution. Canada is, therefore, at an important juncture. Will Canada shift towards decriminalization of adult sex work? Or will the government continue to criminalize sex work in other ways?

Evidence of the harms of criminalization to the health and safety of sex workers is now well documented both in Canada and globally. Criminalizing street-based sex work has been shown to force sex workers to forgo screening

clients, rush transactions and displace the most marginalized, street-based sex workers to isolated spaces where they have few, if any, protections from violence.<sup>12</sup> Banning indoor sex work deprives sex workers of access to safer indoor venues where they can control their work environment and take critical measures to protect their health and safety.<sup>13</sup> Criminalization of third parties means sex workers are forced to work in isolation and are deprived of the ability to hire people to provide services that increase their safety, such as drivers, security persons and assistants.<sup>14</sup> Criminalization increases stigmatization of sex workers, deters access to health and social supports and prevents reporting violence or accessing police and judicial protections.<sup>15</sup> Given this evidence, the World Health Organization and United Nations bodies have issued guidelines calling for full decriminalization of sex work as critical to both the health and human rights of sex workers.<sup>16</sup>

Despite this conclusive body of evidence, the criminalization of adult sex work remains widely debated. A number of women's groups, along with religious and conservative organizations, are pressing the Canadian government to enact a law banning the purchase of sexual services, similar to the laws in Sweden, Norway and Iceland. The Canadian government has indicated a clear interest in this approach.

Given the active debate taking place in Canada and around the world regarding this form of criminalization, we draw on a newly published peer-reviewed report in the *British Medical Journal Open* by Krusi et al., entitled "*Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada. A Qualitative Study.*" ("*Krusi et al. report*").<sup>17</sup> The *Krusi et al. report* was conducted by the Gender and Sexual Health Initiative ("GSHI") of the BC

Centre for Excellence in HIV/AIDS and the University of British Columbia (“GSHI/UBC research”) as part of a larger ongoing research study on the health and safety of street and off-street sex workers throughout Metro Vancouver. Pivot and Sex Workers United Against Violence (“SWUAV”) drew on the findings of the new *Krusi et al. report* as the evidentiary basis for an analysis of the constitutionality of a prohibition on the purchase of sexual services. Pivot and SWUAV, as community partners and co-authors in the GSHI/UBC research, provided legal/policy input on the *Krusi et al. report* and, as such, had advance access to the research. This research was used to prepare this constitutional analysis.<sup>18</sup>

It is our hope that this legal analysis and the findings set out in the *Krusi et al. report* will inform the discussion regarding Canada’s prostitution laws, and lead to the development of laws that promote sex workers’ safety, are evidence-based and consistent with the *Charter*.

## I. STREET-BASED SEX WORK IN VANCOUVER

Pivot and SWUAV drew on the *Krusi et al. report* for this analysis because of the insights it offers into the experiences of street-based sex workers in Vancouver. Vancouver is an important city for an evaluation of the effects of law enforcement targeting purchasers of sexual services. Sex workers in this community have first-hand experience with this model of enforcement given that, for a number of years, the Vancouver Police Department (“VPD”) has directed its enforcement efforts at targeting clients.

Over the past five years, the VPD has gradually shifted away from arresting street-based sex workers, but has continued to actively target clients. This policy shift resulted from a growing awareness of the negative impact of criminalization on sex workers’ safety. In January 2013, this practice became official policy when the VPD’s Sex Work Enforcement Guidelines were approved (“VPD Guidelines”).<sup>19</sup> The VPD Guidelines recognize that police have “considerable discretion” in deciding how and when to enforce the law, and direct police to prioritize sex workers’ safety:

*When responding to sex work-related calls or situations, the Vancouver Police Department’s priority is to ensure*

*the safety and security of sex workers. Police calls regarding violence against sex workers are a priority for assessment and response.*<sup>20</sup>

The VPD Guidelines state that, in order to ensure the safety and security of sex workers, enforcement of the prostitution laws against “survival sex workers” and “consenting adults” will be a low priority or a last resort:

*The VPD does not seek to increase the inherent dangers faced by sex workers, especially survival sex workers. Therefore, where there are nuisance related complaints against survival sex workers, alternative measures and assistance must be considered with enforcement a last resort (emphasis added).*<sup>21</sup>

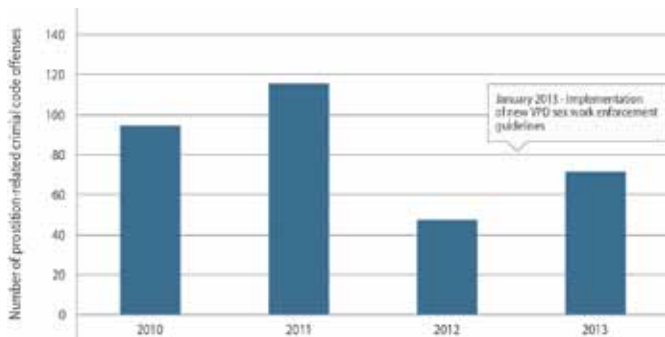
*Often, the sex industry involves consenting adults who may never come to the attention of the community or the police. Sex work involving consenting adults is not an enforcement priority for the VPD.*<sup>22</sup>

Sex workers in Vancouver are generally supportive of the VPD Guidelines, which shift law enforcement away from arresting sex workers and, instead, direct police to protect them. However, sex workers have expressed concerns that the Guidelines fail to acknowledge the harms created by law enforcement targeted at clients. Many sex workers and community organizations insisted that the VPD should not arrest clients in cases where consensual adult sex work is taking place. Police resources should be focused on situations involving violence, abuse or other crimes against sex workers.

Unfortunately this recommendation was not accepted by the VPD, which continues to actively target clients of sex workers through undercover stings and patrols of areas where street-based sex work takes place. The VPD statistics show that sex work-related *Criminal Code* offences rose from an all time low of 47 in 2012 to 71 in 2013, suggesting that enforcement efforts targeting clients are actually on the rise.<sup>23</sup>

With the VPD Guidelines in place, Vancouver sex workers are working in an environment that is comparable to the circumstances created by the Swedish law, where law enforcement is targeted at clients instead of sex workers. Vancouver, therefore, provides a critical opportunity for a scientific evaluation of the effects of this approach on sex workers’ working conditions and their negotiation of health and safety.





**Figure 1:** Number of prostitution-related criminal code offenses in Vancouver, 2010–2013<sup>24</sup>

## II. RESEARCH METHODS EMPLOYED FOR THE *BMJ OPEN* REPORT BY KRUSI ET AL.

The *Krusi et al. report* is based on in-depth interviews conducted with 31 sex workers and 40 hours of ethnographic observation between January and November 2013, following the implementation of the new VPD guidelines. The sample for interviews included 26 female sex workers and five trans sex workers. The mean age of participants was 38 years. Overall, eight were of Aboriginal ancestry, two participants were women of colour, and 21 identified as of Caucasian heritage. All participants had experience with street-based sex work.

The research for the *Krusi et al. report* is part of a large ongoing, qualitative study of the social, physical and policy contexts shaping the health and safety of street and off-

street sex workers, led by GSHI/UBC, in collaboration with a range of community, health and policy partners and monitored by a community advisory board of sex worker organizations, community service providers and health and policy stakeholders. The research is funded through the US National Institutes of Health and Canadian Institutes of Health Research, and holds ongoing ethical approval through the University of British Columbia/ Providence Health Care Ethics Review Board.

## III. OUTLINE OF REPORT BY PIVOT, SWUAV AND GSHI

Chapter Two summarizes the findings in the *Krusi et al. report* regarding the impacts of Vancouver’s enforcement strategy on sex workers’ health and safety as well as their access to police protection. In that chapter, we also examine how these findings correspond to the evidence from Sweden and Norway regarding the impact of criminalization of clients on sex workers in those two countries.

Chapter Three analyses whether a law prohibiting the purchase of sexual services is consistent with the section 7 security of the person rights of sex workers in Canada. We look at the harms created by law enforcement aimed at clients of sex workers, as identified by *Krusi et al.*, and apply the reasoning of the Supreme Court of Canada in *Bedford*.

We end this report with a set of recommendations for how Canada can best meet sex workers’ need for safety, dignity, autonomy and meaningful support.



## CHAPTER TWO – CRIMINALIZING THE PURCHASE OF SEX: DIFFERENT TARGET, SAME HARMS

The *Krusi et al. report* provides important evidence regarding the harmful impacts of criminalization on sex workers' health and safety.<sup>25</sup>

The results demonstrate that enforcement policies targeting clients do not decrease the frequency of sex work for marginalized, street-involved women. Instead, enforcement aimed at clients forces sex workers to more isolated spaces to avoid police detection and results in longer hours spent on the street. These enforcement practices also result in sex workers agreeing to see clients or provide services that they would otherwise refuse, thus placing them at direct risk of violence and poor health outcomes.

While Vancouver sex workers in the GSHI/UBC research all felt that the shift away from arresting sex workers was a positive step forward, they also clearly describe how the overall impact of the shift has been severely limited by the continued dangerous conditions created by police efforts to target clients. The *Krusi et al. report* demonstrates three clear ways that active enforcement against clients negatively impacts sex workers' ability to control their working conditions and ensure their health and safety:

- 1) Displacement to isolated areas
- 2) Inability to screen clients
- 3) Inability to access police protections

### I. DOES LAW ENFORCEMENT DIRECTED AT CLIENTS REDUCE PROSTITUTION?

Proponents of criminal laws that prohibit the purchase of sex say that this approach will “end demand” for prostitution, thereby reducing rates of prostitution overall.<sup>26</sup> The results of the *Krusi et al. report* suggest that targeting clients has no meaningful impact on the demand for the services of street-based sex workers. As evidenced in this study, while some clients are deterred from interacting with a sex worker if police are around, it may simply mean they move to different areas:

*Once the guy that's looking for a woman sees a cop in the neighbourhood, he's scared. So he'll go to another neighbourhood and find another woman somewhere.<sup>27</sup>*

In terms of whether law enforcement targeting clients results in less prostitution, the sex workers in the *Krusi et al. report* indicated that they continue to work, for the obvious reason that they need to earn an income. For this reason, and contrary to the objectives of criminalizing the clients of sex workers, impeding sex workers' ability to engage with potential clients does not result in less street-based sex work. Rather, the presence of law enforcement makes it harder to earn an income and forces sex workers to take clients or agree to riskier services that they would otherwise refuse due to safety concerns.

Participants made it clear that having to work under these types of pressures directly increases risk of physical and sexual violence.

■ ■ ■

#### Criminalization of Clients: Limited Effect on Deterrence of Sex Work<sup>28</sup>

*While they're going around chasing johns away from pulling up beside you, I have to stay out for longer [...] Whereas if we weren't harassed we would be able to be more choosy as to where we get in, who we get in with you know what I mean? Because of being so cold and being harassed I got into a car where I normally wouldn't have. The guy didn't look at my face right away. And I just hopped in cause I was*

*cold and tired of standing out there. And you know, he put something to my throat. And I had to do it for nothing. Whereas I woulda made sure he looked at me, if I hadn't been waiting out there so long.* Violet

*It pisses me off that they [the police] are there because basically what it comes down to is the shortest time that I'm out there, the shorter I'm on the street and the better I'm paid. But you [police] stand out there and you fuck up my business and scare away my dates. The longer I'm out there my chances of getting sick, raped, robbed, beat up whatever are greater so.* Lisa

*Of course, 'cause no one's [clients] going to stop with them there. I'm not going to go home. So they're [police] not really doing anything, they're just keeping me out there longer. Really, if they would just leave me alone, I'd get a date and go home and they wouldn't see me. But that way I end up staying out there for hours 'cause I'm not going home empty-handed so I don't know what they think they're really achieving.* Charlene

■ ■ ■

There is little evidence from Canada or any other country to support the claim that prohibiting the purchase of sex halts demand for sex work or reduces the number of people engaged in sex work.<sup>29</sup> For many decades, Canada's communication and bawdy-house laws have targeted clients, effectively prohibiting the purchase of sex indoors and on the street. Yet sex work still happens in Canada, just in more hidden and dangerous circumstances.

In the Swedish context, three government reports confirmed that the enactment of the *Prohibiting the Purchase of Sexual Services (Sex Purchase Act)* in the *Swedish Penal Code*<sup>30</sup> did not eliminate the sex industry, nor did it decrease the size.<sup>31</sup> There was some evidence that the number of street-based sex workers decreased immediately following the enactment of the law.<sup>32</sup> However, it is now understood that street-based sex work had been declining long before the introduction of the law.<sup>33</sup> The observed reduction may, in many cases, be attributable to increased use of the internet

as a means of connecting with clients, and an overall trend of relocation of sex work to indoor locations. A 2008 National Board of Health and Welfare study concluded that no causal connection between criminalization and the decrease in street-based sex work has been demonstrated.<sup>34</sup> Further, evidence now suggests that the levels have increased again to about two-thirds of the pre-1999 levels.<sup>35</sup>

Swedish sex workers who were unable to work indoors remained on the street where they found themselves left with the most dangerous clients and few options but to accept them.<sup>36</sup> With this in mind, this report now turns to the working conditions experienced by sex workers in Vancouver, and finds that the reality for sex workers in Vancouver replicates what has been seen in Sweden where the prostitution laws have been said to “backfire on sex workers.”<sup>37</sup>

## II. DISPLACEMENT TO ISOLATED AREAS

There is an extensive body of evidence, and now a decision from the Supreme Court of Canada, demonstrating that laws targeting street-based sex work have the effect of displacing sex workers and clients to more isolated and dangerous areas in an effort to avoid police scrutiny.<sup>38</sup> Data from Vancouver and across Canada has consistently demonstrated that displacement of sex workers is not simply an inconvenience: it has a detrimental impact on sex workers' health and safety, including increased risks for physical and sexual violence,<sup>39</sup> decreased ability to negotiate HIV protections (e.g. client condom use)<sup>40</sup> and reduced access to health and support services.<sup>41</sup> Canada's Standing Committee on Justice and Human Rights explained the harms of displacement in the following way:

*The vulnerability of persons engaging in street prostitution is also related to the fact that they frequently change locations. As a result of an arrest, fear of arrest, or a court order, such people are often forced to move to another area, effectively separating them from friends, co-workers, regular customers and familiar places. A number of witnesses indicated that this instability jeopardizes prostitutes' health, safety and well-being.*<sup>42</sup>

The harms of displacement are well understood in Vancouver, where sex workers have historically been forced

into dark, isolated and industrial areas of the city where they are extremely vulnerable to violence. As Commissioner Wally Oppal, QC wrote in the report of the Missing Women Commission of Inquiry:

*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.*<sup>43</sup>

The vast majority of sex workers reported that the presence of police in an area where women are working has negative effects. Irrespective of whether the police are targeting sex workers or clients, sex workers indicated that the mere presence of police has a destabilizing effect on their working lives, with far-reaching consequences on their health, safety and control over their work.

As demonstrated in the quotations from the *Krusi et al. report*, criminalization of clients in Vancouver has displaced sex workers from familiar and populated areas to areas where they are unsafe.

■ ■ ■

### Displacement to Isolated Areas<sup>44</sup>

*Clients worry [about police]. Like for me I don't like going outside the neighborhood, right. Cause, you know what about if the guy turns out to be an asshole. [...] That's how I do lose dates by not going where I'm supposed to cause they're afraid of cops. [So do you turn dates down sometimes?] Yeah sometimes but not all the time cause when I'm I'm really in need of money I will maybe try and go. But then I just try and get a good feel of them first.* Jane

*Clients are worried about police. To avoid police they wanna move to a different area. I don't want to go out of my zone right. [...] Once you get out there, like you know their turf so it's harder for me cause it's their comfort zone or, so hey act differently, you know what I mean. Yeah it never ends up good.* Sandra

*We try to get away from the area as quick as possible. You know. So that we're not in the area. Right. The farther away you get from [name of sex work stroll], the better it is. You're not gonna get pulled over right? I'm just a little nervous as it's so quiet down there by [industrial area].* Violet

■ ■ ■

Many sex workers described that they would relocate to a different area in order to ease clients' fears about arrest, rather than to prevent their own arrest. This finding suggests that replacing the current laws with a law that prohibits the purchase of sexual services will do nothing to address the safety issues that arise as a result of displacement and are already well documented in Canada.<sup>45</sup>

These harmful effects have also been noted in the Swedish and Norwegian contexts. When these countries introduced laws prohibiting the purchase of sex, sex workers and human rights advocates expressed significant concerns that this form of criminalization would not protect sex workers and would, in fact, drive the sex industry underground and increase the risk of violence and abuse.<sup>46</sup> Research has confirmed that these fears were well founded. Sex workers and their clients have been displaced as a result of enforcement efforts and are moving to more hidden, isolated areas.<sup>47</sup> An early report on sex work in Bergen, Norway, made this same finding, concluding that sex workers' safety was negatively impacted by the introduction of a ban on the purchase of sex in 2009.<sup>48</sup> A 2012 report by the municipality of Oslo concluded that violence against sex workers has increased in Norway since the enactment of the law.<sup>49</sup>

For street-based sex workers in Canada, the results of the *Krusi et al. report* suggest that moving to a legal regime that criminalizes the purchase of sexual services would result in continued displacement, which substantial peer-reviewed research and both the Missing Women's Commission of Inquiry and the Supreme Court of Canada have found to increase sex workers' vulnerability to violence and other health risks. The findings of the *Krusi et al. report* confirm that the enactment of a law criminalizing the purchase of sexual services would replicate the very

harms that resulted in Canada's highest court striking down the communication law as an infringement of sex workers' constitutional right to security of the person.

### III. INABILITY TO SCREEN CLIENTS

Sex workers have consistently argued that screening clients for signs of danger and being able to negotiate the terms of a transaction, including condom use, are critical health and safety measures. The efficacy of these safety measures have been recognized by a significant body of research, as well as by the Missing Women's Commission of Inquiry and the Supreme Court of Canada in *Bedford*.<sup>50</sup>

When they are not constrained by law enforcement pressures, sex workers can protect their health and safety by engaging in strategies such as: noting the type and make of a client's car; documenting or memorizing license plate numbers; ensuring a client is alone in the vehicle; making sure there is a door handle and lock release button on the door; and ensuring there are no weapons or restraint devices inside.<sup>51</sup> Sex workers are safer when they can refer to "bad date sheets"<sup>52</sup> containing descriptions of recent violent predators, check the client for sobriety, assess his emotional state, discuss services and rates before getting into the vehicle and call someone or pretend to call someone to report who the client is and where the date will take place.

Both empirical research and sex workers' experiences lead to the same conclusion: screening is a critical measure for sex workers to reduce the risk of exposure to violence.<sup>53</sup> However, when sex workers are focused on avoiding police detection, whether due to their criminalization or the criminalization of clients, sex workers are forced to rush or forgo client screening and negotiation of transactions altogether. This directly increases the risks for violence, abuse and HIV.<sup>54</sup> In the Missing Women's Commission of Inquiry, Commissioner Oppal found a clear connection between enforcement of the communication law and violence against sex workers:

*I conclude that there is a clear correlation between law enforcement strategies of displacement and containment in the period leading up to and during my terms of reference and increased violence against prostitutes. The fear of police harassment or arrest leads prostitutes to rush transactions, jump into cars quickly, and move to dark or*

*more isolated areas. The rushed transaction denies the sex worker the time to innately sense whether a client is a "bad trick," and moving to a darker, isolated area puts her in a more dangerous environment.<sup>55</sup>*

Sex workers who took part in the GSHI/UBC research indicated that the riskiest time for attracting police attention is the moment when they enter the vehicle of a prospective client. Even when the sex worker is not the target of the police investigation, as in the Vancouver context, criminalization of clients creates pressure, and deprives sex workers of the opportunity to screen effectively.

■ ■ ■

### Criminalization of clients severely limits sex workers' safety strategies – sex worker narratives<sup>56</sup>

*Well, usually I try to hop in the car right away, right? 'Cause I don't want to get seen talking, in case a cop drives by or something. [...] I'll hop in and then we can like negotiate and talk, you know? First I like to make sure that nobody's around or following or anything. Maria*

*To avoid police they [clients] drive by couple times and they point. They point at like a place where nobody's driving by. So they point and that means to go follow them with the vehicle and then they'll stop [...] They go somewhere different in an alley or something. They just leave like the window open and then you just, get in. [But would you talk to them first?] Um no well when they're trying to avoid police like that you just get into the vehicle, right. Jane*

*Sometimes the guy will drive up and just sort of wave or point to go down the alley or something like that somewhere else were he can pick me up. [How does that affect your safety?] You never know who it is right? And you can't really see his face, can't really see anything they could have a gun in their hand or. You know what I mean they could be a little bit drunk*

*or something if you can't really see them very clearly, you know? And you don't you can't say hi or whatever before you get in. You have to just hurry up before the cops come. Laura*

■ ■ ■

In the *Krusi et al. report*, the majority of sex workers not only felt rushed to get into vehicles, but they also explained that their first interaction with a potential date is usually focused on convincing them that they are not an undercover police officer rather than screening for safety or negotiating the terms of the transaction. Many participants were under the mistaken belief that asking a potential client to touch them on the genitals is a reliable way to assess whether a person is an undercover police officer:

*Normally when you get picked up, you go: Are you a cop? No, are you? Nope. Prove it. And you, touch each other just to make sure, right? 'Cause cops can't do that. So that's the rule, if you're undercover you can't touch someone. Normally, a guy'll touch my boob, I'll touch his crotch. Or he'll touch my crotch, I'll touch his, right? That's just to verify okay, you're not a cop, right? Martha<sup>57</sup>*

As has consistently been shown both in Canada and globally, sex workers are exceedingly vulnerable to violence and HIV infection when they have to get into a vehicle with a complete stranger before they can negotiate the terms of transactions.<sup>58</sup> These essential negotiations include whether to accept a particular client, provide a particular sexual service, compensation, condom use and where and when the date will take place. The *Krusi et al. report* shows that policing strategies that include the use of undercover police officers result in sex workers spending their time convincing a potential client that they are not a police officer, at the expense of screening and negotiating safety. Previous research regarding the experiences of Vancouver sex workers has shown that, once behind the closed doors of a moving vehicle, a sex worker loses a great deal of control over her health and safety.<sup>59</sup>

Similarly, the inability to screen clients has had serious adverse effects on the health and well being of Swedish sex workers.<sup>60</sup> Street-based sex workers in Sweden have found

that, as a result of law enforcement pressures, they are deprived of the much-needed time to screen clients:

*When the negotiating has to be done in a more rapid way (due to the clients' fear of being caught) it increases the risk of the sex worker making a faulty assessment of the client. And when clients are more stressed and frightened of being exposed, it is also more difficult for the seller to assess whether the client might be dangerous.<sup>61</sup>*

The narratives of sex workers in the *Krusi et al. report* demonstrate that targeting clients in Vancouver has had the same harmful impact as enforcement directed at sex workers, and has recreated the same dangerous conditions. Canada must learn from the mistakes of the past, and recognize that criminalization of street-based sex work has devastating consequences. This was recognized by the Supreme Court of Canada in *Bedford* when it found:

*...[i]f screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.<sup>62</sup>*

#### IV. INABILITY TO ACCESS POLICE PROTECTION

In Canada and globally, evidence has consistently shown that criminalization of sex work prevents sex workers from accessing police protection. In criminalized contexts, police become adversaries instead of safety mechanisms.<sup>63</sup> A clear example is the case of the neglectful and substandard police investigation into the serial murder of missing women in Vancouver, in which criminalization was found to be a key factor in putting police in an adversarial relationship with sex workers.<sup>64</sup>

Sex workers in the *Krusi et al. report* said that, over the past several years and largely in response to the tragic failures of the serial murder investigation, they have observed a positive shift in how Vancouver police officers treat sex workers:

*[Before the serial murders] they just, they used to tell us that fucking, you know, we used to get jacked up a lot and now we don't. [...] They're, they're a lot more reasonable now.<sup>65</sup>*

Despite this increased rapport with police and policy shifts away from arresting sex workers, analyses of sex worker narratives in the *Krusi et al. report* demonstrate that their communication and rapport with police continues to be hindered by the criminalization of clients. As demonstrated in the quotes below, sex workers described how public interactions with police have the effect of scaring away clients:

*It's a drag, you know? I'm out there to make money, not waste twenty minutes talking to them [police]. And then I'm talking to them and half the dates that see me talking to them now think maybe I'm a cop, so they don't wanna stop, now they know the cops are around, they don't wanna stop, or they wonder what I've done to attract the cops so they don't wanna stop, like, it's just a hassle, you know?* <sup>66</sup>

This adversarial and counterproductive relationship undermines the goal of having sex workers report violence or exploitation to police:

*No I would never go to the cops [to report violence]. Because it makes it look like, we shouldn't be out there like we can't take care of ourselves. I feel like if I went and reported some of these things that it might do more harm to the working profession than do good. So I don't do that. Basically we have to fend for ourselves. They don't really like us to begin with.* <sup>67</sup>

*I've needed the police's help with bad dates and they've done absolutely nothing. Um, you know, like, the fact that it's not legalized you kinda can't do it, you know.* <sup>68</sup>

One sex worker was quoted as saying that while police harassment has declined over the last couple of years, she still felt very disrespected by police:

*[The attitude] it's always there. I don't think they'll change it back in their heads that we're trash.* <sup>69</sup>

These perspectives are reflective of the experience of sex workers in Sweden, where the law has caused sex workers to avoid police and distrust authorities because they, and their work, are stigmatized:<sup>70</sup>

*The most common and perhaps most serious complaint regarding sex workers themselves is that they experienced an increased stigmatization after the introduction of the Sex Purchase Act. Some also state that the ban is a violation of their human rights, and many*

*say that they don't feel fairly or respectfully treated: they are not regarded as fully worthy members of society. Sex workers object to the fact that they were not consulted in the making of the law. Since sex workers feel they are not able to influence their legal or societal situation, they feel powerless. And since the ban builds on the idea that women who sell sex are victims, weak and exploited, many claim that the law propagates stereotypical notions about sex workers.* <sup>71</sup>

Sweden's official evaluation of its law documented similar kinds of negative interactions with police. Sex workers reported that:

*... criminalization has intensified the social stigma of selling sex. They describe having chosen to prostitute themselves and do not consider themselves to be unwilling victims of anything. Even if it is not forbidden to sell sex, they feel they are hunted by the police. They feel that they are being treated as incapacitated persons because their actions are tolerated but their wishes and choices are not respected. Moreover, they state that there is a difference between voluntary and forced prostitution.* <sup>72</sup>

Similarly, after the purchase of sex was prohibited in Norway in 2009, sex workers reported increased insecurity and violence.<sup>73</sup>

The profound role of criminalization of sex work in increasing stigma experienced by sex workers is demonstrated in a number of settings globally.<sup>74</sup> It is also reflected in the report of Commissioner Wally Oppal from the Missing Women's Commission of Inquiry. Commissioner Oppal noted that stigmatization of sex work was one of the factors that led to the murder and disappearance of countless women in Vancouver:

*Often they were treated not as persons at all, but as "sub-humans" diminished in the eyes of many by their "high-risk lifestyle". Like poor women across Canada and around the world, their devalued status made them the target of predators.* <sup>75</sup>

Evidence has clearly shown that stigma reduces access to police protections and health and support services.<sup>76</sup> Notably, Oppal pointed not to women's criminalization as the reason that they have poor relations with police, but rather to the stigma associated with their work. Full access to police



is a critical element of sex worker safety (and the safety of all women). We must learn from the tragedy of the missing and murdered women and ensure that current and future laws do not exacerbate the stigma that sex workers experience or create barriers between sex workers and the police.

## V. SEX WORKERS' VIEWS ON EFFECTIVE POLICING

As articulated by one sex worker in the GSHI/UBC research, criminalization and policing of clients can recreate the same harms that sex workers experienced under the existing laws:

*In my opinion harassing the clients is exactly the same as harassing the women. You harass the clients and you're in the exact same spot you were before. It's exactly the same thing. Exactly. I'm staying out on the streets. I'm out there. I'm, I'm at risk. I'm in jeopardy of getting raped, hurt whatever. So you know they harass the clients they're harassing the women. It's the same thing.<sup>77</sup>*

Sex workers clearly expressed the view that purchasing sex should not be a criminal offence in Canada. They felt that policing should be specifically focused on targeting perpetrators of violence against workers in the sex industry:

*Just when there's violence or there's like something that's not, you know agreed upon right. Like being forced against their will.<sup>78</sup>*

*Well if they're [clients] uh, abusing us right? Then yeah. Hitting or anything, you know? You don't want pain. All kinds of shit. Just being violent like thinking he can hit you or whatever or, talking you know. Being aggressive.<sup>79</sup>*

*[My vision is to] not be scared if you do have like some kind of issue. Like if you have a date that goes nuts in your apartment or robs you that you can call the cops. I know that's happened to girls on call right.<sup>80</sup>*

Sex workers need full and equal access to the protective services of police and the broad range of protections that are found in the *Criminal Code of Canada* that are intended to protect all people from violence, abuse and other crimes. Those provisions include 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 (section 264). Further, it is an indictable offence to traffic in persons (section 279.01) and in people under age 18 (section 279.011).

We can look to evidence from Sweden to see that criminalization of clients did not increase safety and protection for sex workers. The Swedish National Board of Health and Welfare concluded that, because of the prohibition, sex workers feel less trusting of social services, police and the legal system and, thus, the current legislation prevents people from seeking help.<sup>81</sup> Swedish sex workers have reported that police are no longer seen as a source of protection: “[s]ex workers feel hunted by them, and are subjected to invasive searches and questioning.”<sup>82</sup>

Fifteen years after its enactment, the Global Commission on HIV and the Law and other experts have concluded that in Sweden, “the law has not improved—indeed, it has worsened—the lives of sex workers.”<sup>83</sup> The *Krusi et al.* report adds to the body of research offering clear empirical evidence that outlawing the purchase of sexual services will create the same safety concerns that sex workers experienced under the legal framework that Canada’s highest court recently struck down.



## CHAPTER THREE – CRIMINALIZATION OF CLIENTS AND THE CHARTER

In the *Bedford* case, the Supreme Court of Canada held that the communication, bawdy-house and living on the avails provisions of the *Criminal Code* violate the rights of sex workers to security of the person, guaranteed by section 7 of the *Charter*. As the federal government considers whether to enact new criminal laws relating to adult prostitution, it is not only important to learn from the mistakes of the past, but also to consider the government's duty to ensure their laws comply with the rights and protections found in the *Charter*.

It is critical that the Government of Canada consider whether a law that prohibits the purchase of sex would infringe section 7 rights of sex workers, which says:

*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.*<sup>84</sup>

In this final chapter, we apply the Supreme Court of Canada's analysis in *Bedford* to the evidence from the *Krusi et al. report* in order to inform this important question.

### I. SUMMARY OF THE *BEDFORD* DECISION

The *Bedford* decision addressed the issue of whether three specific *Criminal Code* provisions – the communication, bawdy-house and living on the avails laws – were consistent with the *Charter*. The applicants in the case were three Ontario sex workers who alleged that the impugned provisions violated their section 7 *Charter* right to security of the person.

In order to determine whether an impugned law infringes section 7 of the *Charter*, the court must conduct a two-part analysis. First, the court must determine whether the law infringes a person's right to life, liberty or security of the person. If it is found to violate one or more of these rights, then the court must determine whether the infringement accords with the principles of fundamental justice.

The analysis then moves on to section 1 of the *Charter*, where the burden shifts to the government to prove that the infringement is justifiable in a free and democratic society.

In order for a law to be "saved" by section 1, the government must show that the law has a pressing and substantial objective that justifies the rights infringement in favour of the broader public interest.<sup>85</sup>

In *Bedford*, the Supreme Court of Canada concluded that the *Criminal Code* provisions heightened the risks faced by sex workers. The Court found that the heightened risk arose from the laws, which impose dangerous conditions that prevent sex workers from taking steps to protect themselves from risk.

The Court found that the practical effect of the bawdy-house law is to give sex workers no option other than to work on the street or do "out-calls."<sup>86</sup> The Court found that in-calls (where sex workers control the location where services take place) are the safest form of sex work. This is because in-call work allows for basic safety measures such as a regular clientele, safe houses and preventive health measures, the hiring of staff and audio room monitoring. The Court therefore concluded that prohibiting in-calls increased the risk to sex workers. Further, it found that the prohibition is especially harmful to street-based sex workers, whom it found to be the most vulnerable population of sex workers.<sup>87</sup>

With regards to the living on the avails provision, the Court found that this law does not distinguish between those who exploit sex workers and those who increase their safety. Therefore, the provisions prevent sex workers from hiring bodyguards, drivers and receptionists who could significantly enhance sex workers' personal security.<sup>88</sup>

The prohibition on communication in public for the purpose of prostitution was found to interfere with sex workers' ability to screen prospective clients for intoxication or

propensity to violence, and to set terms for the transaction (including condom use or accessing a safer indoor space), which reduces the risks they face. Enforcement of this law also displaces sex workers from familiar areas where they may be supported by friends and regular clients, to more isolated areas, thereby increasing their vulnerability.

Since the Court found that sex workers' rights to security of the person were engaged by these laws, the Court then turned to an analysis of whether the deprivation of security of the person accords with the principles of fundamental justice. Principles of fundamental justice are "the basic values underpinning our constitutional order."<sup>89</sup> In the *Bedford* case, the three principles that were raised were that laws should not be arbitrary,<sup>90</sup> overbroad or grossly disproportionate.

A law that has negative effects that are grossly disproportionate to the purpose of the law is not in accordance with principles of fundamental justice. With regards to the bawdy-house and communication laws, the Court determined that the harmful effects of the laws were grossly disproportionate to their legislative objective of preventing nuisance. With regards to the bawdy-house law, the Court said:

*Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.<sup>91</sup>*

The Court found that the communication law's negative impact on safety was grossly disproportionate to its purpose of controlling nuisance:

*If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.<sup>92</sup>*

Overbreadth is when a law goes too far and interferes with conduct that is not connected with the purpose of the law.<sup>93</sup> The living on the avails law was held to be overbroad because it goes far beyond preventing exploitation by also prohibiting non-exploitative relationships such as those between sex workers and bodyguards.<sup>94</sup> The Court concluded that the provisions are unconstitutional and hence are void.<sup>95</sup>

## II. CONSTITUTIONAL ANALYSIS OF A BAN ON PURCHASING SEX

Given the harms that are identified in the *Krusi et al. report* and the fact that they mirror the harms identified in the *Bedford* decision, a prohibition of the purchase of sex would very likely violate sex workers' rights to security of the person.

A ban on the purchase of sexual services would engage sex workers' security rights because it would prevent workers from taking basic safety precautions, as demonstrated by the evidence set out in the *Krusi et al. report* as well as from Sweden and Norway. First, when police target clients, sex workers become displaced to isolated and unsafe areas where their prospective customers are less likely to be detected by police. Second, in order to avoid arrest, clients urge sex workers to get into their vehicles quickly. Sex workers are therefore unable to take the time they need to screen clients or negotiate the terms of the transaction. Third, even in circumstances where the police have shifted enforcement away from sex workers and towards their clients, sex workers face barriers to accessing police protection.

It is also important to note that this law would make working indoors and working collectively extremely difficult. In *Bedford*, the Court found that indoor sex work is much safer, especially in-call work. The Court also recognized the safety benefits of working with others. However, if clients are criminalized, it makes it unrealistic to operate an indoor space or to work collectively with others when the police can simply park out front or engage in other forms of surveillance in order to deter or arrest clients.

Given that criminalizing the purchase of sex would likely have these significant impacts on sex workers' safety, it is likely that a court would find that such a law would engage sex workers' rights to security of the person. The analysis would then shift to the consideration of whether these impacts on sex workers' safety offend the principles of fundamental justice.

The stated purpose of Sweden's prohibition on the purchase of sex is to "end demand" for prostitution. This is based on a premise that ending demand for prostitution would prevent harm to women in the sex industry and to society as a whole.<sup>96</sup> In other words, the purpose of the law is to protect

women from violence and sexual exploitation. Another way that the objective of a law may be framed would be “to target the commercialization of prostitution, and to promote the values of dignity and equality.”<sup>97</sup>

Presumably, the purpose of a Canadian ban on the purchase of sex would similarly be said to “end demand” or, put differently, to “end the commercialization of sex in order to prevent harm to women.” But it is important to consider the fact that a ban on the purchase of sex would capture all clients, not just perpetrators of violence. If the evidence established that the exchange of sex for monetary compensation is not *necessarily* violent, exploitative or otherwise harmful to women, it follows that the criminalization of non-violent clients would have no connection to the objective of protecting women from violence and exploitation. The law would thus be overbroad. This was how the Court in *Bedford* analysed the living on the avails provision, which was overbroad because it applied to non-exploitative relationships, including those relationships that offer security and support to sex workers.

In addition, criminalizing the purchase of sexual services would have an overbroad effect on the security of the person rights of sex workers, given the likelihood that the effect of the law would actually undermine, and therefore be inconsistent with, the law’s stated objective.<sup>98</sup> This is because the practical effect of the law would be to increase the risk of violence and exploitation of women. This analysis would be similar, if not identical, to the analysis of the living on the avails provisions in *Bedford*. In both cases, the person who is criminalized—in *Bedford*, a third party, and in this case, a client—is not the same person whose security of the person is affected by the law—the sex worker.

The effects of a ban on purchasing sex on the security rights of sex workers are also likely to be grossly disproportionate to the law’s objectives. In *Bedford*, the lower courts

concluded that the living on the avails provision’s negative effect on safety and security is grossly disproportionate to its objective of protecting sex workers from exploitative relationships.<sup>99</sup> Even if the objective of criminalizing clients is to protect sex workers from exploitation or to protect their health and safety, if the law’s practical effect is to increase the risk that sex workers will be subject to violence, then it will be said that “the seriousness of the deprivation is totally out of sync with the objective of the measure.” If so, the law would be considered grossly disproportionate.<sup>100</sup>

If a law is found to be arbitrary, overbroad or grossly disproportionate, the burden of proof shifts to the government to justify the rights infringements. Section 1 of the *Charter* directs the courts to engage in an analysis of whether the infringement is rationally connected to the law’s purpose, whether the right is as minimally impaired as possible, and whether the effects of the law are proportionate to the law’s objective.<sup>101</sup>

If the purchase of sexual services is criminalized, the government will face difficulty proving the elements of Section 1 on a balance of probabilities. It would be extremely difficult to argue that a law that violates the security of sex workers by making them vulnerable to abuse is rationally connected to any objective related to the protection of women. Only if new legislation generates reasonable and minimal controls are courts likely to defer to the legislature in determining whether the law minimally impairs the rights of sex workers. It would also be difficult for the government to argue that sex workers’ security is minimally impaired given the Supreme Court of Canada’s explicit rejection of that argument in regards to the living on the avails provision in *Bedford*.<sup>102</sup>

In conclusion, it is our opinion that a law that prohibits the purchase of sexual services would violate the section 7 rights of sex workers and there would be a strong case to be made that such a law should be struck down.<sup>103</sup>



## CHAPTER FOUR – RECOMMENDATIONS: DEVELOPING EFFECTIVE LAWS AND POLICIES REGARDING SEX WORK

In December 2013, the Supreme Court of Canada struck down three *Criminal Code* provisions related to adult prostitution. This landmark decision not only struck down a series of extremely harmful laws, but also sparked an important discussion regarding the proper legal framework for regulating adult sex work in Canada. A key aspect of that conversation centres on the question, should the criminal law specifically prohibit the purchase of sexual services? This report offers a clear answer to that question, and calls on the government to ensure that Canada's laws do not put sex workers in danger or violate their fundamental *Charter* rights.

Recent research published in the *Krusi et al. report* offers critical evidence demonstrating how laws and policing efforts that criminalize the purchase of sexual services expose the most marginalized street-based sex workers to harmful working conditions and profoundly impact their safety, health and human rights. Sex workers who took part in the GSHI/UBC research represent a demographic that some have argued will significantly benefit from criminalizing the purchase of sex, because they do sex work as a result of constrained choices and limited economic options. However, the sex worker narratives make it clear that criminalizing the purchase of sexual services does not mean that sex workers experience increased options in their lives or that they do less sex work. This is true for the simple reason that this type of law does not provide alternate ways for sex workers to make a living. In fact, the law has the opposite effect, forcing sex workers to work longer hours, under more difficult circumstances and without being able to employ strategies that reduce harms, including working in familiar, populated areas, working indoors, screening clients and building supportive relationships with police.

The findings from this Vancouver study accord with the evidence from Sweden and Norway, where the purchase of sexual services has been outlawed since 1999 and 2009 respectively. Sweden has not achieved its goal of ending the demand for sex work. Several government reports have concluded that there is no evidence that the law has had an impact on the numbers of people buying and selling sex and has, instead, influenced how and where it happens.<sup>104</sup> However, there is ample evidence from Sweden and Norway to suggest that the ban has made life worse for people selling sex by increasing sex workers' vulnerability to

violence, increased stigma and discrimination and diminished access to police and other protections.<sup>105</sup>

Given the evidence from Sweden, Norway and Canada, we conclude that a prohibition on the purchase of sexual services would not withstand constitutional scrutiny under section 7 of the *Charter*. With this knowledge, it would be unconscionable to enact a law that replicates the conditions that sex workers have had to endure under Canada's current legal framework, and then wait for a constitutional challenge to wind its way through the courts. Such a law will have devastating consequences and sex workers must be immediately able to take steps to improve their health and safety and the overall conditions of their work.

If adopted, the following four recommendations will lay the groundwork for sex workers' access to healthy and safe working conditions, address law enforcement concerns about abuse in the sex industry and ensure that sex workers' choice and autonomy is respected.

### 1. CANADA'S LAWS SHOULD NOT PROHIBIT THE PURCHASE OR SALE OF SEXUAL SERVICES BY ADULTS.

For more than 30 years, sex workers have been calling on Canada to repeal criminal laws that target sex workers, their clients and the people they work with. This approach — referred to as decriminalization — is a critical step towards creating a safer, just and more equitable society. In order to ensure the safety of sex workers and Canadians overall, the three laws that were found to be unconstitutional in *Bedford*

should not be replaced with new criminal law provisions that prohibit the purchase or sale of sexual services by adults or sex workers' ability to work with third parties.

The *Krusi et al. report* demonstrates that any law that prohibits the purchase of sexual services would replicate the devastating harms associated with the laws that were struck down in the *Bedford* case. New criminal laws prohibiting the purchase of sex would therefore be inconsistent with the security of the person rights that are protected by the *Charter*.

## 2. ENSURE SEX WORKERS ARE IN A LEADERSHIP POSITION IN ALL FUTURE LAW AND POLICY DEVELOPMENT.

The three laws that were struck down in *Bedford* represent a failed and harmful legal framework that has resulted in decades of violence and tragedy. Part of that failure stems from the reality that those laws were not designed with the actual needs and interests of sex workers in mind. Canada now has an important opportunity to envision a legal framework that draws on the knowledge and experience of the greatest experts on these issue — sex workers themselves. Sex workers must be at the centre of planning and decision-making about the criminal law, as well as zoning and licensing issues, employment law and other regulatory issues that will impact their work and their lives.

## 3. USE EXISTING CRIMINAL LAWS TO TARGET VIOLENCE AND ABUSE IN THE SEX INDUSTRY.

Canada's *Criminal Code* contains a range of laws that properly target sexual assault, bodily assault, robbery, forcible confinement and many other forms of violence and abuse. Historically, perpetrators have rarely been charged (much less convicted) when these crimes are committed against sex workers. The criminal law should be used to target real harms against sex workers, rather than criminalizing their work. Rather than creating new laws to target anyone who purchases sex, the criminal justice system must listen to sex workers and support them when they reach out for assist-

ance and protection. Criminal justice resources should be directed at ensuring sex workers' access to police protection, and identifying and prosecuting offenders who abuse, assault or commit other crimes against sex workers or are involved in the sexual exploitation of youth.

## 4. INVEST IN GOVERNMENT PROGRAMS THAT SUPPORT SEX WORKERS' RIGHTS AND SAFETY AND ALLEVIATE POVERTY AND DISCRIMINATION.

For many of the sex workers who participated in this study poverty, discrimination and stigma are ever-present. Using criminal laws to cut off their source of income is not the way to ensure genuine autonomy. Instead, all people experiencing poverty or discrimination need access to safety as well as supports that deal with the underlying social conditions that constrain their personal and professional choices. Depending on individual circumstances, these could include access to adequate financial support, safe housing, educational opportunities, mental health supports, drug treatment and harm reduction services and culturally-appropriate resources for themselves and their families.




## NOTES

1. A Krüsi, K Pacey, L Bird, C Taylor, J Chettiar, S Allan, D Bennett, JS Montaner, T Kerr, and K Shannon. "Criminalisation of Clients: Reproducing Vulnerabilities for Violence and Poor Health among Street-Based Sex Workers in Canada. A Qualitative Study." (2014) *British Medical Journal Open* [Krüsi et al. report].
2. Krüsi et al. report, *supra* note 1. A full copy of the report can be accessed here: <http://www.gshi.cfenet.ubc.ca>.
3. Full copyright retained by GSHI/UBC, with Pivot/SWUAV citing the research report published in the Krüsi et al. report.
4. Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights and Health*. (New York: Global Commission on HIV and the Law, 2012). Available at: <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf> [Accessed on May 3, 2014] [Global Commission].
5. *Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 SCR 1101. Available at: <http://canlii.ca/t/g2f56>. [Accessed on May 3, 2014] [Bedford].
6. *Criminal Code*, RSC 1985, c C-46 [Criminal Code].
7. *Criminal Code* s. 213. (1) Every person who in a public place or in any place open to public view ... (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
8. *Criminal Code* s. 210. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.  
(2) Every one who (a) is an inmate of a common bawdy-house, (b) is found, without lawful excuse, in a common bawdy-house, or (c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house, is guilty of an offence punishable on summary conviction.
9. *Criminal Code* s. 212. (1) Every one who ... (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.
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11. *Bedford*, *supra* note 5 at para 60.
12. *Bedford*, *supra* note 5 at paras 154–159; K Shannon et al, "Prevalence and Structural Correlates of Gender Based Violence Among A Prospective Cohort of Female Sex Workers" (2009) 339 *BMJ* [Prevalence and Structural Correlates]; K Shannon et al. "Social and Structural Violence and Power Relations In Mitigating HIV Risk of Drug-Using Women in Survival Sex Work." (2008) 66.4 *Social Science & Medicine* 911 [Social and Structural Violence]; K Shannon et al, "Structural and Environmental Barriers to Condom Use Negotiation with Clients Among Female Sex Workers: Implications for HIV-Prevention Strategies and Policy." (2009) 99.4 *American Journal of Public Health* 659 [Structural and Environmental Barriers].
13. *Bedford*, *supra* note 5 at para 64; A Krüsi et al. "Negotiating Safety and Sexual Risk Reduction With Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study" (2012) 102:6 *American Journal of Public Health* 1154.
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15. *Global Commission*, *supra* note 4; K Shannon and J Csete, "Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers" (2010) 304 *Journal of the American Medical Association* 573; L Lazarus et al, "Occupational Stigma as a Primary Barrier To Health Care for Street-Based Sex Workers In Canada" (2012) 14(2) *Culture, Health & Sexuality* 139 [Occupational Stigma]; The Hon. Wally T. Oppal, Q.C., *Forsaken: The Report of the Missing Women Commission of Inquiry* (Victoria: Missing Women Commission of Inquiry, 2012) [Missing Women Commission].
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20. *Ibid* at 5.
21. *Ibid* at 3.
22. *Ibid* at 4.
23. Vancouver Police Department Crime Incident Statistics, 2012/2013. Available at: <https://vancouver.ca/police/Planning/StatsDistrict/2013/2012-2013YTD.pdf> [Accessed on May 3, 2014]
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27. Krüsi et al. report, *supra* note 1.
28. *Ibid*.
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39. *Prevalence and Structural Correlates*, supra note 12.
40. *Structural and Environmental Barriers*, supra note 12.
41. K Shannon et al, "Mapping Violence and Policing as an Environmental-Structural Barrier to Health Service and Syringe Availability Among Substance-Using Women in Street-Level Sex Work." (2008) 19.2 *International Journal of Drug Policy* 140 [*Mapping Violence*].
42. *Challenge of Change*, supra note 38 at 64.
43. *Missing Women Commission*, supra note 15, Executive Summary at 15-16.
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45. *Social and Structural Violence*, supra note 12; *Prevalence and Structural Correlates*, supra note 12; *Mapping Violence*, supra note 41.
46. *Ambiguous Sympathies*, supra note 26 at 128 "... a warning was given about possible negative effects on people selling sex: As the demand for their services went down, they could be subjected to harsher everyday lives and increased vulnerability to violence."
47. *Ambiguous Sympathies*, supra note 26 at 125-126, 128-129.
48. *Ambiguous Sympathies*, supra note 26 at 129.
49. U Bjørndahl, *Dangerous Liaisons, A report on the violence women in prostitution in Oslo are exposed to*. (Oslo: Municipality of Oslo, 2012) at 5. Available at: <http://prosentret.no/wp-content/uploads/2012/06/FARLIGE-FORBINDELSER.pdf> (Norwegian) <http://humboldt1982.files.wordpress.com/2012/12/dangerous-liaisons.pdf> (English translation) [Accessed on May 3, 2014].
50. *Bedford*, supra note 5 at para 158.
51. K Shannon et al, "The Politics and Policies of HIV Prevention in Sex Work." (2012) 12.7 *The Lancet Infectious Diseases* at 500.
52. Reports of violence, abuse, robbery and other crimes perpetrated against sex workers are recorded by community agencies and assembled into handouts, know as Bad Date Sheets, which are disseminated through a large network of service providers who are in contact with women working in the sex industry.
53. *Challenge of Change*, supra note 38 at 64-65; C Benoit, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers* (Victoria: PEERS Victoria, 2001) at 51; *Voices for Dignity*, supra note 38 at 11; L Cler-Cunningham et al, *Violence Against Women in Vancouver's Street Level Sex Trade and the Police Response* (Vancouver: PACE Society, 2001) at 78; E Maticka-Tyndale et al, "Managing Risk and Safety on the Job: The Experiences of Canadian Sex Workers", (2005) 17 *Journal of Psychology & Human Sexuality* 161; *Social and Structural Violence*, supra note 12.; *Prevalence and Structural Correlates*, supra note 12.
54. E Maticka-Tyndale et al, "Managing Risk and Safety on the Job: The Experiences of Canadian Sex Workers", (2005) 17 *Journal of Psychology & Human Sexuality* 147; *Challenge of Change*, supra note 38 at 64-65; *Social and Structural Violence*, supra note 12.; K Deering et al, "Client Demands for Unsafe Sex: The Socioeconomic Risk Environment for HIV Among Street and Off-Street Sex Workers." (2013) 63.4 *Journal of Acquired Immune Deficiency Syndromes* 522.
55. *Missing Women Commission*, supra note 15, Vol. 1 at 110.
56. *Krusi et al. report*, supra note 1.
57. *Ibid.*
58. *Social and Structural Violence*, supra note 12; K Shannon and J Csete. "Violence, Condom Negotiation, and HIV/STI Risk Among Sex Workers." (2010) 304.5 *JAMA* 573 [*Violence*].
59. *Social and Structural Violence*, supra note 12; *Voices for Dignity*, supra note 38.
60. *Dodillet*, supra note 29 at 3.
61. *Dodillet*, supra note 29 at p 22-23; I McDonald, "Current Developments, Criminalising 'Punters': Evaluating the Swedish Position on Prostitution" (2004) 26 *Journal of Social Welfare and Family* 200.
62. *Bedford*, supra note 5 at para 158.
63. *Social and Structural Violence*, supra note 12; *Violence*, supra note 58; *Global Commission*, supra note 4.; *Missing Women Commission*, supra note 15; *Challenge of Change*, supra note 38 at 67; *Ambiguous Sympathies*, supra note 26 at 126.

64. *Missing Women Commission*, *supra* note 15, Vol 2. Volume 2 provides an in-depth look at the failures of the justice system response to the epidemic of missing women.
65. *Krusi et al. report*, *supra* note 1.
66. *Ibid.*
67. *Ibid.*
68. *Ibid.*
69. *Ibid.*
70. *Dodillet*, *supra* note 29 at 21–22.
71. *Dodillet*, *supra* note 29.
72. A Skarhed, *Selected Extracts of the Swedish Government Report SOU 2010:49: The Ban against the Purchase of Sexual Services, An Evaluation 1999-2008* (Stockholm: Swedish Institute, 2010) at 34. Available at: <http://www.government.se/content/1/c6/15/14/88/0e51eb7f.pdf> [Accessed on May 3, 2014].
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75. *Missing Women Commission*, *supra* note 15, Executive Summary at 25.
76. *Human Rights Abuses*, *supra* note 74; *Occupational Stigma*, *supra* note 15; *UNAIDS Guidance Note*, *supra* at note 16
77. *Krusi et al. report*, *supra* note 1.
78. *Ibid.*
79. *Ibid.*
80. *Ibid.*
81. *National Board 2007*, *supra* note 34 at 12; RFSU, Remissvar ang SOU 2010:49, Förbud mot köp av sexuell tjänst (Sweden: RFSU, 2010) (cited in *Dodillet*, *supra* note 29 at 22.)
82. *Dodillet*, *supra* note 29 at 20–21.
83. *Global Commission*, *supra* note 4.
84. Section 7 of the *Charter*.
85. *Bedford*, *supra* note 5 at para 126; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (CanLII), [2007] 1 SCR 350, at para 12. Available at: <http://canlii.ca/t/1qljj> [Accessed on May 3, 2014].
86. Out-call refers to an arrangement where the sex work travels to a location to meet the client and provide the service.
87. *Bedford*, *supra* note 5 at paras 63–4.
88. *Bedford*, *supra* note 5 at paras 66–7.
89. *Bedford*, *supra* note 5 at para 96.
90. *Arbitrariness* refers to a lack of connection between the purpose of a law and its actual effect on the ground (*Bedford*, *supra* note 5 at paras 98–100).
91. *Bedford*, *supra* note 5 at para 136.
92. *Bedford*, *supra* note 5 at para 158. The gross disproportionality analysis is found at: *Bedford*, *supra* note 5 at paras 103-104, 120-123, 133–136, 148-159.
93. The overbreadth analysis can be found at: *Bedford*, *supra* note 5 at paras 101, 112-119
94. *Bedford*, *supra* note 5 at paras 139-45.
95. *Bedford*, *supra* note 5 at para 164.
96. Canadian HIV/AIDS Legal Network, *Sex Work Law Reform in Canada: Considering problems with the Nordic model (Briefing Paper)* (Toronto: Canadian HIV/AIDS Legal Network, 2013) at 1. Available at: <http://www.aidslaw.ca/publications/interfaces/downloadFile.php?ref=2191> [Accessed on May 3, 2014]. [*Briefing Paper*]
97. *Bedford*, *supra* note 5 at para 138.
98. *Bedford*, *supra* note 5 at para 119.
99. Their analyses were left intact because the Supreme Court of Canada declined to consider the issue since it found the provision to be overbroad.  
*Bedford*, *supra* note 5 at para 138.
100. *Bedford*, *supra* note 5 at para 120.
101. *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103 at para 70. Available at: <http://canlii.ca/t/1ftv6> [Accessed on May 3, 2014.]
102. *Bedford*, *supra* note 5 at para 162: “... the Attorneys General attempt to justify the Living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists... The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law’s effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law’s positive effect of protecting prostitutes from exploitative relationships.”
103. The authors wish to thank Sandra Ka Hon Chu and the Canadian HIV/AIDS Legal Network for the constitutional analysis presented in their *Briefing Paper*, *supra* note 96, which was of great assistance in the preparation of this report. Also, we would like to acknowledge and refer readers to the thorough analysis of these issues presented in S. Chu and R. Glass, “Sex Work Law Reform in Canada: Considering Problems with the Nordic Model” (2003) Vol 51, No 1 *Alberta Law Review* 101. Available online: <http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=1342> [Accessed on May 3, 2014].
104. *Rikspolisstyrelsen*, *supra* note 31; *National Board 1998–1999*, *supra* note 31.
105. A Collins and G Judge, “Client Participation and the Regulatory Environment” in *Demanding Sex: Critical Reflections on the Regulation of Prostitution*, edited by VE Munro and M Della Giusta. (Aldershot: Ashgate, 2008) at 137–148; M Goodyear and R Weitzer, “International Trends in the Control of Sexual Services”, in *Policing Pleasure. Sex Work, Policy, and the State in Global Perspective*, edited by S. Dewey and P. Kelly. (New York: New York University Press, 2011) at 16–30; D Danna, “Client-Only Criminalization in the City of Stockholm: A Local Research on the Application of the “Swedish Model” of Prostitution Policy”(2012) 9(1) *Sexuality Research and Social Policy* 80; *Ambiguous Sympathies*, *supra* note 26 at 127.



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