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## Visioning Legalized Consensual Adult Sex Work In Canada

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## **Abstract**

On December 6, 2014, Parliament enacted new criminal law addressing prostitution related offences in response to the 2013 decision at the Supreme Court in the matter of *Bedford v Attorney General of Canada*. This major research paper focuses on the criminal law concerning prostitution and sex work and the impact of the law on people who work in the sex trade. This major research paper analyses the new criminal law, and its stated purpose by critically examining the research materials used to help inform those who drafted the law, to conclude that the law is flawed. Parliament has ignored the safety and security rights of sex workers in its most recent legislation on prostitution.

Historically, in Canada women engaged in prostitution were viewed as either victims of men's exploitation, or immoral and considered a nuisance and this view is reinforced in the new legislation. Further, this study explores the effectiveness of human trafficking legislation and argues that decriminalization of prostitution, coupled with legalization and appropriate regulation of sex work are the legal tools best utilized to ameliorate the unsafe and unequal social conditions of sex workers.

**Research Question:** Should the voluntary exchange of a sexual service for remuneration be decriminalized and regulated? **Answer:** Yes.

## **Keywords**

Criminal Law, Prostitution, Sex Work, Human Trafficking for Sexual Exploitation, Legalized Sex Work

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“True equality for women and girls will not be achieved until all forms of violence, including sexual exploitation and sex trafficking, are eradicated. This will require a broad perspective and action taken in all sectors and in a wide range of policy areas. The results will reflect a stronger nation whose political, social and economic inequalities are minimized and where human rights and the possibility for everyone to succeed to their greatest potential is achieved.”<sup>1</sup>

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<sup>1</sup> The Task Force on Trafficking of Women and Girls in Canada, “‘No More’, Ending Sex Trafficking in Canada – Report of the National Task Force on Sex Trafficking of Women and Girls in Canada” at 2, online: <[http://www.canadianwomen.org/sites/canadianwomen.org/files/CWF-TraffickingReport-Auto%20%281%29\\_0.pdf](http://www.canadianwomen.org/sites/canadianwomen.org/files/CWF-TraffickingReport-Auto%20%281%29_0.pdf)>.

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## CHAPTER 1

### Introduction

The harm to prostitutes and sex workers<sup>2</sup> is widely acknowledged, but is prostitution intrinsically harmful to *all* women, as the Canadian Government recently proclaimed when it passed legislation to criminalize sex work?<sup>3</sup> Alarming numbers of individuals involved in prostitution experience violence, degradation and even murder. Many also believed that most individuals who enter prostitution, some as teenagers, do so in response to deception, necessity, coercion, violence and other constraints having little to do with freedom of choice.<sup>4</sup> Further, research indicates that the majority of women in prostitution would leave if given a real choice.<sup>5</sup> Despite the extensive research however, human trafficking for a sexual purpose was not recognized in Canadian law until 2005, when *An Act to amend the Criminal Code (trafficking in persons)* came into force, acknowledging the lack of choice and exploitation faced by those who are forced into prostitution. On the other hand, the stigma and criminality associated with sex work makes it difficult to ascertain with accuracy the numbers of prostitutes who are engaged in *consensual* adult sex work. While there is much violence in prostitution, it is also true that there are a significant number of those who work in prostitution by choice, and the protection of their rights is a major focus of this paper.

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<sup>2</sup> Although different meaning is often given to the labels ‘prostitute’ and ‘sex worker’ for the purpose of this paper the words will be given the same meaning, which is the exchange of direct contact sexual service for money or other consideration, unless otherwise indicated.

<sup>3</sup> Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts (short title: Protection of Communities and Exploited Persons Act)*, 2<sup>nd</sup> Sess, 41<sup>st</sup> Parl, 2014 (Assented to November 6, 2014) [Bill C-36].

<sup>4</sup> Melissa Farley et al, “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder, in Prostitution, Trafficking, and Traumatic Stress Disorder”, (2003) 2:3-4 Journal of Trauma Practice 33 at 51-56.

<sup>5</sup> SC 2005, c 43.

On December 20, 2013, the Supreme Court of Canada (SCC) declared three of the existing criminal laws pertaining to adult prostitution unconstitutional in the matter of *Canada (Attorney General) Bedford*.<sup>6</sup> The Court suspended the validity of its decision until December 20, 2014, at which time the impugned offences became decriminalized. The Supreme Court's decision prompted Parliament to call for a review of the existing *Criminal Code* provisions, and not for a determination of whether criminalization or legalization of prostitution was the better response by Parliament. Subsequently, the Attorney General's office engaged in a nationwide consultation concerning prostitution before proposing Bill C36, the *Protection of Communities and Exploited Persons Act* (Bill C-36).<sup>7</sup>

A significant amount of the research about prostitution and the sex trade by academics and government researchers was tendered as evidence in the *Bedford* decision. The findings of the research to date are polarized between proponents of decriminalization, with or without regulation, and criminalization with the aim of abolishing all prostitution and the sex trade. Proponents of criminalization argue that prostitution is inherently harmful. This supposition requires further interrogation to determine if the harm that occurs in prostitution is both extrinsic and intrinsic.

As Canadians weighed in on the debate regarding prostitution it became clear that there was and still is considerable controversy concerning the issue. The courts in their application of the *Charter*,<sup>8</sup> and the legislatures in response, are adept at balancing competing rights, as demonstrated in their decisions in the face of changing attitudes around sexuality, including homosexuality, obscenity law, and municipal regulation of the adult

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<sup>6</sup> 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford SCC*].

<sup>7</sup> *Ibid.*

<sup>8</sup> Part I of the Constitution Act 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Charter*].

entertainment industry. Parliament however, has not recognized the changing moral standards regarding sex work and appears to have ignored the safety and security rights of sex workers in its most recent legislation on prostitution.

With Bill C-36 now proclaimed into law, prostitution has become illegal for the first time in Canada. The new law creates an offence that prohibits purchasing sexual services or communicating in any place for that purpose. The law essentially targets clients. Additionally, the new law creates an offence that prohibits receiving a material benefit derived from the purchase of sexual services and ensures consistency between prostitution related offences and existing human trafficking offences. Other measures include penalizing communication for the purpose of prostitution in areas where children are likely to be present, such as day care centres and playgrounds, and prohibiting the advertisement of sexual services offered for sale. Existing criminal laws specific to prostitution of and by children, and assaultive and violent offences that often are perpetrated against sex workers, remained unchanged. Human trafficking offences were changed to more closely align with procuring offences. It is anticipated that a constitutional challenge to the revised communication and purchasing sexual services offences will be launched at the first reasonable opportunity. Historically, in Canada, women engaged in prostitution are viewed as either victims of men's exploitation, or immoral and considered a nuisance, and this view is reinforced in the new legislation.<sup>9</sup>

The legislative intent of the new federal law on prostitution is a marked departure from the historical application of the vagrancy and bawdyhouse provisions, which remained relatively intact in Canadian law until this recent change from the treatment of prostitution as

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<sup>9</sup> John Lowman, "Deadly Inertia: A History of Constitutional Challenges to Canada's Criminal Code Sections on Prostitution" (2011) 2 *Beijing Law Review* 33 [*Deadly Inertia*].

a “nuisance”.<sup>10</sup> Much of the literature that was reviewed for this paper supports the view that prostitution is inherently harmful to all women, and that *all* women who do sex work are victims of male violence against women, as is articulated in the preamble to Bill C-36.<sup>11</sup> But there are sex workers who have independent agency in that they willingly choose to work in the sex trade. Consequently, they deserve acknowledgment and constitutional protection of their right to safety and security of the person. These sex workers and their rights are ignored in the new legislation.

This paper explores how the federal law pertaining to prostitution and human trafficking has changed. Criminalizing the purchase of sexual service only exacerbates the problem by increasing the stigma and hampering efforts to enforce existing assaultive and human trafficking offences. My research and professional policing experience leads me to suggest that instead of criminalization we should adopt harm reduction strategies that include social, economic and legal strategies to abolish human sexual trafficking and minimize the harm that many prostitutes experience. Second, this paper examines how legalizing sex work, and allowing for municipal and provincial regulation of sex work, would give sex workers access to protections under provincial and municipal law that are denied them in a criminalized environment. Finally, abolishing the exploitation of sex

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<sup>10</sup> Canada, Department of Justice, ‘Bill C-36, An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford and to Make Consequential Amendments to Other Acts’ (Technical Paper, 1 December 2014) 3 [Technical Paper Bill C-36]; The Canadian Criminal Justice Association, “Bill C-36, Protection of Communities and *Exploited Persons Act*” (2014), online: <<https://www.ccja-acjp.ca/pub/en/briefs-articles/bill-c-36-protection-of-communities-and-exploited-persons-act/>>. (Bill C-36 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 women and girls. Bill C-36 signals this transformational shift both through its statement of purpose, as reflected in its preamble, and its placement of most prostitution offences in Part VIII of the *Criminal Code*, Offences Against the Person.)

<sup>11</sup> *Bill C-36*, *supra* note 3 preamble.

workers through consistent enforcement of existing federal laws and providing access to provincial and municipal law that provides additional protections for sex workers, would make an equal exchange between the purchaser and the seller of the service possible. The individual use of one's own body for a sexual purpose is at the core of the issue. The stigmatization, exploitation, and abuse of the person who uses their body for a commercial sexual purpose must be abolished.

### **Structure of the Paper**

This paper is divided into four chapters including the introduction, research methodology, and literature review. The second chapter includes an historical overview of the law concerning prostitution in Canada, following the development of the law from the nineteenth century until today. This chapter provides context in relation to the changes in the law and establishes how it has been used to control women's sexual behaviour. Interestingly, until recently, prostitution law remained relatively unchanged and prostitution in and of itself was not a criminal offence. The second chapter examines the trial, appellate and Supreme Court of Canada decisions in the case of *Bedford et al.* The latter part of the second chapter addresses the new criminal law enacted by Bill C-36, its implication and application. The third chapter analyses the relatively new law concerning human trafficking, recent changes to the law concerning prostitution, and explores issues in police enforcement of the new laws. The fourth and final chapter explores harm reduction strategies for sex workers, and argues that the decriminalization and regulation of sex work, along with access to carefully written and properly enforced provincial law and municipal regulations, can improve the lives of all sex workers, including protecting those who are exploited.

## Background and Context

Prostitution is controversial, provoking heated and committed debates about morality, equality, personal autonomy and public safety.<sup>12</sup> Canada's earliest recorded prostitution law, enacted in 1839, is derived from British common law, and was used to deal with immorality and vagrancy associated with bawdy houses and street solicitation. *Criminal Code* offences to address bawdy houses included: "Procuring a person to have illicit sexual intercourse; aiding, abetting or controlling for gain the prostitution of another person (s.212. (1)); Living in whole or in part on the avails of the prostitution of another person (s.212.(1)(j)); Owning, keeping, frequenting a common bawdy house (s.210)".<sup>13</sup> Prior to 1972, laws to address the vagrancy and the perceived immorality of prostitution included: "Everyone commits a vagrancy who . . . being a common prostitute or nightwalker is found in a public place and does not, when required, give a good account of herself (s.175 (1)(c))".<sup>14</sup> In 1972 and again in 1985, the solicitation law changed to become gender-neutral and incorporated the language of communication for the purpose of prostitution.<sup>15</sup> Incidentally, police enforcement of the communication law has been predominantly motivated by public complaint.<sup>16</sup>

Enforcement of laws related to solicitation and communication for the purpose of prostitution has been asymmetrical, with women who work in the survival sex trade most

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<sup>12</sup> *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at para 9, 109 OR (3d) 1 [*Bedford ONCA*].

<sup>13</sup> *Criminal Code*, RSC 1985, c C-46, ss 210-213 [*Criminal Code* 1985].

<sup>14</sup> *Criminal Code*, RSC 1970, c C-34, ss 175, 210-212.

<sup>15</sup> *Ibid* s 175(1)(c) as re-enacted by 1972, c 13, ss 13, 15; *Ibid* s 195.1 as enacted by 1985, c 50, s 1.

<sup>16</sup> As a member of the Ontario and the Canadian Associations of Chiefs of Police I am familiar with the relevant policy and practices of police services in Canada. Although I did not attend the conference, prostitution enforcement strategies were the topic of discussion in one session at the 2014 CACP annual general meeting. The conference information is available to all members.

frequently targeted, and often as a result of public demand for police to arrest and charge the seller. Studies have shown that street-based prostitution represents only between 5 and 20% of all sex work, yet this form of sex work comprises 90% of all prostitution-related charges by police.

The inequality represented in the charge and conviction rates of prostitutes, compared with the rates for purchasers of sex, is representative of the value placed upon and stigmatization ascribed to women working in the sex trade. The over-representation of the seller of the service, predominantly women, in the court system demands that we view the law concerning prostitution and sex work from a multiplicity of perspectives. In 2010 a group of advocates<sup>17</sup>, including prostitutes, successfully argued in *Canada v Bedford*<sup>18</sup> that three of the prostitution related offences in the *Criminal Code* breached section 7 of the *Charter*, as the law negatively impacts the “security of the person rights” of sex workers. Further, the group argued that the offence “communicating in public for the purpose of prostitution” also violates section 2 of the *Charter*, the right to freedom of expression. It was the position of Terri Jean Bedford and her advocates that criminal offences exist in law to address the extrinsic harm that exists in prostitution, including violence, exploitation, child prostitution, homicide and trafficking.<sup>19</sup> On this view, sex workers should be able to engage the services of others for the purpose of safely conducting and engaging in their work.

On September 28, 2010, in Ontario, the Honourable Justice S.G. Himel of the Superior Court of Justice struck down the *Criminal Code* provisions on (1) keeping a common bawdyhouse; (2) living on the avails of prostitution; and (3) communicating in public for the

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<sup>17</sup> Downtown Eastside Sex Workers United Against Violent Society, Pace Society and Pivot Legal Society.

<sup>18</sup> *Bedford v Canada*, 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford ONSC*].

<sup>19</sup> *Ibid* at para 16.

purpose of prostitution.<sup>20</sup> On appeal, the Ontario Court of Appeal agreed that the prohibition on common bawdy houses for the purpose of prostitution is unconstitutional, but did not agree with Justice Himel's position regarding communication for the purpose of prostitution.<sup>21</sup> The Attorney General of Canada appealed the case to the Supreme Court of Canada. On December 20, 2013, the Supreme Court upheld the decision of the lower court and the Ontario Court of Appeal.<sup>22</sup> The Supreme Court, in its ruling on section 7 of the *Charter*, agreed with Justice Himel and the position of the respondents, Terri Jean Bedford, Amy Lebovitch and Valerie Scott, that the impugned legislation both targets the activities of prostitution as a public nuisance, and fails to allow prostitutes to adequately protect themselves from serious harm or death.

The Court suspended the effect of its decision until December 20, 2014, at which time the impugned offences were to become decriminalized. The Supreme Court decision prompted the government at the time to call for a review of the existing *Criminal Code* provisions and to undertake a study to determine whether criminalizing the prostitution offences, or leaving them decriminalized was the better response to the challenge of the Supreme Court's decision in *Bedford*. If decriminalization were the result, this would not preclude decisions and methods of legalization being put in place by the provinces, as long as it was within their constitutional spheres of competence.

Subsequently, the federal Attorney General's office engaged in a nationwide consultation on prostitution before proposing Bill C-36.<sup>23</sup> Among other changes it proposed,

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<sup>20</sup> *Ibid.*

<sup>21</sup> *Supra* note 12 at para 5-7.

<sup>22</sup> *Supra* note 6 at para 4.

<sup>23</sup> *Bill C-36, supra* note 3.

the new law targets clients and pimps and criminalizes the purchase of sexual services. Other measures include increasing penalties related to child prostitution and prohibiting the advertising of sexual services in print or online. On November 6, 2014, with minor revisions by the House of Commons, the Senate passed the Bill, which became law on December 6, 2014. The vote on Bill C-36 in both the House and Senate was divided, with the Conservative majority government winning the vote. Liberal and NDP members voted against it.<sup>24</sup>

In the lead up to the newly passed prostitution law, federal Justice Minister Peter MacKay promised that the law would both eradicate prostitution in Canada and protect those most vulnerable in the sex trade. Bill C-36 is predicated on a particular view of people working in the sex industry that characterizes them as victims.<sup>25</sup> Opponents of criminalization argue that the recently passed prostitution law is, like its predecessor, unconstitutional because it will endanger sex workers who will be unable to adequately screen clients seeking to avoid arrest.

The intent of Canada's new prostitution law is to abolish prostitution, but that is not the answer to this complex issue. It is my view that trafficking women for the purpose of prostitution is the ultimate form of violence against women, and these women require our protection from these harms. But it is also my view that the voices of women who *choose* sex work as an occupation are missing from the conversation and they too deserve their

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<sup>24</sup>Parliament of Canada, "House Government Bill 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session", *LegisInfo*, online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C36&Parl=41&Ses=2&billId=6635303&View=5>>.

<sup>25</sup> *Supra* note 3 preamble.

rights and freedom to be protected. For these reasons I argue that those who choose sex work should be free to do so without fear of criminalization.

## **Research Methodology**

### **Strategy and Design**

This paper employs doctrinal research of the current and newly passed *Criminal Code* provisions relevant to work in the sex trade employing a jurisprudential perspective rather than a legal purist perspective in the analysis. The data from the related court decisions referenced will be analyzed from the same perspective. Given the current state of the law and the researcher's role as a police chief in Ontario at the time of its writing, an empirical study conducted with sex workers could place both the researcher and the respondents in an untenable position. While this problem is not insurmountable, the time constraints of the Master of Studies in Law program further limit the breadth of the research at this time.

A qualitative and cross sectional examination of empirical studies of prostitution in Canada is a necessary component of the research study. The research strategy includes the longitudinal studies of the regulatory methods used in New Zealand, where prostitution is legalized, and in Sweden where all prostitution is criminalized. Commonly referred to as the "Nordic Model," this approach was referenced in the debates in the House of Commons and Senate on Bill C-36. The evidence from these studies assists in assessing the effectiveness of the criminal law. The New Zealand approach could be an analogous model to the proposed municipal regulation I believe we should adopt in Canada, which in my view, would be more appropriate to licensing consensual sex work.

## Data Collection and Analysis

Doctrinal research on the relevant sections of the *Criminal Code of Canada*, *Canadian Charter of Rights and Freedoms*, and the written decisions by the judiciary at each of the court levels in the matter of *Canada (Attorney General) v Bedford* was undertaken with a view to understanding how Canada's criminal law concerning prostitution is written and interpreted. The *Protection of Communities and Exploited Persons Act* (Bill-C36), written in response to the *Bedford* decision at the SCC, substantially altered the law. Doctrinal analysis of the new *Criminal Code* provisions arising from Bill C-36 is necessary to address the question of how criminal law may or may not be better situated to address the systemic issues that persist in the activities of prostitution. The legislative intent is clearly articulated in the preamble to the new law. Furthermore, the *Constitution Act* outlines the powers of the provinces, from which flow the powers of municipalities.

Given that each of the provinces has legislated its powers to municipalities differently, and the scope of this study is limited due to time, the research of municipal law will be constrained to include only Ontario. The *Ontario Municipal Act*, and the *City of Toronto Act* will also inform this work. Municipalities currently regulate aspects of the sex industry, including locations where sex related activities take place, such as massage parlours and strip clubs. Municipalities derive their authority to act from their respective provincial legislation, and are charged with the responsibility of ensuring that any bylaw and licensing provision is not *ultra-vires* the municipality. Municipal bylaws can be targeted to eliminate the circumstances which can lead to crime, but they cannot address morality and standards of community tolerance.

An analysis was completed of some of the existing municipal regulation in Ontario with respect to the entertainment industry, as well as in Toronto, where bylaws have been

enacted specific to controlling prostitution activities. A brief examination of some of the standing decisions from various courts on the application of municipal bylaws relative to the regulation of sex work related activities in the entertainment industry is also helpful to assess the current extent of the powers of municipalities to regulate the sex trade, should decriminalization of prostitution occur.

Traditional library research on the numerous studies available will be employed. The data from the various monographs and reports, which contain widely conflicting views and conclusions, will be analyzed. The socio-legal research will assist in situating the law and its impact on prostitution to help ascertain if the law has, or will, achieve its intended goal. A comparison of the results of the longitudinal studies conducted in New Zealand where prostitution was decriminalized, and Sweden where the intent of the law concerning prostitution is abolition, will also be addressed. A comparative analysis of the regulation and criminalization of prostitutes in these two countries vis-à-vis the new laws in Canada was undertaken.

### **Study Limitations**

Due to time constraints, empirical human subject data collection on the lived experiences of prostitutes is from secondary sources and therefore subject to the researcher's interpretation. The scope of this paper does not allow for an in-depth study of how provincial labour law and the *Occupational Health and Safety Act* would intersect in a regulated environment to provide greater protection from exploitation for sex workers. Further, Canada's new prostitution laws did not take effect until the end of 2014, and therefore the impact and the effectiveness of the legislative objective post implementation is indeterminate this soon after implementation. A longitudinal study of the new criminal prostitution law

will be necessary to determine the effectiveness of the legislation, and to ascertain if it has achieved the stated purpose. The final outcome may not match the practical considerations or amendments made to the *Criminal Code*. Finally, the proposed municipal regulation is theoretical and the impact it would have if implemented is unknown.

## Review of the key literature

Two major theories or constructs inform the literature and research on prostitution and make up the framework for this study. Proponents of criminalization, often termed abolitionists, view prostitution and all sex work as violence against women perpetrated by men.<sup>26</sup> The diametrically opposing view is that some women have agency in their work in the sex trade and to criminalize them, and those who purchase their services, not only increases the risk to sex workers, but also denies them their constitutional right to work in a safe environment.<sup>27</sup> Conceptually, these polarized views need to be brought together to find the intersections where the law can situate itself in the future. Prostitution is a politically charged issue and has been the subject of debate in the legislature several times in the last forty years.<sup>28</sup> During the public consultation phase and prior to the passage of the new law,

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<sup>26</sup> *Bedford SCC*, *supra* note 6 (Factum of the Intervenors, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Intervening as the Women's Coalition for the Abolition of Prostitution) [*Bedford Factum of the Intervenors*], online: <<http://www.rapereliefshelter.bc.ca/sites/default/files/imce/SCC%20Factum%20of%20Intervner%20Women%27s%20Coalition.pdf>>.

<sup>27</sup> This view point is researched from that perspective. It is clearly articulated in *Bedford Factum of the Intervenors: Ibid.*

<sup>28</sup> Law Reform Commission of Canada, *Report on Sexual Offences*, (Ottawa: Minister of Supply and Services, 1978); Canada, Committee on Sexual Offences against Children and Youth, *Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youth* (Ottawa: Department of Supply and Services: 1984) [*Badgely Report*]; Department of Justice, *Report and Recommendations in Respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities* by Federal-Provincial-Territorial Working Group on Prostitution (Ottawa: 1998) [*Federal-Provincial Working Group Report*] (The Federal-

Justice Minister Peter MacKay pledged that the law would eradicate prostitution in Canada to the greatest extent possible, and protect those most vulnerable in the sex trade.<sup>29</sup> It is indeed the case that criminal offences of violence, murder, human sexual trafficking and exploitation perpetrated against prostitutes occur in Canada at alarming rates.<sup>30</sup>

Opponents of criminalization argue that the recently passed prostitution law is, like its predecessor, unconstitutional because it will endanger sex workers who will be unable to adequately screen clients seeking to avoid arrest.<sup>31</sup> Canadians are divided on the issue of legalized prostitution, as evidenced in the conflicting opinions presented by those with intervenor standing in the *Bedford* case, and in the considerable media reporting since the Supreme Court decision.<sup>32</sup> In the *Bedford* decision, the Supreme Court referenced the term ‘sex workers’ as opposed to the language of ‘prostitute’ frequently, and acknowledged a certain amount of agency of choice in the decisions of the respondents in particular, and some sex workers in general.<sup>33</sup> This view of prostitutes as sex workers is contrary to that

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Provincial-Territorial Working Group on Prostitution was established in 1992 by the justice ministers to study the legislation, policies and practices concerning prostitution); Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) [*The Challenge of Change*].

<sup>29</sup> Minister MacKay has publicly stated this abolitionist intention, which has been widely reported by numerous reputable media sources: “Peter McKay insists new prostitution bill will protect sex workers”, *Canadian Broadcasting Corporation* (9 September 2014), online: < <http://www.cbc.ca/news/politics/peter-mackay-insists-new-prostitution-bill-will-protect-sex-workers-1.2759701>.>. As well, during a small group meeting that I was invited to in London Ontario on August 13<sup>th</sup> 2014, in my role as Chief of Police, Minister MacKay emphatically stated his views on the purpose of the new law and his belief that prostitution is violence against all women.

<sup>30</sup> A Krüsi, K Pacey et al, “Criminalization of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study” (2014) 4:6 *BMJ Open* 1 at 5, online: <http://bmjopen.bmj.com/content/4/6/e005191.full.pdf+html>. [A Krüsi, K Pacey et al]; John Lowman, “Violence and the Outlaw Status of (Street) Prostitution in Canada, (2000) 6:9 *Violence Against Women* 987.

<sup>31</sup> *Bedford SCC Factum of the Intervenors*, *supra* note 26.

<sup>32</sup> A Google search query of the phrase “News articles prostitution law in Canada” returned 1,350,000 hits.

<sup>33</sup> *Supra* note 6 at para 4.

espoused in the newly passed law, which states among the overarching objectives:

“protecting prostitutes, considered to be victims of sexual exploitation”.<sup>34</sup>

The attitudes of Canadians regarding sexual activities and sexual expression are changing, and have been evolving over the last several decades. Case law decisions on pornography and exotic dancers and changing views on homosexuality indicate a shift from a strictly morality-based to a more equality-based approach. A brief historical and doctrinal analysis of the new *Criminal Code* provision in Bill C-36 is necessary to address the question of how criminal law may or may not be better situated to address systemic issues persistent in prostitution. Sex work has been legalized in New Zealand, and other mechanisms of regulation have been in force since 2003. Canada’s new criminalization law has been characterized as consistent with the “Nordic Model” based on Sweden’s law prohibiting the purchase of sexual service. Both of these models of prostitution regulation were argued before the House of Commons and the Senate to assist with their deliberations on Bill C-36, and require further analysis.

Prostitutes facing persecution and prosecution are extremely reluctant to report incidents of violence because they do not trust the police and the justice system.<sup>35</sup> Only recently have police agencies invested resources and combined efforts to address human sexual trafficking, and recognized the plight of marginalized women working in the sex trade. This shift in police focus came after and in part due to public outcry regarding the systemic failure of the police investigation of missing and murdered women in lower mainland BC and Vancouver’s downtown east side. The Missing Women Commission of

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<sup>34</sup> *Technical Paper: Bill C-36*, *supra* note 10.

<sup>35</sup> Marlise Richter et al, “Sex work and the 2010 FIFA World Cup: time for public health imperatives to prevail”, (2010) 6:1 *Globalization and Health* 1 at 2, online: <  
<https://globalizationandhealth.biomedcentral.com/articles/10.1186/1744-8603-6-1>>.

Inquiry (MWCI) was convened in 2010 to investigate this systemic failure.<sup>36</sup> More concerted effort is required to end the violence and exploitation that occurs to prostituted persons and sex workers. Social service agencies and police services must work together to build trust with vulnerable sex workers by working with them to abolish human sexual trafficking. The systemic barriers faced by street involved sex workers<sup>37</sup> and human trafficking survivors must be broken down such that sex work is not a constrained choice, but is a viable option.

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<sup>36</sup> Wally Oppal, *Forsaken: Missing Women Commission of Inquiry Executive Summary*, (Library Archives of Canada, 2012), online: <<http://www.missingwomeninquiry.ca/reports-and-publications/>> [MWCI].

<sup>37</sup> Street involved sex workers in the context of this paper are those individuals who solicit clients predominantly from a public place such as a street or park. The work may be completed in a public place, motor vehicle, apartment or motel.

## CHAPTER 2

### Brief History of Prostitution Law and Enforcement in Canada

In 1972, the law of vagrancy changed, resulting in a so-called gender-neutral offence that read: “Every person who solicits a person in a public place for the purpose of prostitution is guilty...” (*Criminal Code* s.195.1). Enforcement of street solicitation was increased following public pressure to address what was deemed the nuisance of prostitution. Ultimately a new solicitation offence was written to prohibit “communicating in public for the purposes of prostitution” (s. 213(1)(c)).<sup>38</sup> Police enforcement of solicitation law has been predominantly motivated by public complaint. The image of the prostitute as a victim who is destitute, drug addicted, exploited by men and needing protection are co-mingled with that of women disturbing the peace of quiet neighbourhoods, soliciting men for sex and littering family spaces with discarded condoms and used needles.<sup>39</sup>

After the legislative amendments to the communications provisions in 1972, prostitution as a social problem garnered more attention from the media.<sup>40</sup> There has been considerable media attention around the risks associated with sex work, and concern has been raised about nuisance, loitering and litter in locations where the survival sex trade takes place.<sup>41</sup> Moral values regarding sexuality, and at times panic prompted by well-publicized and tragic events such as the missing and murdered women investigation in BC, have impacted police, judicial, and legislative response to prostitution and sex work. Enforcement

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<sup>38</sup>*Criminal Code* 1985, *supra* note 13 ss 210-213.

<sup>39</sup> Deborah Brock, *Making Work, Making Trouble, The Social Regulation of Sexual Labour*, 2d ed (Toronto: University of Toronto Press, 2009).

<sup>40</sup>Canada, Department of Justice, “Identifying Research Gaps in the Prostitution Literature”, (Ottawa: 2015), online: <[http://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/jsp-sjp/rr02\\_9/p1.html#sec1](http://www.justice.gc.ca/eng/rp-pr/cs-j-sjc/jsp-sjp/rr02_9/p1.html#sec1)>.

<sup>41</sup> Survival sex is the term used to describe sex work undertaken because of need and for survival, as opposed to sex work undertaken because of it is chosen.

of solicitation and communication for the purpose of prostitution law has been asymmetrical, with women working in the survival sex trade frequently targeted as a result of public uproar, which is often exacerbated by media reporting.<sup>42</sup>

There has been a plethora of studies conducted into prostitution with many reporting conflicting information regarding the number of women, men and children engaged in sex work, and other demographics including the average age of entry and exit. Some opponents of decriminalization routinely generalize prostitution statistics based on studies and surveys of street based prostitution and survival sex workers.<sup>43</sup> Given the stigma of prostitution, the illegality of the communication provisions, and the nature of human trafficking, it is not surprising that it is very difficult to determine the extent of prostitution and its monetary value in Canada. Despite the difficulty with assessing the relative value of prostitution-related statistics, they will be used periodically in this paper from various sources.

Based on witness testimony before The House of Commons Standing Committee on Justice and Human Rights in 2006, the committee reported that the majority of prostitutes are female (75-80%) many of whom entered prostitution between the ages of 14 and 20, while almost all clients are male.<sup>44</sup> However, other studies, including that of Benoit and Millar, indicate that the average age of entry into prostitution is older, suggesting 18-22 years.<sup>45</sup> Incident crime reporting data gathered by Statistics Canada however does provide a

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<sup>42</sup> Brock, *supra* note 39 at 34.

<sup>43</sup> For examples of such unwarranted generalization, see John Lowman, "Crown Expert-Witness Testimony in *Bedford v. Canada*: Evidence-based Argument or Victim-Paradigm Hyperbole?" in E van der Meulen, E Durisin and V. Love, eds, *Selling Sex: Canadian Academics, Advocates, and Sex Workers in Dialogue* (Vancouver: UBC Press, 2013) 230.

<sup>44</sup> *The Challenge of Change*, *supra* note 28 at 10, 12 (The committee also noted that the age of entry this is a very controversial point and they heard many contradictory accounts).

<sup>45</sup> Cecilia Benoit & Alison Millar, *Dispelling Myths and Understanding Realities— Working Conditions, Health Status, and Exiting Experiences of Sex Workers*, (Victoria: Department of Sociology, University of Victoria, 2001), online:

more statistically accurate analysis of those who have been charged and prosecuted for prostitution related offences.

Targeting prostitutes who have historically been more frequently arrested, charged and incarcerated has been for some officers the perceived sole opportunity to help a street level sex worker exit from prostitution. Most prostitutes, however, would not see it from that perspective given the statistics regarding charges and conviction rates. Based on statistics provided by the Canadian Centre for Justice Statistics in 2003-2004, 68% of women charged with a prostitution related offence were found guilty of communicating for the purpose or prostitution under *Criminal Code* section 213(1)(c), while 70% of charges were stayed or withdrawn for men charged under the same provision.<sup>46</sup> Upon conviction, almost 40% of those women were given prison sentences, while the prison sentence rate for the men was just over 5%, and fewer than 40% of the men were fined.<sup>47</sup> Historically, as exemplified in the above Justice Canada Statistics, inequality represented in the charge and conviction rates of prostitutes compared with the purchasers of sex is representative of the comparative value and stigmatization consigned to women working in the sex trade, and that given to men who use the services of prostitutes. The over representation of the seller of the service - women prostitutes and sex workers - in the court system speaks of the need that exists to view the law concerning prostitution and sex work from a different perspective.

More recently, and in response to public awareness of the victimization of prostitutes, some larger Canadian municipal police services rewrote their policies to target purchasers of sex. Although 'john' stings have been in place in many police services over the last several

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<<http://www.understandingsexwork.com/sites/default/files/uploads/10%2026%202012%20DispMyths%20Benoit%20%26%20Millar.pdf>>; A Krusi, K Pacey et al, *supra* note 30 at 4 (average age 38).

<sup>46</sup> *Ibid* at 52.

<sup>47</sup> *Ibid* at 52-53.

years, enforcement efforts targeting clients have increased significantly. In January 2013, Vancouver police adopted sex work enforcement guidelines that criminalized purchasing sex. Similar policies were adopted in Ottawa in July 2012, and Montreal, where enforcement strategies targeted purchasers of sex, often referred to as johns.<sup>48</sup> In 2011/2012, 66% of all cases involving males accused of a criminal offence resulted in a guilty finding compared to 54% of those involving females. Only 19% of men, however, are found guilty of a –non-violent prostitution related offence compared with 54% of women charged.<sup>49</sup> This change in policy and practice is evidenced in Statistics Canada reporting of completed cases during the 2013/2014 reporting year. The reports from this period are starkly different from those issued ten years earlier. In the more recent report, men were prosecuted in 71% of prostitution related charges, while women were prosecuted in 29% of the prostitution related cases completed in adult criminal court.<sup>50</sup>

The Vancouver Police Department policy articulates the importance of sex worker safety as a greater priority than arrest. The practice of criminalizing clients was the subject of a study undertaken by a group of ten researchers in Vancouver under the direction of Dr. Kate Shannon.<sup>51</sup> Legislation and responding policing strategies that target clients reproduce the harms created by the criminalization of sex work, in particular, risks for violence and abuse.<sup>52</sup> Although targeting clients may shame and act as a deterrent for some, it will not

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<sup>48</sup> Vancouver Police Department, *Sex Work Enforcement Guidelines*, by Kristie McCann et al (Vancouver: January 2013).

<sup>49</sup>Canada, Statistics Canada, “Adult Criminal Court Statistics in Canada, 2011/2012”, Statistics Canada Publications: 85-002 Juristat (2013), online: <<http://www.statcan.gc.ca/pub/85-002-x/2013001/article/11804-eng.pdf>>.

<sup>50</sup>Canada, Statistics Canada, “Adult Criminal Court Statistics in Canada, 2013/2014”, Statistics Canada Publications: 85-002 Juristat (2015), online: <<http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226/tbl/tbl04-eng.htm>>.

<sup>51</sup> A Krüsi, K Pacey et al, *supra* note [30](#).

<sup>52</sup> *Ibid.*

reduce the stigmatization of prostitution faced by sex workers, and will further strain their relationships with the police.

### **Constitutional Challenge to Canada's Prostitution Law**

In 2010, Justice Himel of the Ontario Superior Court of Justice (ONSC) struck down the *Criminal Code* provisions on (1) keeping a common bawdy-house; (2) living on the avails of prostitution; and (3) communicating in public for the purpose of prostitution.<sup>53</sup> Terri Jean Bedford, Amy Lebovitch and Valerie Scott challenged the constitutional validity of Canada's prostitution law. The three women, one active and two former sex workers, challenged the three offences referenced above on the grounds that the sections infringe on their rights under section 7 of the *Charter*.<sup>54</sup> They argued the restrictions on prostitution put the safety and lives of prostitutes and sex workers at risk, by preventing implementation of safety measures that could protect them from violence, such as hiring security guards and drivers, and "screening" potential clients.<sup>55</sup> Justice Himel of the Ontario Superior Court (ONSC) declared that each of the impugned *Criminal Code* provisions violated Section 7 of their *Charter* right to life, liberty and security of the person, and could not be saved by section 1.<sup>56</sup>

The Attorney General appealed the ONSC decision and in 2012, the Ontario Court of Appeal upheld two aspects of Justice Himels' ruling. In the majority decision, the Court of Appeal maintained the prohibition against communicating in public for the purpose of prostitution, agreed in part with the prohibition on living on the avails of prostitution except

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<sup>53</sup> *Criminal Code*, *supra* note 13 s 210-213.

<sup>54</sup> *Charter*, *supra* note 8.

<sup>55</sup> *Supra* note 18 at para 6.

<sup>56</sup> *Ibid.*

in circumstances of exploitation, and disagreed with the prohibition against keeping a common bawdy house.<sup>57</sup> The majority were of the view the prostitution offences criminalized conduct that could reduce the risk associated with an otherwise legal act. However, the Ontario Court of Appeal did not agree with Himel's view that "the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance."<sup>58</sup> Significantly, in considering the harm of prostitution to those who are especially marginalized, Justice MacPherson, dissenting in part, was of the view that the communicating provision had an equally serious and possibly worse effect on the security of the rights of the person.

It is precisely those street prostitutes who are unable to go inside or to work with service providers who are most harmed when screening is forbidden. The communicating provision chokes off self-protection options for prostitutes who are already at enormous risk. The evidence in the record about the violence faced by street prostitutes across Canada is, in a word, overwhelming... Any measure that denies an already vulnerable person the opportunity to protect herself from serious physical violence, including assault, rape and murder, involves a grave infringement of that individual's security of the person.<sup>59</sup>

The Ontario Court of Appeal suspended the declaration of invalidity for twelve months. The matter was appealed to the Supreme Court of Canada (SCC). On December 20, 2013, the Supreme Court in a unanimous decision declared the three challenged sections unconstitutional in that the Criminal provisions infringed the constitutional protection to the right to security of the person. In her judgment in *Bedford*, Chief Justice McLachlin agreed with Justice MacPherson's dissent on the communicating provision and upheld the trial judge's decision, stating: "If screening could have prevented one woman from jumping into

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<sup>57</sup> *Supra* note 12 at para 5-7.

<sup>58</sup> *Ibid* at para 344.

<sup>59</sup> *Ibid* at para 358.

Robert Pickton's car, the severity of the harmful effects is established.”<sup>60</sup> Further, as it relates to both the risk of harm in prostitution and a person's agency, Chief Justice McLachlin acknowledged that some prostitutes freely engage in prostitution while for others their choice is constrained, stating:

First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself “to make enough money to at least feed myself”...As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population. Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money.<sup>61</sup>

In part, the SCC ruled that the legislative regulation of public nuisances within the Criminal Code by way of measures, including those which prohibit public communication, must not jeopardize the “health, safety and lives of prostitutes”.<sup>62</sup> The SCC also suspended the declaration of invalidity for 12 months, giving Parliament one year to rewrite the law concerning prostitution; otherwise decriminalization of most adult prostitution would ensue. After a review of the considerable research on prostitution done over several decades, and public consultations with various stakeholders across the country, the Minister of Justice tabled Bill C-36 *Protection of Communities and Exploited Persons Act*, which after proceeding through the legislature and senate hearings received royal assent in November 2014, and remains current legislation to date.

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<sup>60</sup> *Supra* note 6 at para 158.

<sup>61</sup> *Ibid* at para 86-87.

<sup>62</sup> *Ibid* at para 136.

## **Bill C-36 - Protection of Communities and Exploited Persons Act**

With the enactment of the new *Protection of Communities and Exploited Persons Act* (Bill C-36) and the subsequent amendments to the Criminal Code of Canada, the term ‘prostitution’ was repealed in law. There are several aspects to the new legislation that are very positive and encouraging with respect to addressing the exploitation of prostitutes and abolishing human trafficking. Newly written prostitution related violations are classified as “Commodification of Sexual Activity”. The new offences, which have been relocated in the *Criminal Code* to the section on *Offences Against the Person and Reputation* and deemed “Violent Crime” include: the purchasing of sexual services or communicating for that purpose, receiving a material benefit deriving from the purchase of sexual services, procuring of persons for the purpose of prostitution, and advertising sexual services offered for sale.<sup>63</sup> Other prostitution related offences deemed to be non-violent include communicating to provide sexual services for consideration, and stopping or impeding traffic for the purpose of offering, providing or obtaining sexual services for consideration.<sup>64</sup>

Arguing that it is the demand for sexual services that is at the root of the expanding sex industry, the framers’ legislative intention for Bill- C36 appears to be to eliminate the demand for prostitution. During the Parliamentary debates on Bill C-36, Justice Minister Peter MacKay maintained that the legislation addresses the “root causation” of sex work, by placing criminal liability on those “who drive the demand for the purchasing and commoditization of sexual services” — “the johns [and] the pimps.”<sup>65</sup>

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<sup>63</sup> *Criminal Code*, *supra* note 13 s 286.

<sup>64</sup> *Ibid.*

<sup>65</sup> *House of Commons Debates*, 41st Parl, 2nd Sess, (12 June 2014), vol 147, no 102 at 6723 (Peter MacKay).

Bill C-36 reflects a paradigm shift from the view of prostitution as a nuisance to being a form of sexual exploitation. The new legislation targets “the exploitation that is *inherent* in prostitution and the risks of violence posed to those who engage in it”.<sup>66</sup> One of the legislative objectives is to advance the view that prostitution itself reinforces gender inequality in that it disproportionately and negatively impacts women and girls.<sup>67</sup> The new law contains several significant changes that are reflective of this paradigm shift. The purchase of sexual services, regardless of the gender of the purchaser and where it occurs, is illegal for the first time in Canadian law. Under the former law the offence occurred with the communication for the purpose, rather than the actual attainment of the sexual service for consideration. The new offence states:

Section 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, a range of fines depending on the location and repetition of offending.<sup>68</sup>

The criminalization of the purchase of sexual services, regardless of venue, is controversial, and likely to be the subject of a constitutional challenge on a number of grounds.<sup>69</sup> Selling a sexual service is not an offence unless it occurs in defined locations, predominately related to where children and youth may congregate. Further, the new law criminalizes, also for the first time, advertising the sale of sexual services, targeting the promotion of prostitution, unless by the individual seller in limited circumstance.

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<sup>66</sup> *Bill C-36*, *supra* note 3 preamble.

<sup>67</sup> *Bill C-36 Technical Paper*, *supra* note 10 at 2; Canada, Parliamentary Information and Research Service, ‘Legislative Summary — Bill C-36: An Act to Amend the Criminal Code in Response to the Supreme Court of Canada Decision in Attorney General of Canada v Bedford and to Make Consequential Amendments to Other Acts’ Legislative Summary No 41-2-C36-E (Ottawa: Library of Parliament, 2014).

<sup>68</sup> *Criminal Code 1985*, *supra* note 13 ss 286.1(1)(a).

<sup>69</sup> Chris Bruckert, ‘Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action’ (2015) 30 Canadian Journal of Law & Society 1.

There are several positive aspects of the new legislation that are derived from both the Bedford decision, and this paradigm shift to eliminate exploitation. The law addresses “living off the avails of prostitution” with limitations, but provides the same penalties as the old sections 212(1)(j) and 212(2) with the introduction of a new offence of “receiving a material benefit from the sexual services of another person” in section 286.2 of the Code. The “material benefits” offence allows for several exceptions in some circumstances, predominantly those noted in the *Bedford* decision, where the Court held that section 212(1)(j) was over broad because it encompassed obviously non-exploitive relationships. In short, the exceptions allow for co-tenancy, familial living arrangements with a sex worker, and the employment of assistants such as receptionists, drivers or bodyguards at fair market value. Receiving a material benefit in a commercial enterprise that offers sexual services for consideration constitutes a new offence and is considered to be an aggravating factor that carries a higher penalty.

There are additional amendments to the sentencing provisions of the *Criminal Code* that positively advance the objective of abolishing human trafficking. The law increased the maximum penalty and established minimum penalties of five and four years depending on the infraction committed while trafficking. Unlike the offence of trafficking of minors, trafficking of adults did not previously have a minimum penalty attached. Additionally, under the new law the maximum penalty for the offences of receiving a material benefit from a minor increased from 10 years to 14 years, and a minimum penalty of two years was added.

Also indicative of some of the positive aspects of Bill C-36, the new legislation also includes amendments to the designated prostitution offences that permit DNA sampling upon conviction, or a conditional discharge. The offences now include the following: an

individual convicted of trafficking of a minor shall automatically be subject to DNA sampling; a person convicted of an offence related to the trafficking of adults shall be subject to DNA sampling, unless the person has established that “the impact of such an order on their privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice”; and a person convicted of obtaining, for consideration, the sexual services of an adult may be subject to DNA sampling.<sup>70</sup>

In my role as a police chief, I had the opportunity to meet with Justice Minister Peter MacKay at a small group round table during the consultation phase. In summary, from that meeting, it is clear the stated purpose of the law is to abolish all prostitution to the greatest extent possible. There is no doubt that Minister MacKay was sincere in his intention and views prostitutes as victims; “the bill treats sellers as victims of sexual exploitation, victims who need assistance in leaving prostitution.”<sup>71</sup> In the legislative objective, Minister McKay expands the scope of the negative impact of prostitution on the seller to include everyone.

Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women’s bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society. Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it, regardless of the venue or legal framework in which it takes place both from purchasers of sexual services and from third parties.<sup>72</sup>

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<sup>70</sup> *Criminal Code*, *supra* note 13 ss 487.04-487.05(2).

<sup>71</sup> Statement of then Minister of Justice and Attorney General of Canada Peter McKay at a small group meeting I was invited to participate in at London Ontario, in April, 2014.

<sup>72</sup> Technical Paper Bill C-36, *supra* note 10.

It is problematic that some of the legislative objectives of Bill C-36 are based on conclusions the drafters formed about prostitution and sex workers, which come from research that Justice Himel found problematic when reaching her decision in *Bedford*.<sup>73</sup>

The primary legislative objective of Bill C-36 is to eliminate the demand for sexual service by criminalizing clients.<sup>74</sup> The criminalization of sex workers under Bill C-36 is likely to give rise to human rights violations in and of itself.<sup>75</sup> Adopting a protectionist approach to sex work reinforces harmful stereotypes and raises concern that an already marginalized group will be further stigmatized. A protectionist approach to sex workers increases vulnerability. The new law exacerbates the potential for violence against sex workers. A sex worker's decision to enter, and remain in, prostitution is influenced by a variety of socio-economic factors, such as poverty, youth, lack of education, child sexual abuse and other forms of child abuse, and drug addiction.

The significance of the implementation date for the new law is that December 6, 2014, was the 25<sup>th</sup> anniversary of the Montreal Massacre.<sup>76</sup> Notwithstanding the importance to many of the date of implementation for the new prostitution law, Canadians are divided in their views on the new law. In an Angus Reid survey conducted on June 10, 2014 and published on line, 47% of respondents were opposed to Bill C-36, while only 35% supported

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<sup>73</sup> *Bedford ONSC*, supra note 18.

<sup>74</sup> Bill C-36 Preamble: 'the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution ... which has a disproportionate impact on women and children' (emphasis added): supra note 10; Canada, *House of Commons Debates*, 41st Parl, 2nd Sess, vol 147, no 102 (12 June 2014) at 6730 (Joy Smith): 'Prostitution exploits women [and] escalates gender inequalities by turning women's bodies into a commodity to be bought, sold, rented, and exploited by men'.

<sup>75</sup> Bruckert, supra note 69; Jay Levy and Pye Jakobsson, "Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish Sex Work and on the Lives of Sweden's Sex Workers" (2014) 14 *Criminology & Criminal Justice* 593 at 598.

<sup>76</sup> Dec. 6 1989, a 25 year old male murdered 14 women at Montreal's École Polytechnique. After separating the men from the women and before opening fire on the female engineering students he screamed, "I hate feminists." The Montreal Massacre is a symbol of the outrage of all violence against women.

the Bill and 18% were undecided.<sup>77</sup> There have been several surveys published with slightly different numbers but the results all indicate the mixed views of Canadians who participated in the random surveys. The various polls asked respondents their views on the issue of legalizing or criminalizing prostitution for purchasers and sellers. That Canadians are divided on their views of prostitution regulation is indicative not only of the complexity of the issue, but also the likelihood of future changes to the new law.

Prostitution is a politically charged issue with politicians influenced by their constituents, who as outlined earlier are often influenced by widely reported events. In 1983, Justice Minister Mark MacGuigan formed the Special Committee on Pornography and Prostitution to address, among other concerns, the reported problems of street solicitation. The Fraser Committee comprised of seven representatives conducted public hearings in 22 centres across Canada. In their report released in 1995, the Fraser committee recommended that the prostitution related activities of both customers and sellers be removed from the *Criminal Code*, unless they would contravene another provision of the code or create a definable nuisance. The committee further recommended that any prostitution business that does not contravene the *Criminal Code* should be subject to municipal regulation, with the provincial governments assisting in the development of prostitution establishments.<sup>78</sup> The committee also made recommendations with respect to addressing the nuisance and disturbance that can be created by street solicitation and proposed wording for an offence provision, which recognised a need to balance the competing interests and rights at stake.

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<sup>77</sup> John Lowman, "Hyperbole Exposed: Brief to the Senate Committee on Legal and Constitutional Affairs on the Protection of Communities and Exploited Persons Act", online: <[http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/SM\\_C-36\\_brief\\_John\\_Lowman\\_E.pdf](http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/SM_C-36_brief_John_Lowman_E.pdf)>.

<sup>78</sup> Canada Special Committee on Pornography and Prostitution, *Pornography and Prostitution in Canada: Report of the Special Committee on Prostitution* (Ottawa, Canada: Minister of Supply and Services, 1985) [*The Fraser Committee*].

The committee was established under the Liberal government at the time; however, the report was received after a new Conservative government was elected. The Conservative government disregarded the majority of the Fraser Committee's recommendations relating to prostitution and replaced the solicitation law with the communication provision. The communication provision focused on the public nuisance aspect of prostitution while failing to address the overall concern about the conditions and harm to prostitutes that was highlighted in the report. Prior to passing Bill C-36, the Senate committee considered a vast amount of testimony and research from individuals across the country and internationally.

### **Parliamentary Intent and the New Law to Criminalize Prostitution**

Much of the research that was relied upon by the Department of Justice in its work on the new legislation comes from the work done by those who promote the view that commodification of sexual service prostitution is a form of violence against women and should be abolished.<sup>79</sup> The intent of Canada's new prostitution law suggests a more protectionist approach to prostitutes. It is inarguable that systemic violence occurs in the survival sex trade, and that many women who trade sex have multiple intersections of oppression and marginalization. Many survival sex workers enter prostitution because of pre-existing vulnerabilities. Women who are already marginalized through poverty, family violence, sexual abuse, and racism, are at greater risk.

As articulated by Catherine MacKinnon, a world-renowned expert on violence against women, "Women with no real options in a sex-discriminatory economic setting where they

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<sup>79</sup> The research of each of these academics – Professors Melissa Farley et al; Liz Kelly, Maddy Coy & Rebecca Davenport; Janine Benedet; Niklas Jakobsson and Andreas Kotsadam, Seo-Young Cho, Axel Dreher & Eric Neumayer -- was relied upon and often quoted in the Government of Canada's Technical Paper: *supra* note 10.

have no human rights are pushed into a shortened desperate life of sexual abuse.”<sup>80</sup>

MacKinnon opines that prostitution is not a job just like any other job, but rather the desperate labour of women with no other options but to sell themselves into sexual slavery in an economy where a small number of men profit at the expense of *all* women.<sup>81</sup> This view is predominantly articulated in the position adopted by the Women’s Coalition for the Abolition of Prostitution (Women’s Coalition).<sup>82</sup> The Women’s Coalition proposes that abolition is not only achievable, but also that to accept that prostitution is inevitable is to admit defeat.<sup>83</sup>

Several interveners who testified at the Ontario Superior Court *Bedford* trial also provided testimony or reports during the Bill C-36 deliberations. Prostitution abolitionists argue that decriminalization and/or municipal regulation will not have the same deterrent effect necessary to bring about the change needed to reduce both the physical and psychological harm caused to women who are prostituted.<sup>84</sup> Those who are prostituted,

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<sup>80</sup> Catherine A. MacKinnon, “Trafficking, Prostitution, and Inequality” 46 *Harvard Civil Rights-Civil Liberties Law Review* 271 [MacKinnon].

<sup>81</sup> This position is also argued by Janice Raymond and Shelia Jeffreys. Raymond makes this argument in her book *Not a Choice, Not a Job* (Dulles VA: Potomac Books, 2013). Raymond argues that prostitution is an industry driven by male sexual desire and an increasing demand for access to women’s bodies that has spurred a business where a few men profit at the expense of women with no regard for their wellbeing. Raymond’s view, like MacKinnon’s, is that prostitution is antithetical to women’s equality. In *The Industrial Vagina: The political economy of the global sex trade*, (London: Routledge, 2008), Sheila Jeffreys writes that feminists before the 1980s believed that prostitution is an example of women’s subordination and would cease to exist when women gained equality.

<sup>82</sup> The members of the Women’s Coalition for the Abolition of Prostitution members include the Canadian Association of Sexual Assault Centres, Native Women’s Association of Canada, Canadian Association of Elizabeth Fry Societies, Action Ontarienne contre la Violence Faite aux Femmes, la Concertation des Luttes contre l’Exploitation Sexuelle, Le Regroupement Québécois des Centres d’Aide et de Lutte contre les Agressions à Caractère Sexuel and Vancouver Rape Relief Society: *Bedford SCC Factum of the Intervenors*, *supra* note 26.

<sup>83</sup> Janine Benedet, “For the Sake of Equality: Arguments for Adapting the Nordic Model of Prostitution Law to Canada” (2014), online: <<http://www.rapereliefshelter.bc.ca/learn/resources/sake-equality-arguments-adapting-nordic-model-prostitution-law-canada>>.

<sup>84</sup> *Ibid.*

having little or no choice, will continue to be harmed by those who exploit them.

Extortionist businesses, pimps and brothel owners will continue to profit from prostitutes until the law and those responsible for enforcement hold them accountable. The prostitution abolitionists argue that prostituting women does not make them equal because prostitution consigns women to poverty, psychological and physical trauma, verbal, physical and sexual abuse and high rates of homicide. Most street involved-prostitutes and some individuals working in the sex trade report experiencing many of the harms that Benedet and other researchers name. Benoit and Millar reported in their study, involving interviews of 201 current or recently-exited sex workers, that the majority of respondents reported receiving medical treatment for a physical injury caused by a john. Further, the majority reported "poor mental health, which they linked in part to the stigma and discrimination they faced on a daily basis."<sup>85</sup>

The goal of legislative reform should not be to increase sexual access to women's bodies by creating so-called legitimate businesses in Canada where a few, mostly men, profit from the risky labour and exploitation of many, mostly women. The legislative objective of sex work law should be to advance women's equality by giving them a viable choice to exit prostitution or to choose sex work that is free from exploitation and where the risks associated with it are minimized. The harm caused by anyone to prostituted women and sex workers should be eliminated. In addition to the new legislation, the Canadian Government has pledged an investment of 20 million dollars to support exiting options for individuals to leave prostitution. This is a laudable and necessary strategy to assist those who are in need and want to leave prostitution. According to the numbers represented in the various studies

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<sup>85</sup> *Supra* note 30 at 21.

done, most women would rather not earn a living in the sex trade, and those who are exploited by others especially deserve and need financial aid and the assistance of social programs to leave the trade.

The Women's Coalition, who was given standing as interveners at both the Ontario Court of Appeal and the Supreme Court of Canada, is among a large group of influential supporters who advocated for the new criminal laws targeting those who purchase and profit from the sexual services of prostitutes.<sup>86</sup> The Women's Coalition successfully argued that the focus of the new criminal legislation should be on those who are responsible for the harm caused by prostitution and those who create and profit from the demand.<sup>87</sup> The Women's Coalition and several others, including many other women's advocacy groups and several police chiefs, advocated for legislation that targets johns and pimps combined with federal support for programs that help women exit prostitution. To achieve this goal, proponents advocated for what has become known as the Swedish or 'Nordic Model'.

### **Models for Reform – The Nordic Model**

In 1999, the Swedish Parliament passed an omnibus bill on men's violence against women that situated prostitution and the new law in the context of sex inequality, rather than among crimes against morality, decency, or the public order. Although prostitution had earlier been decriminalized, the Swedish 'Sex Purchase Law' criminalizes the purchase of sexual services, profiting from another's prostitution, and keeping a brothel. The public debate and the three impugned Canadian prostitution laws are largely framed around the

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<sup>86</sup> *House of Commons Debates*, 41st Parl, 2nd Sess, vol 147, no 102 (12 June 2014) at 6730: For example, MP Joy Smith stated that: "Prostitution exploits *women* [and] *escalates gender inequalities* by turning women's bodies into a commodity to be bought, sold, rented, and exploited by men."

<sup>87</sup> *Ibid* at 6723 (Peter MacKay).

same three issues. The Swedish omnibus bill stated “prostitution and violence against women” were “issues . . . related with each other.”<sup>88</sup> Men’s violence against women is not consonant with the aspirations toward a gender equal society”.<sup>89</sup> By targeting those who pay for sex and not the seller, sex workers are not criminalized and incarcerated and have more opportunity to eventually leave prostitution and gain other employment. Notwithstanding the immense value in not criminalizing the seller, all persons in sex work are labelled and treated as victims under this abolitionist model. Therefore, there is no recognition of any agency on the part of a woman who prostitutes herself in the sex trade.

All prostitution under the Swedish law is viewed as sexual exploitation. Philosophically, there is no distinction between sex work occurring among consenting adults and the trafficking of women and children. In her testimony to the Standing Committee on Justice and Human Rights, Gunilla Ekberg, Special Advisor to the Government of Sweden on Issues Regarding Prostitution and Trafficking in Human Beings, stated: “In Sweden, prostitution and trafficking in human beings for sexual purposes are seen as issues that cannot and should not be separate. Both are harmful and intrinsically linked practices.”<sup>90</sup>

The Swedish Law is also premised on the belief that criminalizing the purchaser will reduce the demand for prostitution, believing that without the demand the prostitution industry will fail. By creating harsh penalties for the users and procurers of prostitutes, the demand and supply will decline. Reducing the exploitation of and demand for prostitution are laudable and attainable goals. However, failing to recognise individuals with agency who

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<sup>88</sup> Waltman Max, “Prohibiting Sex Purchasing and Ending Trafficking: the Swedish Prostitution Law” (2011) 33 Michigan Journal of International Law 133.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Challenge of Change, supra* note 28 at 72.

choose sex work, and denying their opportunity to work, is paternalistic. The success of the application of Sweden's law is also controversial.

Other witnesses testifying before the Standing Committee on Justice and Human Rights in 2005 reported prostitution had not decreased but had been pushed further underground with prostitutes placed in a more dangerous situation with increased vulnerability to violent johns and pimps. With fewer safe places to work, and limited time for screening clients, only the more dangerous johns who are not afraid of the law remain and the violence has increased.<sup>91</sup> The Working Group on the Legal Regulation of the Purchase of Sexual Services testified that there is no documented evidence from hospitals or police reports...but there is significant evidence indicating that the "market" for sex work has become tougher and more prone to violence.<sup>92</sup> The testimony before the subcommittee was received in 2005; the Swedish Government has since released a report on the success of the new law.<sup>93</sup>

After reviewing critiques on the evaluation of the success of the Swedish model, it becomes apparent that the actual impact of the Swedish regulation is difficult to ascertain. Ann Jordan critically examined the report '*Prohibition of the purchase of sexual services, An evaluation 1999-2008*', released by the Swedish government in 2010. The Swedish anti-prostitution laws focus on increasing the social stigma against sellers as well as buyers of sex, and are actually intended to increase stigma and discrimination against the sex workers

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<sup>91</sup> *Ibid* at 75.

<sup>92</sup> *Ibid*.

<sup>93</sup> Chancellor of Justice, *Evaluation of the Prohibition of the purchase of sexual services*, by Anna Skarhed, SOU 2010:49 (2010).

who refuse or are unable to “quit” (implying a degree of voluntariness) selling sex.<sup>94</sup> The law has been ineffectual in achieving its intended goal.<sup>95</sup> It has been noted that under the Swedish Act the reduction in the number of clients has had a correlative effect on the client’s negotiating power while the overwhelming need to generate an income greatly reduced the sex worker’s bargaining ability within the transaction.<sup>96</sup>

The Swedish report is flawed not only for its inaccurate statements about the effectiveness of the law, but also for its assumptions about women who work in the sex trade.<sup>97</sup> The review of the criminalization of all prostitution regardless of location and with only the purchaser subject to charge, shows that the law has not achieved the intended purpose.<sup>98</sup>

The Nordic model upon which Bill C-36 is modeled is largely flawed and the studies used to support its effectiveness are explicitly of the anti-prostitution school and in particular the feminist view that prostitution and violence against women are deeply connected to each other, which is predicated on the view that prostitution objectifies and commodifies women and therefore further entrenches gender inequality in a patriarchal society. Although promoted as a made in Canada model, Bill C-36 replicates many of the problems which have

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<sup>94</sup> G Ekberg, “The Swedish law that prohibits the purchase of sexual services: Best practices for prevention of prostitution and trafficking in human beings”, (2004) 10:10 Violence Against Women 1187, online: <<http://dx.doi.org.proxy1.lib.uwo.ca>>.

<sup>95</sup> Ann Jordan, “The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering” (2012) American University Washington College of Law - Center for Human Rights & Humanitarian Law, online: <[http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4\[1\]\\_0.pdf](http://www.nswp.org/sites/nswp.org/files/Issue-Paper-4[1]_0.pdf)> [Jordan].

<sup>96</sup> Phoebe J Galbally, “Playing the Victim: A Critical Analysis of Canada’s Bill C-36 From an International Human Rights Perspective”, (2016) 17:1 Melbourne Journal of International Law 135.

<sup>97</sup> Jordan, *supra* note 94.

<sup>98</sup> *Ibid.*

been shown to occur where similar approaches have already been tried, and the Bill and legislation serves to increase the stigma surrounding sex work and sex workers.

### **The New Zealand Model**

In 2003, the New Zealand government mandated that a study be undertaken to measure the impact of decriminalization five years after the legislature in that country passed the *Prostitution Reform Act*. The government report presents the Prostitution Law Review Committee's review of the operation of the Prostitution Reform Act 2003. The report examines several aspects of the sex industry, including the three predominant locations where legalized sex work takes place, and also explores any change in the health conditions of workers. As well, the authors tracked whether or not the legislative changes had an impact on the number of persons working in the sex trade before and after decriminalization. Consideration was also given in the report to the impact of the intersection of labour and employment law and health and safety law after decriminalization.

The research in the report draws heavily on the work of the Christchurch School of Medicine and Victoria University's Crime and Justice Research Centre. The committee which authored the study reports that, on the whole, the new law in New Zealand has achieved its intended purpose and that the majority of people involved in the sex trade are better off under the PRA than before. The report also noted however, that sex workers are still vulnerable to exploitive working conditions, and recommended that another extensive review be undertaken by 2018.<sup>99</sup>

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<sup>99</sup> New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003*, (Wellington: 2008) at 168.

## Exploring Harm to Prostitutes and Sex Workers

A number of Canadians take the view that prostitution is inherently harmful. For example, on September 9 2014, the Evangelical Fellowship of Canada (EFC) submitted their brief to the Standing Senate Committee on Legal and Constitutional Affairs during the Senate committee hearings on Bill C-36. The EFC count among their Affiliate and Observing members a number of religious organizations including the Presbyterian Church and the Anglican Church of Canada. In their brief and before the Senate Committee the EFC stated:

Prostitution exploits the vulnerable, violates human dignity, is an affront to equality between the sexes and is harmful to the purchased and the purchaser, to communities and to society as a whole. Prostitution is inherently dangerous; it is violence against women and a form of systemic exploitation of many of our society's most vulnerable women, children and men. Prostitution cannot be considered safe or legitimated as a form of work; nor can it be accepted as a solution to poverty and a range of other underlying social issues.<sup>100</sup>

But is this perspective valid?

In the current state of sex work in Canada the harm that is experienced by many sex workers and those who are prostituted is undeniable but it is not inevitable. The horrific violence and abuse that occurs to women, men and transgender individuals working in the sex trade regardless of venue or the amount of choice they have in doing this work is systemic. But it can be addressed and in my view it is not intrinsic to sex work itself. Furthermore, the state is responsible for making sex work safe.

Chief Justice McLachlin in the *Bedford* decision articulated not only the responsibility of the state to protect prostitutes, but also the source of the harms perpetrated against them,

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<sup>100</sup> The Evangelical Fellowship of Canada Centre for Faith and Public Life, "Submission to the Standing Senate Committee on Legal and Constitutional Affairs", Sept 2014, online: <[http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/C-36\\_brief\\_Evangelical\\_Fellowship\\_of\\_Canada\(Julia\\_Beazley\)\\_E.pdf](http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/C-36_brief_Evangelical_Fellowship_of_Canada(Julia_Beazley)_E.pdf)>.

when she wrote that, “it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes.... The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.”<sup>101</sup>

Given the physical harm that occurs to many individuals in prostitution, it is difficult to argue that prostitution is not harmful to those who are involved in it, but is prostitution intrinsically harmful? As stated, advocates for abolition of prostitution argue that sex work is inherently harmful to all women, not just to those individuals who engage in sex work. Opponents of prostitution argue: “prostitution is inherently dangerous; prostitution is male violence against women; women cannot gain equality with men as long as prostitution exists.”<sup>102</sup> The extrinsic harms of prostitution are well documented and the results are tragic, yet the question of whether or not prostitution is in itself inherently harmful requires further exploration.

Evidence tendered in the *Bedford* case at the Ontario Superior Court of Justice on research done on prostitution was conflicting. Several expert witnesses were called by both the respondent and the defendants Bedford et al. Predominantly this research is well informed and its methodology sound, but some of the data collected and analyzed does not

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<sup>101</sup> *Bedford SCC*, *supra* note 6 at para 89.

<sup>102</sup> Melissa Farley et al, “Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder” (2004) 2:3-4 *Journal of Trauma Practice* 33 at 37-8; Melissa Farley, “Bad for the Body, Bad for the Heart: Prostitution Harms Women Even if Legalized or Decriminalized” (2004) 10:10 *Violence Against Women* 1087; Liz Kelly, Maddy Coy & Rebecca Davenport, “Shifting Sands: A Comparison of Prostitution Regimes Across Nine Countries” (2009) *Child & Women Abuse Studies Unit*, London Metropolitan University at 40-3, available online: < [http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/Shifting\\_Sands\\_UK-HOME-Office.pdf](http://www.turnofftheredlight.ie/wp-content/uploads/2011/02/Shifting_Sands_UK-HOME-Office.pdf)>; Janine Benedet, “For the Sake of Equality: Arguments for Adapting the Nordic Model of Prostitution Law to Canada” (2014), online: <http://www.rapereliefshelter.bc.ca/learn/resources/sake-equality-arguments-adapting-nordic-model-prostitution-law-canada> (prepared for the Women’s Coalition for the Abolition of Prostitution); Seo-Young Cho, Axel Dreher & Eric Neumayer, “Does Legalized Prostitution Increase Human Trafficking?” (2013) 41 *World Development* 67; Niklas Jakobsson and Andreas Kotsadam, “Prostitution Laws and Trafficking for Sexual Exploitation” (2010) *University of Gothenburg, Working Papers in Economics*, no. 458 (Revised in 2013).

adequately support its conclusions, and some evidence presented was given less weight. Dr. Farley, who was called to testify in *Bedford*, argued that all sex work is a form of violence against women. Dr. Farley et al summarized the empirical work that she and her fellow researchers completed. They conducted interviews of 854 people currently or recently engaged in prostitution in nine countries (Canada, Colombia, Germany, Mexico, South Africa, Thailand, Turkey, United States and Zambia), with their inquiry focused on current and historical experiences of sexual and physical violence to prostitutes.

The research found that 89% of those interviewed wanted to escape prostitution, but did not have other options for survival, and further that of the 100 women interviewed in Vancouver, 54% entered prostitution before age 18.<sup>103</sup> The research findings of Farley et al contradict the studies conducted by Cecelia Benoit during a similar time frame in a similar geographic location, which may be as a result of the potentially narrow framework used in Farley's self-admittedly "brief" prostitution questionnaire. Farley's review of prostitution regulation in other jurisdictions such as Nevada and New Zealand was helpful; however, the data and testimony to support her conclusion that legalizing or decriminalizing prostitution would increase its harm was problematic for the trial court.

I found the evidence of Dr. Melissa Farley to be problematic. Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions.... For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence.... Dr. Farley stated during cross-examination that some of her opinions on prostitution were formed prior to her research, including "that prostitution is a terrible harm to women, that prostitution is abusive in its very nature, and that prostitution amounts to men paying a woman for the right to rape her".<sup>104</sup>

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<sup>103</sup> Dr. Farley's research in Canada was done on women working as prostitutes in Vancouver's Downtown East Side most of who work in the survival sex trade as street prostitutes. The conclusions that she draws relative to the victimization of prostitutes are from that perspective.

<sup>104</sup> *Bedford* ONSC, *supra* note 18 at para 353-355.

Farley, Benedet, and Jeffreys express concern that there has been a movement, which they term as socialist feminism, to normalize prostitution as sex work. The language of sex work fails to recognize the similarity between experiences of prostitutes and rape victims.<sup>105</sup> The unsafe working conditions of sex workers are exacerbated by the stigma due in part to criminalization, resulting in a lack of protection and difficulty accessing health care. Some researchers have argued that the possibility of being murdered must be taken into account, as prostitution is the only work where that possibility exists.<sup>106</sup> The solved and unsolved homicide statistics of women who have been murdered in Canada are alarming.<sup>107</sup>

There are however, other occupations where workers are murdered or killed while performing their jobs. Policing is one example where the workplace homicide rate is also alarming. Where there is increased risk of work place death and violence there is a corresponding increase in remuneration. Workplace violence has increased significantly, with workplace homicides of employee and employer directed deaths statistically higher.<sup>108</sup> Similarly, opponents of prostitution speak to the post-traumatic stress injury that occurs to prostitutes who suffer violence from johns and pimps.<sup>109</sup> Post-traumatic stress injury is

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<sup>105</sup> Sheila Jeffreys, *The Industrial Vagina: The Political Economy of the Global Sex Trade* (London: Routledge, 2008) at 17.

<sup>106</sup> Sheila Jeffreys, "Beyond 'Agency' and 'Choice' in Theorizing Prostitution" in Dr. Maddy Coy, ed, *Prostitution, Harm and Gender Inequality: Theory Research and Policy* (London: Ashgate, 2012) at 81.

<sup>107</sup> Statistics Canada, Canadian Centre for Justice Statistics, report between 1991 and 1995, 63 known prostitutes were murdered: Statistics Canada, Juristat Canadian Centre for Justice Statistics, 'Street Prostitution in Canada' Catalogue no. 85-002-XPE, V 17 n 12, online: <<http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0029785-002-XIE.pdf>>. Convicted killer Robert Pickton charged with 33 homicides, 22 charges were stayed, but he bragged to an undercover police officers that he had killed 49 prostitutes: MWCI, *supra* note 36.

<sup>108</sup> Homicide is now the third highest work-related cause of death in the United States. The National Institute of Occupational Safety and Health conducted an in-depth study of homicides at work from 1980 to 1989. They found that homicide accounted for 12% of job-related deaths: Center for Disease Control, "Occupational Injury Deaths, United States, 1989-1989 (15 April 1994) *Morbidity and Mortality Weekly Report* (blog), online: <<https://www.cdc.gov/mmwr/preview/mmwrhtml/00026193.htm>>.

<sup>109</sup> Farley, Melissa et al, "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2004) 2:3-4 *Journal of Trauma Practice* 33 at 56-57, online: <<http://www.prostitutionresearch.com/pdf/Prostitutionin9Countries.pdf>> [Farley, Melissa et al].

becoming widely recognized as an occupational hazard in many occupations, especially amongst front line emergency service personnel, and Canada's veterans. Of the greatest significance to these two issues of workplace violence and trauma is that violence prevention methods and awareness training is given to workers in recognized occupations to reduce the risks. Services and compensation are available to those who suffer trauma and violence in 'bona fide' occupations. In the criminalized and stigmatized environment of prostitution there is no support, or compensation for workers. In a decriminalized and properly regulated environment, workplace violence towards sex workers could and should be eliminated and until it is sex workers should be appropriately remunerated for the risks they take to perform the work that they do.

Some abolitionists argue that prostitutes are further harmed psychologically by having to habitually feign pleasure. Some women have reported engaging in this aspect of the work for men's fantasy, or to avoid a confrontation with the client, and that this has had a detrimental effect on them.<sup>110</sup> Megan Tyler advances the argument that it is not just a women's body that is used, as the women cannot separate mind, body and soul, and that women in prostitution dissociate as a method of coping. Empirical research done by Pateman, Finstad and Coy, summarized by Tyler indicate a causal link between the physical acts of prostitution and emotionality and sense of self.<sup>111</sup> Again, the link between what many women experience in sex work and what is reported in the studies does not support the view that the emotional harm experienced is due to acts of sex work. Rather, it is due to the stigma ascribed to prostitution and the degradation that some women experience. Wendy Chapkis'

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<sup>110</sup> Maddy Coy. "This body which is not mine: The notion of the habit body, prostitution and (dis) embodiment" 10:1 (2009): *Feminist Theory* 61.

<sup>111</sup> Megan Tyler, "Theorizing Harm through the Sex of Prostitution", in Maddy Coy, ed, *Prostitution, Harm and Gender Inequality, Theory, Research and Policy* (London: Ashgate, 2012).

research on sex work in the United States and Netherlands suggests that the sex worker is able to "summon and contain emotion within the commercial transaction", to "erect and maintain boundaries that protect the sex worker from abuse, and to develop a professionalism toward the job".<sup>112</sup>

The perceived ills of each of these areas deemed harmful to sex workers cannot be supported by a causal analysis. For those who work in the sex trade, the extrinsic harm caused by exploitative and assaultive men is a sad reality, which should and frankly can be a rarity if properly and consistently addressed. The historical subordination of women in general is further exacerbated in sex work with women predominantly seen as the seller. Unfortunately, the risk of this type of harm is greatly exacerbated by the stigma and repressive laws that surround prostitution. A significant source of harm to prostitutes lies in the way people stigmatize and devalue those who work as prostitutes; virtually any job or activity would correlate with significant harms to its practitioners if society treated them the way prostitutes are typically treated.<sup>113</sup> These harms derive from our subjective attitudes towards prostitution, rather than some objective, essential aspect of the practice of sex in exchange for money or goods.

Women's autonomous sexuality has been denied in a patriarchal culture. The view of women's sexual pleasure has yet to be considered in this conversation. It is a cultural norm that men will freely engage in casual sexual relationships, yet women who have multiple sexual partners have been labelled as sluts. Literature and artistic representations are replete with images of women as sexual beings solely for the purpose of men's sexual pleasure.

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<sup>112</sup> Wendy Chapkis, *Live Sex Acts: Women Performing Erotic Labor* (CITY: Routledge, 1997) cited in *Playing the Victim*, *supra* note 95 at **152**; Sari Kuovo and Zoe Pearson, eds, *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Toronto: Hart, 2011) 121.

<sup>113</sup> Scott Anderson, "Response to Ole Martin", (2014) 40 *J Med Ethics* 82.

While it is clear that women derive pleasure from sex, the recognition of this has been slow and is only now beginning to enjoy more widespread acceptance, and the idea of male strippers for women's viewing is a paradigm shift of relatively recent occurrence. That women would engage the services of a sex worker is repugnant to most.<sup>114</sup> There is a growing recognition and acceptance of women engaging in casual sexual relationships, with casual sex becoming a normative activity among young people. Recent studies among university students have shown that both men and women who engaged in casual sexual relationships reported higher levels of well-being.<sup>115</sup>

Expanding on a view of casual sexual relations advanced by Dr. Ole Moen's, if one accepts the premise that casual sex is not harmful, then does it reasonably flow that the sale and purchase of sex for money is also not harmful?<sup>116</sup> Given the relative anonymity, or at least unfamiliarity, that often occurs in a casual sexual relationship, the exchange of money or goods enhances the argument. Further, given that some women working in the sex trade, albeit predominantly those working indoors, develop long-term business relationships with their clients, the intimate knowledge they have within the partnership can be greater for prostitutes than that which occurs in a casual sexual relationship. Regardless, there remains a gender imbalance with respect to what are acceptable sexual norms although there is a noticeable attitudinal shift towards sexual activity irrespective of gender. The relatively

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<sup>114</sup> Through this research I have YET to find a study on women who employ sex workers to fulfil their own sexual needs and desire.

<sup>115</sup> Casual sex, sexual behavior occurring outside of committed romantic relationships, is a common experience among contemporary youth, reported by up to 80% of college students: Garcia, Reiber, Massey, & Merriwether, "Sexual Hookup Culture: A Review" (2012) 16:2 Review of General Psychology 161 at 163; Anthony D. Ong, "Who Benefits From Casual Sex? The Moderating Role of Sociosexuality", (2014) 5 Social Psychological and Personality Science 883.

<sup>116</sup> This premise advanced by Dr. Ole Moen suggests that it is not.

modern view of sexuality is considerably different from that which previously informed Canadian morality-based legislation.

Despite the extrinsic harm that prostituted persons and many street based sex workers face, there is nothing intrinsically harmful in prostitution. The extrinsic harm caused to prostitutes is well documented, but does not support the argument that prostitution is inherently harmful. Some of the harms derive from our subjective attitudes towards prostitution, rather than some objective, essential aspect of providing sex for money, so they are not inherently harmful. When examining if there is anything inherently harmful in sex work, the causal relationship of the commodification of the body for a sexual service must be separated from the obvious extrinsic factors present and experienced by prostitutes.

As a proponent of decriminalization, one might examine the extrinsic harm of prostitution from this perspective and find a rational argument based on the amount of agency of the sex workers involved. This examination must start from the assumption that the seller in the exchange is a rational agent who freely chooses to advance his or her economic standing by providing a sexual service. Chief Justice McLachlin in the *Bedford* decision accepted the Crown's assertion that the decision that a prostitute makes may well be a "constrained choice". However, when a person engages in sex work because in his or her view there is no better means available, does it necessarily constitute a constrained choice? "Simultaneously, as 'victims,' people engaging in sex work are constructed as passive objects, which cannot exercise active agency".<sup>117</sup>

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<sup>117</sup> Deborah Brock, "Victim, Nuisance, Fallen Woman, Outlaw, Worker?: Making the Identity, *Prostitute*, in Canadian Criminal Law," in Dorothy Chunn and Dany Lacombe, eds, *Law as a Gendering Practice*, (Toronto: Oxford University Press, 2000) 93.

## **Sex as Work, Agency and Choice**

Is prostitution harmful to all women because of the men who use women for their bodies and objectify them for the purpose of self-gratification? This is not necessarily the harm of prostitution; rather it is the patriarchal attitude towards women that is the problem. Furthermore, this attitude takes a paternalistic view of all sex workers as victims. Or is it possible to trouble that notion and suggest that women should be empowered to use their bodies for their own purposes, which could include economic wellbeing? By embracing changing views of morality and attitudes about sex, the harm associated with prostitution and sex work can be eradicated. By eliminating the stigma and abolishing the abuse that has been endemic to prostitution, men and or women who purchase a sexual service can truly value the services that empowered sex workers can provide.

In fact, in an unconstrained market, sex workers, where they are in control of their own sexuality and how they choose to use it, could actually be viewed as valuable. Imagine the possibility of a sexual economy where no one was forced to engage in sex work and there was no stigma around prostitution. In this scenario, those who abused sex workers and anyone who tried to exploit children and vulnerable people through sex work would be arrested, prosecuted and punished in such a way to act as a deterrent for such abhorrent behavior; in this way the harm of sex work could be abolished. I believe that just as the perceived harm to society and stigma in Canada against homosexuality is changing and the laws prohibiting sexual acts between homosexual men have been repealed, so can the law, attitudes, and harms of prostitution change for the better.

When we consider the intrinsic harm caused by sex work, we recognize that it is associated with the value assigned to using the body for sexual purposes during work. We use our hands to provide work of many types. Physical labour of many types is highly

valued, yet the individual who uses his or her hands or another body part to provide a sexual service is deemed to be lesser than a person who uses their hands or their mouth to provide another service, like a chef or food taster, or a surgeon. It is the value assigned to the work itself and the use of the body part and the devaluation of the service provided in prostitution that is causing the extrinsic harm to the person who provides that service. Similarly, it is the politics of sex and the morality assigned to sex and sexuality that have changed and continue to change.

The shifting and contemporary view of sexuality is increasingly reflected in the law. Take, for example, the rapidly changing views on homosexuality. In the still commonly accepted morality in Canadian society many people consider sex work to be “immoral”. But if sex work was not conscripted, and was chosen and valued, then the sex worker would be respected because of his or her ability to provide an appreciated service. While it may be difficult to imagine this shift in perspective, it was also impossible, only fifty years ago in Canada, to envision the legalization of same-sex marriage.

Dr. MacKinnon states: “No one promotes trafficking and sexual exploitation, but there is a growing and disturbing movement of proponents of prostitution as sex work”.<sup>118</sup>

*Criminal Code* offences exist to address trafficking and obvious occurrences of sexual exploitation. Concerns regarding the industrialization of sex work with profits assumed by a few, mostly men, at the expense of sex workers and marginalized prostitutes are real and must also be addressed. However, some women freely choose to enter and remain in prostitution, the actual numbers of which are difficult to measure because they want to remain invisible and not counted for a variety of reasons. Some of those reasons include the

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<sup>118</sup> MacKinnon, *supra* note 80.

criminalization associated to most aspects of the work; others involve the considerable stigmatization of sex workers.

Many prostitutes engage in prostitution for survival, some having left an untenable situation at home, and exchange sex for a bed to sleep in, or turn to having sex for money, but find that for them it is a liberating or lucrative exchange. Many sex workers acknowledge that their participation in sex work was directly informed by poverty, lack of education, immediate economic need, and for some - addiction to substances. Other participants had more labour choices available to them but felt that sex work was a labour option that suited their immediate needs.<sup>119</sup>

Although today women are recognized as sexual beings who freely act on their own sexual desire, Victorian morals regarding women's sexuality shaped the discourse on women and how they should behave for many decades and remnants of these ideas remain. The argument that sex workers have agency in their work is for some a difficult argument to make, especially when the majority of research available on sex workers in Canada has been done on street level prostitutes. The voices of sex workers who freely chose, or choose to remain in, prostitution are missing from the conversation for a variety of reasons. Empirical research on individuals working indoors is especially absent. Collectively, their voices are vital in understanding the challenges that sex workers face in choosing or remaining in sex work.

The choice of some sex workers is predicated on several constraining factors, including drug addictions and oppressive personal relationships. However, despite the constraining factors that precipitated entry into sex work, infantilizing women in sex work

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<sup>119</sup> *Supra* note 39.

by denying them any agency only exacerbates the problems they are working against. Their work and sexuality are viewed as symptomatic of various social or psychological relations located outside their immediate control – they are not actors in their social world, active agency and autonomy is denied them.<sup>120</sup> Failure to recognize their autonomy denies that some individuals choose sex work over other labour options because the conditions of the work better suit their needs. The sex worker as a rational actor may have considered the economic perspective of sex work as compared to some other jobs. Appreciating the distinction between rational choice and free choice holds some potential for understanding a person's involvement in sex work without reducing people to either victims or deviants.<sup>121</sup>

Consideration must be given to the view that some women in sex work see their work as an advancement of their own sexual freedom of expression. Sex trade workers and activists have challenged the view of sex trade work as harmful to women because of its oppressiveness, and have spoken out about the pleasure they get from it. At a conference in Toronto in 1985 entitled 'Challenging Our Images: The Politics of Pornography and Prostitution' one woman stated: "What's so terrible about fucking for a living? I like it; I can live out my fantasies." This statement troubles the notion of women prostitutes as victim; however, her next statement speaks to the judgement and stigmatization that this woman faced when she followed up with: "It's being said that there's something sick if you enjoy this profession".<sup>122</sup> The voices of women who find the act of prostitution liberating and an opportunity for their own sexual expression are missing from the harm dialogue of the

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<sup>120</sup> Deborah Brock, "Victim, Nuisance, Fallen Woman, Outlaw, Worker?: Making the Identity, *Prostitute*, in Canadian Criminal Law," in Dorothy Chunn and Dany Lacombe, eds, *Law as a Gendering Practice*, (Toronto: Oxford University Press, 2000).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

abolitionists. The women who speak out in favour of sex work as pleasurable also recognize that they are labelled as deviant and face greater stigmatization than that of a victim.

Despite a shift in societal norms regarding human sexuality and the increased tolerance of casual sex, there remains a hierarchal norm of appropriate sexual behaviour. Advancing a sex positive perspective recognises that while sex can be a site of danger there is a greater acceptance of sex as a source of pleasure for women.<sup>123</sup> Rubin, quoted in Brock, posits that there is a sexual hierarchy where homosexuality, promiscuity, sex between older women and younger men, and sex for money are most heavily stigmatized.<sup>124</sup> Brock's and Rubin's conclusions also support the deduction that the stigmatization of expressions of human sexuality is the source of the harm, not the activity of paid sex in these circumstances. The social identity of 'victim' can mitigate some of the judgment and perhaps reduce the degree of personal responsibility that sex workers are expected to take on. Recognizing agency and free choice removes the stigma of victimization that many sex workers do not want to be labeled with. Denying the existence of consensual sex work fails to recognise the diverse experiences of women prostitutes.

By way of example, consider how agency can be exercised in a decision to engage in prostitution in the following scenario. Consider the licensed, well-trained, and home-based registered massage therapist who provides a service that involves touching most areas of the body. She builds a trusted clientele, and agrees at some point after building trust with her clients, to provide some customers sexual services for a fee. This agent follows safe practices, and has made a rational individual choice based on an economic need or want.

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<sup>123</sup> *Ibid* at 92.

<sup>124</sup> *Ibid* at 93.

Predominantly the only harm in this exchange may be the stigma of being labelled a prostitute, or any preconceived ideas of self-worth that she may carry because of the stigmatization.

Human traffickers can make upwards of \$1,000 per day from one woman providing contact sexual services.<sup>125</sup> There are few jobs that provide that type of income, but in these circumstances selling sex is not a job, it is a criminal activity where the exploited receive very little. There is a considerable amount of money made by human traffickers that is denied those who do the work. But imagine a Canada where human trafficking was abolished. Given the profit that is available to traffickers and pimps, if the woman who were sexually trafficked were the recipients of the money they earned, it is reasonable to expect that some may wholly choose contact sexual service as a viable occupation.

To date I have not found peer reviewed and published research on women who buy sex from men or other women. There is however a current research study on this topic underway, co-led by Dr. Sarah Kingston of Lancaster University and Dr. Natalie Hammond of Manchester Metropolitan University. According to information on the Lancaster University website, the study to date has involved interviews with 21 escorts who are paid for their sexual services. The researchers are also in the process of gathering information from women who purchase sex. Kingston and Hammond are seeking to “explore motivations, experiences and characteristics of women who book escorts; from whom and where they buy sex, and how physical and sexual safety is negotiated”.<sup>126</sup> Contrary to the abundance of scholarly research on female sex workers, there is comparatively little research

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<sup>125</sup> Royal Canadian Mounted Police (RCMP), Human Trafficking National Coordination Centre, Project SAFEKEEPING- Domestic Human Trafficking for Sexual Exploitation in Canada, (Ottawa: 2014) at 10, online: <[http://publications.gc.ca/collections/collection\\_2014/grc-rcmp/PS64-114-2014-eng.pdf](http://publications.gc.ca/collections/collection_2014/grc-rcmp/PS64-114-2014-eng.pdf)>.

<sup>126</sup>Online: <<http://www.lancaster.ac.uk/news/articles/2015/why-some-women-pay-for-sex/>>.

on adult male prostitution, yet research on prostitution estimates that approximately 20-25% of prostitutes are men.<sup>127</sup> Given the plethora of material espousing the harm to women caused by prostitution, and the scarcity of research on either the sale of sexual service by men and the purchase of sexual service by women, no significant conclusions can be drawn about the sex trade from the perspective of women as consumers.

### **Analogies to Other Harms and the Risks of Sex Work**

The harm and stigma associated with sex work is analogous to that of several other more accepted practices. Consider the prostitution prohibitionist movement of today and the success of the social purity movement, which gathered momentum around the harms of alcohol consumption and achieved alcohol prohibition in some Canadian jurisdictions between 1864 and 1948. On the abolitionist view, prostitution is harmful therefore all adult sex work should be criminalized, just as prohibitionists viewed all alcohol consumption as harmful. But the fact that some individuals become alcoholics, and are violently abusive after overconsumption of alcohol does not support criminalizing all alcohol consumption<sup>128</sup>, and neither does the harm caused to some individuals through prostitution support criminalization of all sex work.

Drawing on another analogy, smoking is inherently harmful. Smoking today carries a certain negative stigma in western society, yet historically smoking was an acceptable practice often enjoyed by those with an elevated social status. It is a well-accepted fact that both smokers and non-smokers may die from the harmful effects of smoking and second hand smoke. The risks to the smoker cannot be mitigated through safer smoking practices

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<sup>127</sup> *Challenge of Change*, *supra* note 28; Farley, Melissa et al, *supra* note 101 at 37-8.

<sup>128</sup> *Deadly Inertia*, *supra* note 9.

yet millions of people continue to smoke. Although now known to be potentially deadly, smoking tobacco is completely legal, regulated and a significant source of revenue for businesses and government. Although governments have started to raise awareness of its harmful effects and address the risks to non-smokers, there is no plan to prohibit smoking.

A third analogy can be drawn to the inherent risk in organ donation, which could be considered analogous to the risk and moral efficacy of selling one's body in prostitution. In Canada, the sale of live organs such as liver, kidneys, lungs and bone marrow is unlawful, but living Canadians are donating organs at an unprecedented rate. Many individuals donate their organs to living relatives in need; while others donate organs to strangers arranged through a third party, and some choose to sell their organs on the black market. Like prostitution, exploitation does occur, and is a source of harm that should be addressed.

There are arguably ethical issues associated with each of the options described, and each option presumes agency of the organ donor. A comparatively recent debate has been raised regarding providing a financial incentive to donors to address a growing shortage of life saving organs. Organ transplant physicians and other medical professions are seeking to bring about a change in the ethical discourse concerning compensation for organs.<sup>129</sup> There is a moral argument that commodifying a living organ devalues its worth. There currently exists an international organ trafficking black market. Similar concerns of abuse and exploitation exist when considering the commodification of body parts as with the commodification of sexual service. Medical professionals and academics who have studied

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<sup>129</sup> Donald Joralemon, "Shifting ethics: debating the incentive question in organ transplantation", (2001) 27 *Journal of Medical Ethics* 30 at 34

black market data suggest regulating organ sales would lead to more humane conditions than outlawing sales.<sup>130</sup>

The final analogy is between the criminalization of adult sex work, and the legal and illegal drug trade. Opponents of prostitution argue that prostitution is a billion dollar industry and that decriminalization in Canada will only increase the profit of the exploiter.<sup>131</sup> In the drug trade, those who reap the greatest profit have the least interaction with police and are rarely the target of costly enforcement efforts. Despite assumptions of excessive drug use by prostitutes, Benoit reported that only 29% of the individuals in their study reported having used illicit drugs<sup>132</sup>, yet survival sex workers and those who are drug dependent are not only the most prone to violence, they are also more likely to have interaction with police.

The illicit sale and use of drugs is a multi-billion dollar industry in Canada. The illicit drug trade in 2003 in Canada was estimated at \$7 to \$18 billion dollars a year; although, due to the nature of the industry estimates are difficult to ascertain because profits vary and are hidden. The economic cost to Canadians, including health care, property crimes committed by users, lost work and enforcement, is estimated at \$5 billion a year.<sup>133</sup> In addition to the use of cocaine and heroin, a significant portion of the sale of illegal drugs comes from the use of lawfully and unlawfully manufactured chemical substances.

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<sup>130</sup> Jennifer Monti, "The Sale of Human Organs Should Be Allowed" in ed, Christine Watkins, *Is Selling Body Parts Ethical?* (Detroit: Greenhaven Press, 2013).

<sup>131</sup> Jeffreys, *supra* note 104.

<sup>132</sup> Benoit & Millar, *supra* note 44 at 21, (The writer is aware of the limitations of applying the results of this study from BC to a national level).

<sup>133</sup>Parliament of Canada, 'Illegal Drugs and Drug Trafficking', (Ottawa: Political and Social Affairs Division, 2003), online: <[www.parl.gc.ca/content/lop/researchpublications/bp435-htm#34](http://www.parl.gc.ca/content/lop/researchpublications/bp435-htm#34)>.

According to Industry Canada, pharmaceutical manufacturer's sales of patented and non-patented drugs in 2012 amounted to 21.6 billion dollars.<sup>134</sup> Large pharmaceutical manufactures realize huge profit from the sale of these drugs. Resale of these otherwise legal drugs is on the rise in the illicit drug trade resulting in increased property crimes, health care costs and deaths from pharmaceutical drug overdoses. Police services at the local, provincial and federal levels expend considerable effort and cost to conduct lengthy criminal investigations aimed at both low level drug dealers and organized crime enterprise.<sup>135</sup> In 2006, the Standing Committee on the Status of Women undertook to address the issue of human trafficking for the purpose of sexual exploitation. In his testimony before the Committee, Sergeant Detective Monchamp of the Montreal Police noted that while there were only eight investigators in the Commercial Sexual Exploitation of Children unit for the Island of Montreal, there were 60 officers assigned to investigate drug related activities.<sup>136</sup> Although with the enactment of the new Human Trafficking legislation there has been greater emphasis on addressing human trafficking in 2016, prior to the *Bedford* decision 90% of prostitution related enforcement was targeted towards 5-20% of the industry.<sup>137</sup> Investigations into human sexual trafficking and the exploitation women and children and of prostituted persons in brothels, strip clubs and massage parlours are also costly and time

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<sup>134</sup> Industry Canada, Pharmaceutical Industry Profile, (Manufacturing and Life Science Branch, 2017), online: <[https://www.ic.gc.ca/eic/site/lsg-pdsv.nsf/eng/h\\_hn01703.html](https://www.ic.gc.ca/eic/site/lsg-pdsv.nsf/eng/h_hn01703.html)>.

<sup>135</sup> Although I cannot speak in detail due to my oath, I can speak broadly regarding my knowledge as a Chief on drug enforcement related governing bodies.

<sup>136</sup> Standing Committee on the Status of Women, *Turning Outrage into Action to address Trafficking for the Purpose of Sexual Exploitation in Canada*, (Ottawa: House of Commons, 2007) at 44, online: <<http://www.parl.gc.ca/content/hoc/Committee/391/FEWO/Reports/RP2738918/feworp12/feworp12-e.pdf>> [*Turning Outrage Into Action*].

<sup>137</sup> Department of Justice Canada, *Statistics on Prostitution-related Offences*, (Criminal Justice Research Unit, Research and Statistics Division, 2005) at 2.

consuming. Significant increases in both human and financial resources are required to facilitate investigations into human trafficking for the purpose of sexual exploitation.

## **The Role of the State in Enforcement**

### **Historical Overview:**

With police enforcement closely linked to public complaint, as evidenced earlier, the majority of state regulation of prostitution has been targeted at street level prostitution. Historically, police response to street level sex workers, many of whom face multiple intersections of marginalization, has been abysmal. Marginalization is closely related to the conditions of endangerment and vulnerability to predation. Overarching social and economic trends contribute to the street level prostitutes' marginalization: retrenchment of social assistance programs, the ongoing effects of colonialism, and the criminal regulation of prostitution and related law enforcement strategies.<sup>138</sup>

Evidence presented in the *Bedford* decision at the Ontario Superior Court suggested that there was a causal link between the risks of street solicitation, predominantly conducted by marginalized individuals, and increased enforcement of the communication provisions of the *Criminal Code*.<sup>139</sup> A large portion of respondents in studies of prostitutes reported that they were robbed, sexually assaulted, assaulted to varying degrees in law, strangled, kidnapped, and assaulted with weapons.<sup>140</sup> Although some prostitutes have a good relationship with individual police officers, most prostitutes and sex workers report difficulty with police officers, resulting in minimal reporting of the offences that have been committed

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<sup>138</sup> *Challenge of Change*, *supra* note 28 at 20.

<sup>139</sup> John Lowman in his affidavit for the trial matter of *Bedford v Canada*, 2010 ONSC, made a direct causal link between the CC provisions and violence against prostitutes, however, on cross-examination he asserted that there was an indirect relationship.

<sup>140</sup> *The Federal-Provincial Working Group Report*, *supra* note 28.

against them. Some witnesses at the subcommittee of the report on the *Challenge of Change* testified to being degraded, humiliated and further stigmatized by police officers, while some alleged that they had been beaten by individual police officers.

I keep hearing these kinds of stories of women who are sex workers in Vancouver who have violent experiences at the hands of police officer. It didn't happen once or twice; it has happened to them regularly, with different police officers at different times.<sup>141</sup>

The view that prostitution is inherently harmful can be a difficult argument to refute in the public aftermath of the Missing Women Commission of Inquiry (MWCI) in British Columbia. Commissioner Chair Wally Oppal *QC* was asked to examine the systemic failure that occurred in the police investigation of missing and murdered women in Vancouver's Downtown East Side (VDES).<sup>142</sup> The plight of so many women working as street prostitutes in the sex trade in the VDES is tragic, and has received considerable media attention after it became apparent that there was a serial sexual predator abducting and murdering prostitutes in British Columbia. The convicted murderer at the centre of the inquiry is deemed responsible for 33 murders, and bragged to an undercover RCMP police officer that he had killed 49 prostitutes.<sup>143</sup>

The inquiry was called to address the failure of the numerous police agencies involved to respond with due diligence to the multiple reports of missing Aboriginal women, let alone to respond with appropriate care and concern. Oppal's report was critical of the criminal regulation of sex workers and the enforcement of the law that was used against them. Oppal expressed concern that the legal regulation of sex work was characterized by a 'profound unevenness in the legal regime, which has become mostly about the control of public

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<sup>141</sup> *Challenge of Change supra* note 28 at 20.

<sup>142</sup> *MWCI, supra* note 36.

<sup>143</sup> *Ibid* at 81-100.

space'.<sup>144</sup> Commissioner Oppal articulated a larger overall disregard for women working in prostitution when he stated in his report:

The failure to take the lives of the women into account in the policing strategies, particularly in failing to recognize the duty to protect an endangered segment of our community....The relationship between police and sex trade workers is generally marked by distrust, so they tend to under-report crimes of violence. There is a clear correlation between law enforcement strategies of displacement and containment of the survival sex trade to under-populated and unsafe areas.<sup>145</sup>

The systemic indifference to the vulnerability of prostitutes and survival sex workers is exacerbated by the enforcement actions of the state. Police services have routinely engaged in both 'john and hooker stings' by using undercover police officers to apprehend offenders. As evidenced in Statistics Canada Reporting, prior to its repeal in December 2014, section 213 of the *Criminal Code* was by far the most commonly used offence involving prostitution. Between 2009 and 2014, 82% of all prostitution offences reported by police were for the communication offence, followed by 8% for procuring, and 4% for keeping a bawdy house.<sup>146 147</sup>

As heard in testimony in 2006 at the subcommittee and reported in the *Challenge of Change*, numerous studies have shown that targeting street solicitation has not had the deterrent effect desired.<sup>148</sup> Why then is the most marginalized group of sex workers the primary target of police enforcement? One explanation for the disproportionate charge rates for the communicating provision is the complaint driven nature of policing. As discussed

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<sup>144</sup> *Ibid* at 100.

<sup>145</sup> Wally Oppal, *Forsaken: Missing Women Commission of Inquiry Vol-1*, (Library Archives of Canada: 2012) at 78-79, online: <http://www.missingwomeninquiry.ca/reports-and-publications/> [MWC].

<sup>146</sup> Cristine Rotenberg "Prostitution offences in Canada: Statistical Trends," Statistics Canada Reporting (2016) online:<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14670-eng.htm>.

<sup>147</sup> Benoit and Millar, Krusi and Pacey et al, and Brock, all report that street based sex work accounts for only a small portion of prostitution related activity. In the 2006 report *The Challenge of Change*: "According to the testimony provided to the Subcommittee and most studies on the subject, street prostitution accounts for just 5-20% of all prostitution activity in the country.": *Supra* note 28 at 5.

<sup>148</sup> *Challenge of Change, ibid* at 62.

earlier, the nuisance aspect of street solicitation, exacerbated by negative media attention, has prompted greater police attention. Less visible aspects of the prostitution industry have not only garnered less attention from the public, but are also more difficult to enforce. Apart from the bawdy-house and communication provisions, there are several applicable sections of the *Criminal Code* that could be applied to address the extrinsic harms that prostitutes and sex workers face.

In addition to the seemingly obvious offences of assault, sexual assault, weapons offences, kidnapping, forcible confinement, attempted murder and murder, several *Criminal Code* offences, which have been upheld on appeal, exist to protect sex workers from violence and exploitation.<sup>149</sup> Offences regarding intimidation include s. 423, and uttering threats s. 264.1. Theft and robbery have both been upheld on appeal in Ontario and British Columbia relative to charges when prostitutes were the victim complainants.<sup>150</sup> In cases where a level of organized crime is involved, such as human trafficking and sexual exploitation, prostitutes are at considerable risk of greater violence or death if they testify. On rare occasions, an individual who has been prostituted has entered into the witness protection program in order to secure a conviction.<sup>151</sup> Prosecuting any of the above offences is predicated on a willingness to build a relationship of trust between the victim and the police, and the Crown prosecution.

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<sup>149</sup> As reported in the *Globe and Mail* newspaper on October 17 2014, Justice Ministry MacKay lauded the success of the not yet passed Bill C-36 following the arrest of a Hamilton man by York Regional Police for Human Trafficking. Raising awareness of the extent of Human Sexual trafficking and early efforts at combating it has been on the police radar since the introduction of legislation to address it. Gaining the trust of victims has been a goal of police enforcement efforts since its inception, and are not as a result of the new prostitution law.

<sup>150</sup> *Challenge of Change*, *supra* note 28 at 113-114.

<sup>151</sup> Entry into the witness protection program is difficult for victims and witnesses who are removed from all associations and contacts. As well the witness protection program is very costly. As a former trained witness protection officer, I have only been involved in one such occurrence involving sexual exploitation.

In the case of *R. v Ng*<sup>152</sup>, the vice unit of the Vancouver Police Department focused exclusively on one case for six months.

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<sup>152</sup> *R. v. Ng*, 2006 BCPC 111, 140 CRR (2d) 224.

## CHAPTER 3

### Moving Forward with the New Law on Sex Work and Human Trafficking

As outlined in the history of prostitution law in Canada (see Chapter 2 above), the law remained predominantly unchanged except as it related to street based sex workers. Prior to December 2014, the actual sale and purchase of a sexual service referred to in the Criminal Code was not unlawful. In private, away from the public gaze, persons of all genders could exchange sex for material benefit with impunity in most circumstances. With prostitution treated as a nuisance, and CC section 213 (1) (c) CC Communication for the Purpose<sup>153</sup> being the most commonly laid and prosecuted prostitution related offence, the exploitation of women and children for sex remained predominantly unchallenged. Following the consciousness raising prompted by the extensive media surrounding the *Bedford* trail and subsequent courts' decisions, coupled with the public disapproval of the police response to the murdered and missing women investigations in British Columbia, police services across the country re-examined the investigative direction of their "vice units".<sup>154</sup>

With the realization that a horrendous number of prostitutes had gone missing and were murdered and that for a long time, little or nothing had been done to investigate the disappearance of so many vulnerable women, police investigations into missing and or murdered street based sex workers have increasingly been scrutinized. The public awareness raised later in the police investigation into the murdered and missing prostitutes in the

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<sup>153</sup> Criminal Code RS, 1985, c C-46, s 213 (1)(c) (repealed).

<sup>154</sup> Due to the limitations and understandable restrictions regarding use of empirical research in this paper, I will frequently reference media reports of police charges and convictions to support statements, as well, where appropriate will I speak to the first-hand knowledge I have as a result of my organisational positions as a police officer.

greater Vancouver area prompted many larger police services to develop a persons at risk program. Following the MWCI and the subsequent release of Oppal's investigative findings, the extent of human trafficking that occurs in Canada has become more apparent. In response, police investigations of human trafficking for a sexual purpose have risen dramatically. Statistics compiled from Stats Canada reporting show that prostitution related charges have declined while human trafficking charges have increased.

By way of example, I have first-hand professional knowledge of a recent investigation regarding two men who were engaged in human sexual trafficking, as well as exploiting several women involved in prostitution and receiving a material benefit from the exploitation of their bodies and labour. Through gaining the trust of two of the trafficked women, police investigators learned that they were being forced into prostitution and had been unable to leave. As a result of their investigation, police were able to proceed with several charges of human trafficking contrary to *CC* section 279.01 trafficking in adults, and receiving a material benefit from trafficking of minors, section 279.02(2). Through the one investigation, police seized proceeds of crime valued at over \$1 million in cash and property. As well, during the investigation over one hundred trafficked or at minimum exploited women and youth were identified. Many of the women who were identified as at risk did not want to co-operate with police, and further they did not want to participate in "exit" opportunities that were offered to them. Several of the women involved in the investigation advised investigators that they were actually quite content to continue working in the sex trade. However, through the investigation several young women were released from the control of the traffickers and entered into exit programs. Across Canada, exit programs for sex workers and victims of human sexual trafficking are becoming more readily available. Social service agencies and women's organization have been assisted in creating exit

programs through grant funding that was made available following the release of the \$20 million from the federal government to support extra programs.<sup>155</sup>

Some examples of outreach to sex workers and sexually exploited persons that were initiated by police services within the last ten years include the following: Street Reach Winnipeg, which started in 2009, provides outreach to youth who are at a high risk of becoming exploited, helps sexually exploited youth escape further exploitation, and identifies perpetrators and places where missing high-risk and sexually exploited youth are being harboured and further exploited.<sup>156</sup> Vancouver Police Department (VPD) SisterWatch was started by VPD in December 2010. According to the VPD web site, the Sister Watch program recognizes “that women in the Downtown Eastside are particularly vulnerable to violence, injury and death and are reluctant to report crimes against themselves or others”.<sup>157</sup> As well, the position of Sex Industry Liaison Officer within the VPD has been developed to increase communication between the VPD and street based sex workers to improve the safety of some of the most vulnerable members of the Vancouver community. In 2013, the VPD first published their *Sex Work Enforcement Guidelines*. The guidelines were published again on December, 15, 2015 in video format on the VPD on line Youtube channel, with a preamble address by Vancouver Police Chief Constable Adam Palmer. The Enforcement Guidelines, which are being adapted into a province wide policy as recommended by the

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<sup>155</sup> Department of Justice, “Measures to Address Prostitution Initiative Call for Proposals- NGOs & Governmental Organizations, online: <<http://www.justice.gc.ca/eng/fund-fina/cj-jp/fund-fond/ngo.html>> (“Recognizing the significant harms that flow from prostitution, the Government of Canada announced new funding over the next five years (2015-2016 to 2019-2020) to complement the recently passed criminal law reforms. Accordingly, these new resources will be available through the Victims Fund to support those exiting prostitution and demonstrate the commitment to meaningfully support those exploited through prostitution”).

<sup>156</sup> Government of Manitoba Web Page, online <<http://www.gov.mb.ca/fs/traciustrust/legislation.html>>.

<sup>157</sup> Project Sister Watch Vancouver Police Department Web Page, online: <<http://vancouver.ca/police/organization/investigation/investigative-services/major-crime/sister-watch.html>>.

MWCI, state that sex work between consenting adults is not an enforcement priority for the Vancouver Police Department.<sup>158</sup> Although the VPD guidelines were written prior to the implementation of the new criminal law of sex work, there was a new release of the VPD guidelines through an online video in December 2015. The online version of the guideline reiterates that despite the law, which now criminalizes the purchaser of sexual services, “‘john stings’ that target men seeking to purchase consensual adult sex are no longer an enforcement priority”.<sup>159</sup> Several Police Services across the country have created special investigations units who prioritise investigations of human trafficking and the exploitation of vulnerable sex workers.

In 2008, York Regional Police Service revamped the priority of their vice unit when Detective Thai Truong took over the lead. With encouragement and agreement from senior command officers, Detective Truong shifted the unit’s focus away from seeking out street level prostitutes under the communications section of the prostitution legislation. It is significant that there was a proactive shift in enforcement to seeking out pimps and traffickers prior to the application brought forward by Bedford et al in 2010.

Based on his experiences as one of the lead detectives in Ontario combating human trafficking for the purpose of sexual exploitation, Detective Truong outlined some of the challenges he anticipated to efforts at enforcing the new criminal law. This is what he said during the debates on Bill C-36 to the Standing Committee on Justice and Human Rights:

I need the legal tool and the legal right to take a young woman away from her pimp and enable a serious conversation with that vulnerable young woman—not arrest her, not charge her or put her in jail. But under Bill **C-36** that's going to be challenging for me to do. Some of the tools are challenging. Pimps will mask

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<sup>158</sup> VPDonline, “VPD Sex Work Enforcement Guidelines”, (December 15, 2015), online: <<https://www.youtube.com/watch?v=-gKafib7TN4>>.

<sup>159</sup> *Ibid.*

themselves as personal bodyguards and continue to exploit women and girls right in front of police officers. I'll explain. Let's say under the old regime she says, "Get away from me, police officer. You're harassing me. I'm doing this on my own volition. Nobody is exploiting me. That bruise you see? I fell." But prior to my coming to talk to her, I may already know that she's a sex worker, that this is how she's operating, and that the individuals around her are exploiting her. She can tell me to get lost, but under the old regime, when that pimp shows up and I form the grounds that he is living on the avails of her prostitution, I can separate her. He can't come up to me and say, "Get lost, police officer. I'm her bodyguard. We're doing everything legal. She's working on her own volition. She doesn't have to talk to you. Get lost."

Once under the control of a pimp, it's nearly impossible for a victim to walk away. Pimps are abusive. They are manipulative. They control with violence, sometimes drugs, and the harshest forms of coercion. They spin a web of lies around their victims, to the point where these girls cease to believe they have anyone to rely on or run to. Families, friends, law enforcement, and all those looking to give a helping hand become an enemy who cannot be trusted or understand their oppression. The psychological trap is complete and inescapable.<sup>160</sup>

One example of a successful program developed by a police service to assist women and girls who are involved in street level sex work is the Persons At Risk Program (PAR) created by the London Police Service (LPS).<sup>161</sup> In 2005 Sergeant Lorna Bruce, a 20 year member of the LPS, was tasked with creating a program that would reach out to at risk women working in street level prostitution in London. Initially, the key focus of the PAR program was for the Sgt. Bruce to connect with and build enough trust among local street involved sex workers. Predominantly the goal was for Sgt. Bruce to build a record of all the women engaged in street level sex work in case they should go missing. By being aware of who is involved in street sex work and paying closer attention, London Police Service

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<sup>160</sup> Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, (Detective Thai Truong, York Regional Police), online: <<http://www.ourcommons.ca/DocumentViewer/en/41-2/JUST/meeting-38/evidence>>.

<sup>161</sup> I was a member of the London Police Service and working as a Detective in the Sexual Assault, Child Abuse, Domestic Abuse, and Elder Abuse Section in 2005 when Sgt. Bruce was assigned to develop this program. Because of my work experience with street based sex workers as victims of crimes and knowledge of and interest in the LPS persons at risk program, I have followed the work of Sgt. Bruce and the development of the program for the past ten years.

officers would know sooner if someone went missing. Additionally, because of the trust that she earned with the women, Sgt. Bruce was able to collect a voluntary DNA sample to have as part of each woman's record in case later identification of human remains was required. This initial tactic was in direct response to the missing and murdered women in British Columbia and the staggering revelations that came out of the investigation of the convicted killer of at least 13 of the women from VDES.

Through conversations with colleagues in both policing and social services, it is apparent that Sgt. Bruce has gained not only the trust but also the respect of the majority of the almost 200 women on average who work in the street level sex trade in London. Building that trust, she has also been able to assist detectives in the more recently created human sexual trafficking unit at the London Police Service. Through working with sex workers in a respectful, non-judgmental manner, The London Police PAR program has become a model for police seeking to assist women to either exit prostitution and or take more control of their lives. As well, Sgt. Bruce was instrumental in bringing together 22 different community agencies in London to address systemic socio economic issues that can lead to human sexual trafficking and exploitation in sex work.

The policy position that VPD clearly articulates in their *Sex Work Enforcement Guidelines* is now a more common view shared among police leaders. As we seek to enforce the new prostitution law, the emphasis must be on building trust with sex workers and prostituted persons and working to keep them safe. I have heard some police leaders advocate for continued enforcement that targets johns seeking to pay for consensual sex. However, for targeting purchasers, Calgary, Saskatoon and Halifax Police Services have all been in the news in the past year with stories about "John Stings". John stings only continue to reproduce the vulnerabilities associated with street level sex work considered in the

Bedford decision. According to one sex worker surveyed in Vancouver, “while they’re going around chasing johns away . . . I have to stay out for longer . . . if we weren’t harassed we would be able to be more choosy as to where we get in, who we get in with.”<sup>162</sup>

Enforcement that continues to target street level sex work without recognizing the immediate impact on sex workers will negatively impact the worker’s ability to negotiate a safe exchange and increase the likelihood of harm.

Many of my police colleagues and I are targeting the human traffickers and expending our investigative resources to address the violence that many sex workers experience and working together on task forces to eradicate the sexual exploitation of women and children.

### **Overview of Human Trafficking Law in Canada**

In November 2005, Canada signed on to the 2003 United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (hereinafter the Protocol), which supplements the United Nations Convention Against

Transnational Organized Crime. Article 3 of the Protocol defines trafficking in persons as:

[t]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services...<sup>163</sup>

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<sup>162</sup> Pivot Legal Society, ‘My Work Should Not Cost Me My Life: The Case against Criminalizing the Purchase of Sex in Canada’ (Discussion Paper, 2014) at 5.

<sup>163</sup> *Turning Outrage into Action*, *supra* note 135 at 3 .

A September 21 2007 study by the Standing Committee on the Status of Women found that 92% of all human trafficking is for the purpose of sexual exploitation.<sup>164</sup>

An amendment to section 279.04 of the *Criminal Code* was assented to in June 2012 to add factors that the court may consider when determining whether an accused exploits another person. The text of this provision is set out below:

**279.01 (1)** Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation, is guilty of an indictable offence and liable

(a) to imprisonment for life and to a minimum punishment of imprisonment for a term of five years if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or

(b) to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of four years in any other case.

(2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

**279.02 (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 279.01(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

**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.

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused

(a) used or threatened to use force or another form of coercion;

(b) used deception; or

(c) abused a position of trust, power or authority.<sup>165</sup>

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<sup>164</sup> *Ibid* at 1.

<sup>165</sup> *Supra* note 13.

The 2006 Committee on the status of women was of the view that Subsection 279.01(2) specifies that one cannot consent to the activities described, which clearly indicates that all persons who have been trafficked are victims, regardless of whether or not they actually consented or thought that they had consented to any of the activities.<sup>166</sup>

### **Challenges with prosecution under the Human Trafficking law**

A 2014 York Regional Police initiative resulted in the arrest of 10 men for human trafficking in relation to the sexual exploitation of a number of women and girls, 40% of whom were under 18 years of age. Although we did not initially have grounds to lay human trafficking charges, we were able to rely upon prostitution-related offences to separate these men from their victims. This gave us the opportunity to gain the trust of the victims, eliciting comprehensive statements to form the basis of human trafficking charges, as well as connecting those victims to support agencies.<sup>167</sup>

In October 2015, police officers from 40 police services across Canada mobilized in a coordinated effort to target human sexual trafficking. Human trafficking investigations are complex and very labour intensive. In coordinating this initiative the RCMP, OPP and FBI came together with large and smaller sized municipal and regional police services to share best practices and information regarding known and suspected traffickers. Human trafficking in Canada is very transient, with traffickers moving exploited women and children across the country, making it very difficult for police to have enough evidence to lay charges. Although an investigation of this magnitude is rare in Canada, joint forces operations are especially

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<sup>166</sup> *Ibid.*

<sup>167</sup> Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 13 (Eric Jolliff Chief of Police York Regional Police Service).

advantageous as information that one service has about victims or suspects may not be sufficient for a warrant. However, through working together and sharing information on a relatively short project dubbed “Operation Northern Spotlight –Phase 4” investigators in Canada were able to assist 20 individuals who were being exploited as minors and/or were working in the sex trade against their will. Additionally, police charged 47 people with 135 offences including trafficking in persons, forcible confinement, child pornography and sexual assault with a weapon.<sup>168</sup>

Between 2009 and 2014, there were 396 victims of police-reported human trafficking. Of that number 206 were reported in 2014. The vast majority of these victims were female (93%). The majority of accused were male (83%).

From 2005/2006 to 2013/2014, there were 53 completed adult criminal court cases involving human trafficking, of which the majority resulted in a finding of proceedings being stayed or withdrawn.<sup>169</sup> However the number of actual victims of human trafficking is believed to be significantly higher. Although it is difficult to determine specifics, the National Task Force on Sex Trafficking of Women and Girls in Canada has conducted a survey of service agencies working in the field of “trafficking” and “sexual exploitation” and the organizations collectively identified 1,929 trafficked women and 943 trafficked girls in 2012.<sup>170</sup> Given that the estimated numbers of human trafficking victims in Canada are

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<sup>168</sup> As the Chief of Police I have loaned a member of our service to both local and broader initiatives to combat humans sexual trafficking and therefore have first-hand knowledge of Operation Northern Spotlight. As well, this particular joint forces operation was widely reported in the media. Below is the link to the project media release in which I was invited to participate: <http://opp.mediaroom.com/2015-10-22-Operation-Northern-Spotlight-Phase-4>.

<sup>169</sup> Maisie Karam, “Trafficking in persons in Canada, 2014”, Statistics Canada Catalogue no. 85-002-X 2016, online: <<http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14641-eng.htm#c1>>.

<sup>170</sup> *Supra* Note 1 at pg. 32

glaringly high in relation to the rate of police reported charges, the statistics exemplify how much more work needs to be done to eradicate human sexual exploitation in this country.

When considering the evidence from studies done in the Netherlands, it is apparent that unless issues of human trafficking are adequately addressed it will be very difficult to enact and enforce regulation that protects sex workers from exploitation. As indicated in the statistics Canada report released on July 21, 2016, human trafficking convictions remain very difficult to secure.<sup>171</sup> In 2016 the Ontario government pledged \$72 million over four years to address ongoing efforts to eradicate human sexual trafficking. Ontario's anti-human trafficking plan includes initiatives for community support for survivors of human trafficking, and enhanced support for investigation and prosecution of human trafficking.<sup>172</sup> Further, on May 18, 2017 the Legislative assembly of Ontario passed the *Anti-Human Trafficking Act, 2017*. This new Ontario law provides a mechanism for trafficked persons to not only apply for restraining orders to protect themselves and their children, but also establishes a tort of human trafficking making it possible for survivors to initiate a civil action against their trafficker.<sup>173</sup> According to the Ontario Government's news release announcing the that the new act had passed "Ontario is a major centre for human trafficking in Canada, accounting for roughly 69 percent of police-reported cases nationally in 2015".<sup>174</sup>

The new Ontario law and Ontario's *Strategy to End Human Trafficking* are all laudable efforts at creating and enforcing laws to protect those who are exploited by sexual

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<sup>171</sup> *Supra* note 169.

<sup>172</sup> Ontario, "Ontario Taking Steps to End Human Trafficking", online: <<https://news.ontario.ca/owd/en/2016/06/ontario-taking-steps-to-end-human-trafficking.html>>.

<sup>173</sup> *Prevention of and Remedies for Human Trafficking Act, 2017*, SO 2017 c 12.

<sup>174</sup> Ontario, "Ontario Passes Legislation to Protect Human Trafficking Survivors, online: <<https://news.ontario.ca/owd/en/2017/05/ontario-passes-legislation-to-protect-human-trafficking-survivors.html>>.

trafficking that will not only assist in ending human trafficking, and support victims and survivors of human trafficking for the purpose of sexual exploitation, but also will eventually allow for a safer occupation and safer working condition for individuals working in the sex trade.

## CHAPTER 4

### Harm Reduction, Decriminalization and Regulation of Sex Work

#### Sex Work as a Human Rights Issue

Bill C-36 constructs the sex worker as wholly a ‘victim’ of men’s exploitation, with abolishment of prostitution and ‘extraction’ from sex work as the panacea, while simultaneously failing to recognize any agency in sex work. The new criminalization law does not take into account the potential to enhance sex workers’ safety, and more generally improve the protection of human rights, from within sex work.<sup>175</sup>

Prior to the new law concerning prostitution taking effect some of those opposed to Bill C-36 have already argued it is unconstitutional.<sup>176</sup> The significant changes to the law concerning prostitution include the lengthy preamble, which clearly outlines the legislative objective, and serves as a beginning for any *Charter* analysis. At each trial level in the *Bedford* decision it was acknowledged that prostitution is not in itself illegal. Also of significance in attempting to defend a constitutional challenge is the legislation’s shift of focus from treating prostitution as a nuisance to the view that all prostitution is sexual exploitation.

The new legislation directly criminalises sex workers who offer or provide sexual services “in a public place, or in any place open to public view ... [including] next to a school ground, playground or daycare centre.”<sup>177</sup> Even the abolitionists whose approach is to focus on the demand side of prostitution are critical of sections of the Bill that criminalize

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<sup>175</sup> *Playing the Victim*, *supra* note 95.

<sup>176</sup> John Lowman, Pivot Legal Society, and Allan Young, lawyers who represented the three defendants in the *Bedford* matter, have all been quoted in several national media sources arguing that the new law will likely be challenged and may not withstand *Charter* scrutiny. See for example, Laura Stone, “Group threatens Liberals with new legal challenge over sex work law,” Global News, October 30, 2015, <http://globalnews.ca/news/2309848/group-threatens-liberals-with-new-legal-challenge-over-sex-work-law/>.

<sup>177</sup> *Criminal Code 1985*, *supra* note 13 s 286.1(1)(i).

the activities of women who are exploited. Gunilla Ekberg, a leading proponent of the Swedish anti-prostitution law, expressed her concern about the communication provision and its abrogation of human rights in her testimony before the Standing Committee on Justice and Human Rights.

Communication for the purpose to provide a sexual service troubles me deeply,... that the government decided, despite plenty of evidence.....as to the multiple detrimental effects of criminal or administrative sanctions on those who are exploited in prostitution. Not only are they discriminatory but they are contrary to the human rights obligations that Canada has signed on to.<sup>178</sup>

Some areas where a constitutional challenge to the law could be advanced were brought forward by Lowman, who believes the law could fail due to the asymmetrical criminalization of purchasers, most of who are men.<sup>179</sup> Given that most prostitutes are women, and the government views prostitution as sexual exploitation, the argument could fail on the basis of equality. The issue of substantive equality was successfully argued in *Andrews v Law Society of British Columbia* when the Supreme Court wrote: “every difference in treatment between individual under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.”<sup>180</sup>

A constitutional challenge could be advanced on the grounds that targeting men continues to pose a serious risk of harm to the safety and security of the person, as advanced and won in the *Bedford* decision.<sup>181</sup> Studies done on the impact on sex workers of targeting

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<sup>178</sup> Evidence to the Standing Committee on Justice and Human Rights, House of Commons, Parliament of Canada, Ottawa, 41st Parl, 2nd sess, 38th mtg, 9 July 2014, 13 (Gunilla Ekberg).

<sup>179</sup> John Lowman, “Tripping Point: Brief to the Standing Committee on Justice and Human Rights on the Protection of Communities and Exploited Persons Act” at 9, online: <[http://184.70.147.70/lowman\\_prostitution/HTML/SCJHR/Tripping\\_Point\\_Lowman\\_Brief\\_to\\_the\\_SCJHR\\_on\\_Bill\\_C36.pdf](http://184.70.147.70/lowman_prostitution/HTML/SCJHR/Tripping_Point_Lowman_Brief_to_the_SCJHR_on_Bill_C36.pdf)>.

<sup>180</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 185.

<sup>181</sup> *Bedford SCC*, *supra* note 6.

clients show that women continue to be at risk of harm when ‘johns’ are targeted.<sup>182</sup> The SCC addressed the effect of the law and the harm to prostitutes in the risks they had to take in order to continue to service clients when declaring the former law unconstitutional.

All three principles—arbitrariness, over breadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law’s effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits.... The question under s. 7 is whether *anyone’s* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.<sup>183</sup>

Change may result from another *Charter* challenge, or legislative amendments introduced by a different Canadian government with dissimilar political views from those who passed the new law.

The realm of sexuality also has its own internal politics. Inequities and modes of oppression....the concrete institutional forms of sexuality at any given time and place are products of human activity. They are imbued with conflicts of interest and political manoeuvring....In that sense sex is always political.<sup>184</sup>

### **Regulating sex work through the power of municipal bylaws**

The Supreme Court in *Bedford* emphasized the legal limitations that could be imposed by declaring that the safety of sex workers was paramount to public nuisance concerns. If the new legislation governing solicitation, bawdyhouses, and material benefit fails to withstand another constitutional challenge and if municipalities are charged with the regulation of sex work, municipal law makers will need to give consideration to the safety implications for sex workers when planning and creating provisions for sex workers in prostitution businesses. For example, a zoning bylaw that restricts all sex-related business to

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<sup>182</sup> A Krüsi & K Pacey et al, *supra* note 30 at 53.

<sup>183</sup> *Supra* note 6 at para 123.

<sup>184</sup> Rubin Gayle, ‘Thinking Sex’, in eds A Habelove, MA Barale, D Halperin, *Lesbian and Gay Studies Reader* (London: Routledge, 1993) 189.

an industrial park with infrequent evening traffic may increase the risk to women in the area, and could create more danger to the physical safety of the workers. Any bylaw that either directly or indirectly puts sex workers at greater risk of violence, or prevents them from pursuing safer working conditions would likely fail due to *Charter* scrutiny.

Elaine Craig, an assistant Professor of Law at Dalhousie University, hypothesises that in order to ensure the constitutional validity of proposed bylaws, municipal lawmakers will need to consider the impact their bylaws have on the safety of sex workers. In reviewing the trial decision at the Ontario Superior Court, Craig writes that the decision in *Bedford* suggests three interrelated principles that municipal lawmakers should consider when formulating bylaws aimed at regulating sex work. These principles she opines, if they were upheld on appeal, would inform the constitutionality of both current and prospective bylaws regulating sex work in Canadian cities.<sup>185</sup> Fundamentally these three principals combined require municipal lawmakers not to only recognise the risk of violence to sex workers, but also constrains law makers from increasing those risks to mitigate public nuisance complaints. Craig's research is predominantly doctrinal; she examines Justice Himel's reasons in the trial judgment *Bedford* with a view to how municipal regulation would apply.

It would appear that attempts at municipal regulation of prostitution and the sale of sex work related activities in strip clubs and massage parlours, have not been proven to be either consistent or effective at reducing the exploitation or harm caused to those performing the acts. Nor has any attempt at regulation or criminalization effectively removed the systemic barriers to equal employment protection faced by sex workers. In view of the court's recognition of the risks to those individuals engaged in sex work, any potential bylaw

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<sup>185</sup> Elaine Craig, "Sex Work By Law: Bedford's Impact on the Municipal Regulation of the Sex Trade" (2011) 16 *Review of Constitutional Studies* 205 at 205.

provision must give consideration to the principles of safety and security of the person as articulated in the Court's decision in *Bedford*.

Given how each of the provinces has differently legislated their powers to municipalities, and in light of the limitations of the scope of this study due to time, the research briefly addresses only Ontario, including *Ontario Municipal Act*, and the *City of Toronto Act*. Municipalities currently regulate aspects of the sex industry including locations where sex related activities take place, such as massage parlours and strip clubs. Municipalities who derive their authority to act from their respective provincial legislation, are charged with the responsibility of ensuring that any bylaw and licensing provision is not *ultra vires* the municipality. Municipal bylaws can address the elimination of circumstances which can lead to crime, but not morality and standards of community tolerance.

There is certainly time now for provinces and municipalities to prepare for regulation of bawdy houses and to engage sensitively trained ethical municipal regulators who will work with local police enforcement official to protect women working in brothels, but investigate criminal offences if they occur.

As it relates to decriminalization and regulating prostitution, the natural person powers of the municipality can allow the municipality to choose to respond with bylaws to regulate or prohibit certain activities in certain locations. If they chose to, individual municipal councils could be responsible for providing for a system of business licensing for sex workers and bawdy houses. Additionally, municipalities could regulate permits and zoning for the sale and location of sexual services and related businesses activities. Municipalities should also consider their role in the public health aspect of sex work. Any municipal bylaws and licensing scheme must be *intra virus* the municipality and is appropriately subject to scrutiny for reasonableness, certainty, and discriminatory use.

## Regulations in Toronto

Prior to the Bedford matter in the Ontario Courts, the City of Toronto passed a motion in support of the decriminalization of adult prostitution (18 years and over). Toronto supported decriminalization by the federal government with regulation by the municipalities. The motion stated that Toronto should draft a licensing and regulatory control plan in preparation for the decriminalization of adult prostitution.<sup>186</sup> If such a plan existed it has not yet been located in this research; however, on October 12, 2012 the City of Toronto released its Staff report for action on Review of Adult Entertainment Parlour Regulations. The report contains several recommendations in response to the issues raised by the adult entertainment industry, and clarifies enforcement interests by updating their bylaw provisions. Toronto staff members were also concerned about the health and safety risks to, and the needs and rights of, the entertainers. The report recommends amending the bylaw to change to the current; "no-touch" and "unobstructed -view" provisions, and the construction standards for private performance areas, and provisions to address working conditions of the entertainers.<sup>187</sup> Specifically the report proposed:

Replace definition 800.50 (5) with the following (5) Adult Entertainment means premises used for entertainment including activities, facilities, performances, exhibitions, viewings or encounters designed to appeal to erotic or sexual appetites or inclinations in which a principal feature or characteristic is the nudity or partial nudity of any person. An adult entertainment is not a body rub service. Insert a new definition in 800.50 (92) regarding Body Rub Service (92) Body Rub Service means premises used for services involving the kneading, manipulating, rubbing, massaging, touching or stimulating by any means of a person's body for the purposes of appealing to erotic or sexual appetites or inclinations. Final Report on

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<sup>186</sup> Canada, Library of Parliament, *Prostitution*, (Ottawa: 2003), online: <<http://publications.gc.ca/Collection-R/LoPBdP/CIR/822-e.htm>>.

<sup>187</sup> City of Toronto, *Staff report for action on Review of Adult Entertainment Parlour Regulations* (2012), online: <<http://www.toronto.ca/legdocs/mmis/2012/ls/bgrd/backgroundfile-50917.pdf>>.

the City-wide Zoning By-law 30 A body rub service is not an adult entertainment, massage therapy, or wellness centre.<sup>188</sup>

545-333. Medical examination of body-rubbers. A. Every person applying for a body-rubber's licence, and every person applying for an owner's or operator's licence who intends to perform or solicit body-rubs or who actually does perform or solicit body-rubs, shall deliver or have delivered to the Medical Officer of Health, prior to his or her licence being issued or renewed, a certificate on a form supplied by the Municipal Licensing and Standards Division, signed by a duly qualified medical practitioner certifying that such person is free from communicable diseases and is medically fit to perform or receive body-rubs, provided that, subject to Subsection C hereof, no such certificate shall be required by the Municipal Licensing and Standards Division pursuant to this section more than once every three years. B. The Medical Officer of Health may make a report, based on the certificate referred to in Subsection A, to the Municipal Licensing and Standards Division. C. Where there are reasonable grounds to believe that, by reason of illness, injury or any other physical or mental impairment, the conduct of any person who performs body-rubs in a body-rub parlour may not be in accordance with this chapter, or may endanger the health or safety of other persons, the Municipal Licensing and Standards Division and the Toronto Licensing Tribunal may require such person to be medically examined by a duly qualified medical practitioner, and such medical practitioner may make a report of such examination to the Municipal Licensing and Standards Division or the Toronto Licensing Tribunal, as the case may be.<sup>189</sup>

This report is helpful as several bylaw provisions and constructs in the adult entertainment industry are analogous to those regulating prostitution.

## **Municipal Regulation of the Sex Trade and Health Issues**

Municipal enforcement officers with a properly and carefully enacted municipal licensing and zoning regulations and inspection opportunities contained within the municipal and provincial legislation, will allow for Health and Safety inspections under the occupational health and safety regulations Act. Sex workers could be included in the Ontario employment standards act and could be provided with access to unions.

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<sup>188</sup> City of Toronto, *Final Report on the City-wide Zoning By-law* (2013), online: <<http://www.toronto.ca/legdocs/mmis/2013/pg/bgrd/backgroundfile-55477.pdf>>.

<sup>189</sup> City of Toronto, *TORONTO MUNICIPAL CODE CHAPTER 545-333, LICENSING*, (December 2015), online: <[http://www.toronto.ca/legdocs/municode/1184\\_545.pdf](http://www.toronto.ca/legdocs/municode/1184_545.pdf)>.

This can assist with providing access to inspectors in Massage parlours to ensure that safety precautions are being used and can ensure that persons who are obtaining the sexual services in those establishments are identified and that if abuses do occur, that they can be acted upon. Licensed sex workers can ensure that condom use is enforced and that sex workers are not obliged to provide sexual services without the use of a condom. In some municipal licensing by-laws for massage attendants, they are required to have to produce medical certificates of health, and the same could be required for sex workers.

When considering municipal licensing and mandatory testing of sex workers for sexually transmitted infections, there are a number of stigmatizing concerns that are raised around this testing. When drafting municipal by-laws, consideration should be given to how discussions of violence or infection in relation to sex work plays an important role in the further stigmatization of sex workers as carriers of disease. Mandatory protection from sexually transmitted infections better addresses the health and safety of both the worker and the client, without further stigmatizing sex workers. If consensual adult sex work is decriminalized, municipal licensing and the application of provincial law becomes not only possible but an expectation.

### **Sex therapy as an occupation**

Currently there are occupational sex therapists who provide sexual services to the elderly and persons with disabilities.<sup>190</sup> A Vancouver businesswoman began a service connecting “intimacy coaches” with persons with disabilities when she founded Sensual

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<sup>190</sup> Damon Mitchell Holzum, *Exploring Attitudes on the Issues of Sex Positive Therapy and Surrogate Partner Therapy Referral and Execution by Licensed Clinical Mental Health Professionals*, (MSW Thesis, California State University, Long Beach, 2015), ProQuest Dissertations Publishing, 1573060.

Solutions in 2011.<sup>191</sup> The purchase and advertising of the sexual services provided to disabled clients was lawful at the time the business began but under the new legislation both the client and the advertiser are subject to criminal prosecution. These services are valued and those who provide sex therapy and their clients have not been subject to charges until recently. But it would not be until the stigmatization of sex workers and those who rely on their services is eliminated that this kind of service can safely be provided to those who need it.

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<sup>191</sup> Emily Lazatin, “Vancouver Service Helps People with Disabilities Have Better Sex Lives” *The Huffington Post BC* (October 30, 2014), online: <[http://www.huffingtonpost.ca/2014/10/30/sex-disabled-peopleescort-vancouver\\_n\\_6077972.html?1414700636&utm\\_hp\\_ref=canada-british-columbia](http://www.huffingtonpost.ca/2014/10/30/sex-disabled-peopleescort-vancouver_n_6077972.html?1414700636&utm_hp_ref=canada-british-columbia)>.

## **Conclusion**

The stigmatization of people who work in the sex trade exacerbates the violence, degradation and exploitation that they experience. Enforcement efforts, public policy and dedication of money and resources to assist those women who want to exit prostitution are all urgent needs that must be made a priority through legislation and regulation that is enforced by police services and government officials. The violence and exploitation that currently exists in prostitution must be abolished. Several issues require immediate address: poverty, racism, sexual violence and intersections of multiple marginalization, the lack of options and support to exit the sex trade, the need to educate police officers on systemic bias toward sex work, and insufficient support for enforcement efforts aimed at sexual exploitation and human trafficking. Individuals involved in human sexual trafficking and sexual exploitation must be prosecuted and incarcerated and all of their profits seized as proceeds of crime to the full extent of the law.

All women deserve to have agency in their choice of work. Those women who choose sex work deserve to have their rights protected under the Constitution of Canada. The new prostitution law does not recognize and treat women as equal, but infantilizes sex workers as victims in need of protection. The views of Canadians on this remain conflicted, as they are regarding other expressions of human sexuality. Just as the laws and actions of society that stigmatized homosexuals in the 80s and resulted in state action such as the bathhouse raids in Toronto continued to be revisited and catalyzed demands for equality and respect in society, so should the laws relative to sex work.

The laws and actions of society should continue to abhor the exploitation of sex workers, not sex work. The law should support the safety and security of persons performing sexual labour, and workers should be freely able to safely conduct their work. It will take

time to assess the impact of the new law concerning prostitution that came into effect on December 6, 2014; however, it is certain that there will be another constitutional challenge. Possibly the Supreme Court will take a similar position as was successfully argued in the *Bedford* decision and prostitution will be decriminalized.

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