

SEX WORK LAW REFORM IN CANADA: CONSIDERING PROBLEMS WITH THE NORDIC MODEL

SANDRA KA HON CHU AND REBECCA GLASS*

The Nordic model is a piece of legislation, passed in Sweden in 1999, which criminalizes the purchase of sex. In Canada, exchanging sex for money is not illegal, but virtually every activity associated with prostitution is. Following the Ontario Court of Appeal's decision in Bedford v. Canada, the question of what type of legislation is most appropriate with respect to prostitution has become even more important. This article begins by evaluating the degree of success (or lack thereof) of the Nordic model. The article then goes on to determine whether legislation similar to the Nordic model would be constitutional if adopted in Canada.

Le modèle nordique est une loi adoptée en Suède en 1999 criminalisant l'achat de services sexuels. Au Canada, il n'est pas illégal d'échanger de l'argent pour des services sexuels, ce qui n'est pas le cas de quasiment toute autre activité associée à la prostitution. En conséquence de la décision de la Cour d'appel de l'Ontario dans l'affaire Bedford c. Canada, la question de savoir quel type de loi conviendrait le mieux relativement à la prostitution prit encore plus d'importance. L'auteur commence par évaluer le degré de succès (ou le manque de succès) du modèle nordique. L'auteur détermine ensuite si une loi semblable au modèle nordique serait constitutionnelle si elle était adoptée au Canada.

TABLE OF CONTENTS

I.	INTRODUCTION	101
II.	BACKGROUND	103
III.	EVALUATIONS OF THE NORDIC MODEL	105
	A. VIOLENCE	106
	B. POLICE ABUSE AND REPRESSION	106
	C. HIV PREVENTION AND HEALTH	107
IV.	CONSTITUTIONALITY OF THE NORDIC MODEL IN CANADA	108
	A. APPLICABILITY OF <i>BEDFORD</i> TO THE NORDIC MODEL	111
	B. WORKING INDOORS	113
	C. WORKING COLLECTIVELY AND PROFITING FROM THE SEXUAL LABOUR OF OTHERS	116
	D. PURCHASING SEX	117
	E. SECTION 1 ANALYSIS	122
V.	CONCLUSION	123

I. INTRODUCTION

Since the passage of the “Nordic model” of sex work in Sweden in 1999, an approach that criminalizes the purchase of sex, there has been increasing debate about the model’s potential application in Canada, where exchanging sex for money is not illegal, but virtually every

* With contributions from Frédérique Chabot, Jenn Clamen, Richard Elliott, Émilie Laliberté, and Kate Shannon. Sandra Ka Hon Chu is a senior policy analyst at the Canadian HIV/AIDS Legal Network. Rebecca Glass is a law student at the Osgoode Hall Law School, York University. This article was made possible in part through funding from a Canadian Institutes of Health Research Team Grant on Gender, Violence and Health (PI: Shannon/Kerr, CIHR 20R68140). We would also like to acknowledge the input of Pye Jakobsson, co-founder of Swedish sex work organization Rose Alliance, who reviewed the accuracy of the description of the Nordic model and its evaluations.

activity required to do this work is.¹ In 2006, the House of Commons Standing Committee on Justice and Human Rights and the Subcommittee on Solicitation Laws, mandated by Parliament to review the prostitution-related provisions of Canada's *Criminal Code* in order to improve sex workers' safety and reduce the exploitation and violence they experience, released a report which included a minority opinion seemingly endorsing the Nordic model.² In 2011, the issue arose during the Ontario Court of Appeal's consideration of *Bedford v. Canada*, a constitutional challenge to prostitution-related provisions of the *Criminal Code*.³ A group of interveners, referring to themselves as the Women's Coalition for the Abolition of Prostitution (consisting of groups who view all prostitution as inherently a form of violence against women), championed what they called a model of "asymmetrical criminalization" as a means of eradicating prostitution.⁴ Soon after, a Member of Parliament suggested she would introduce a private member's bill replicating the Nordic model in Canada in an attempt to "target the market" of people who buy sex, an aspiration that did not eventually materialize.⁵ In light of these developments, numerous opinion pieces were written and panels convened to debate the model's merits, efficacy, and possible adoption in Canada.⁶

In Canada, criminalizing "demand" is not a novel tactic, and both communicating in a public place for the purpose of purchasing sex and profiting from the sexual labour of others are already criminalized. The *Criminal Code* makes it illegal for anyone to live on the avails of prostitution,⁷ outlaws keeping a common bawdy-house,⁸ and criminalizes communicating in public for the purpose of prostitution⁹ — all of which were challenged by Terri Jean Bedford, Amy Lebovitch, and Valerie Scott in the Ontario Superior Court of Justice in the *Bedford* case.¹⁰ In 2010, that Court accepted that these provisions infringe sex workers' rights to liberty, security of the person, and freedom of expression under the *Canadian Charter of Rights and Freedoms*,¹¹ because the law played a contributory role in preventing sex workers from taking steps that could reduce the risk of violence. The Court further found that these infringements on constitutional rights could not be "reasonably and demonstrably justified in a free and democratic society" (under the justification section of the *Charter*, section 1). Therefore, the Court struck down these *Criminal Code* provisions as unconstitutional. In

¹ *Criminal Code*, RSC 1985, c C-46, ss 210-13.

² *Ibid*; House of Commons, Standing Committee on Justice and Human Rights and Subcommittee on Solicitation Laws, *The Challenge Of Change: A Study Of Canada's Criminal Prostitution Laws: Report of the Standing Committee on Justice and Human Rights and the Subcommittee on Solicitation Laws* (December 2006) (Chairs: Art Hanger & John Maloney) at 91 [*The Challenge of Change*].

³ 2012 ONCA 186, 109 OR (3d) 1 [*Bedford Ont CA*]; *Criminal Code*, *supra* note 1.

⁴ *Bedford Ont CA*, *ibid* (Factum of the Intervener Women's Coalition for the Abolition of Prostitution) [Women's Coalition Factum].

⁵ Daphne Bramham, "Backbench MP Joy Smith aims to abolish sex trade," *Vancouver Sun* (6 July 2011), online: canada.com <<http://www.canada.com/vancouvernews/news/westcoastnews/story.html?id=7e40b737-63b8-44fc-8d6e-5e96459e752d>>.

⁶ See e.g. Mark Hasiuk, "Feminist lawyer outlines Swedish prostitution success," *Vancouver Courier* (7 March 2011); Lisa M Kelly & Katrina Pacey, "Why anti-john laws don't work," *Toronto Star* (19 October 2011) online: Toronto Star <http://www.thestar.com/opinion/editorialopinion/2011/10/19/why_antijohn_laws_dont_work.html>; Meghan Murphy, "On Prostitution, Can Canada Learn from the Nordic Model?" *The Tyee* (11 April 2012) online: The Tyee <<http://www.thetyee.ca/News/2012/04/11/Nordic-Prostitution-Laws/>>.

⁷ *Criminal Code*, *supra* note 1, s 212(1)(j).

⁸ *Ibid*, s 210.

⁹ *Ibid*, s 213(1)(c).

¹⁰ *Bedford v Canada*, 2010 ONSC 4264, 102 OR (3d) 321 [*Bedford Ont Sup Ct*].

¹¹ Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

2012, the Ontario Court of Appeal partially upheld this ruling by (1) invalidating the *Criminal Code* provision on bawdy-houses and (2) qualifying the prohibition on living on the avails of prostitution by limiting it to “circumstances of exploitation.”¹² However, the Court of Appeal maintained the prohibition on communicating in a public place for purposes of prostitution. Given that both courts found the criminal law to be harmful to sex workers’ rights to liberty and to security of the person — and unconstitutionally so in several respects — an appeal and a cross-appeal to the Supreme Court of Canada means that at least some elements of the *Criminal Code* currently constructing a web of criminal liability surrounding prostitution may no longer form part of Canadian law. The prospect of such a Supreme Court of Canada ruling, coupled with the growing number of advocates forcefully lobbying for the Nordic model’s implementation in Canada, has the potential to provoke Parliament into passing legislation, like the Nordic model, underpinned by a philosophy of eradicating “demand,” in response to judicial pronouncements about the constitutional limits on the state to criminalizing sex work. As in Canada, the Nordic model criminalizes most indoor sex work as well as promoting and “living on the avails of” sex work. The Nordic model also criminalizes the purchase of sex, and not just any public communication associated with it, which is the case in Canada. Based on the trial and appellate courts’ findings in *Bedford*, this article argues that a model premised on ending the demand for sex work would not withstand constitutional scrutiny in Canada.

II. BACKGROUND

Before 1999, selling sex was not prohibited in Sweden, and off-street work was rarely debated given an “evident lack of data about this sector (and an assumption it included ‘upmarket’ forms of sex work requiring little scrutiny).”¹³ Sex workers were monitored by way of laws on vagrancy or on “antisocial” behaviour.¹⁴ In response to proponents of an anti-sex work feminist position which views all sex work as a form of male violence against women and seeks to eradicate sex work in order to achieve what they deem is “gender equality,” the Swedish government introduced a bill called *Regeringens Proposition 1997/98:55 Kvinnofrid (Women’s Peace)* in 1998.¹⁵ This bill included provisions stipulating harsher penalties for sexual harassment, sexual violence, and domestic violence, as well as a law *Prohibiting the Purchase of Sexual Services (Sex Purchase Act)*, which came into force

¹² *Bedford* Ont CA, *supra* note 3 at para 6.

¹³ Phil Hubbard, Roger Matthews & Jane Scoular, “Regulating Sex Work in the EU: Prostitute Women and the New Spaces of Exclusion” (2008) 15:2 *Gender, Place and Culture* 137 at 143.

¹⁴ Yvonne Svanström, “Prostitution as Vagrancy: Sweden 1923-1964” (2006) 7 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 142 at 154.

¹⁵ See also Arthur Gould, “The Criminalisation of Buying Sex: the Politics of Prostitution in Sweden” (2001) 30:3 *Journal of Social Policy* 437; Jane Scoular, “Criminalising ‘Punters’: Evaluating the Swedish Position on Prostitution” (2004) 26:2 *J Soc Welfare & Fam L* 195; Norway, Working Group on the Legal Regulation of the Purchase of Sexual Services, *Purchasing Sexual Services in Sweden and the Netherlands: Legal Regulation and Experiences, Abbreviated English Version* (Oslo: Ministry of Justice and the Police, 2004) [*Purchasing Sexual Services*]. As noted by the Swedish government, “In Sweden, prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children and constitutes a significant social problem, which is harmful not only to the individual prostituted woman or child, but also to society at large.... [G]ender equality will remain unattainable as long as men buy, sell and exploit women and children by prostituting them” (Regeringskansliet, *Fact Sheet: Prostitution and Trafficking in Women* (Stockholm: Ministry of Industry, Employment and Communications, 2004) [*Prostitution and Trafficking in Women*]).

on 1 January 1999.¹⁶ This legislation — which was passed without any consultation with sex workers — criminalizes those who purchase sex (that is, anyone who obtains or attempts to obtain a “casual sexual relation” in exchange for payment).¹⁷ Punishment for this offence ranges from a fine to imprisonment for up to one year under the *Penal Code of Sweden*.¹⁸ Within this framework, all men who purchase sex are deemed to be aggressors and all women in sex work are deemed to be victims of male violence and patriarchal oppression, a framing that conflates sex work with trafficking, pathologizes male clients,¹⁹ and renders male and trans workers largely invisible. Since the passage of this legislation in Sweden, similar legislation has been enacted in Iceland and Norway and is being considered elsewhere, including France, the United Kingdom, and Scotland.²⁰

Other Swedish laws also affect the practice of sex work in the country. Sweden’s *Penal Code* criminalizes those who “promote” or “improperly financially exploit” sex work by sentencing those individuals to imprisonment for up to four years (or up to eight years if the crime is “gross,” involving large-scale exploitation).²¹ This law also criminalizes those who “promote” sex work by permitting individuals to use premises for sex work; this effectively criminalizes working indoors (unless the sex worker owns the space from which she or he works) and working with others.²² As a result of this law, most sex workers who work indoors continue to be criminalized, and they are unable to work or live with others, including their partners, since it is illegal to share in any income derived from sex work.²³ Sex workers are also forced to lie in order to rent premises or are pressured to pay exorbitant rent because of the risk of criminal prosecution.²⁴ More broadly, sex workers are unable to access social security benefits that are available to all other workers in legal labour activities.²⁵

¹⁶ *Act Prohibiting the Purchase of Sexual Services*, SFS 1998:408; Gunilla 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.

¹⁷ *Penal Code*, SFS 1962:700 *Brottsbalk* at Ch 6, s 11 [*Penal Code* 1962].

¹⁸ (Law 1998:393) [*Penal Code*]; *Legislation on the Purchase of Sexual Services* (Stockholm: Ministry of Education and Research, 2009), online: Regeringskansliet Government Offices of Sweden <<http://www.government.se/sb/d/4096/a/119861>> [*Legislation on the Purchase of Sexual Services*]. This page notes that on 1 July 2011, “the maximum penalty for purchasing sexual services was raised from imprisonment for six months to imprisonment for one year. The purpose of this is to create scope for a more nuanced assessment of penalties in serious cases of purchases of sexual services.”

¹⁹ Don Kulick, “Four Hundred Thousand Swedish Perverts” (2005) 11:2 *GLQ: A Journal of Lesbian and Gay Studies* 205.

²⁰ Ann Jordan, “The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering” (Washington: American University Washington College of Law, 2012) at 2. Daniela Danna, “Client-Only Criminalization in the City of Stockholm: A Local Research on the Application of the ‘Swedish Model’ of Prostitution Policy” (2012) 9:1 *Sexuality Research and Social Policy* 80 and *Proposed Criminalisation of the Purchase of Sex (Scotland) Bill (2)*, online: The Scottish Parliament <<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/54314.aspx>>.

²¹ *Supra* note 17, s 12.

²² *Ibid.*, s 8.

²³ Susanne Dodillet & Petra Östergren, “The Swedish Sex Purchase Act: Claimed Success and Documented Effects” (Paper delivered at the International Workshop on Decriminalizing Prostitution and Beyond: Practical Experiences and Challenges, The Hague, 3-4 March 2011), online: Göteborgs Universitet <http://www.plri.org/sites/plri.org/files/Impact%20of%20Swedish%20law_0.pdf>.

²⁴ Petra Östergren, “Sexworkers Critique of Swedish Prostitution Policy,” online: Petra Östergren <http://www.petraostergren.com/pages.aspx?r_id=40716>.

²⁵ Jordan, *supra* note 20 at 5.

III. EVALUATIONS OF THE NORDIC MODEL

In the more than ten years since its inception, there has been little in the way of English-language publications describing evaluations of the Nordic model in Sweden and elsewhere. In order to assess the available evidence, a literature review was conducted, covering English-language government reports published by the Swedish government since the passage of the model,²⁶ publications of organizations that have reviewed the Nordic model,²⁷ scholarly journal databases (surveyed through the use of electronic journal portals), blogs, and other web publications.²⁸

Of the material that was accessible, the majority indicate that in Sweden, while “visible” prostitution (that is, sex workers working on the street) appears to have declined,²⁹ sex workers have merely moved indoors, online, and to neighbouring countries.³⁰ As a result of the law, Swedish social workers have reported that some women who were selling sex on the streets have moved to work in illegal brothels or work alone in indoor locations, activities that may subject them to criminalization.³¹ The law has also been rarely enforced because of the “low penal value of this type of offence.”³² Some evaluations also criticize the approach for reinforcing violence against — and police abuse and repression of — sex workers, and for undermining sex workers’ access to HIV prevention initiatives and HIV-related care, treatment, and support, which is explored further below.

²⁶ Some of the English-language Swedish government publications that were identified were limited in scope, as complete reports were not translated and only summaries or selected extracts were available. These include: Regeringskansliet, *Förbud mot köp av sexuella tjänster Tillämpningen av lagen under första året BRÅ-rapport* (Stockholm: National Council for Crime Prevention, 2000); Regeringskansliet, *Prostitution in Sweden 2003: Knowledge, Beliefs & Attitudes of Key Informants* (Stockholm: National Board of Health and Welfare, Individual and Family Unit, October 2004) [*Prostitution in Sweden 2003*]; Sweden, *Fact Sheet: Prostitution and trafficking in women* (Stockholm: Ministry of Industry, Employment and Communications, 2004), online: Government of Sweden <http://www.myweb.dal.ca/mgoodyea/Documents/Sweden/prostitution_fact_sheet_sweden_2004.pdf>; Regeringskansliet, *Prostitution in Sweden 2007* (Stockholm: National Board of Health and Welfare, Individual & Family Unit, 2008); Regeringskansliet, *Against Prostitution and Human Trafficking for Sexual Purposes* (Stockholm: Ministry of Integration and Gender Equality, 2009); Regeringskansliet, *Global AIDS Response Progress Reporting 2012* (Stockholm: Swedish Institute for Communicable Disease Control, 2012); *Prostitution and Trafficking in Women*, *supra* note 15.

²⁷ Anna Skarhed, *Selected Extracts of the Swedish Government Report SOU 2010:49: “The Ban against the Purchase of Sexual Services. An evaluation 1999-2008”* (Stockholm: Swedish Institute, 2010).

²⁸ Specifically, Scholars Portal (a multi-disciplinary academic journal portal), JSTOR and health sciences journals (such as the *Journal of Acquired Immune Deficiency Syndromes*) were searched with multiple terms that are used to describe the Swedish model of sex work: “end demand” model, “asymmetric” model, and “client criminalization” model.

²⁹ Skarhed, *supra* note 27 at 9.

³⁰ See e.g. *Purchasing Sexual Services*, *supra* note 15; Jay Levy, “Impacts of the Swedish Criminalisation of the Purchase of Sex on Sex Workers” (Paper delivered at the British Society of Criminology Annual Conference, Northumbria University, 4 July 2011), at 14 online: Cybersolidaires <<http://www.cybersolidaires.typepad.com/files/jaylevy-impacts-of-swedish-criminalisation-on-sexworkers.pdf>>; Jordan, *supra* note 20 at 7 (referring to research by Elizabeth Bernstein, *Temporarily Yours: Intimacy, Authenticity, and the Commerce of Sex* (Chicago: University of Chicago Press, 2007)); Jane Scoular, “What’s Law Got To Do With it? How and Why Law Matters in the Regulation of Sex Work” (2010) 37:1 *JL & Soc’y* 12 at 19; Svanström, *supra* note 14 at 147.

³¹ Scoular, *ibid* at 19.

³² Dodillet & Östergren, *supra* note 23 at 10; Östergren, *supra* note 24; *Purchasing Sexual Services*, *supra* note 15.

A. VIOLENCE

Since the passage of the law prohibiting the purchase of sexual services in Sweden, sex workers who work on the street have reported increased risks and experiences of violence, in part because regular clients have avoided them for fear of police harassment and arrest, turning instead to the internet and indoor venues for sex.³³ Sex workers have reported fewer clients on strolls, and those that remain are more likely to be drunk, violent, and to request unprotected sex.³⁴ The phenomenon of increasing violence against sex workers following anti-client measures has also been noted in other jurisdictions.³⁵ In Sweden, the decline in client numbers on strolls has also meant greater competition for clients and lower prices, a situation that has eroded sex workers' bargaining power and placed pressure on them to see more clients and provide their services without demanding safer sex.³⁶

When clients fear arrest for purchasing sex, negotiations must be done rapidly and often in more secluded locales. As Susanne Dodillet and Petra Östergren explain, "when clients are more stressed and frightened of being exposed, it is also more difficult for the seller to assess whether the client might be dangerous."³⁷ Sex workers who work on the street report having to work in more isolated areas and rush transactions, leading to greater risk-taking in client selection and making it more difficult for sex workers to alert others if they are in danger and to extricate themselves from dangerous situations.³⁸ Moreover, since police surveillance has driven sex workers to more isolated locations, informal support networks among sex workers have weakened, and it has become more difficult to warn other sex workers about abusive or violent aggressors posing as clients.³⁹ Several reports also indicate that clients who would have previously helped to report violence, coercion or other abuse towards a sex worker are now much more reluctant to go to the police for fear of their own arrest.⁴⁰

B. POLICE ABUSE AND REPRESSION

In Sweden, the Nordic model has had a negative impact on both street and indoor sex workers. Sex workers who work on the street have reported aggressive policing, police harassment, police persecution, and overall mistrust of police.⁴¹ Dodillet and Östergren note that "[i]nstead of police being a source of protection, sex workers feel hunted by them, and

³³ See e.g. Skarhed, *supra* note 27 at 10; Daniela Danna, "Client-Only Criminalization in the City of Stockholm: A Local Research on the Application of the 'Swedish Model' of Prostitution Policy" (2012) 9:1 *Sexuality Research and Social Policy* 80.

³⁴ *Purchasing Sexual Services*, *supra* note 15 at 12; *Prostitution in Sweden 2003*, *supra* note 26 at 9, 32; Global Network of Sex Work Projects, *Briefing Paper #02: The Criminalisation of Clients* (2011), online: Global Network of Sex Work Projects <<http://www.nswp.org/sites/nswp.org/files/Criminalisation%20of%20Clients-c.pdf>> [*Briefing Paper*].

³⁵ *Briefing Paper*, *ibid* at 5.

³⁶ *Ibid*; *Purchasing Sexual Services*, *supra* note 15 at 13, 19; Svanström, *supra* note 14 at 147; Dodillet & Östergren, *supra* note 23 at 22.

³⁷ Dodillet & Östergren, *ibid*.

³⁸ *Purchasing Sexual Services in Sweden and in the Netherlands*, *supra* note 15 at 19; Svanström, *supra* note 14 at 147 (citing Anders Nord & Tomas Rosenberg, *Rapport: Lag (1998:408) om förbud mot köp av sexuella tjänster. Metodutveckling avseende åtgärder mot prostitution* (Malmö: Polismyndigheten i Skåne, 2001)).

³⁹ Östergren, *supra* note 24; *Briefing Paper*, *supra* note 34 at 5.

⁴⁰ See e.g. *Briefing Paper*, *ibid* at 5; Östergren, *ibid*.

⁴¹ Östergren, *ibid*; Dodillet & Östergren, *supra* note 23; Levy, *supra* note 30 at 11.

are subjected to invasive searches and questioning.”⁴² This is particularly so when sex workers have been found with their clients, and police have confiscated belongings that they think they can use as evidence against clients, providing sex workers with a strong incentive to avoid using condoms.⁴³

Jay Levy has also found that the law has been used to destabilize sex work in indoor locations. Sex workers have described being banned from hotels and other venues where they work as a result of police speaking with venue management about sex work on the premises.⁴⁴ Aggressive police surveillance in Swedish cities has included the use of video cameras to capture clients and sex workers on film for use as evidence in criminal proceedings.⁴⁵ Furthermore, patrolling has resulted in the disbanding of informal sex worker networks and driven sex workers alone into more isolated areas in order to work.⁴⁶ Verbal and physical assaults of sex workers by the police have also been reported, and in some instances formal complaints have been lodged and disciplinary proceedings taken.⁴⁷ Although sex workers are technically allowed to sell sex, because the law criminalizes the purchaser of those services the transaction remains *de facto* illegal. Hence, the Nordic model has provided leverage to law enforcement to subject sex workers to constant surveillance.

C. HIV PREVENTION AND HEALTH

Criminalizing clients has been noted to increase risks to sex workers’ health in a variety of ways. Lessened ability to properly negotiate with and screen clients as a result of clients’ fear of arrest diminishes the power of sex workers to demand safer sex. Fewer clients on the street, and greater competition for those clients, have also driven down the price of sexual services. This has led to reports of an increase in unprotected sexual services for higher prices,⁴⁸ which is compounded by the fact that police search for condoms as evidence of prostitution, so sex workers are less likely to carry them.⁴⁹

Correspondingly, sex workers report an increase in stigma from service providers (including social workers and healthcare providers), anti-prostitution activists, and the general population.⁵⁰ Sex workers frequently face difficulties accessing and maintaining housing as a result of anti-prostitution stigma, a fact that the Swedish government has acknowledged.⁵¹ This has had negative consequences for sex workers’ health, as increased mobility and the displacement of sex workers to hidden venues impede their access to health and other services. Dodillet and Östergren, citing a study carried out by the Swedish Federation for Lesbian, Gay, Bisexual and Transgender Rights (RFSL), also explain that “sex workers with whom the RFSL has been in contact have reported that stigma prevents them

⁴² Dodillet & Östergren, *ibid* at 23.

⁴³ Don Kulick, “Sex in the new Europe: The Criminalization of Clients and Swedish Fear of Penetration” (2003) 3:2 *Anthropological Theory* 199 at 203.

⁴⁴ Levy, *supra* note 30 at 12.

⁴⁵ *Briefing Paper*, *supra* note 34 at 4.

⁴⁶ Östergren, *supra* note 24; Svanström, *supra* note 14 at 147.

⁴⁷ Levy, *supra* note 30 at 12.

⁴⁸ *Prostitution in Sweden 2003*, *supra* note 26 at 32-33; *Purchasing Sexual Services*, *supra* note 15 at 19.

⁴⁹ See *The Challenge Of Change*, *supra* note 2 at ch 6.

⁵⁰ Danna, *supra* note 33.

⁵¹ The Swedish government has characterized this as a positive development, demonstrating the effective normative function of the law to eliminate tolerance for sex work and to gradually eradicate it entirely. See *Legislation on the Purchase of Sexual Services*, *supra* note 18.

talking about their prostitution experiences when testing for HIV/STI. To strengthen the stigma will lessen the chances to reach people who sell sex and to conduct harm reduction measures.”⁵²

In Sweden, it has been noted that most social service providers who work with sex workers do not employ a harm reduction approach, and providing condoms is widely opposed, as it is perceived to render social workers complicit in prostitution-related offences.⁵³ In a study currently being conducted by HIV Sweden and Rose Alliance, a Swedish sex worker group, 75 percent of sex workers report that they have never been targeted with condom distribution.⁵⁴ Further, after the passage of the Swedish law criminalizing clients, several HIV prevention projects aimed at clients of sex workers ceased.⁵⁵ At the same time, government evaluations of the law often ignore its impact on men and transgender people who sell sex. Consequently, very little is known about their sexual behaviour and sexual health.⁵⁶

IV. CONSTITUTIONALITY OF THE NORDIC MODEL IN CANADA

As discussed above, in 2010, the Ontario Superior Court of Justice struck down *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, having found that they had the effect of forcing sex workers to choose between their constitutional rights to liberty (because of the threat of incarceration upon conviction) and personal security and were not in accordance with the principles of fundamental justice. Under Canadian constitutional law, it offends the principles of fundamental justice if a law infringes *Charter* rights to life, liberty and security of the person in ways that are arbitrary, overbroad, or grossly disproportionate.

The Government of Canada appealed this decision and in 2012, a majority of the Ontario Court of Appeal upheld the *Criminal Code* prohibition against communicating in public for the purpose of prostitution, limited the prohibition on “living on the avails” of prostitution to “circumstances of exploitation,” and struck down the prohibition against common bawdy-houses.⁵⁷ In its view, each of the challenged provisions criminalized conduct that would mitigate the risks to those engaged in the otherwise legal endeavour of prostitution, and therefore individually and collectively, added risk sufficient to engage sex workers’ security of the person, pursuant to section 7 of the *Charter*.

In examining the prohibition on common bawdy-houses, the Court unanimously held that the legislative objective of this provision was to combat neighbourhood disruption or disorder and to safeguard public health and safety.⁵⁸ Although it was not arbitrary, the Court held that the blanket prohibition was overbroad as it criminalized not only large

⁵² *Supra* note 23 at 24.

⁵³ Danna, *supra* note 33 at 85.

⁵⁴ Pye Jakobsson, Rose Alliance, personal communication, 7 January 2013.

⁵⁵ Dodillet & Östergren, *supra* note 23 at 24.

⁵⁶ *Ibid.* However, as noted above, a study on sex workers and sexual health is currently being conducted by HIV Sweden and Rose Alliance, with a report forthcoming in the spring of 2013.

⁵⁷ *Bedford Ont CA*, *supra* note 3 at paras 325-28.

⁵⁸ *Ibid* at para 172.

establishments (which were likely to contribute to neighbourhood disruption and disorder), but also a single sex worker operating discreetly in her or his own home. Moreover, the provision was grossly disproportionate because it prevented sex workers from moving indoors to locations under their control, which the lower court had held was a safer way to sell sexual services.

In examining the prohibition against “living on the avails,” the Court was again unanimous in its view. It found that the provision was intended to prevent the exploitation of sex workers by “pimps,” but found that the provision was overbroad because it captured conduct that was not exploitative.⁵⁹ Its harmful effects were also grossly disproportionate to the state’s expressed interest in preventing exploitation because it prevented sex workers from hiring bodyguards, drivers, or others who could keep them safe, and could conversely increase the likelihood of exploitation by forcing sex workers to seek protection from those who were willing to risk a charge under this provision. To remedy this, the Court read in words of limitation so that the prohibition applied only to those who lived on the avails of prostitution in “circumstances of exploitation,” which in its view, cured the constitutional defect and aligned the text of the provision with the vital underlying legislative objective.

Finally, the Court considered the prohibition against communicating in public for the purpose of prostitution. While the lower court found its purpose was to target the “social nuisance” associated with street prostitution, three of the five justices of the Court held that the lower court had underemphasized the importance of this legislative objective, improperly locating street prostitution “towards the low end of the social nuisance spectrum” and minimizing its relationship with serious criminal conduct, including drug possession, drug trafficking, public intoxication, and organized crime.⁶⁰ The majority of the Court held that there was evidence that enforcement of the prohibition on communication had been effective in protecting residential neighbourhoods from the harms associated with street prostitution. Therefore, the prohibition on communicating was not arbitrary. The majority also held that the provision was not overbroad or grossly disproportionate, finding that the lower court had overemphasized the impact of the provision on sex workers’ security of the person. Though they accepted that it denied sex workers the opportunity to have face-to-face contact with prospective customers, this was but one factor, among many, that together contributed to the risk faced by sex workers working on the street. Accordingly, a majority of the Court was satisfied that the communicating provision did not violate the principles of fundamental justice.

Notably, two judges of the Ontario Court of Appeal issued a strong dissent on the majority’s finding with respect to the communicating provision. The dissenting judges held that the lower court was correct to find that “the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance” and that the provision therefore violated section 7 of the *Charter*.⁶¹ In particular, the dissenting judges noted that the communicating provision had equally serious (and perhaps worse) effects on sex workers’ right to security of the person as the prohibition on bawdy-houses and the

⁵⁹ *Ibid* at paras 239, 256.

⁶⁰ *Ibid* at para 306.

⁶¹ *Ibid* at para 333.

prohibition on living on the avails of prostitution.⁶² They also disputed the majority's view that continuing to criminalize communicating helped curb criminal activity such as the possession and trafficking of drugs, violence and "pimping." Most significantly, the dissenting judges argued that though sex workers' efforts to screen clients may be imperfect, the record demonstrated "that it is nevertheless an essential tool for safety."⁶³ Furthermore, they argued, the majority ignored other ways in which the communicating provision adversely affects sex workers' safety, including forcing them into isolated and dangerous areas and discouraging them from working together.

The dissenting judges also held that the majority failed to properly consider the vulnerability of the persons most affected by the communicating provision and the ways in which the vulnerability of sex workers who work on the street magnifies the adverse impact of the law. In their view, the equality values underlying the *Charter* require careful consideration of the adverse effects of the provision on women (many of them Indigenous), lesbian and gay individuals, and those with drug or alcohol dependence, who constitute the majority of sex workers working on the street. As Justice MacPherson noted, "prostitutes' pre-existing vulnerability exacerbates the security of the person infringement caused by the communicating provision. 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."⁶⁴

Sex workers and sex workers' allies had a mixed reaction to the decision of the Ontario Court of Appeal. Some applauded the Court's recognition of the ways the criminal provisions contributed to the harms experienced by sex workers, but the majority decision was also criticized for:

- singling out the sex industry for ambiguously criminalizing "exploitative" third party relationships that are defined by the courts (and coloured by their attendant stereotypes of who "pimps" are — a term used liberally in the decision but never properly defined);
- overstating the supposed benefits of the prohibition on communication;
- understating the negative impact the prohibition on communication had on sex workers; and
- subjecting sex workers who work on the street to continued arrest, police harassment, prosecution, and violence.⁶⁵

⁶² *Ibid* at para 344.

⁶³ *Ibid* at para 348.

⁶⁴ *Ibid* at para 358.

⁶⁵ See e.g. Maggie's Toronto Sex Workers Action Project, "Ontario Court leaves most vulnerable sex workers unprotected" (26 March 2012), online: Maggie's Toronto <http://www.maggiestoronto.ca/press-releases?news_id=86>; Alliance Féministe Solidaire Pour Les Droits Des Travailleuses (rs) Du Sexe, "Victoire partielle : le jugement de la Cour d'appel de l'Ontario laisse tomber les travailleuses et travailleurs du sexe de la rue" (26 March 2012), online: Alliance Féministe Solidaire <www.alliancefeministesolidaire.org/2012/03/victoire-partielle.html>; Feminists Advocating for Rights and Equality for Sex Workers, "Statement on the Ontario Court of Appeal decision: Canada (Attorney General) v. Bedford, 2012 ONCA 186" (28 March 2012) online: First Advocates <<http://archive.is/yZto5>>.

A. APPLICABILITY OF *BEDFORD* TO THE NORDIC MODEL

One major distinction between the Nordic model and Canada's laws concerning sex work is the legislative objective underlying each. As noted above, the Ontario Court of Appeal and the trial court did "not accept that one of the objectives of the challenged legislation is to eradicate prostitution through the criminalization of related activity."⁶⁶ Instead, the Ontario Court of Appeal affirmed the trial judge's conclusions that the objectives of the various prohibitions are as follows:

- prohibiting common bawdy houses is aimed at combatting neighbourhood disruption or disorder and safeguarding public health and safety;
- prohibiting living on the avails of prostitution aims to prevent the exploitation of sex workers by "pimps"; and
- prohibiting communicating aims to curtail social solicitation and the social nuisance that it creates, encapsulating "serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime."⁶⁷

In Sweden, the purported aim of the *Sex Purchase Act*, which criminalizes the purchase of sex, is normative: to promote gender equality by eradicating sex work, a legislative objective that is significantly different from those found by the Ontario trial and appellate court as the objectives of Canada's prostitution laws.⁶⁸ While the promotion of gender equality is clearly a legitimate legislative objective in Canadian constitutional law, an underlying aim to eradicate sex work is arguably impermissible. In *R v. Butler*, the Supreme Court of Canada held that Parliament has "the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society."⁶⁹ However, the Court qualified this right by holding that in order to warrant an override of *Charter* rights, the moral claims "must involve concrete problems such as life, harm, well-being, and not merely differences of opinion or taste."⁷⁰

In *Bedford*, the Ontario Court of Appeal cited *Butler* in affirming that "a legislative purpose grounded in imposing certain standards of public and sexual morality is no longer a legitimate objective for purposes of *Charter* analysis."⁷¹ The Supreme Court of Canada subsequently held in *R v. Labaye* that to "incur the ultimate criminal sanction," a supposed harm must transgress "values which Canadian society as a whole has formally endorsed," and not be "based on individual notions of harm, *nor on the teachings of a particular*

⁶⁶ *Bedford* Ont CA, *supra* note 3 at para 124.

⁶⁷ *Ibid* at para 307.

⁶⁸ It is not entirely clear whether Sweden's prohibitions on indoor sex work, working collectively, and profiting from the sexual labour of others were also intended to promote gender equality by eradicating sex work; this rationale was only clearly articulated for the prohibition on purchasing sex. Assuming Canada passes a law governing prostitution that is modelled after Sweden's, prohibitions on indoor sex work, working collectively, and profiting from the sexual labour of others would, presumably, also be motivated by this objective.

⁶⁹ [1992] 1 SCR 452 at 493.

⁷⁰ *Ibid* at 523.

⁷¹ *Bedford* Ont CA, *supra* note 3 at para 189.

ideology.”⁷² As the interveners Prostitutes of Ottawa/Gatineau Work Education and Resist (POWER) and Maggie’s: Toronto Sex Workers’ Action Project (Maggie’s) argued before the Ontario Court of Appeal, “[w]hile avoidance of harm to society may be a legitimate objective, the court must be careful to ensure that the conception of ‘harm’ being advanced does not merely disguise the moral or religious conventions of a particular community.”⁷³

The Supreme Court of Canada’s test in *Labaye* for scrutinizing whether conduct is “indecent,” and, therefore, criminal, helps illuminate the permissibility of a legislative objective predicated on the eradication of sex work and based on the notion that prostitution is inherently harmful to women. According to this test:

- (1) there must be an actual risk that members of the public (and not only those who are willing participants) be unwillingly exposed to acts that are deemed unpalatable;⁷⁴
- (2) the conduct will predispose others to commit anti-social acts, though “[v]ague generalizations that the sexual conduct at issue will lead to attitudinal changes and hence anti-social behaviour will not suffice”;⁷⁵ or
- (3) the conduct will physically or psychologically harm the persons involved, for which the “consent of the participant will generally be significant in considering whether this type of harm is established”;⁷⁶ and
- (4) the harm or risk of harm is of a degree that is incompatible with the proper functioning of society, all of which should be based on evidence establishing beyond a reasonable doubt actual harm or a significant risk of actual harm.⁷⁷

The notion that sex work is a form of gender inequality (and thus, a form of harm) is highly contested, as is the notion that the promotion of gender equality is conditional on the elimination of sex work. In their factum, the intervener styling itself the “Women’s Coalition for the Abolition of Prostitution” described “ample evidence” of the harms associated with prostitution, which they urged the court to address by upholding the criminal prohibitions on bawdy houses, living on the avails of prostitution, and communication insofar as these provisions apply to “those who exploit and profit from women’s prostitution.”⁷⁸ Yet, the trial judge in *Bedford* concluded that the assertion made by an expert witness of the government that “prostitution is inherently violent” was unfounded.⁷⁹ Moreover, as the interveners POWER and Maggie’s pointed out, the presumption that sex work is necessarily degrading for sex workers “is at odds with the subjective experiences of many sex workers, who do not regard sex work as degrading, who decided to enter the occupation and who decide to remain in it.”⁸⁰ In Sweden, there is no evidence suggesting that gender equality has been bolstered

⁷² 2005 SCC 80, [2005] 3 SCR 728 at paras 33, 35 [*Labaye*] [emphasis added].

⁷³ *Bedford Ont CA*, *supra* note 3 (Factum of the Intervener POWER and Maggie’s) at para 31 [POWER Factum].

⁷⁴ *Labaye*, *supra* note 72 at para 57.

⁷⁵ *Ibid* at para 58.

⁷⁶ *Ibid* at para 49.

⁷⁷ *Ibid* at para 60.

⁷⁸ Women’s Coalition Factum, *supra* note 4 at paras 41, 34.

⁷⁹ *Bedford Ont Sup Ct*, *supra* note 10 at para 353.

⁸⁰ POWER Factum, *supra* note 73 at para 7.

as a result of the *Sex Purchase Act*. Rather, evaluations of the law have demonstrated that it is contributing to the marginalization and violence that sex workers — who are predominantly women — experience. Measured against the test articulated in *Labaye*, criminalizing prostitution on the suppositions that (1) sex work is inherently harmful as violence against women, and therefore (2) its prohibition must promote gender equality, is not a legitimate objective.

Furthermore, the logical extension of legislation motivated by a desire to “eradicate sex work” is the suppression of sex workers, an objective that is clearly discriminatory in purpose and cannot survive the scrutiny of section 15(1) of the *Charter*, which affords all persons the right to the equal protection and benefit of the law and prohibits discrimination on the basis of race, national or ethnic origin, colour, religion, sex, age, disability, and other analogous grounds, many of which sex workers embody. Basing the “eradication of sex work” on a claim that prostitution is inherently a practice of “sexual exploitation and male violence against women”⁸¹ promotes and exacerbates stereotypes of sex workers as hyper-vulnerable to exploitation and incapable of operating in their own self-interests. It also singles out sex workers for adverse treatment that is not accorded to workers in other occupations, effects that are unconstitutional.⁸²

Nevertheless, if it were deemed permissible to pursue the legislative objective of promoting gender equality via the dubious means of eradicating sex work, the Ontario Court of Appeal held in *Bedford* that “*the respondents’ security of the person interest would nonetheless be infringed by the legislation.*”⁸³ In other words, a finding of a violation of sex workers’ security of the person is not contingent on the state’s legislative objective, which is not relevant until one considers the applicable principles of fundamental justice.

B. WORKING INDOORS

Sweden’s *Penal Code* criminalizes those who “promote” sex work by permitting individuals to use premises for sex work, effectively criminalizing working indoors and with others, unless a sex worker owns the space from which she or he works.⁸⁴ In *Bedford*, the Ontario Court of Appeal found the analogous prohibition on “common bawdy-houses” unconstitutionally infringed sex workers’ security of the person.⁸⁵ This reasoning would seem to apply equally to Sweden’s approach to indoor sex work.

Having established a violation of sex workers’ security of the person, the next step is to consider whether the provision is arbitrary or overbroad, or whether its harmful effects are grossly disproportionate to the importance of the legislative objective. If it is found to be any of these three, then it is not in accordance with the principles of fundamental justice and therefore impermissibly infringes section 7 of the *Charter*. Each is considered in turn below.

⁸¹ Women’s Coalition Factum, *supra* note 4 at para 3.

⁸² See e.g. *Vriend v Alberta*, [1998] 1 SCR 493.

⁸³ *Bedford Ont CA*, *supra* note 3 at para 124 [emphasis added].

⁸⁴ *Penal Code* 1962, *supra* note 17, s 12.

⁸⁵ *Bedford Ont CA*, *supra* note 3.

A provision is *arbitrary* where it bears no relation to, or is inconsistent with, the objective that lies behind the legislation. In *Canada (Attorney General) v. PHS Community Services Society*, the Supreme Court of Canada held that the jurisprudence on arbitrariness is not “entirely settled,” with one approach assessing whether a limit on one’s constitutional rights is “necessary” to further the state objective and another focusing on whether the deprivation of a right “bears no relation to, or is inconsistent with, the state interest that lies behind the legislation.”⁸⁶

Presumably, proponents of this hypothetical law would argue that a prohibition on indoor sex work is consistent with a legislative objective of eradicating sex work because it targets the very sites where sex work takes place, and discourages, or at least makes it more difficult to engage in, prostitution, and has symbolic, normative value. Significantly, the Attorney General of Canada attempted this line of argument in *Bedford*, submitting that the objective of the “overall legislative scheme” concerning sex work was to “denounce and deter the most harmful and public emanations of prostitution, to protect prostitutes, and to reduce the societal harms that accompany prostitution.”⁸⁷ Going further, the Attorney General of Ontario argued that the objective was to “eradicate prostitution.”⁸⁸ Although the Ontario Court of Appeal rejected this, it did hold, in *obiter* (and without elaborating on its justification for this conclusion) that it “would be difficult for the respondents [Terri Jean Bedford, Amy Lebovitch, and Valerie Scott] to establish that the provisions are arbitrary or overbroad and perhaps even disproportionate *if, in some way, the laws advance the objective of reducing or abolishing prostitution.*”⁸⁹

However, as noted above, Sweden’s laws on sex work — including the prohibition that effectively criminalizes working indoors — have merely displaced sex work rather than genuinely reduced it, while making it more difficult for sex workers to control their working conditions. Similarly, evidence in Canada also indicates that the criminalization of common bawdy-houses increases the risk of violence sex workers experience. Exposing the very people a law is professing to “save” to a greater risk of violence may well render arbitrary a prohibition on indoor sex work that is intended to promote gender equality.

Assessing whether a law is unconstitutionally *overbroad* requires a court to ask whether the challenged law deprives a person of his or her section 7 rights more than is necessary to achieve the legislative objective, while according the legislature a measure of deference.⁹⁰ If a prohibition on working indoors is *not* deemed arbitrary, it is unlikely that it would be deemed overbroad, especially if there is an exception for working independently out of a sex worker’s own home. In *Bedford*, the Ontario Court of Appeal stated that if “the legislative objectives of the bawdy-house provisions included the eradication of prostitution and the deterrence of the sex industry, it may be that a blanket prohibition would *not be overbroad.*”⁹¹ The Court further held that the criminalization of common bawdy-houses is “most significantly overbroad in its extension to the prostitute’s own home for her own

⁸⁶ 2011 SCC 44, [2011] 3 SCR 134 at para 132.

⁸⁷ *Bedford Ont CA, supra* note 3 at para 158.

⁸⁸ *Ibid* at para 159.

⁸⁹ *Ibid* at para 157 [emphasis added].

⁹⁰ *Ibid* at para 148.

⁹¹ *Ibid* at para 200 [emphasis added].

use.”⁹² In its view, “a single person discreetly operating out of her own home by herself would be unlikely to cause most of the public health or safety problems to which the legislation is directed.”⁹³ With a considerably broader legislative objective of promoting gender equality and eradicating sex work but with a legislative exception for sex work in limited circumstances, Sweden’s approach to criminalizing indoor sex work could escape a finding of overbreadth.

Finally, when a court considers *gross disproportionality*, it analyzes whether the deprivation of a person’s section 7 rights is so extreme as to be disproportionate to any legitimate government interest.⁹⁴ A weighing exercise is undertaken between the importance of the objective of a challenged law and the impact of that law on a claimant’s section 7 rights. In assessing gross disproportionality, the Ontario Court of Appeal noted that, “[g]iven the importance of the legislative objectives that animate the bawdy-house provisions, the impact on prostitutes would have to be extreme to warrant a finding of gross disproportionality.”⁹⁵ Nevertheless, the Court held that

the evidence in this case suggests that there is a very high homicide rate among prostitutes and the overwhelming majority of victims are street prostitutes. As well, while indoor prostitutes are subjected to violence, the rate of violence is much higher, and the nature of the violence is more extreme, against street prostitutes than those working indoors. The bawdy-house provisions prevent prostitutes from taking the basic safety precaution of moving indoors to locations under their control, which the application judge held is the safest way to sell sex. In this way, as the application judge found, the provisions *dramatically impact on prostitutes’ security of the person*.⁹⁶

Criminalizing indoor sex work also undermines the safety of sex workers who work indoors; people who target sex workers know that sex workers are unlikely to contact police if they risk criminal charges and their livelihood as a result, and because it inhibits the screening of clients, who do not wish to disclose any identifying information for fear of criminal liability.

The very limited exception in Sweden’s *Penal Code* for sex workers working alone out of property they own does not assist those sex workers who wish to work collectively or who do not own the property in which they work. Evaluations of the Nordic model have shown that sex workers are forced to lie in order to rent premises, are pressured to pay exorbitant rent, and are frequently banned from hotels and other venues after police inform management of sex work on their property.⁹⁷ The impact of Sweden’s prohibition on indoor sex work is thus similarly “extreme,” “grossly disproportionate,” and extraordinarily inconsistent with a legislative objective of promoting gender equality, particularly if the prohibition contributes to violence against sex workers, who are predominantly women.

⁹² *Ibid* at para 204.

⁹³ *Ibid*.

⁹⁴ *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571 at para 143.

⁹⁵ *Bedford Ont CA*, *supra* note 3 at para 206.

⁹⁶ *Ibid* at para 207 [emphasis added].

⁹⁷ Levy, *supra* note 30 at 11.

C. WORKING COLLECTIVELY AND PROFITING FROM THE SEXUAL LABOUR OF OTHERS

As is the case in Canada, the Nordic approach to sex work prohibits sex workers from working with others and prohibits profiting from the sexual labour of others. While Swedish legislation ostensibly criminalizes only those who “improperly financially exploit” those in sex work, no distinction is made in practice between relationships involving exploitation and those that do not. Dodillet and Östergren explain that the implications of the law are that sex workers cannot employ others to assist them to find clients or act as security guards, and sex workers also “can not work together, recommend customers to each other, advertise, work from property they rent or own or even cohabit with a partner (since that partner is likely to share part of any income derived from sex work).”⁹⁸ The prohibition thus renders sex workers more susceptible to violence by preventing them from working with, or employing, third parties and ultimately limits sex workers’ options on how they work. Criminalizing activities so as to force sex workers to work in isolation materially contributes to a deprivation of their security of the person, a finding the Ontario Court of Appeal also made in *Bedford*.

Arguably, these provisions are not necessary to further a state objective to promote gender equality through the eradication of sex work, especially if one considers the availability of other legislation in Canada to address various forms of exploitation, including against sex workers.⁹⁹ Proponents of a hypothetical “Nordic model” law in Canada may argue that these prohibitions are consistent with the legislative objective because they deter people from working in the sex industry and have symbolic, normative value, reinforcing as they do the notion that all sex workers are exploited. However, a court may still find a prohibition on the “improper financial exploitation” of sex workers to be arbitrary if it considers evidence demonstrating that the closest analogy in Canada’s *Criminal Code* (“living on the avails of prostitution” — even if read down more narrowly to apply only in “circumstances of exploitation” as done by the Ontario Court of Appeal in *Bedford*) renders sex workers more susceptible to violence, an outcome that is inconsistent with the promotion of gender equality.

What of potential overbreadth of a provision such as the one as in the current Swedish law? The Supreme Court of Canada has held that a blanket prohibition, as is the case in Sweden, can escape a charge of unconstitutional overbreadth when (1) a narrower prohibition will be ineffective in achieving the legitimate legislative objective because the class of affected persons cannot be identified in advance; and (2) if there is a significant risk to public safety in the event of misuse or misconduct.¹⁰⁰ The Ontario Court of Appeal held that neither circumstance was applicable in the context of Canada’s current prohibition on “living on the avails” of prostitution and therefore deemed the provision overbroad.¹⁰¹ Admittedly, a broad legislative objective gives greater latitude to the government to declare “non-exploitative” working relationships that facilitate the practice of sex work to be criminal (for example, sex workers’ employers, managers, employees and colleagues). Nevertheless, a blanket prohibition on “improper financial exploitation” casts too wide a net should it capture sex

⁹⁸ Dodillet & Östergren, *supra* note 23 at 4.

⁹⁹ *Bedford* Ont Sup Ct, *supra* note 10 at paras 524-35.

¹⁰⁰ *R v Clay*, 2003 SCC 75, [2003] 3 SCR 735 at para 40.

¹⁰¹ *Bedford* Ont CA, *supra* note 3 at para 245.

workers' personal supportive relationships (for example, family and partners) as well as professional relationships which are mistakenly defined as exploitative merely on the basis that one of the parties is a sex worker. A charge of overbreadth, particularly with respect to sex workers' non-professional relationships, may thus succeed against the enactment of this aspect of the Nordic model.

Moreover, the Ontario Court of Appeal found that Canada's current prohibition on "living on the avails" of prostitution was grossly disproportionate because it prevents sex workers from hiring staff who could keep them safe, and could conversely increase the likelihood that sex workers would be exploited by "forcing them to seek protection from those who are willing to risk a charge under this provision."¹⁰² Depriving sex workers of their security of the person, without necessarily advancing a legislative objective of gender equality or the eradication of sex work, dooms a prohibition on "improper financial exploitation" to a finding of gross disproportionality.

D. PURCHASING SEX

While the wording of Sweden's *Sex Purchase Act* suggests that only the purchase of sex is criminalized, sex workers continue to face threats of violence and to their health because they are prevented from screening their clients, who are exposed to police scrutiny for such communication in the course of purchasing their services. In *Bedford*, both the trial and appellate court found the prohibition on communication in public for the purpose of prostitution violated sex workers' security of the person by preventing sex workers from screening potential customers for fear of arrest. Even if the purpose of the Nordic model is not to criminalize communication for the purpose of selling sex, this is its effect, with perilous repercussions for sex workers.¹⁰³ Since the passage of Sweden's *Sex Purchase Act*, sex workers who work on the street have testified that they have less time and power to negotiate safer sex, face more dangerous clients, and have less time or leverage to assess potential danger¹⁰⁴ — issues similar to those faced by sex workers in Canada and exacerbated by police sweeps and operations targeting clients. Where police forces in Canada have targeted clients for arrest, several sex worker led organizations have documented its dangerous ramifications.

In Montreal, for example, Stella, a sex worker-led organization, has kept thorough documentation since 2001 about client sweeps performed by the police in the neighbourhood of Hochelaga-Maisonneuve.¹⁰⁵ Where police have aggressively targeted clients, their presence on habitual strolls has displaced regular clients of sex workers on the street to sex workers working indoors where the risk of criminalization is lower. Sex workers on the street have fewer choice of clients as a result and do not have the time while avoiding police to assess if someone is a potential client or an aggressor. Due to a decrease in the visibility of clients, they also accept seeing clients that they would otherwise reject: those who may be drunk or violent, or who request that particular sexual services be performed that they would

¹⁰² *Ibid* at para 253.

¹⁰³ *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 [*Big M Drug Mart*].

¹⁰⁴ *Purchasing Sexual Services*, *supra* note 15.

¹⁰⁵ Emilie Laliberté, Executive Director of Stella, personal communication, 1 August 2012.

normally refuse (including unprotected sex), at lower prices.¹⁰⁶ During a three month span in 2001 when police targeted clients for arrest, Stella reported a threefold increase in their “Bad Tricks and Aggressors List,” as well as a fivefold increase in assaults with a knife perpetrated against sex workers in the neighbourhood.¹⁰⁷ In June 2010, a client sweep was announced by the police in Hochelaga-Maisonneuve during which 76 clients were arrested.¹⁰⁸ Again, Stella recorded dramatic increases in violence experienced by sex workers working on the street, including eight violent sexual assaults against sex workers.¹⁰⁹ Following this sweep, in the fall of 2010, the local police prefect acknowledged that the targeting of clients had been an ineffective response to sex work in the community, with unintended detrimental impacts on the safety and security of sex workers.¹¹⁰ Nevertheless, in the summer of 2012, the police undertook another massive client sweep in Hochelaga-Maisonneuve and 54 clients were arrested over seven days, after which Stella recorded 14 assaults, including sexual assaults, and an attempted murder against sex workers in the neighbourhood.¹¹¹

In Ottawa-Gatineau, the “Community Safety” or “John” letter was introduced in 2007 to “reduce unwanted traffic and sensitize sex trade consumers and drug users of the impact of their illegal activity” by undermining clients’ anonymity.¹¹² The letters are sent by police to clients of sex workers after an officer has observed a client picking up a sex worker, in the company of a sex worker, continually driving around an area frequented by sex workers, or routinely stopping and talking to sex workers — an approach that further reifies the divide between sex workers and their community and reinforces sex workers’ social isolation, since one can be targeted by the police for simply interacting with them. It can also have grave consequences for sex workers working on the street, who may be unable to obtain assistance from passerbys who fear this sanction. More recently, there has been a trend towards targeting and charging clients while declining to charge sex workers, likely associated with a safety advisory published by the Ottawa Police Service in December 2011.¹¹³ The advisory, directed towards sex workers, referred to a spate of murders of sex workers and provided recommendations for personal safety, including working in well-lit areas and in teams, and exercising greater caution in entering vehicles.¹¹⁴ These safety precautions, of course, are impossible to execute without risk of criminal liability when the communication provision is valid law. Under the leadership of a new Chief of Police in July 2012, a new policing policy was adopted premised on solely charging clients for communicating in public for the purpose of prostitution.¹¹⁵ In spite of this, POWER, a sex worker led organization in Ottawa,

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Daniel Renaud, “La police ouverte au centre de répit pour prostituées,” *ExRue Frontenac* (8 November 2010) online: ExRue Frontenac <<http://www.exruefrontenac.com/nouvelles-generales/societe/29691-echec-de-loffensive-policiere-de-lete-dernier>>.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ Laliberté, *supra* note 105; Pierre-André Normandin, “Hochelaga veut tolérer la prostitution” *La Presse* (16 June 2012) online: <<http://www.lapresse.ca/actualites/regional/montreal/201206/15/01-4535557-hochelaga-veut-tolerer-la-prostitution.php>>.

¹¹² Ottawa Police Service, “Community Safety Letters,” online: Ottawa Police <<http://www.ottawapolice.ca/en/crimeprevention/communitysafetyletter.aspx>>.

¹¹³ Ottawa Police Service, “Safety Advisory,” online: Ottawa Police <http://www.ottawapolice.ca/Libraries/Publications/Message_to_Sex_Trade_Workers_E.sflb.ashx>.

¹¹⁴ In a press release dated 8 July 2012, POWER explained that these well-established safety precautions are nearly impossible to exercise in the context of criminalization, including the specific targeting of clients (POWER, “Ottawa Police’s Aggressive Tactics Continue to Put Sex Workers at Risk” (8 July 2012), online: POWER Ottawa <<http://www.powerottawa.ca/Press%20Release%20July%202012.pdf>>).

¹¹⁵ Frédérique Chabot, POWER Board of Directors, personal communication, 2 August 2012.

has noted that client sweeps ostensibly carried out to promote the safety of sex workers have resulted in increased feelings of risks to personal security and feelings they cannot trust or turn to the police for assistance.¹¹⁶

As is evident from the experiences of sex workers working on the streets of Montreal and Ottawa/Gatineau, targeted client sweeps have had a harmful impact on sex workers' safety and security. Rather than being a protective benefit to sex workers, evaluations of the Nordic model in Sweden and documentation of client sweeps in Canada suggest this approach poses a threat to sex workers' security of the person similar to that posed by the current prohibition on communication.

Still, given the broad legislative objective behind the Nordic model, such a law is not likely to be deemed arbitrary. If its legislative objective is deemed permissible, asymmetric criminalization is consistent with a paradigm within which all sex workers are victims of exploitation and the view that all clients of sex workers are perpetrating violence against women (although, as with the other criminal provisions, exposing sex workers to a greater risk of violence ostensibly in service of gender equality arguably renders the prohibition on purchasing sex arbitrary). Claims have also been made (and contested) that Sweden's law has been effective in reducing the number of "casual" clients and those that remain have become more cautious in their interactions with sex workers on the street.¹¹⁷

Asymmetric criminalization may also escape a charge of overbreadth because it does not impose a blanket prohibition on the buyers and sellers of sex, but specifically criminalizes its clients, who are regarded as perpetrators of violence against women. Along with tentative findings that the law has led to greater "caution" among clients of sex workers, proponents of the law may contend that asymmetric criminalization minimally impairs sex workers' constitutional rights in order to achieve its legislative objective. Of course, any conclusion that a law criminalizing the purchase of sexual services is not overbroad rests entirely on the premise that all instances — or at least a sufficiently critical proportion of instances — of exchanging sexual services for money are inherently a form of violence against women — a contention that is not borne out on the facts.

The evidence does, however, support a finding of gross disproportionality. Evaluations of Sweden's *Sex Purchase Act* indicate that asymmetric criminalization has not made a significant dent on overall levels of prostitution, with sex work merely having moved off the street to spaces which are not monitored by the police.¹¹⁸ According to the Swedish government, social workers who meet buyers of sex indicate that the number of Swedish men who purchase sex is actually increasing because clients are purchasing sex abroad, rather than within Sweden.¹¹⁹ A 2008 survey of opinion on the *Sex Purchase Act* also indicated that the Swedish public has very little faith that the law has had any impact on sex work despite their support for it.¹²⁰ Only one-fifth of respondents believe that the number of sex buyers has

¹¹⁶ *Ibid.*

¹¹⁷ Skarhed, *supra* note 27 at 9, 32.

¹¹⁸ See e.g. Svanström, *supra* note 14 at 147.

¹¹⁹ *Global AIDS Response Progress Report 2012*, *supra* note 26 at 29, citing Niclas Olsson, *Mobilitet Och Kommersiell Sexualitet* (Malmö: Malmö City Social Resource Management, 2011).

¹²⁰ Jari Kuosmanen, "Attitudes and Perceptions about Legislation Prohibiting the Purchase of Sexual Services in Sweden" (June 2011) 14:2 *European Journal of Social Work* 247 at 259.

declined since the passage of the law compared to one-third who believe the figure has actually increased, and 38 percent believe that the number of people selling sex has increased compared to just 13 percent who believe that there are now fewer sex workers.¹²¹ While the Swedish government has lauded the benefits of the *Sex Purchase Act* in reducing sex work on the street, the rigour of its evaluation has been criticized.¹²²

It must be noted that a majority of the Ontario Court of Appeal in *Bedford* did not find Canada's current communication provision grossly disproportionate.¹²³ In its view, the trial judge erred in her finding of gross disproportionality by understating the objectives of the communicating provision — namely, to curtail social solicitation and the social nuisance which it creates.¹²⁴ To the extent that the law was ineffective in achieving this purpose, “the role of that ineffectiveness in the gross disproportionality analysis is limited because deference is to be accorded to Parliament’s choice of means to achieve its objective.”¹²⁵ The majority of the court also found that though the communicating provision has “some material impact” on sex workers’ security of the person because it denies them the opportunity to have face-to-face contact with prospective customers, there was “limited evidence” to establish the extent to which such contact would improve the safety of sex workers working on the street.¹²⁶

Upon closer scrutiny, however, the majority’s analysis is not supported by the vast evidence demonstrating the importance of communication for the safety of sex workers on the street. In particular, the majority overlooked a finding by the trial judge in *Bedford* that not only did the communicating prohibition prevent sex workers from screening clients, but also displaced sex workers from their regular strolls and near friends, co-workers, and regular customers, and in so doing, made them more vulnerable,¹²⁷ a fact recognized by the dissenting judges of the Ontario Court of Appeal.¹²⁸ As noted above, sex workers in Sweden have been similarly displaced to more isolated locations by asymmetric criminalization and have affirmed the importance of taking time to screen clients. Correspondingly, client sweeps in Canada have displaced regular clients of sex workers on the street to sex workers working indoors and led to spikes of violence perpetrated against sex workers.¹²⁹

Furthermore, as the dissenting Court of Appeal justices also pointed out in *Bedford*, the majority’s view that “[s]treet prostitution is associated with serious criminal conduct including drug possession, drug trafficking, public intoxication, and organized crime” should not be a basis for increasing the weight assigned to the legislative objective, since tackling these issues was not among the objectives of the communicating provision.¹³⁰ Presumably,

¹²¹ *Ibid.*

¹²² Dodillet & Östergren, *supra* note 23.

¹²³ *Bedford Ont CA*, *supra* note 3.

¹²⁴ *Ibid* at para 287.

¹²⁵ *Ibid* at para 308.

¹²⁶ *Ibid* at paras 315-16.

¹²⁷ *Bedford Ont Sup Ct*, *supra* note 10 at para 502.

¹²⁸ *Bedford Ont CA*, *supra* note 3 at para 353.

¹²⁹ Laliberté, *supra* note 105.

¹³⁰ *Ibid* at paras 346-47.

a Nordic approach of asymmetric criminalization would not be passed or defended in Canada by invoking similarly broad aims.¹³¹

In one critical respect, the Ontario Court of Appeal majority's rationale for upholding the communication provision does not apply in the context of asymmetric criminalization. Since it found the bawdy-house prohibition unconstitutional, the majority of the appellate court justices in *Bedford* concluded that sex workers could move indoors, consequently eluding many of the harms sex workers on the street face.¹³² As the dissent pointed out, the international experience demonstrated that sex workers continue to work on the street even where brothels are legalized, and particularly those who cannot for various reasons work indoors, are thus harmed by the law.¹³³ The majority conceded this reality, but did not account for the ongoing harm that the communicating provision would pose to sex workers on the street. Moreover, this justification by the Ontario Court of Appeal majority for upholding Canada's current communicating provision is clearly not applicable to the Nordic model because the majority of indoor sex work is still criminalized under that model.

Another glaring misinterpretation of the majority of the Ontario Court of Appeal in *Bedford* was the requirement articulated in *New Brunswick (Minister of Health and Community Services) v. G.(J.)* to take into account the principles and purposes of the equality guarantee in considering section 7 of the *Charter* and the principles of fundamental justice.¹³⁴ Because the communicating provision disproportionately affects sex workers who work on the street, many of whom face violence and work to secure basic human necessities, the adverse effects of the provision on sex workers on the street must be considered. The interveners POWER and Maggie's also contended that issues of equality were raised because virtually all sex workers "fall into the categories of disadvantage represented by the enumerated or analogous grounds under s. 15 of the *Charter*," including women, male sex workers who have sex with other men and identify as either gay or bisexual, racialized, Indigenous, and trans workers, and sex workers facing intersecting forms of disadvantage.¹³⁵ Although the majority accepted that it should take sex workers' vulnerability into account in the gross disproportionality analysis, it found the law was only one of a number of factors that contributed to the section 7 deprivation, given the "many social, economic, personal and cultural factors that combine to place survival sex workers at significant risk on the street."¹³⁶ As the dissent noted, the majority "turned the question of pre-existing disadvantage on its head" by reasoning that "because prostitutes' marginalization contributes to their insecurity, the adverse effects of the law are diluted and should be given *less* weight."¹³⁷ Rather, "prostitutes' pre-existing vulnerability *exacerbates* the security of the person infringement caused by the communicating provision. 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."¹³⁸ Therefore, "[a]ny measure that denies an already vulnerable person the

¹³¹ It should be noted that there is no evidence in Sweden that the law has had any impact on drug-related or organized crime.

¹³² *Ibid* at para 318.

¹³³ *Ibid* at para 367.

¹³⁴ [1999] 3 SCR 46 at para 115.

¹³⁵ POWER Factum, *supra* note 73 at para 14.

¹³⁶ *Bedford Ont CA, supra* note 3 at paras 319-21.

¹³⁷ *Ibid* at paras 357-58.

¹³⁸ *Ibid* at para 358 [emphasis added].

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."¹³⁹

In light of the ambiguity concerning the Swedish law's ability to achieve its objective of eradicating sex work and promoting gender equality, over ten years' worth of evidence of its harmful impact on sex workers in Sweden, emerging evidence concerning the harmful impact of police sweeps targeting clients under Canada's current communicating provision, and the correlative deprivation of sex workers' security of the person, a Nordic model of asymmetric criminalization that maintains a criminal prohibition on the purchasers of sex workers' services should be deemed grossly disproportionate in its impact on sex workers' constitutional rights.

E. SECTION 1 ANALYSIS

Even if a violation of a section 7 right has been established, it is theoretically still possible that the violations could be justified under section 1 of the *Charter*, though any law or state action that offends the principles of fundamental justice will not ordinarily be saved by section 1.¹⁴⁰ According to section 1, the *Charter* "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁴¹ The test to determine what can be accepted as "demonstrably justified" under this section has been outlined by the Supreme Court of Canada in *R v. Oakes* and subsequent cases.¹⁴² To justify the infringement of a *Charter* right by a law or government policy or action, the government must demonstrate that:

- (1) the objective of the government measure is of sufficient importance to warrant overriding a constitutional right, meaning that, at a minimum, it must relate to concerns which are pressing and substantial;
- (2) the government measure is rationally connected to achieving this objective, meaning it is not arbitrary, unfair, or based on irrational considerations;
- (3) the government measure impairs as little as possible the constitutional right(s) in question; and
- (4) the harm done by limiting the right does not outweigh either the importance of the measure's objectives or the benefits of the measure.

If a section 1 analysis in considering the constitutional validity of the Nordic model were required, it would not likely succeed. While Sweden's purported legislative objective of promoting gender equality by eradicating sex work may be a "pressing and substantial" one, and perhaps even rationally connected to a regime that criminalizes both third parties involved in sex work (including purchasers) and sex workers who work indoors, this should

¹³⁹ *Ibid* at para 360.

¹⁴⁰ *Ibid* at para 213.

¹⁴¹ *Supra* note 11.

¹⁴² *R v Oakes*, [1986] 1 SCR 103. See also *R v Edward Books and Art*, [1986] 2 SCR 713; *Dagenais v CBC*, [1994] 3 SCR 835; *Thomson Newspaper Co v Canada (Attorney General)*, [1998] 1 SCR 877.

not save such legislation. A fundamental principle of *Charter* interpretation is that both the purpose and effects of any legislative instrument be constitutional.¹⁴³ As such, even if the legislative objectives are found to be constitutional — which is debatable, as outlined above — the effects of the legislation are unconstitutional and cannot be saved.

As has been demonstrated in Sweden and in Canada, collectively the impugned provisions significantly impair sex workers' security of the person. Just as important, but less well-considered by the courts, is the manner in which the laws entrench and increase stigmatization of sex workers and constrain their access to justice by institutionalizing an adversarial relationship between sex workers and the police. Sex workers are consequently dissuaded from reporting violence directed against them, creating a climate of impunity which fosters and fuels further violence. As the trial Court noted in *Bedford*, the applicant Amy Lebovitch did not report rape perpetrated by an aggressor to the police for fear of police scrutiny and the possibility of a criminal charge,¹⁴⁴ and many of the applicants' experts testified that the impugned provisions create "a conflicting victim/criminal status in the eyes of the police, which leads many prostitutes to believe that the police are not willing to protect them."¹⁴⁵ This effect is especially acute for racialized sex workers, including those who are Indigenous, whose access to justice is already compromised due to systemic racism in the criminal justice system.¹⁴⁶ In Canada and in Sweden, sex workers who report a violent experience risk incriminating not only themselves, but their employer, colleagues, and clients, leading to a loss of work, income, and potentially child custody. Reporting a violent incident may also mean police subsequently harass and target a sex worker and the men she is in personal relationships with for arrest, because they assume that those men are her clients. As noted above, this scenario is already playing out in Sweden, with sex workers reporting aggressive policing, police harassment, police persecution, and overall mistrust of police by sex workers. Accordingly, the Nordic model does not minimally impair sex workers' security of the person, since other avenues of achieving gender equality (including other approaches to regulating sex work) could be canvassed that do not subject sex workers to stigma and violence and impair their health and access to justice. Invariably, the dangerous, and potentially fatal, consequences of limiting the section 7 rights of sex workers must be found to outweigh any questionable benefits that might arise through the legislation.

V. CONCLUSION

Although advocates of the Nordic model claim their efforts to eliminate commercial sex are motivated by a desire to end sexual exploitation and to protect women, the evidence suggests that this approach is harmful for sex workers because it denies them any control over their working conditions and impedes their ability to practice their profession safely and without risk to their bodily integrity. This was recognized by the Global Commission on HIV and the Law, tasked with analyzing the interaction between the legal environment, human rights, and HIV, and making recommendations for rights-based law and policy in the context

¹⁴³ *Big M Drug Mart*, *supra* note 103.

¹⁴⁴ *Bedford Ont Sup Ct*, *supra* note 10 at paras 35-36.

¹⁴⁵ *Ibid* at paras 125, 154, 172, 313, 328, 332, 336, 341.

¹⁴⁶ Karin Galldin, Leslie Robertson & Charlene Wiseman, "Bedford v. Canada: A Paradigmatic Case Toward Ensuring the Human and Health Rights of Sex Workers" (2011) 15:3 HIV/AIDS Policy & Law Review 1.

of HIV.¹⁴⁷ In 2012, the Commission released a report denouncing the Nordic model, finding that “[s]ince its enactment in 1999, the law has not improved — indeed, it has worsened — the lives of sex workers.”¹⁴⁸ Evidence is already emerging in Canada of the violent consequences of client sweeps on sex workers, a foreseeable consequence of the Nordic model in this country. In light of this, Parliament owes a responsibility to sex workers to ensure that one deadly — and unconstitutional — regime is not replaced with another.

¹⁴⁷ Global Commission on HIV and the Law, *Risks, Rights, and Health* (New York: United Nations Development Programme, 2012)

¹⁴⁸ *Ibid* at 38.