

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N :

CANADIAN ALLIANCE FOR SEX WORK LAW REFORM,  
MONICA FORRESTER, VALERIE SCOTT, LANNA MOON PERRIN, JANE X,  
ALESSA MASON and TIFFANY ANWAR

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

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**(October 3, 2022)**

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**FACTUM OF THE APPLICANTS  
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## PART I - INTRODUCTION

1. This application is about people, primarily women with intersecting and marginalized identities, who sell or exchange sexual services. It is about *Criminal Code* provisions that infringe the *Charter* rights of adults who consent to the sale or exchange of sex by unnecessarily subjecting them to danger and denying them bodily autonomy. The Applicants are, or represent, sex workers: people who sell or trade sexual services for compensation, whether money, goods, or services, in a diverse range of contexts, and includes those who have limited options.<sup>1</sup> They come before this Honourable Court because Parliament failed to heed the Supreme Court of Canada's holding in *Bedford v. Canada*.<sup>2</sup> Instead of correcting constitutional deficiencies, Parliament exacerbated them, with the result that sex workers continue to suffer serious breaches of their *Charter* rights. The impugned legislation could not stand in *Bedford*, and it cannot stand now.

2. The application challenges the constitutionality of the following sections of the *Criminal Code*: s. 213(1), stopping traffic for the purpose of offering or obtaining sexual services (the “**stopping traffic provision**”); s. 213(1.1) communication for the purpose of offering sexual services in a public place (the “**public communication provision**”); s. 286.1(1) purchasing sexual services (the “**purchasing provision**”); s. 286.2(1) receiving a material benefit from the purchase of sexual services (the “**material benefit provision**”); s. 286.3(1) procuring sexual services (the “**procuring provision**”); and s. 286.4 advertising the sale of sexual services (the “**advertising provision**”, and together with the others, the “**impugned provisions**”). The constitutionality of any provisions relating to minors is outside the scope of this application.

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<sup>1</sup> The Applicants generally use the term “sex worker” to refer to people who sell and exchange sexual services, while recognizing that some may self-identify with other terms.

<sup>2</sup> *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#) [“*Bedford*”], Applicants’ Book of Authorities [“BOA”], Tab 1.

3. The Applicants have led a comprehensive record that presents the evidence of sex workers, front-line service providers primarily from organizations led by and for sex workers, and leading scholars in the field. This evidence was tested and amplified under extensive cross-examination. In the result, there are no issues of credibility to be resolved. The record demonstrates that the *Protection of Communities and Exploited Persons Act*, S.C. 14, c. 25 (the “**PCEPA**”), Parliament’s response to *Bedford*, causes serious and repeated breaches of sex workers’ *Charter* rights to life, liberty, and security of person, equality, freedom of expression, and freedom of association. Moreover, it does so without protecting communities or exploited persons.<sup>3</sup>

4. The Respondent, the Attorney General of Canada (“**Canada**”) and the Intervener, the Attorney General of Ontario (“**Ontario**”), seek to uphold the impugned provisions on the unfounded notion that exploitation and human trafficking are intrinsic to the sex industry. In support of these claims, however, they led not a single word from an actual sex worker. Although they led affidavits from a platoon of police officers, not a single one affirmed that sex work is inherently exploitative, or that it was necessary to criminalize consensual sex between consenting adults. Nor did a single witness affirm that the impugned provisions had the effect of reducing sex work or human trafficking in Canada. On the contrary, the Crown’s witnesses, in effect, testified that the impugned provisions are overbroad, and they can be an impediment to protecting the groups that are ostensibly their object.

5. The government of Prime Minister Justin Trudeau was elected on an acknowledgement that the PCEPA is unconstitutional and a promise to repeal it.<sup>4</sup> The President of the Liberal Party of Canada made that commitment to the Applicants in writing, stating unequivocally that the

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<sup>3</sup> Exhibit “B” to the Affidavit of Dr. Benoit, affirmed July 13, 2021 [“**Dr. Benoit Report**”] at p. 24.

<sup>4</sup> Exhibit “X”, Affidavit of Jenn Clamen, affirmed July 13, 2021 [“**Clamen Affidavit**”].

PCEPA “makes sex workers more vulnerable and prone to exploitation” and contravenes the holding in *Bedford*.<sup>5</sup> Disappointingly, however, Parliament has failed to take action, and the Applicants now ask the Court to protect their *Charter* rights.

6. In the result, the impugned provisions contravene ss. 2(b), 2(d), 7, and 15 of the *Charter*, they are not saved by s. 1, and they are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. In view of the serious harms caused by the impugned provisions, this Court cannot permit them to stand.

## **PART II - THE FACTS**

### **A. Introduction to the Cast of Characters**

#### **i. The Applicants**

7. The natural person Applicants are a diverse group of women, five of whom are current or former sex workers, and one of whom is a former escort agency operator. The Applicants each attest to the harmful effects that the impugned provisions have had on their lives, and the lives of other sex workers.

8. Ms. Monica Forrester is a Black and Indigenous 2Spirit trans woman.<sup>6</sup> Ms. Forrester has been an active Ontario-based sex worker for over thirty years, and she continues to work in indoor and outdoor settings.<sup>7</sup> Ms. Forrester is currently the Program Manager of Outreach Services and Indigenous Programs at Maggie’s Toronto Sex Workers Action Project (“**Maggie’s**”).<sup>8</sup>

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<sup>5</sup> Clamen Affidavit at para. 40.

<sup>6</sup> Affidavit of Monica Forrester, affirmed July 13, 2021, [“**Forrester Affidavit**”] at para. 3.

<sup>7</sup> Forrester Affidavit at paras. 3, 5.

<sup>8</sup> Forrester Affidavit at para. 6.

9. Ms. Valerie Scott has been involved in the sex industry for more than four decades, as both a sex worker and activist for sex workers' rights.<sup>9</sup> Ms. Scott's advocacy includes serving as one of the three applicants in *Bedford*.<sup>10</sup> She is the Legal Coordinator of Sex Work Professionals of Canada.<sup>11</sup> She regularly supports sex workers, including through advising on safe working practices, communicating and negotiating with clients, and assisting with safe calls.<sup>12</sup>

10. Ms. Lanna Moon Perrin is an Anishinaabe artist, human rights advocate, and land defender.<sup>13</sup> Ms. Perrin has been an active Ontario-based sex worker for more than thirty years, and she continues to work in outdoor settings.<sup>14</sup> Ms. Perrin is a member of the Sex Workers Advisory Network of Sudbury, and testified about her experiences in sex work to the National Inquiry into Missing and Murdered Indigenous Women and Girls.<sup>15</sup>

11. Ms. Jane X is an active sex worker in Canada who has been working in the industry for more than two decades.<sup>16</sup> She works out of her own home, clients' homes, and rented spaces. She has also previously worked in outdoor settings.<sup>17</sup> On May 7, 2021, the Honourable Justice Myers directed that Ms. X may maintain this application under a pseudonym.<sup>18</sup>

12. Ms. Alessa Mason is a trans woman living with a disability and is an active sex worker in Canada.<sup>19</sup> Ms. Mason has been engaged in sex work for nearly a decade, and primarily works out

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<sup>9</sup> Affidavit of Valerie Scott, affirmed July 10, 2021, ["**Scott Affidavit**"] at para. 3.

<sup>10</sup> Scott Affidavit at para. 4.

<sup>11</sup> Scott Affidavit at para. 11.

<sup>12</sup> Scott Affidavit at paras. 11, 13, 21, 23.

<sup>13</sup> Affidavit of Lanna Moon Perrin, affirmed July , 2021, ["**Perrin Affidavit**"] at para. 1

<sup>14</sup> Perrin Affidavit at paras. 2, 6.

<sup>15</sup> Perrin Affidavit at para. 4, Perrin Affidavit at Exhibit "A".

<sup>16</sup> Affidavit of Jane X, affirmed July 10, 2021, ["**Jane X Affidavit**"] at para. 2.

<sup>17</sup> Jane X Affidavit at para. 2.

<sup>18</sup> See Order by Myers J. dated May 7, 2021.

<sup>19</sup> Affidavit of Alessa Mason, affirmed July 13, 2021, ["**Mason Affidavit**"] at paras. 3, 8.

of her home.<sup>20</sup> On May 7, 2021, the Honourable Justice Myers directed that Ms. Mason may maintain this application under a pseudonym.<sup>21</sup>

13. Tiffany Anwar managed an escort business named Fantasy World Escorts in London, Ontario.<sup>22</sup> Ms. Anwar’s business facilitated in-call and out-call appointments and engaged in advertising.<sup>23</sup> Tiffany and her husband were charged in November 2015 with offences contrary to ss. 286.2(1), 286.3(1), and 286.4 of the *Criminal Code*.<sup>24</sup> On February 21, 2020, they were acquitted of all charges after Mr. Justice McKay of the Ontario Court of Justice found the three provisions to be unconstitutional.<sup>25</sup>

14. The final Applicant is The Canadian Alliance for Sex Work Law Reform (the “**Alliance**”), a public interest standing litigant. Formed in 2012, the Alliance is a coalition of 25 sex worker-led and allied groups across Canada.<sup>26</sup> Members of the Alliance work together to advance sex work law reform, sex workers’ rights, and community well-being.<sup>27</sup>

## **ii. The Alliance has Public Interest Standing**

15. As an association comprised of sex worker rights groups, the majority of which are led by and for sex workers, the Alliance has a real stake and genuine interest in the welfare of sex workers.

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<sup>20</sup> Mason Affidavit at paras. 3, 8.

<sup>21</sup> See Order by Myers J. dated May 7, 2021.

<sup>22</sup> Affidavit of Tiffany Anwar, sworn June 27, 2021, [“**Anwar Affidavit**”] at para. 3.

<sup>23</sup> Anwar Affidavit at paras. 6, 10.

<sup>24</sup> Anwar Affidavit at paras. 2, 14.

<sup>25</sup> *R. v. Anwar*, [2020 ONCJ 103](#), [“Anwar”], BOA Tab 2, at para. 216

<sup>26</sup> See Clamen Affidavit at para. 25. The Alliance’s member organizations are: (1) Action Santé Travesti(e)s et Transsexuel(le)s du Québec (ASTT(e)Q); (2) ANSWERS Society (Advocacy Normalizing Sex Work through Education and Resources Society®); (3) BC Coalition of Experiential Communities (BCCEC); (4) Butterfly Asian and Migrant Sex Worker Support Network; (5) HIV Legal Network; (6) Émissaire; (7) Maggie’s: Toronto Sex Workers Action Project; (8) Maggie’s Indigenous Sex Work Drum Group; (9) PEERS Victoria; (10) Projet L.U.N.E. (Libres, Unies, Nuancées, Ensemble); (11) Prostitutes Involved Empowered Cogent Edmonton (PIECE); (12) Providing Advocacy, Counselling and Education (PACE) Society; (13) Rézo, projet travailleurs du sexe; (14) Safe Harbour Outreach Project (SHOP); (15) SafeSpace London; (16) Sex Workers’ Action Program Hamilton; (17) Sex Professionals of Canada; (18) Sex Workers’ Action Network of Waterloo Region (SWAN Waterloo); (19) Sex Workers of Winnipeg Action Coalition (SWWAC); (20) Sex Workers United Against Violence (SWUAV); (21) Shift, HIV Community Link; (22) Stella, l’amie de Maimie; (23) SWANS Sudbury; (24) SWAN Vancouver; and (25) SWAP Yukon.

<sup>27</sup> Clamen Affidavit at paras. 29, 35.

Alliance members support people who sell or trade sex on the street and in public spaces, massage parlours, in-call and out-call agencies, strip clubs, and on the internet.<sup>28</sup> Member groups also include organizations that exclusively serve migrant sex workers, Indigenous sex workers, and trans and non-binary sex workers.<sup>29</sup> The Alliance has significant expertise in relation to the issues raised in this application through its extensive advocacy, public education, policy reform, and research.<sup>30</sup> Submissions on standing are appended as Appendix “A”.

### **iii. The Witnesses**

#### **(a) Applicants’ Fact Witnesses**

16. In addition to evidence from the Applicants themselves, this application is supported by evidence from eight fact witnesses who have worked with sex workers in a diverse range of contexts. These fact witnesses provide first-hand knowledge of the effects of the impugned provisions on sex workers:

(a) Ms. Jenn Clamen is the National Coordinator of the Alliance and has been active in the sex workers’ rights movement for more than twenty years.<sup>31</sup> In 2002, she co-founded the Canadian Guild for Erotic Labour to educate, advocate, and improve working conditions for sex workers.<sup>32</sup> Since 2003, Ms. Clamen has been actively engaged with Stella, l’amie de Maimie (“Stella”), a Montreal-based non-profit organization by and for sex workers, where she currently acts as the Coordinator of Mobilizing and Communications.<sup>33</sup> Ms. Clamen has direct and daily interactions with sex worker rights

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<sup>28</sup> Clamen Affidavit at para. 29.

<sup>29</sup> Clamen Affidavit at para. 29.

<sup>30</sup> Clamen Affidavit at paras. 24, 35, 39-45.

<sup>31</sup> Clamen Affidavit at paras. 1-2.

<sup>32</sup> Clamen Affidavit at para. 4.

<sup>33</sup> Clamen Affidavit at para. 5.

groups and individual sex workers from all sectors of the industry.<sup>34</sup>

(b) Ms. Nora Butler-Burke provides sex worker support at Action Santé Travesti(e)s et Transsexuel(le)s du Québec (“**ASTT(e)Q**”), a Montreal-based project by and for the trans community which services low-income trans persons.<sup>35</sup> Ms. Butler-Burke has worked with ASTT(e)Q in various capacities since 2008.<sup>36</sup>

(c) Ms. Elene Lam is the Executive Director of Butterfly, the Asian and Migrant Sex Workers Support Network.<sup>37</sup> She founded Butterfly in 2014 to provide support to Asian and migrant sex workers, and advocate for their rights.<sup>38</sup> Ms. Lam has worked on sex worker, migrant, labour, and gender justice for over 20 years.<sup>39</sup>

(d) Ms. Danielle Cooley is a co-facilitator of SACRED, a program for Indigenous sex workers that is offered through the Peers Victoria Resource Centre (“**Peers**”), where she has worked for over three years.<sup>40</sup> At Peers, which was founded in 1995, she also works as the Violence Prevention and Support Coordinator.<sup>41</sup> Ms. Cooley works directly with, and designs and coordinates programming specifically for, Indigenous sex workers.<sup>42</sup>

(e) Ms. Sandra Wesley is the Executive Director of Stella, a Montreal-based non-profit organization by and for sex workers founded in 1995.<sup>43</sup> Ms. Wesley oversees Stella’s extensive work which includes offering frontline services to sex workers from all

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<sup>34</sup> Clamen Affidavit at para. 8.

<sup>35</sup> Affidavit of Nora-Butler Burke, affirmed July 13, 2021, [“**Butler-Burke Affidavit**”] at para. 1.

<sup>36</sup> Butler-Burke Affidavit at paras. 4-5.

<sup>37</sup> Affidavit of Elene Lam, affirmed July 12, 2021, [“**Lam Affidavit**”] at para. 1.

<sup>38</sup> Lam Affidavit at para. 7.

<sup>39</sup> Lam Affidavit at para. 4.

<sup>40</sup> Affidavit of Danielle Cooley, affirmed July 9, 2021, [“**Cooley Affidavit**”] at para. 1.

<sup>41</sup> Cooley Affidavit at paras. 4-5.

<sup>42</sup> Cooley Affidavit at paras. 7-10.

<sup>43</sup> Affidavit of Sandra Wesley, affirmed July 12, 2021, [“**Wesley Affidavit**”] at para. Affidavit at paras. 1, 3.

backgrounds and all sectors of the industry.<sup>44</sup> She has been in this role since 2015.<sup>45</sup>

(f) Ms. Ellie Ade Kur is the Vice Chair of the Board of Directors at Maggie's, a by and for sex worker justice organization in Toronto founded in 1986.<sup>46</sup> Ms. Ade-Kur is involved in Maggie's frontline services for sex workers, and she designs and coordinates programming specifically for Black sex workers.<sup>47</sup> She has been involved with Maggie's for over six years.<sup>48</sup>

(g) Ms. Jessica Quijano is the coordinator of the Iskweu Project at the Native Women's Shelter of Montreal, which provides assistance to relations of Indigenous women, girls, and trans and Two-Spirit persons who go missing.<sup>49</sup> Ms. Quijano has held this position since 2017, working on 55 missing persons cases, most of which involved people in the sex trade.<sup>50</sup> She has previously served as a street outreach worker for the Sex Work Project at REZO, a Montreal-based non-profit organization, where she worked with male and trans sex workers.<sup>51</sup>

(h) Ms. Laurel Cassels was a Community Programs Coordinator at Daniel McIntyre and St. Matthews Community Association, which serves the west-end of Winnipeg.<sup>52</sup> For over four years Ms. Cassels worked as a safety coordinator and harm reduction specialist, and she developed and ran "Our Place, Safe Space", a drop-in program for sex workers.<sup>53</sup>

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<sup>44</sup> Wesley Affidavit at paras. 1, 9-19, 30-31.

<sup>45</sup> Wesley Affidavit at paras. 1.

<sup>46</sup> Affidavit of Ellie Ade Kur, affirmed July 12, 2021, ["**Ade-Kur Affidavit**"] at paras. 1, 6.

<sup>47</sup> Ade Kur Affidavit at para. 2.

<sup>48</sup> Ade Kur Affidavit at para. 2.

<sup>49</sup> Reply Affidavit of Jessica Quijano, affirmed January 18, 2022 ["**Quijano Reply Affidavit**"] at paras. 1, 3.

<sup>50</sup> Quijano Reply Affidavit at para. 5.

<sup>51</sup> Quijano Reply Affidavit at para. 1.

<sup>52</sup> Reply Affidavit of Laurel Cassels, affirmed January 20, 2022, ["**Cassels Reply Affidavit**"] at para. 1.

<sup>53</sup> Cassels Reply Affidavit at para. 1.

Ms. Cassels is also involved in the Sex Workers of Winnipeg Action Coalition.<sup>54</sup>

**(b) Applicants' Expert Witnesses**

17. The Applicants tendered reports from seven expert witnesses, including leading scholars researching sex work in Canada, the United States, and New Zealand. These experts holistically address critical aspects of the sex industry, including: people who sell or exchange sexual services in various sectors, settings, working relationships, geographical regions, and legal contexts; people who have experienced violence, coercion, and other abuse in the context of sex work; people who move in and out of sex work; and enforcement of anti-human trafficking initiatives.

18. Dr. Cecilia Benoit is a Professor Emerita in the Department of Sociology at the University of Victoria and a research scientist at the Centre for Addictions Research of British Columbia.<sup>55</sup> Dr. Benoit has an extensive track record in research excellence, and has authored or coauthored over 220 peer reviewed publications.<sup>56</sup> Dr. Benoit been sought for her expertise by several Parliamentary standing committees, and served as an expert witness to the applicants in *Bedford*.<sup>57</sup> Dr. Benoit's research over the past two decades includes documenting the experiences of sex workers in Canada and abroad, and the intersecting factors that determine their health and safety.<sup>58</sup> These research projects have occurred both before and after the PCEPA, and have included approximately 500 in person interviews with sex workers.<sup>59</sup> This work has captured the most hard to reach sex workers, including Indigenous sex workers.<sup>60</sup>

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<sup>54</sup> Cassels Reply Affidavit at para. 7.

<sup>55</sup> Dr. Benoit Report, July 13, 2021 at p. 5.

<sup>56</sup> Dr. Benoit Report, July 13, 2021 at p. 5.

<sup>57</sup> Dr. Benoit Report, July 13, 2021 at p. 5; *Bedford v. Canada*, [2010 ONSC 4264](#) [*"Bedford ONSC"*], BOA Tab 3, at paras. 311-313.

<sup>58</sup> Dr. Benoit Report, July 13, 2021 at pp. 3-5.

<sup>59</sup> Dr. Benoit Report, July 13, 2021 at pp. 3-5.

<sup>60</sup> Dr. Benoit Report, July 13, 2021 at p. 4.

19. Dr. Chris Bruckert is a Professor in the Department of Criminology at the University of Ottawa.<sup>61</sup> For over twenty-five years, Dr. Bruckert has conducted a series of in-depth research projects that capture the diversity of the Canadian sex industry.<sup>62</sup> This work has included nine major research projects where over 400 sex workers, 75 third parties, and 20 clients have been interviewed or surveyed.<sup>63</sup> Dr. Bruckert is a well-established qualitative methodologist with an emphasis on research ethics.<sup>64</sup> Her work includes the *Management Project* – a rigorous research project which sought to bolster knowledge on third parties in the sex industry.<sup>65</sup> Various Parliamentary committees and public consultations have sought Professor Bruckert’s expertise.<sup>66</sup>

20. Dr. Andrea Krusi is an Assistant Professor of Social Medicine in the Department of Medicine and Associate Faculty in the School of Population and Public Health at the University of British Columbia.<sup>67</sup> Dr. Krusi has authored or co-authored 41 peer-reviewed papers on the health and safety of marginalized populations, including sex workers.<sup>68</sup> She is a lead investigator for *An Evaluation of Sex Workers’ Health Access (AESHA) Project*, which is North America’s largest, longest standing longitudinal study on sex workers’ health, safety, and working conditions, and which involves more than 900 sex workers.<sup>69</sup> This project was funded by the Canadian Institutes of Health Research and US National Institutes of Health, and its results have been published in leading social science and medical journals.<sup>70</sup>

21. Mr. Chris Atchison is a Research Associate at the Department of Sociology at the

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<sup>61</sup> Affidavit of Dr. Benoit, affirmed July 13, 2021 [“**Dr. Benoit Affidavit**”] at para. 1.

<sup>62</sup> Exhibit “B” to the Affidavit of Dr. Chris Bruckert, affirmed July 13, 2021 [“**Dr. Bruckert Report**”] at p. 2.

<sup>63</sup> Dr. Bruckert Report, July 13, 2021 at p. 2.

<sup>64</sup> Dr. Bruckert Report, July 13, 2021 at p. 4; Cross-Examination of Dr. Bruckert, April 14, 2022, [“**Dr. Bruckert Cross**”], at Q. 14, p. 12, ln. 16-23.

<sup>65</sup> Dr. Bruckert Report, July 13, 2021 at p. 6.

<sup>66</sup> Dr. Bruckert Report, July 13, 2021 at p. 3.

<sup>67</sup> Exhibit “B” to the Affidavit of Dr. Andrea Krusi, affirmed July 13, 2021 [“**Dr. Krusi Report**”] at p. 3.

<sup>68</sup> Dr. Krusi Report, July 13, 2021 at p. 3.

<sup>69</sup> Dr. Krusi Report, July 13, 2021 at p. 6.

<sup>70</sup> Dr. Krusi Report, July 13, 2021 at p. 6.

University of Victoria and an instructor for the Department of Sociology and Anthropology at Simon Fraser University.<sup>71</sup> Mr. Atchison has been involved in sociological and criminological research on the sex industry in Canada since 1995.<sup>72</sup> He is the co-principal investigator on four major studies of Canadian sex workers and clients, a co-investigator on four other major sex industry studies, and a lead investigator on seven federally-funded research projects examining the experiences of sex industry participants.<sup>73</sup> Mr. Atchison recently served as an expert witness in two matters that considered some of the impugned provisions: *R. v. N.S.* and *R. v. Anwar*.<sup>74</sup>

22. Dr. Gillian Abel is a Professor at the University of Otago in Christchurch, New Zealand, and has been the head of the Department of Population Health since 2013 and a member of the department since 1997.<sup>75</sup> She has received funding in New Zealand for various research projects assessing sex workers' health and safety.<sup>76</sup> Her research adopts a community-based participatory approach, which includes working with Aotearoa New Zealand Sex Workers Collective (“NZPC”).<sup>77</sup> She has edited two books on the “New Zealand Model” of decriminalization, and has published numerous journal articles and book chapters.<sup>78</sup> *Bedford* cited Dr. Abel's research.<sup>79</sup>

23. Dr. Ronald Weitzer is a Professor Emeritus of Sociology at George Washington University in Washington, D.C.<sup>80</sup> Dr. Weitzer has been researching sex work since 1975, and has written more than 100 criminology and sociology articles and book chapters.<sup>81</sup> He has conducted empirical research on a variety of issues related to sex work in the United States, Belgium, Germany, the

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<sup>71</sup> Affidavit of Chris Atchison, affirmed July 13, 2021 [“**Atchison Affidavit**”] at para. 1.

<sup>72</sup> Atchison Affidavit at para. 1.

<sup>73</sup> Exhibit “B” to the Affidavit of Chris Atchison, affirmed July 13, 2021 [“**Atchison Report**”] at p. 1.

<sup>74</sup> *R v N.S.*, [2022 ONCA 160](#) [“*N.S.*”], BOA Tab 4 at paras. 137-142. See also *Anwar*, BOA Tab 2 at paras. 23-38, 78.

<sup>75</sup> Exhibit “B” to the Affidavit of Dr. Gillian Abel, affirmed July 11, 2021 [“**Dr. Abel Report**”] at p. 3.

<sup>76</sup> Dr. Abel Report at p. 3.

<sup>77</sup> Dr. Abel Report at p. 4.

<sup>78</sup> Dr. Abel Report at p. 5.

<sup>79</sup> See *Bedford ONSC*, BOA Tab 3 at para. 325.

<sup>80</sup> Reply Affidavit of Dr. Ron Weitzer, affirmed January 26, 2022 [“**Dr. Weitzer Reply Affidavit**”] at para. 1.

<sup>81</sup> Exhibit “C” to the Reply Affidavit of Dr. Ron Weitzer, affirmed January 26, 2022 [“**Dr. Weitzer Reply Report**”] at p. 1.

Czech Republic, the Netherlands, and Thailand.<sup>82</sup> He served as an expert witness in *Bedford*.<sup>83</sup>

24. Dr. Katrin Roots is an Assistant Professor in the Department of Criminology at Wilfrid Laurier University.<sup>84</sup> Dr. Roots is a qualitative researcher whose focus is on the legal regulation of human trafficking in Canada, particularly in relation to sex work.<sup>85</sup> Dr. Roots has published several peer reviewed articles on human trafficking and surveillance.<sup>86</sup> Dr. Roots recently served as an expert witness in *R. c. Kloubakov*, which considered some of the impugned provisions.<sup>87</sup>

### (c) Canada's Fact Witnesses

25. Canada did not tender evidence from anyone who has ever sold or exchanged sexual services, or who is impacted by the impugned provisions. Nor did Canada provide evidence from any sex worker-led organization or collective representing those who are impacted by the impugned provisions. Instead, Canada's fact witnesses are as follows:

(a) six police officers from different Canadian cities: Staff Sergeant Colin Organ, Detective Brian McGuigan, Commander Dominic Monchamp, Inspector Darryl Ramkissoon, Sergeant Maria Koniuck, and former Detective Paul Rubner;

(b) four representatives from service organisations that work with people who have experienced sexual exploitation and human trafficking: Andrea Rittenhouse, Cora-Lee McGuire, Diane Redsky and Megan Walker;

(c) Kathy Aucoin, a statistical analyst who supervised the preparation of crime statistics, but who has no experience in sex work research.<sup>88</sup>

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<sup>82</sup> Dr. Weitzer Reply Report at p. 1.

<sup>83</sup> *Bedford ONSC*, BOA Tab 3 at para. 323.

<sup>84</sup> Reply Affidavit of Dr. Katrin, affirmed January 26, 2022 [“**Dr. Roots Reply Affidavit**”] at para. 1.

<sup>85</sup> Exhibit “B” to the Reply Affidavit of Dr. Katrin Roots, affirmed January 26, 2022 [“**Dr. Roots Reply Report**”] at p. 1.

<sup>86</sup> Dr. Roots Reply Affidavit, at Exhibit “A”.

<sup>87</sup> *R c. Kloubakov*, [2021 ABQB 960](#) [“*Kloubakov*”], BOA Tab 5 at paras. 121-148.

<sup>88</sup> Cross-Examination of Ms. Kathy Aucoin, April 21, 2022, [“**Aucoin Cross**”], at Q. 17, p. 9, ln. 8-11.

#### (d) Canada's Expert Witnesses

26. Canada tendered evidence from three scholars:

27. Dr. May-Len Skilbrei is a Professor of Criminology and Sociology of Law at the University of Oslo in Norway.<sup>89</sup> Dr. Skilbrei has never conducted research in Canada, and she is not familiar with the empirical research on sex work in Canada.<sup>90</sup> Dr. Skilbrei has researched sex work laws in Nordic countries and has found that those laws “are often implemented in ways that produce negative outcomes for people in prostitution.”<sup>91</sup>

28. Dr. Debra Haak is an Adjunct Professor of Law at Queen's University.<sup>92</sup> Until 2016, she practiced as a commercial and insolvency lawyer.<sup>93</sup> She now works as a theorist whose only published work consists of literature reviews.<sup>94</sup> Dr. Haak's personal view is that the commercial exchange of sex should not be normalized as “work”.<sup>95</sup> In her doctoral thesis, Dr. Haak expressed that she “continue[s] to believe there are risks for all women and girls in society, particularly those most vulnerable, if prostitution is normalized” and that she “support[s] a goal of abolition”.<sup>96</sup> Dr. Haak served as an advisor to the Crown on the criminal prosecution of the Applicant Ms. Anwar.<sup>97</sup>

29. Dr. John Pratt: Dr. Pratt is a criminologist from New Zealand whose research has focused on the history and sociology of legal punishment in modern society and comparative penology.<sup>98</sup> Dr. Pratt has never conducted research on the criminalization of sex work, in Canada or

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<sup>89</sup> Affidavit of Dr. May-Len Skilbrei, affirmed December 20, 2021 [“**Dr. Skilbrei Affidavit**”] at para. 1.

<sup>90</sup> Cross-examination of Dr. May-Len Skilbrei, April 27, 2022 [“**Dr. Skilbrei Cross**”], Q. 18, p. 7, ln. 13-15; Dr. Skilbrei Cross, Q. 7, p. 5, ln. 13-20 & Q. 17, p. 7 ln. 10-12.

<sup>91</sup> Dr. Skilbrei Cross, QQ. 136-138, p. 40 ln. 2 to p. 41 ln. 7.

<sup>92</sup> Affidavit of Dr. Debra Haak, sworn December 15, 2021 [“**Dr. Haak Affidavit**”] at para. 1.

<sup>93</sup> Dr. Haak Affidavit at Exhibit “1”.

<sup>94</sup> Dr. Haak Affidavit at Exhibit “1”; Cross-examination of Dr. Debra Haak, April 11, 2022 [“**Dr. Haak Cross**”], Q. 484 p. 196 ln. 3-6.

<sup>95</sup> Dr. Haak Cross, Q. 222 p. 85 ln. 10-17

<sup>96</sup> Dr. Haak Cross, Q. 113 p. 45 ln. 10 to p. 46 ln. 7

<sup>97</sup> Dr. Haak Cross, p. 204, ln. 2-5; *R. v. Anwar*, [2020 ONCJ 103](#), BOA Tab 2.

<sup>98</sup> Cross-Examination of Dr. Pratt, April 5, 2022 [“**Dr. Pratt Cross**”], QQ. 14 and 17, p. 6, ln. 16-20, p. 7, ln. 2-6.

elsewhere.<sup>99</sup> Canada led Dr. Pratt's evidence to criticize community-based participatory research, but he has no experience with this research method.<sup>100</sup>

30. The Applicants accept that Dr. Skilbrei is qualified to provide expert evidence in this proceeding. The Applicants challenge the qualifications of Dr. Haak and Dr. Pratt to do the same. Neither Dr. Haak nor Dr. Pratt has any expertise relevant to the application, and Dr. Haak's personal views prevent her from providing an objective opinion.<sup>101</sup>

#### **(e) Ontario's Fact Witnesses**

31. Ontario is an intervener as of right. Like Canada, Ontario did not tender evidence from anyone who has ever sold or exchanged sexual services, or who is impacted by the impugned provisions. Instead, Ontario led evidence from two police officers, Detective Sergeant David Correa and Detective Staff Sergeant Andrew Taylor.

#### **(f) Ontario's Expert Witness**

32. Ontario's only expert, Dr. Seo-Young Cho, has no experience researching sex work in Canada. Dr. Cho is a researcher at the University of Music and the Performing Arts, a music school in Vienna.<sup>102</sup> A decade ago, she co-authored a paper on the incidence of human trafficking, using data from more than two decades ago.<sup>103</sup> All of her recent papers report on South Korea, most of which are on the export of South Korean popular culture to Europe, and none of which address

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<sup>99</sup> Dr. Pratt Cross, QQ. 18-20, p. 7, ln. 7-19.

<sup>100</sup> Dr. Pratt Cross, Q. 151, p. 41, ln. 2-4.

<sup>101</sup> Dr. Haak Cross, Q. 113 p. 45 ln. 10 to p. 46 ln. 7; Dr. Haak Cross, Q. 121 p. 49 ln. 24 to p. 50 ln. 10; Dr. Haak Cross, Q. 310 p. 126 ln. 9-22 Dr. Pratt Cross, QQ. 14 and 17, p. 6, ln. 16-20, p. 7, ln. 2-6; Dr. Pratt Cross, QQ. 18-20, p. 7, ln. 7-19.

<sup>102</sup> Cross-examination of Dr. Seo-Young Cho, March 18 and April 5, 2022 [**"Dr. Cho Cross"**], Q. 95 p. 30 ln. 18-22.

<sup>103</sup> Affidavit of Dr. Seo-Young Cho, affirmed January 11, 2022, [**"Dr. Cho Affidavit"**] at Exhibit "D".

human trafficking.<sup>104</sup> Dr. Cho has no expertise in Canada, and had to stop her cross-examination to determine the legal status of sex work in this country.<sup>105</sup>

33. The Applicants challenge Dr. Cho's qualifications to provide evidence in this proceeding. Dr. Cho does not have any expertise relevant to the application.

## **B. Overview of the Sex Industry**

### **i. Composition of the Sex Industry**

34. People who sell sexual services are diverse,<sup>106</sup> and often experience intersecting realities such as racial and cultural identity, social and economic backgrounds, gender identity, access to education and employment opportunities, and immigration and health status. They are equally diverse in terms of their contexts and ways of working. Women compose the majority of sex workers.<sup>107</sup> Marginalized communities who face structural inequalities such as poverty, racism, colonialism, sexism, transmisogyny, classism, and limited social, employment, and economic opportunity are overrepresented in the sex industry.<sup>108</sup> Studies have shown that Indigenous,<sup>109</sup> trans and non-binary,<sup>110</sup> and racialized migrant<sup>111</sup> sex workers are over-represented in the industry. Indigenous sex workers are also over-represented in street-based settings.<sup>112</sup> Sex workers are more

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<sup>104</sup> Dr. Cho Cross, QQ. 103-118 p. 32 ln. 1 to p. 36 ln. 12. For example, her most recent co-authored work is "The Rise of South Korea's Soft Power in Europe—A Survey Analysis of Public Diplomacy", to be published in the *Korea Observer*.

<sup>105</sup> Cho Cross, QQ. 128-141 p. 38 ln. 13 to p. 41 ln. 19. Dr. Cho had significant difficulty answering the questions that were put to her in cross-examination: see, for example, Dr. Cho Cross, QQ. 427-429 p. 139 ln. 7 to p. 140 ln. 15; QQ. 470-483 p. 158 ln. 2 to p. 162 ln. 18; QQ. 499-500 p. 171 ln. 16 to p. 172 ln. 17; Q. 520 p. 177 ln. 22 to p. 179 ln. 19; QQ. 540-541 p. 187 ln. 10-25. While Ontario suggested that these difficulties were attributable to Dr. Cho's lack of familiarity with the English language, she deposed to writing highly technical papers in English without difficulty, and holds a Master's degree from Columbia University: Dr. Cho Re-Examination, Q. 716, p. 281, ln. 22-25, p. 282, ln. 1-8; Dr. Cho Re-Cross-Examination, QQ. 718-721, p. 282, ln. 15-25, p. 283, ln. 23-25, p. 284, ln. 1-2.

<sup>106</sup> Dr. Krusi Report at p. 13.

<sup>107</sup> Dr. Benoit Report at p. 21; see also, Dr. Bruckert Cross, Q. 367, p. 155, ln. 24-25, p. 156, ln. 1; Dr. Krusi Report, July 13, 2021 at pp. 13-14.

<sup>108</sup> Dr. Benoit Report at p. 2; Clamen Affidavit, Exhibit "Y".

<sup>109</sup> Dr. Krusi Report at p. 13.

<sup>110</sup> Dr. Benoit Report at p. 21.

<sup>111</sup> Dr. Krusi Report at p. 14.

<sup>112</sup> Dr. Krusi Report at p. 18.

likely to report a disability.<sup>113</sup> In the face of barriers and limited options, sex work is a viable opportunity for many to generate income.

35. While some sex workers enter the trade as minors, Canada's claim that the average age of entry is 13 years old has been widely discredited.<sup>114</sup> In studies on sex work, the average age of participants is approximately 35 years of age.<sup>115</sup> None of the *Criminal Code* provisions relating to minors is at issue on this application.

36. Expert witnesses explain that indoor and outdoor categories "fail to illustrate the wide range of locations ... where people negotiate and deliver sex work services", such as homes, hotels, motels, studios, bars, vehicles, parks,<sup>116</sup> on the street, in agencies, brothels, massage parlours, and online.<sup>117</sup> Some of these settings are run by third parties who have never provided sexual services, and some by current or former sex workers. Some are operated collectively by several workers and businesses which may or may not be registered or licenced. For the majority of sex workers, work location is not static; many work in different locations, some doing so concurrently and others over time.<sup>118</sup> Street work has been estimated to account for up to 20% of the industry.<sup>119</sup>

37. Many sex workers work with third parties. This can resemble a standard employer/employee relationship or it can take the form of an independent contract to perform certain tasks. Some divide their time between working with third parties and working "independently," meaning they are not working for third party businesses.<sup>120</sup> "Independent" sex workers nonetheless use third

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<sup>113</sup> Dr. Benoit Report at p. 21.

<sup>114</sup> Affidavit of Diane Redsky, sworn December 15, 2021, ["Redsky Affidavit"] at para. 45; Cross-Examination of Diane Redsky, April 24, 2022, ["Redsky Cross"], Q. 234, p. 79, ln. 23-25, p. 80, ln. 1-11; Dr. Roots Reply Report at p. 8.

<sup>115</sup> Dr. Krusi Report, July 13, 2021 at pp. 14, 16, 18, 19, 20, 21, 25, 36.

<sup>116</sup> Dr. Benoit Report at p. 11.

<sup>117</sup> Dr. Krusi Report at pp. 13-14.

<sup>118</sup> Dr. Benoit Report at pp. 11, 16.

<sup>119</sup> Dr. Bruckert Report at p. 8; Dr. Benoit Report at p. 11.

<sup>120</sup> Dr. Bruckert Report at p. 25.

party services, such as agents, workspace providers, hired drivers, and website providers.<sup>121</sup>

## **ii. Reasons People Sell and Exchange Sexual Services**

38. Sex work is a form of income generation<sup>122</sup> and is considered a viable way to earn income in a context of many or limited options.<sup>123</sup> Criminalization does not stop sex workers from participating in sex work— nor does it provide other viable options or resources – but it does shape their labour conditions.<sup>124</sup> The sex industry reflects labour dynamics similar to those of other precarious occupations, including retail and restaurant work.<sup>125</sup> And as with other forms of work, the main reason that people engage in sex work is for “financial need” to support themselves and their families, combined with “less favourable employment options”.<sup>126</sup> Simply put, sex work is an effective way for some people to earn a living.<sup>127</sup>

39. People sell and exchange sexual services for a variety of reasons,<sup>128</sup> and many do so to “enhance their lives”.<sup>129</sup> Sex work is often a way for people to address the impacts of intersecting structural constraints they experience, including poverty.<sup>130</sup> This includes securing food, clothing, shelter, paying off debts, and supporting their families.<sup>131</sup> Some people also engage in sex work to “explore and affirm sexual and gender identities”.<sup>132</sup> For others, who may live in poverty or use drugs, sex work provides a source of income to increase their opportunities, access housing, secure

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<sup>121</sup> Dr. Bruckert Report at pp. 17-19, 21, 25, 34-35.

<sup>122</sup> Dr. Benoit Report at p. 8.

<sup>123</sup> Clamen Affidavit at paras. 47-48, 98.

<sup>124</sup> Dr. Bruckert Report at p. 8.

<sup>125</sup> Dr. Benoit Report at pp. 8-9.

<sup>126</sup> Dr. Benoit Report at pp. 8-9; Dr. Bruckert Cross, Q. 242, p. 110, ln. 7-12; Dr. Krusi Report at p. 8; Forrester Affidavit at paras. 13-14.

<sup>127</sup> Dr. Benoit Report at p. 10.

<sup>128</sup> Dr. Krusi Report at p. 9; Forrester Affidavit at para. 3; Clamen Affidavit at para. 47; Jane X Affidavit, at para. 2.

<sup>129</sup> Clamen Affidavit at para. 49.

<sup>130</sup> Dr. Krusi Report at p. 9; Dr. Benoit Report at p. 8; Forrester Affidavit at para. 14; Clamen Affidavit at para. 47; Quijano Reply Affidavit at para. 7.

<sup>131</sup> Clamen Affidavit, at para. 47; Perrin Affidavit, April 25, 2022, at para. 2.

<sup>132</sup> Dr. Krusi, July 13, 2021 Report at p. 9; Forrester Affidavit, July 13, 2021, para. 66; Clamen Affidavit at para. 48; Mason Affidavit at para. 47.

food, obtain drugs,<sup>133</sup> and gain otherwise inaccessible gender affirming surgeries.<sup>134</sup>

40. Sex workers often face exclusion and other barriers to participating in formal and conventional labour markets, and they engage in sex work for higher pay and greater flexibility.<sup>135</sup> People who are Indigenous, Black, racialized, trans, migrant, and live with disabilities may decide to sell sexual services because they are frequently “excluded from other employment sectors due to multiple factors including discrimination, racism, colonialism, stigma, immigration status, lack of gender affirming and identity concordant documentation, and previous criminal records.”<sup>136</sup> For many migrant sex workers, the flexibility and higher pay “accommodate family/child care obligations”.<sup>137</sup> Reasons for engaging in sex work are diverse, and include lifting children out of poverty and paying for education.<sup>138</sup> For one of the applicants, sex work also allowed her to support herself as an advocate, and engage in the community work that she always felt “called to do”.<sup>139</sup>

41. The numerous reasons for engaging in sex work include economic empowerment, the ability to have more control over one’s working conditions than in other work sectors, and job satisfaction.<sup>140</sup> These factors distinguish sex work from other informal labour markets and low-wage personal service jobs because sex workers are afforded “greater freedom deciding when, where, and with whom they provide services”.<sup>141</sup>

### **iii. Sex Workers Exercise Agency, Including in the Context of Limited Options**

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<sup>133</sup> Dr. Krusi Report at p. 9; Forrester Affidavit at paras. 14, 67; Mason Affidavit at para. 44; Ade-Kur Affidavit at para. 25.

<sup>134</sup> Mason Affidavit at para. 47; Forrester Affidavit at para. 3.

<sup>135</sup> Dr. Krusi Report at p. 11; Clamen Affidavit at para. 48.

<sup>136</sup> Clamen Affidavit at para. 48; Ade-Kur Affidavit at para. 17.

<sup>137</sup> Dr. Krusi Report at p. 10.

<sup>138</sup> Dr. Benoit Report at p. 8; Forrester Affidavit at para. 67.

<sup>139</sup> Perrin Affidavit at para. 4.

<sup>140</sup> Dr. Benoit Report at p. 9; Lam Affidavit at para. 23.

<sup>141</sup> Dr. Benoit Report at pp. 9-10.

42. For people who face structural inequalities, money earned through sex work is important and can improve their quality of life.<sup>142</sup> Sex workers exercise agency and decision-making capacity, even under conditions of economic constraint and limited options,<sup>143</sup> which mirrors workers in other gendered, precarious labour. For sex workers who experience the inequalities of “persistent poverty and instability”, sex work offers “enough money, stability, autonomy”, and provides a meaningful work option.<sup>144</sup> This holds true regardless of where a sex worker works – whether in an indoor environment or on the street level, or working independently or with third parties. Sex workers are “actors with agency, where engaging in sex work constitutes a rational decision, albeit one that is shaped by social and structural factors” such as gender, race, class, barriers to other labour markets, and immigration policies.<sup>145</sup>

43. As Ms. Perrin explained, sex work allowed her to “support [her] family and buy nice things for [her] children”, including new shoes, nice clothes, and pay for school field trips”.<sup>146</sup> Many sex workers choose sex work “in addition to or instead of other jobs available to them” which may provide less income or personal satisfaction.<sup>147</sup> Like workers in other sectors, sex workers “want ... to be able to earn a living without interference, discrimination, harassment, or judgment”.<sup>148</sup>

44. As discussed further below, the Crown’s witnesses frequently conflate sex work with exploitation and human trafficking.<sup>149</sup> Both human trafficking and exploitative working conditions

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<sup>142</sup> Forrester Affidavit at para. 67; Perrin Affidavit at paras. 2, 5; Reply Affidavit of Monica Forrester, affirmed January 20, 2022 [“**Forrester Reply Affidavit**”] at para. 23.

; Cross-Examination of Monica Forrester, March 11, 2022 [“**Forrester Cross**”], Q. 77, p. 18, ln. 4-9; Clamen Affidavit at para. 98; Jane X Affidavit, at para. 2.

<sup>143</sup> Dr. Benoit Report at p. 8; Forrester Reply Affidavit at paras. 4, 7.; Dr. Krusi Report at p. 12; Cooley Affidavit at para. 13.

<sup>144</sup> Dr. Benoit Report at p. 8.

<sup>145</sup> Exhibit “B” to the Reply Affidavit of Dr. Andrea Krusi, affirmed January 21, 2022 [“**Dr. Krusi Reply Report**”] at p. 2.

<sup>146</sup> Perrin Affidavit at para. 3. Canada’s fact witnesses did not challenge this account: Redsky Cross at Q. 118, p. 44, ln. 22, QQ. 47-50, 57, pp. 17-18, 20 at ln. 12-17; Cross- Examination of Cora-Lee McGuire, April 8, 2022, [“**McGuire Cross**”] QQ. 20-22 p. 8 ln. 4-18.

<sup>147</sup> Dr. Benoit Report at pp. 8-9; Perrin Affidavit at Exhibit “A” at p. 86.

<sup>148</sup> Dr. Benoit Report at p. 8.

<sup>149</sup> Dr. Roots Report at p. 1.

can occur in the sex industry as they do in many industries, including farming and manufacturing.<sup>150</sup> However, consent is fundamental to what the Applicants mean when they refer to sex work.<sup>151</sup> People can give consent when they live in difficult circumstances and have limited options. By contrast, forcing a person to perform sexual services is a criminal offence quite apart from the impugned provisions at issue in this application.<sup>152</sup> This application does not challenge the criminalization of forcing sex without consent. The application does, however, challenge the impugned provisions on the basis that they perpetuate conditions that increase sex workers' risk of sexual assault, as discussed below.

#### iv. Methodological Considerations for Studying the Sex Industry

45. Canada and Ontario's fact witnesses present anecdotal evidence on the segments of the sex industry with which they interact.<sup>153</sup> These descriptions have limited utility. The Applicants' experts are the only witnesses who have conducted studies of the sex industry in Canada. As a research population, sex workers are marginalized and hard to reach.<sup>154</sup> For this reason, recruitment for research on sex work is frequently done in partnership with sex worker-led organizations.<sup>155</sup> Although Drs. Pratt and Haak criticized the Applicants' experts' methodology on participant recruitment, neither has any experience conducting research on sex work.<sup>156</sup>

46. As Dr. Benoit explains, granting agencies like the Social Sciences and Humanities

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<sup>150</sup> Exhibit "2" to Cross-Examination of Dr. Cho at p. 10.

<sup>151</sup> Clamen Affidavit at paras. 46, 53.

<sup>152</sup> See, for example, *Criminal Code* ss. 265-269 (assault), 271 (sexual assault), 279(1) (kidnapping), 279(2) (forcible confinement), 279.01 (trafficking), 279.02 (material benefit from trafficking), 264.1 (uttering threats), 346 (extortion), 423 (intimidation), 264 (criminal harassment), 322 (theft), 343 (robbery).

<sup>153</sup> Redsky Cross, Q. 117, p. 43, ln. 24-25, p. 44, ln. 1-11; Cross-Examination of Andrea Rittenhouse, April 1, 2022 [**"Rittenhouse Cross"**], QQ. 41-44 p. 15 ln. 12 to p. 17 ln. 21; Cross-Examination of Detective Brian McGuigan, March 28, 2022 [**"McGuigan Cross"**], Q. 58 p. 17 ln. 19-23; Cross Examination of Paul Rubner, April 28, 2022 [**"Rubner Cross"**], QQ. 20-22 p. 8 ln. 1-13.

<sup>154</sup> Dr. Skilbrei Cross, Q. 205 p. 66 ln. 23 to p. 67 ln. 2.

<sup>155</sup> Atchison Affidavit at Exhibit "B", pp. 11-13.

<sup>156</sup> Dr. Haak Cross, Q. 484 p. 196 ln. 3-6; Dr. Pratt Cross, QQ. 18-20, p. 7, ln. 7-19.

Research Council and the Canadian Institute for Health Research frequently require research collaborations with community partners for research with marginalized populations.<sup>157</sup> In fact, funders have been “criticized for not engaging with communities about the research that’s done to them”.<sup>158</sup> Instead, research that collaborates with those who are part of the research is “part of a rigorous research process” and is known as “the gold standard”.<sup>159</sup> Given these expectations, most projects will not receive funding if they do not comply with these well-established social science research standards in Canada.<sup>160</sup>

47. As Dr. Bruckert explains, researchers are “committed to studying a broad cross-section of participants” and “mitigate the risk of a skewed sample by minimizing barriers to participation” including by using a wide range of recruitment techniques,<sup>161</sup> allowing as broad of a sample as possible to be captured.<sup>162</sup> For Dr. Bruckert, recruitment materials are designed to capture all those who meet the specified criteria – *e.g.*, those who have sold or exchanged sexual services over the past year, rather than only those who “conceptualize their activities as work”.<sup>163</sup>

48. Diverse and broad samples are achieved by implementing methods that “ensure that there are no barriers to people participating and they recruit widely”.<sup>164</sup> Techniques like these have allowed the experts to the Applicants to capture a diverse range of participants in their research, including:

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<sup>157</sup> Dr. Benoit Re- Examination, Q. 799, pp. 260-261, ln. 7-21.

<sup>158</sup> Dr. Benoit Re- Examination, Q. 799, pp. 260-261, ln. 7-21.

<sup>159</sup> Dr. Krusi Cross-Examination, April 19, 2022, [“**Dr. Krusi Cross**”] at QQ. 652-653, p. 275, ln. 20-25, p. 276, ln. 1-15, 20-25, p. 2766, ln. 1-3, Q. 195, p. 95, ln. 4-10, Q. 198, p. 96, ln. 15-23; Exhibit “B” to the Reply Affidavit of Dr. Benoit, affirmed January 27, 2022 [“**Dr. Benoit Reply Report**”], p. 10.

<sup>160</sup> Dr. Benoit Re- Examination, Q. 799, p. 262, ln. 11-15; Dr. Krusi Re- Examination, Q. 653, p. 276, ln. 20-25, p. 277, ln. 1-3; Dr. Bruckert, Cross-Examination. At Q. 172, p. 80, ln. 15-25, p. 81, ln. 1-4.

<sup>161</sup> Exhibit “B” to the Reply Affidavit of Dr. Bruckert, affirmed January 20, 2022 [“**Dr. Bruckert Reply Report**”] at pp. 6-7.

<sup>162</sup> Dr. Bruckert Cross, Q. 76, p. 43, ln. 22.

<sup>163</sup> Dr. Bruckert Reply Report at p. 9.

<sup>164</sup> Dr. Bruckert Cross, Q. 30, p. 22, ln. 14-25, p. 23, ln. 1-4; Cross-Examination of Dr. Benoit, April 4, 2022 [“**Dr. Benoit Cross**”] at p. 50 at ln. 22-25, p. 51 at ln. 1-3, p. 56, ln. 7-15, p. 57 at ln. 18-25, p. 58 at ln. 1, 13-16.

- (a) participants with various gender identities, sexuality, racial, ethnic and cultural identities, socio-economic status, age, and geographic locations;<sup>165</sup>
- (b) participants who sell or exchange sex in a variety of different sectors and settings, including participants who are the “most marginalized”, such as Indigenous, Black, and racialized sex workers, sex workers who work on the street, and those who use drugs;<sup>166</sup>
- (c) participants who currently sell or exchange sexual services or have sold or exchanged sexual services,<sup>167</sup> regardless of whether they self-identify as a sex worker<sup>168</sup> and participants who no longer work in the sex industry.<sup>169</sup>

49. Community involvement means that communities have input on the research questions that are important to them and ensure a high standard of ethics when engaging their community. It does not mean that a researcher does what a community agency wants them to do.<sup>170</sup> Researchers retain responsibility for the conclusions of their work, regardless of the scope of community involvement.<sup>171</sup> There is no evidence to suggest that any of the Applicants’ experts have altered their research findings to accommodate the views of a community or sex worker-led organization.

50. When this issue was put to Dr. Abel on cross-examination, she explained that she conducts her analysis without the input of NZPC, the community organization that she works with, and that she has never allowed the NZPC to alter any findings.<sup>172</sup> Other experts led by the Applicants gave similar answers.<sup>173</sup>

51. Critically, as Dr. Abel explains, researchers use community organizations to assist with

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<sup>165</sup> Dr. Benoit Reply Report at p. 11; Dr. Benoit Reply Report at pp. 10-11, 15; Dr. Benoit Cross at p. 99, ln. 18-25, p. 100, ln. 1-3, 18-21; Dr. Benoit Reply Report at pp. 10-11, 15; Dr. Benoit Cross at p. 99, ln. 18-25, p. 100, ln. 1-3, 18-21.

<sup>166</sup> Dr. Bruckert Reply Report at p. 7.

<sup>167</sup> Dr. Bruckert Reply Report at p. 8.

<sup>168</sup> Dr. Benoit Cross at Q. 349, p. 129, ln. 1-17; Dr. Benoit Re- Examination, Q. 798, p. 258, ln. 13-22.

<sup>169</sup> Dr. Benoit Reply Report at p. 14.

<sup>170</sup> Dr. Benoit Re-Examination, Q. 799, p. 261, ln. 21-23.

<sup>171</sup> Dr. Bruckert Cross, QQ. 91-92, p. 48, ln. 22-25, p. 49, ln. 1-25, p. 50, ln. 1-10.

<sup>172</sup> Cross-Examination of Dr. Abel, March 15 & 16, 2022, [“**Dr. Abel Cross**”] Q. 442 p. 137 ln. 24 to p. 138 ln. 8; Dr. Abel Cross, Q. 449-450 p. 142 ln. 2 to p. 143 ln. 12.

<sup>173</sup> Dr. Krusi Cross, Q. 198, p. 97, ln. 7-16; Dr. Bruckert Cross, Q. 160, p. 75, ln. 6-14, Q. 207-208, p. 98, ln. 7-8.

recruiting participants, in order to gain access to the sex work community.<sup>174</sup> Dr. Skilbrei agreed that partnerships with sex worker-led organizations are a common approach to recruiting participants, and they can improve the quality of research.<sup>175</sup> Dr. Skilbrei affirmed that she is “fully on board with participatory research methods, and for marginalized populations, hard to reach populations, it is often unethical to just watch them and study them, [which] contribute[s] to objectivizing them.”<sup>176</sup>

### C. History of the Impugned Provisions

#### i. *Bedford* struck down the prior *Criminal Code* prohibitions

52. The applicants in *Bedford* challenged the constitutionality of three sections of the *Criminal Code*: the prohibition on keeping, being an inmate of, being found in, or being an owner/ landlord of a common bawdy house (s. 210, the “**bawdy house provisions**”); the prohibition on living on the avails of the prostitution of another (s. 212(1)(j), the “**avails provision**”); and the prohibition of stopping or communicating with another person in a public place for the purpose of engaging in prostitution (s. 213(1)(c), the “**communicating provision**”).

53. At first instance, Justice Himel found that each of the three *Criminal Code* sections violated the applicants’ s. 7 rights. Justice Himel found that the sections unnecessarily prohibited measures to enhance sex workers’ safety, security and health.<sup>177</sup> She made the following factual findings:

(a) The risk that a sex worker will experience violence can be reduced in the following ways:

(i) Working indoors is generally safer than working on the streets;

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<sup>174</sup> Dr. Abel Cross, Q. 112 p. 33 ln. 22 to p. 32 ln. 16; Atchison Report, at pp. 11-13.

<sup>175</sup> Dr. Skilbrei Cross, QQ. 207-212, p. 67 ln. 10 to p. 68 ln. 8.

<sup>176</sup> Re-Examination of Dr. Skilbrei, Q. 243, p. 92 ln. 7-11.

<sup>177</sup> *Bedford* ONSC, BOA Tab 3 at paras 300-301, 326, 359-362, 365, 385, 421, 427, 432, 434-436, 506.

- (ii) Working in close proximity to others, including paid security staff, can increase safety;
- (iii) Taking the time to screen clients for intoxication or propensity to violence can increase safety;
- (iv) Having a regular clientele can increase safety;
- (v) When a sex worker's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;
- (vi) The use of drivers, receptionists, and body guards can increase safety; and
- (vii) Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring, and financial negotiations done in advance can increase safety.

(b) The bawdy house provisions can place sex workers in danger by preventing them from working in-call in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed-circuit television and other monitoring;

(c) The living on the avails provision can make sex workers more susceptible to violence by preventing them from legally hiring bodyguards or other drivers while working. Without these supports, sex workers may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor;

(d) The communicating provision can increase the vulnerability of street-based sex workers by forcing them to forego screening customers at an early and crucial stage of the transaction, increasing the speed of negotiation of terms, and forcing sex workers to work in more remote and less safe places.<sup>178</sup>

54. Justice Himel held each of the provisions was contrary to the principles of fundamental justice. The avails section arbitrarily deprived the applicants of liberty and security of the person. Justice Himel held that the remaining two challenged sections, acting in concert, were arbitrary.<sup>179</sup> Justice Himel also found both the bawdy house section and the avails section were overbroad. The bawdy house section was overbroad because it extended to *all* places, “including a prostitute

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<sup>178</sup> *Bedford ONSC*, BOA Tab 3 at paras. 421, 171, 335.

<sup>179</sup> *Bedford ONSC*, BOA Tab 3 at para. 385.

working independently and discreetly from home, or with another person in order to enhance safety”. The avails section was overbroad because its provisions extended beyond exploitative third parties. Justice Himel found all three sections grossly disproportionate to their legislative purposes. Justice Himel held that none of the provisions was saved under s. 1. She also found that the communicating provision violated s. 2(b) of the *Charter* and was not saved under s. 1.

55. The Supreme Court of Canada unanimously found that the three impugned provisions infringed s. 7 and were not saved under s. 1. Chief Justice McLachlin, writing for the Court, agreed with Justice Himel that the impugned provisions limited the applicants’ right to security of the person, noting that “the prohibitions at issue do not merely impose conditions on how prostitutes operate.<sup>180</sup> They go a critical step further, by imposing *dangerous* conditions on prostitution.”<sup>181</sup>

56. Chief Justice McLachlin considered each of the three provisions in this context. On the bawdy house provision, she held the provision engaged security of the person.<sup>182</sup> The Chief Justice found this provision was grossly disproportionate from its objective, and did not consider it necessary to consider whether it was overbroad, stating that the provision came “at the cost of the health, safety and lives of prostitutes”.<sup>183</sup>

57. Likewise, on the avails provision, Chief Justice McLachlin agreed with Justice Himel that “by denying prostitutes access to those security-enhancing safeguards, the law prevented from them taking steps to reduce the risks they face and negatively impacted their security of the person.”<sup>184</sup> She held that this provision was overbroad because it did not distinguish between those

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<sup>180</sup> *Bedford*, BOA Tab 1 at para 60.

<sup>181</sup> *Bedford*, BOA Tab 1 at para 60.

<sup>182</sup> *Bedford*, BOA Tab 1 at para 62.

<sup>183</sup> *Bedford*, BOA Tab 1 at para 136.

<sup>184</sup> *Bedford*, BOA Tab 1 at para 66.

who exploited sex workers, and those who could increase their safety.<sup>185</sup>

58. Chief Justice McLachlin held that the communicating provision engaged s. 7 by preventing sex workers from screening clients and setting the terms for their services, such as the use of condoms or safe houses, and thereby significantly increased their risk of harm.<sup>186</sup> The Chief Justice determined the provision was grossly disproportionate to its objective.<sup>187</sup>

**ii. The *Protection of Communities and Exploited Persons Act***

59. The PCEPA was enacted as a direct response to *Bedford*, as revealed by its extended title: *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*. Accordingly, at least part of Parliament's purpose in enacting the PCEPA was to address the safety issues identified in *Bedford* – namely, that sex workers must be able to take measures to protect their safety, including working indoors and engaging in working relationships with others.<sup>188</sup> The short title suggests that Parliament was concerned with preventing exploitation even though, as detailed below, exploitation is not an element of any of the impugned provisions.

60. The preamble of the PCEPA provides further evidence of Parliament's objectives:

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

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<sup>185</sup> *Bedford*, BOA Tab 1 at para 142.

<sup>186</sup> *Bedford*, BOA Tab 1 at para 156.

<sup>187</sup> *Bedford*, BOA Tab 1 at para 159.

<sup>188</sup> Legislative History Bill c-36 Vol 1 pp. 6654, 6755; Legislative History Bill c-36 Vol 2 Tab 32 page 8; Legislative History Bill c-36 Vol 2, p. 18; Legislative History Bill c-36 Vol 2 Tab 32 pp 8, 11, 17; Legislative History Bill c-36 Vol 2 Tab 37 p. 7882; Legislative History Bill c-36 Vol 3 Tab 43 pp. 15:15, 15:28, 15:41; Legislative History Bill c-36 Vol 4 Tab 46 p. 2256; Legislative History Bill c-36 Vol 4 Tab 48 p. 19:71; Legislative History Bill c-36 Vol 4 Tab 51 p. 2371.

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;

Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution [Emphasis added].<sup>189</sup>

61. The objectives of the legislation as stated in the Preamble suggest that Parliament hoped that they would justify legislation that would be unconstitutional according to *Bedford*.<sup>190</sup> The Supreme Court of Canada was clearly concerned that Parliament had failed to promote the safety of sex workers. Read together as a coherent legislative scheme, one object of the PCEPA was to promote the safety of sex workers until such time as sex work is eradicated. As discussed further below, while there were other objects to the PCEPA, including the eradication of sex work, those objects cannot displace or override the object of promoting the safety of sex workers. Taken as a whole, the PCEPA cannot make sex work *more* dangerous than the provisions that were struck down in *Bedford*, yet the empirical evidence demonstrates that it has exacerbated the dangers caused by the previous provisions.

62. The Applicants challenge five of the *Criminal Code* provisions that were enacted in the PCEPA. The full text of these provisions is reproduced in Schedule “B”.

(a) Section 213(1.1): the “public communication provision”. This provision criminalizes communication for the purpose of offering or providing sexual services for

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<sup>189</sup> Preamble, *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25. See Schedule “B” of this factum for full text.

<sup>190</sup> Legislative History Bill c-36 Vol 1 pp. 6754, 6721, 6726; Legislative History Bill c-36 Vol 3 Tab 43 p. 15:33; Legislative History Bill c-36 Vol 3 Tab 43 p. 15:35.

consideration in a public place, or in any place open to public view, that is next to a school ground, playground, or daycare centre.

(b) Section 286.1(1): the “purchasing provision”. This provision prohibits the purchase of sexual services and communication for that purpose.

(c) Section 286.2(1): the “material benefit provision”. This provision criminalizes receiving a financial or other material benefit from the purchase of sexual services.

(d) Section 286.3(1): the “procuring provision”. This provision criminalizes “procuring” a person to offer or provide sexual services by recruiting, holding, concealing, or harbouring the person or exercising control, direction or influence over the movement of that person.

(e) Section 286.4: the “advertising provision”. This provision criminalizes advertising the sale of sexual services.

63. Section 286.5, which the Applicants do not challenge, provides immunity from prosecution for sex workers whose conduct would violate the material benefit and/ or advertising provisions in relation to the sale of their own sexual services (the “**immunity provision**”). Yet, as explained below, s. 286.5 does not mitigate the numerous intersecting harms to sex workers caused by the impugned provisions.

64. Additionally, the material benefit provision is qualified by s. 286.2(3), which creates a rebuttable presumption that anyone who lives with or is “habitually in the company of” a sex worker is guilty of an offence under s. 286.2(1). Further, while s. 286.2(4) creates certain “exceptions” to s. 286.2(1), they are rendered meaningless for third parties providing essential supports and services by the “exceptions to the exceptions” provided in ss. 285.2(5)(d) and (e). Paragraphs 119-120 explain how the application of ss. 286.2(1) and 286.2(5) prohibits vital health and safety measures by third parties, which the courts identified in *Bedford*.

65. The Applicants also challenge s. 213(1), which criminalizes the stopping or impeding of traffic for the purpose of offering or obtaining sexual services (the “**impeding traffic provision**”). This provision predates the PCEPA.

### iii. The Court of Appeal's Decision in *N.S.*

66. *R. v. N.S.* concerned criminal charges against a third party who was not a sex worker. The accused sought to challenge the constitutional validity of the material benefit, procuring, and advertising provisions on the basis that they contravened sex workers' rights. In support of this challenge, *N.S.* led a report from Mr. Atchison and posed several hypotheticals. There were no fact witnesses, and more importantly, there was no evidence from any sex workers. Justice Sutherland found that the impugned provisions were contrary to s. 7 of the *Charter*, were not saved by s. 1 of the *Charter*, and were therefore of no force or effect. The Crown appealed to the Court of Appeal.

67. The Applicants were concerned that the Court of Appeal might determine questions of fundamental importance to their rights without their participation. The Applicants were particularly concerned about the lack of evidence before the Court of Appeal, and the artificiality of challenging only the third party provisions without considering the purchasing provision which underlies them, or the provisions which directly criminalize sex workers in public space – all of which are part of the interdependent regime. They urged the Court of Appeal to delay the hearing of the *N.S.* appeal to permit this application to catch up. However, the Crown refused to wait. In the alternative, the Applicants sought leave to adduce their record in this proceeding as fresh evidence on appeal in *N.S.* The Crown resisted this effort as well. Associate Chief Justice Fairburn granted the Applicants leave to intervene in the *N.S.* appeal, but denied them from either joining this proceeding or leading their evidence before the Court of Appeal.<sup>191</sup>

68. The Court of Appeal was therefore deprived of the robust record before this Court, and it

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<sup>191</sup> *R v N.S.*, [2021 ONCA 605](#) (Chambers), BOA Tab 6 at paras. 42-46.

proceeded on the basis that there was no challenge to some of the interdependent impugned provisions, such as the purchasing provision. The panel was obliged to decide the appeal on a thin evidentiary record and a series of hypotheticals that were limited to the three provisions at issue and do not reflect the realities of most sex workers' working relationships with third parties.

69. The Court of Appeal overturned Justice Sutherland's decision that the material benefit, procuring, and advertising provisions were unconstitutional. Justice Hoy, writing for the court, determined the purpose of the PCEPA and identified three objectives of the PCEPA as a whole:

- (a) To reduce the demand for sex work with a view to discouraging entry, deterring participation, and abolishing it to the greatest extent possible, in order to protect communities, human dignity, and equality;
- (b) To prohibit the promotion of the sex work of others, and the institutionalization of sex work through commercial enterprises in order to protect communities, human dignity and equality; and
- (c) To mitigate some of the dangers associated with the continued provision of sexual services for consideration.<sup>192</sup>

70. On the third objective, Justice Hoy found that "there is no doubt that Parliament was concerned about the safety of those who engage in the provision of sexual services for consideration."<sup>193</sup> To that end, Justice Hoy concluded that Parliament intended to permit sex workers to avail themselves of the safety-enhancing measures identified in *Bedford*.<sup>194</sup>

71. Justice Hoy found that N.S.'s hypothetical sex worker cooperative scenario did not actually infringe the material benefit provision, so she did not consider whether the provision was unconstitutional. Justice Hoy held that the procuring provision and the advertising provision had their own purposes, which were narrower than the overall purposes of the *PCEPA*:

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<sup>192</sup> N.S., BOA Tab 4 at para 59.

<sup>193</sup> N.S., BOA Tab 4 at para 61.

<sup>194</sup> N.S., BOA Tab 4 at para 62.

(a) The purpose of the procuring provision is to “denounce and prohibit the promotion of the prostitution of others in order to protect communities, dignity and equality.”<sup>195</sup>

(b) The purpose of the advertising provision is to “reduce the demand for the provision of sexual services for consideration in order to protect communities, human dignity and equality.”<sup>196</sup>

72. In view of these objectives, Justice Hoy concluded that neither of the provisions violated s. 7 because they were not contrary to the principles of fundamental justice. While the advertising provision violated sex workers’ s. 2(b) rights, the violation was justified under s. 1.<sup>197</sup>

73. *N.S.* was an incomplete and artificial exercise that arose in the particular circumstances of a criminal prosecution, it does not reflect the true impact of the impugned provisions at issue in this application, and it is readily distinguishable. Importantly, the Court of Appeal’s analysis occurred in a vacuum and did not consider ss. 213(1), 213(1.1) and the blanket criminalization produced by 286.1 or the realities of most sex workers’ working relationships with third parties. *N.S.* therefore provides no guidance to this court as to the provisions’ intersecting harms.

74. In particular, the exceptions to the material benefit provision and the immunity provision do not mitigate the harms caused to sex workers caused by the purchasing provision, which forces them to work in a criminalized context. The claim that the exceptions to the material benefit provision allows sex workers to work together from an indoor location is illusory in the context of the purchasing provision, which prohibits clients from communicating with sex workers regarding their services and to establish conditions, prevents sex workers from screening clients, and prevents sex workers from renting a residential or commercial location to provide sexual services without risking eviction.

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<sup>195</sup> *N.S.*, BOA Tab 4 at para 121.

<sup>196</sup> *N.S.*, BOA Tab 4 at para 152.

<sup>197</sup> *N.S.*, BOA Tab 4 at paras. 155-163.

75. Likewise, the exceptions to the material benefit provision and the immunity do not mitigate the harms of the stopping traffic and public communication provisions, which prohibit sex workers and clients from communicating and determining conditions and consent, forces sex workers into isolated and dangerous areas, and threatens sex workers with arrest.

76. Even setting aside the serious harms of the purchasing, stopping traffic, and public communication provisions, the “exceptions to the exception” render the material benefit exceptions meaningless in the context of sex workers’ relationships with third parties who provide health and safety services. The Court of Appeal did not have evidence about the real-world work structures and relationships between third parties and sex workers. The Court of Appeal considered a narrow set of oversimplified hypotheticals, which led the Court to focus on “cooperatives” among “independent” sex workers, in which no one exerts any influence, assists with the purchase of, or receives any profit from others’ services. Not only do such cooperatives not reflect the majority of third party supports and relationships in the industry, but the Court also failed to acknowledge that the most marginalized sex workers facing the most serious harm from criminalization are precisely those without the resources to establish their own “non-profit cooperative.”

77. This application provides the Court an opportunity to consider the object of the impugned provisions as a coherent legislative scheme. Parliament cannot have intended the operation of these provisions, taken together, to undermine the safety enhancing purpose of the PCEPA that Justice Hoy recognized, and which is apparent from its preamble. Yet on the record before the Court, that is precisely the effect of the impugned provisions, and further, it is evident that they do not serve any of the other objectives of the legislation.

78. Recognizing the broader scope of this application and its richer evidentiary record, Justice

Hoy expressly stated that the Applicants’ arguments were “for another day”.<sup>198</sup> The Court of Appeal deliberately constrained its decision in *N.S.* so as to avoid foreclosing the relief that the Applicants seek here. As in *Bedford*, the evidence that the Applicants have presented “fundamentally shifts the parameters of the debate”.<sup>199</sup>

#### **D. The PCEPA Harms People Who Sell or Exchange Sex**

79. The impugned provisions form an interconnected regime introduced by the PCEPA – each of which intersects to perpetuate and exacerbate overlapping harms to sex workers – many of which are the very harms that were affirmed in *Bedford*.<sup>200</sup> As detailed below, the impugned provisions have replicated and exacerbated these harms, which are disproportionately borne by sex workers from Indigenous, Black, racialized, migrant, and trans communities.

##### **i. Targeting Clients Harms Sex Workers**

80. Clients of the sex industry are typically “average” people who are not predatory nor violent.<sup>201</sup> Expert witnesses confirmed that the “majority of sex workers’ client interactions [are] positive”<sup>202</sup> and “peaceful.”<sup>203</sup> As with any other service industry, sex workers do encounter bad clients,<sup>204</sup> though such encounters are the exception.<sup>205</sup>

81. Canada and Ontario’s case rests on one of the most harmful misconceptions of the PCEPA: that the criminalization of clients and third parties does not directly impact sex workers. However, the extensive evidentiary record of this application confirms the contrary: prohibitions on clients

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<sup>198</sup> *N.S.*, BOA Tab 4 at footnotes 4, 14.

<sup>199</sup> *Bedford*, BOA Tab 1 at para 42. See also *Bedford*, BOA Tab 1 at paras. 38-45.

<sup>200</sup> Dr. Benoit Report at p. 11; Dr. Bruckert Report, at p. 9.

<sup>201</sup> Dr. Krusi Report at pp. 30-31; Atchison Report p. 17; Scott Affidavit at para. 47.

<sup>202</sup> Dr. Krusi, Report at p. 29.

<sup>203</sup> Atchison Report p. 18.

<sup>204</sup> Dr. Krusi Report at p. 31; Atchison Report at pp. 17-18.

<sup>205</sup> Atchison Report p. 18; Forrester Affidavit at para. 47; Perrin Affidavit at para. 31.

produce a multitude of overlapping harms for sex workers.

82. The purchasing provision leads to police surveillance and the threat of criminalization,<sup>206</sup> causing clients to fear police detection, which shapes their behaviour and interactions with sex workers.<sup>207</sup> This creates a dynamic where clients feel “on edge”, and results in increased aggression,<sup>208</sup> posing significant harms to sex workers.

83. The purchasing provision changed what was previously a lawful activity in a private setting into an unlawful one. In so doing, the purchasing provision has “completely transformed practices with clients” in both indoor and public spaces, as clients seek to remain under the radar.<sup>209</sup> The consequences of the purchasing provision are striking. As Dr. Krusi explains, criminalizing and targeting clients directly impacts sex workers’ ability to control and negotiate their working conditions. This materializes in a number of ways, including:

(a) Sex workers are left unable to screen clients and negotiate terms of sexual transactions (including type of service and sexual health information), as clients now prefer to “maintain anonymity”,<sup>210</sup> causing screening measures to disappear;<sup>211</sup>

(b) Sex workers are displaced into isolated areas because of client demands to engage in transactions away from police presence, putting sex workers in situations where there are risks of violence and “little chance for help”;<sup>212</sup> and

(c) Sex workers are unable to access police protections because clients are enforcement targets, rendering police inquiries about sex workers’ safety as “a nuisance at best, and a form of police harassment at worst”, undermining the policing of violence, theft, and harassment.<sup>213</sup>

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<sup>206</sup> Jane X Affidavit at paras. 11, 31; Wesley Affidavit at para. 39.

<sup>207</sup> Dr. Bruckert Report at p. 8; Dr. Bruckert Cross, QQ. 333-334, p. 144, ln. 4-16.

<sup>208</sup> Dr. Krusi Report at p. 31; Forrester Affidavit at para. 41.

<sup>209</sup> Clamen Affidavit at para. 69.

<sup>210</sup> Dr. Krusi Report at pp. 29-30, 32.

<sup>211</sup> Dr. Krusi Report at pp. 27-29; see also, Clamen Affidavit at paras. 70-73.

<sup>212</sup> Dr. Krusi Report at pp. 27-29; see also, Dr. Bruckert Report at pp. 8-9; Dr. Bruckert Cross, Q. 332, p. 143, ln. 18-25, p. 144, ln. 1-3; Clamen Affidavit at paras. 70-73.

<sup>213</sup> Dr. Krusi Report at pp. 27-29; see also, Clamen Affidavit at paras. 70-73.

84. The purchasing provision causes sex workers to operate in more isolated, precarious, and dangerous conditions, and compromises their ability to establish consent and reject clients who do not comply with the terms of a transaction.<sup>214</sup> Instead, sex workers may “accept clients or services that they would otherwise reject due to safety concerns”.<sup>215</sup> As Dr. Krusi affirms, this has made it more difficult for sex workers to keep themselves and their work environment safe.<sup>216</sup>

85. As discussed further below, the ill effects of the purchasing provision are exacerbated by the public communication provision and the impeding traffic provision, which criminalize both clients and sex workers. These offences force sex workers to replicate the same behaviours exhibited by clients seeking to avoid prosecution under the purchasing provision.<sup>217</sup>

**ii. Impediments to Clear and Direct Communication Undermine Screening and Compromise Consent**

**(a) Thwarted Screening Exposes Sex Workers to Danger**

86. Screening is a vital way to promote sex workers’ safety and prevent encounters that exceed the agreed parameters or become violent.<sup>218</sup> Effective screening in all areas of the industry, including in public space, in commercial or residential locations, and when communicating with clients remotely, requires clear and direct communication with prospective clients prior to an engagement.<sup>219</sup>

87. For sex workers working in public spaces, screening is used to assess how a client makes them feel, detect any troubling signs, determine whether a client is seeking a service that they can

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<sup>214</sup> Dr. Krusi Report at p. 26; Dr. Krusi Report at p. 32; Dr. Bruckert Report at p. 9; Dr. Bruckert Cross, Q. 335, p. 144, ln. 17-24.

<sup>215</sup> Dr. Krusi Report at p. 26; Dr. Bruckert Report at p. 9; Dr. Bruckert Cross, Q. 335, p. 144, ln. 17-24.

<sup>216</sup> Dr. Krusi Report at p. 32.

<sup>217</sup> Clamen Affidavit at para. 74.

<sup>218</sup> Dr. Bruckert Report at pp. 9-10; Dr. Krusi Report at pp. 22, 27-28; Mason Affidavit at paras. 19-20; Jane X Affidavit at para. 14.

<sup>219</sup> Scott Affidavit at paras. 41-44; Jane X Affidavit at paras. 9-16; Dr. Benoit Report at p. 15.

provide, and decide whether they feel safe to accept a client based on assessing their surroundings.<sup>220</sup> However, communication can cause clients to become anxious when meeting with a sex worker because they want to “minimize the time they are visible” with a sex worker.<sup>221</sup> The desire to remain discreet frequently “leads to more hostile behaviours”, including refusal to communicate in advance of a transaction, which result in rushed and perfunctory screening.<sup>222</sup>

88. In this manner, the purchasing provision, the public communication provision, and the impeding traffic provision force sex workers to make split-second decisions:

When working on the street, clients will approach me and share a hand signal indicating that they want to see me. Before the PCEPA, I would have had a chance to make a decision about the person talking to me. Now, I have to make a split-second decision to see the client or not, by providing them with a signal in response. I have to engage in these subtle signals because under the PCEPA, stopping a car to offer sexual services is illegal. This makes it nearly impossible to communicate, as I am always nervous about being arrested by the police while trying to screen a client. My goal is to try to maintain invisibility while working. Sometimes, I have to get into the car before saying a single word to the potential client. But these kind of rushed encounters – jumping into cars blind – expose sex workers to considerable danger and allow us to get hurt.<sup>223</sup>

89. The impugned provisions hurt sex workers working in a public place, who need time to screen potential clients to determine essential components of a transaction, like assessing clients for intoxication, other persons in a vehicle, or weapons.<sup>224</sup> Instead, sex workers are forced to quickly enter unknown vehicles.<sup>225</sup> This comes at the cost of critical safety measures that would otherwise allow sex workers and third parties to screen for potential violence.<sup>226</sup> These screening measures are particularly important for street-based sex workers because “[p]redators are more likely to prey on [them] because the street provides anonymity”.<sup>227</sup>

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<sup>220</sup> Forrester Cross, Q. 286 and 289, p. 61, ln. 12-25, p. 62, ln. 1-6,21-25, p. 63, ln. 1-2; Forrester Affidavit, at para. 32.

<sup>221</sup> Forrester Affidavit, at para. 33.

<sup>222</sup> Forrester Affidavit, at para. 33; Jane X Affidavit, at paras. 10-11.

<sup>223</sup> Forrester Affidavit, at para. 34.

<sup>224</sup> Dr. Bruckert Report at p. 10; Forrester Affidavit at para. 38; Dr. Krusi Report at p. 22; Forrester Affidavit at para. 46.

<sup>225</sup> Dr. Bruckert Report at p. 10; Forrester Affidavit at para. 38; Dr. Krusi Report at p. 22; Forrester Affidavit at para. 46.

<sup>226</sup> Dr. Bruckert Report at pp. 9-10.

<sup>227</sup> Dr. Bruckert Report at p. 10.

90. The Applicants' witnesses repeatedly underscored the consequences of foregoing proper screening measures. For example, Ms. Perrin explained how the PCEPA precipitates rushed encounters without screening:

When a car pulls up, there is not a lot of time – as the clients are nervous. The criminalization of clients in recent years makes them paranoid during our engagements. Clients are very scared of being caught and charged by the cops. So the quicker, the better. Oftentimes, clients will even ask if I am a cop before I get in. I have to quickly show them that I am not wearing a wire, and reassure them that I am not a cop. I have little time to decide whether to get into that car and I often spend it proving that I am not a cop, rather than trying to do an initial screen of the client.

This situation is made more dangerous because the law stops me from working near many public places – like school yards or parks – even at night – so I get pushed into more isolated places. I end up in more secluded spaces, like commercial or industrial areas.<sup>228</sup>

91. The negative impacts on screening measures are equally felt by sex workers operating in indoor locations, who are attempting to remotely communicate with clients prior to meeting in person. Just like street-based sex workers, the purchasing provision has resulted in clients exhibiting increased fear and aggression, and being reluctant to disclose personal information.<sup>229</sup> Clients are guarded, preferring to maintain anonymity, making it more difficult for sex workers to effectively screen.<sup>230</sup> Ms. Mason, who works indoors, explains:

... I cannot obtain a photo of their face for screening and security purposes, even though I provide photos of myself. This contrast illustrates the dynamic: clients can obtain fulsome information from sex workers while fading into the background as they wish, while sex workers are denied access to any information and screening measures – no matter the risks or consequences.<sup>231</sup>

Under the PCEPA, potential clients refuse to provide almost anything. This includes any other identifying information, such as their identification or health-related information – which are additional measures that help with screening and safety ...

These realities prevent me from obtaining a record of personal information from clients, which is a critical tool for decreasing the power imbalances created by the PCEPA. Identification signals to clients that their actions are not untraceable and that they can be held accountable if they try to harm me. This information would provide me with evidence to share with police and seek recourse

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<sup>228</sup> Perrin Affidavit, April 25, 2022, at paras. 25-26; Jane X Affidavit at paras. 9-16; Scott Affidavit at paras. 41-44; Cooley Affidavit at para. 18.

<sup>229</sup> Dr. Krusi Report at p. 33; Dr. Bruckert Report at p. 33.

<sup>230</sup> Dr. Benoit Report at p. 15; Jane X Affidavit at para. 10.

<sup>231</sup> Mason Affidavit at para. 16.

should an engagement become violent. It would also allow me to warn the sex worker community about violent clients through information sharing. This would allow other sex workers to avoid violent clients and enhance our individual and collective safety.<sup>232</sup>

92. Similarly, Ms. X emphasizes that screening practices have transformed under the PCEPA:

I noticed a major shift in the nature of my interactions with clients after the PCEPA came into force. Clients now provide little to no personal identifying information, as they are afraid of being connected with a crime. In the past, I found that I was more likely to obtain the real name and contact information of clients. But in most cases, I am now only able to get a first name (which may or may not be real) and a phone number (which may or may not be their main number). This is not enough information to meaningfully screen clients, for example by searching them online or cross-referencing them on bad date lists.<sup>233</sup>

93. Effective screening requires “careful attention to ‘cues’” and the “collection of verifiable information from clients”.<sup>234</sup> Unfortunately, the limitations imposed by the purchasing, public communication, and impeding traffic provisions are compounded by the other impugned provisions. For example, third parties could perform screening measures on behalf of sex workers, establishing an enhanced level of security as potential clients know that there are safety and accountability measures in force.<sup>235</sup> However, third parties are prohibited from providing these services under the material benefit provision and the procuring provision.<sup>236</sup> Similarly, the advertising provision undermines screening measures because it criminalizes a ready means of communicating sex workers’ expectations and inviting a dialogue with prospective clients.<sup>237</sup>

94. Within a criminalized context the “ability to screen is weakened” as sex workers must “balance[e] the simultaneous screening for both police and aggressors” where “the former may

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<sup>232</sup> Mason Affidavit at paras. 17-18.

<sup>233</sup> Jane X Affidavit at para. 10.

<sup>234</sup> Dr. Bruckert Report at p. 33.

<sup>235</sup> Dr. Bruckert Report at pp. 17-18, 33; Scott Affidavit at paras. 24-27.

<sup>236</sup> Dr. Bruckert Report at p. 33.

<sup>237</sup> Jane X Affidavit at paras. 5-8.

‘trump’ the latter” and third parties who continue to work “may miss important information in their preoccupation with avoiding police and criminalization”.<sup>238</sup>

**(b) Limited Communication Compromises Capacity to Negotiate Terms and Establish Consent**

95. Conflict most frequently arises from a misalignment of expectations.<sup>239</sup> Clear and direct communication between sex workers and prospective clients is an important means by which sex workers can avoid aggression and violence.<sup>240</sup> This requires the ability to communicate and negotiate terms and conditions of the services *before* the start of an engagement.<sup>241</sup> Determining these expectations and boundaries are fundamental to allowing sex workers to exercise autonomy and establish consent.<sup>242</sup> However, the impugned provisions undermine full and explicit conversations,<sup>243</sup> which impairs sex workers’ ability to clearly communicate and negotiate their terms of service.<sup>244</sup> This includes the capacity to clearly communicate sexual health practices.<sup>245</sup>

96. For sex workers who operate in public spaces like Ms. Forrester, the terms of a transaction are rarely determined prior to being alone with a client. This means that “important discussions like which sexual acts will take place, whether a condom will be used, and other important terms are not talked about until [a sex worker and a client] are alone in a car – often in an isolated space”.<sup>246</sup> Critically, “[e]ach topic requiring discussion creates a risk of potential toxicity and aggression” as there may be a disagreement.<sup>247</sup> It also sets up sex workers to go unpaid.<sup>248</sup>

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<sup>238</sup> Dr. Bruckert Report at p. 33.

<sup>239</sup> Mason Affidavit at paras. 10-11; Forrester Affidavit, at para. 58; Jane X Affidavit at para. 8.

<sup>240</sup> Dr. Benoit Report, at p. 15; Mason Affidavit at para. 23; Jane X Affidavit at para. 14.

<sup>241</sup> Dr. Benoit Report, at p. 15; Mason Affidavit at para. 24; Jane X Affidavit at paras. 12-14.

<sup>242</sup> Dr. Benoit Report at p. 15.

<sup>243</sup> Mason Affidavit, at paras. 10-12; Jane X Affidavit at paras. 8, 11-13.

<sup>244</sup> Dr. Benoit Report at p. 14; Atchison Report at pp. 20-22; Jane X Affidavit, at paras. 14-17.

<sup>245</sup> Scott Affidavit at para. 44; Mason Affidavit at para. 26, Dr. Benoit Report at p. 15.

<sup>246</sup> Forrester Affidavit at para. 39.

<sup>247</sup> Forrester Affidavit at para. 39.

<sup>248</sup> Forrester Affidavit at para. 39.

97. As Ms. Forrester explains, the impugned provisions severely impair her ability to communicate, negotiate, and establish consent:

... Now, clients fear detection by police, which impacts my ability to communicate with them. This makes our engagements riskier. I cannot negotiate prices and services with clients, especially in public spaces, because the police might show up. The fear of the police rushes my initial encounters with potential clients, forcing me to forego most screening measures and diminishes my ability to give informed consent. Now, when I walk out of my door for work, the first thing that I think about is whether I will have a bad client or if something bad will happen to me.<sup>249</sup>

98. These consequences are also felt by sex workers who operate indoors. Ms. X explains that the impugned provisions have undermined her ability to communicate and negotiate with clients in advance of them arriving at her home:

Under the PCEPA, clients are more reluctant to speak with me in advance of appointments, even regarding essential elements of the transaction, such as the nature of the services offered, price, and safer sex practices. Clients have informed me that they were afraid of having these discussions over text and phone, concerned about the potential for undercover police investigations and surveillance ....

Instead of reaching an agreement in advance, clients often want to discuss the nature of the services in person. I do not feel that this is a safe practice because I end up alone with someone I have never met, with little information about them and what they expect out of the appointment.<sup>250</sup>

99. As Ms. Mason similarly explains that the impugned provisions have harmed advance communications with clients:

When the *PCEPA* became law ... I noticed that clients became unwilling to have the types of direct conversations that we once had. Instead, clients demanded blunt and quick dialogue. Clients became uncooperative, uncomfortable, and were noticeably trying to be discreet. Clients continue to be reticent to offer any information. This results in fewer, shorter, and disappearing phone conversations. My clients tell me that they fear having explicit communications with sex workers due to the criminal risks created by the PCEPA.<sup>251</sup>

100. Unfortunately, sex workers are forced to rely on the use of coded terms to “keep

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<sup>249</sup> Forrester Affidavit at para. 31; see also, Cooley Affidavit at para. 16.

<sup>250</sup> Jane X at para. 13.

<sup>251</sup> Mason Affidavit at para. 12; Jane X Affidavit at paras. 7-8, 11.

communications discreet and avoid criminalization”.<sup>252</sup> However, clients may “not know (or understand) the code”.<sup>253</sup> This leaves sex workers subject to “increased exposure to harm”.<sup>254</sup>

101. The impugned provisions also restrict third parties’ behaviours, which in turn affects sex workers’ ability to establish conditions of consent.<sup>255</sup> Because their involvement is criminalized, third parties must try to avoid police detection, so they too use “‘coded’ language in both promotion and ... interactions with clients”.<sup>256</sup> As a consequence, third parties may not be able to “establish the terms and conditions of service when screening and booking clients”.<sup>257</sup> This means that sex workers’ boundaries on things like condom use, types of services offered, and payment for additional services cannot usually be communicated to clients.<sup>258</sup>

102. The lack of clear communication before the encounter can set the stage for “unpleasant encounters with frustrated clients”.<sup>259</sup> Ms. Mason details some of the ways that these harms can materialize:

While I usually try to set the terms of engagement as best as I can through text messages, many clients do not carefully read, or do not fully understand, the limits of what we are agreeing to. The elimination of detailed conversations sets the stage for clients to take advantage of me. Often, this results in clients pressuring me into lower prices and to offer services that we never agreed to. As a result, I have found myself on the receiving end of abuse.

I am a trans woman who has retained her penis. I need my clients to understand this about me, to understand my body and its capabilities, before they engage my services. Otherwise, I would be scared to be undressed with a client who may react in a number of ways, and I have had transphobic and violent responses.<sup>260</sup>

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<sup>252</sup> Atchison Report at pp. 20-22; Mason Affidavit at para. 15; Clamen Affidavit at para. 64; Dr. Bruckert Report, at p. 14; Cooley Affidavit at para. 18.

<sup>253</sup> Dr. Bruckert Report at p. 31; Atchison Report at p. 21; Clamen Affidavit at para. 64.

<sup>254</sup> Dr. Benoit Report at p. 15; Clamen Affidavit at para. 65; Jane X Affidavit at para. 14.

<sup>255</sup> Dr. Bruckert Report at p. 33.

<sup>256</sup> Dr. Bruckert Report at p. 31.

<sup>257</sup> Dr. Bruckert Report at p. 31.

<sup>258</sup> Dr. Bruckert Report at p. 31.

<sup>259</sup> Dr. Bruckert Report at p. 31; Clamen Affidavit at para. 65.

<sup>260</sup> Mason Affidavit at paras. 23-24; Jane X Affidavit at paras. 11-16.

103. *Bedford* recognized that impaired screening and communication put sex workers at risk of harm. Justice Himel found that sex workers can increase safety by taking time to screen clients for intoxication or propensity to violence, and by agreeing in advance on the sexual acts that will occur.<sup>261</sup> Without these tools, sex workers’ ability to consent is diminished, and they face a risk of violence.

### **(c) Prohibiting Advertising Jeopardizes Health and Safety**

104. Advertising is a “necessary tool” that protects sex workers’ health, safety and autonomy.<sup>262</sup> It requires “explicit” and “detailed” information to ensure that clients and sex workers have a shared set of expectations for an engagement.<sup>263</sup> Advertising helps to obtain clients and manage expectations.<sup>264</sup> PCEPA now prohibits this measure.

105. While s. 286.5 of the *Criminal Code* notionally permits sex workers to advertise their own services, this exception is of little practical use. Advertising “necessitates the engagement of third parties, including website providers to run sex workers’ advertisements”.<sup>265</sup> Sex workers often require the assistance of other third parties to help with advertising, for example to design an advertisement, create an account, and access a credit card.<sup>266</sup> Notably, “[m]ore marginalized sex workers frequently do not have access to these resources and skills”,<sup>267</sup> and they are in particular need of assistance from others.<sup>268</sup> However, every person who knowingly assists with the advertisement of another person’s sexual services is caught by the advertising provision without

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<sup>261</sup> *Bedford* ONSC, BOA Tab 3 at para. 421; *Bedford*, BOA Tab 1 at para. 69.

<sup>262</sup> Clamen Affidavit at para. 89.

<sup>263</sup> Forrester Affidavit at para. 55; Jane X Affidavit at paras. 5-8.

<sup>264</sup> Forrester Affidavit at para. 55; Jane X Affidavit at paras. 5-8.

<sup>265</sup> Clamen Affidavit at para. 90.

<sup>266</sup> Clamen Affidavit at para. 90; Dr. Bruckert Report at p. 35.

<sup>267</sup> Clamen Affidavit at para. 90.

<sup>268</sup> Mason Affidavit at para. 36; Lam Affidavit at para. 23; Reply Affidavit of Sandra Wesley, affirmed January 25, 2022 [“**Wesley Reply Affidavit**”] at para. 35.

exception.<sup>269</sup>

106. As a result, many advertisers will no longer take sex workers' advertisements, and remaining outlets have "become inaccessible for many sex workers" due to their costs, limitations on payment methods, and requirements for personal information like photo identification.<sup>270</sup> Even for those sex workers who can clear these hurdles, advertisements cannot list the specific details of the services that are offered.<sup>271</sup> Instead, sex workers must be indirect when writing their descriptions, as censors will remove advertisements that are too explicit, which eliminates a critical opportunity for sex workers to screen and negotiate with clients, as well as establish consent.<sup>272</sup>

107. The advertising provision produces the following consequences, as described by Dr. Bruckert:

- (a) Restricted options for marginalized sex workers who are unable to advertise on more accessible and free non-sex work specific sites, which "may necessitate a return to soliciting for clients in public spaces";<sup>273</sup>
- (b) Denied access to important information and increased isolation, as sex work advertising website providers "make available important security tools" where bad date lists and other information are shared, and the emotional wellbeing and community among sex workers is enhanced;<sup>274</sup>
- (c) Inability of agencies to be forthright in their promotional material in order to avoid law enforcement, resulting in "clients being unaware of what services sex workers ... provide and lack information regarding the fees for additional services"; and
- (d) Inhibited ability to communicate and negotiate directly with clients on the "services they do (and do not) provide and under what circumstances", thereby "increas[ing] the likelihood of a misunderstanding ... resulting in unpleasant or even hostile encounters".<sup>275</sup>

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<sup>269</sup> Clamen Affidavit at para. 90.

<sup>270</sup> Forrester Affidavit at para. 56; Perrin Affidavit at para. 20; Jane X Affidavit at para. 6.

<sup>271</sup> Forrester Affidavit at para. 56; Jane X Affidavit, at para. 7. For examples of the vagueness of current online advertisements, see Exhibit "B" of Affidavit of Andrew Taylor, sworn at January 12, 2022 ["**Taylor Affidavit**"].

<sup>272</sup> Forrester Affidavit, at para. 57; Jane X Affidavit, at paras. 7-8.

<sup>273</sup> Forrester Affidavit at para. 59; Perrin Affidavit at para. 20.

<sup>274</sup> Mason Affidavit at para. 35.

<sup>275</sup> Dr. Bruckert Report at pp. 36-39. See also: Jane X Affidavit, at paras. 7-8, 15.

108. In the result, the advertising provision leads some sex workers who would prefer to work indoors into more dangerous street-based work, because they cannot obtain clients for their indoor work.<sup>276</sup> This is particularly problematic for the most marginalized sex workers, who lack the client base and resources to increase their safety by moving indoors.<sup>277</sup> The prohibition on advertising therefore replicates the harms that were identified in *Bedford*.<sup>278</sup>

109. The advertising provision also reduces the ability of indoor workers to clearly communicate with clients before the transaction to establish boundaries and lay the foundation for consent.<sup>279</sup> It is no answer to say that these sex workers and clients can communicate privately in advance of the transaction, either with established clients, or to follow up on a coded advertisement. This answer ignores the fact that those communications themselves are subject to the purchasing provision, as discussed above.<sup>280</sup> In these circumstances, an advertisement may be the sex worker's only opportunity to speak openly about what they are offering. As Ms. X states, the provisions push conversations about the terms of services to the appointment itself, "a setting in which I have less control and bargaining power, and I am less able to protect myself."<sup>281</sup>

110. The purchasing provision and the advertising provision combine to create a significant barrier to effective communication prior to the encounter. Sex workers cannot declare their intentions in an advertisement, and clients will not engage in a candid conversation about their intentions, even in private. As Ms. Perrin deposed, advertising can be the difference between a haphazard and risky encounter, and the opposite:

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<sup>276</sup> Forrester Affidavit at para. 59; Perrin Affidavit at paras. 20-21; Ade-Kur Affidavit at para. 32.

<sup>277</sup> Dr. Benoit Report at p. 20; Perrin Affidavit at paras. 20-21; Cooley Affidavit at para. 23.

<sup>278</sup> *Bedford*, BOA Tab 1 at paras. 64, 69, 71.

<sup>279</sup> Jane X Affidavit at paras. 7-8, 13-16.

<sup>280</sup> This speaks to the artificial nature of the analysis in *N.S.*, which ignored the effect of the purchasing provision, and on that basis concluded that the advertising provision was not a significant impediment to communication: *N.S.*, BOA Tab 4 at paras. 143-146.

<sup>281</sup> Jane X Affidavit, at para. 16.

When I work on the streets – I am outside – on my own. A car will slow down, and I have to make a decision. When I jump into the car, I am with a stranger, who immediately drives off. This is a real contrast to what my working conditions would be like if I were able to properly advertise online – where I could screen potential clients, let a friend know where I was going, give them the address, and negotiate with the client in advance. Maybe I would have someone who knows who I am seeing, finds a room, takes me there, and tells clients that they will be checking up on me. All of this would make me feel a lot safer. But none of these safety measures are available to me when working on the streets.<sup>282</sup>

### **iii. Inability to Establish Fixed Indoor Workplace Imperils Sex Workers**

111. *Bedford* recognized that working from a fixed indoor location where sex workers could exercise control over their work environment and conditions is vital to protecting their health and safety. Justice Himel found that “bawdy-house would improve prostitutes’ safety by providing the ‘safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate.’”<sup>283</sup> Subsequent research confirms that working in a controlled indoor location enhances the protection of sex workers’ safety, health, and autonomy.<sup>284</sup>

112. A key misconception about PCEPA is that it allows sex workers to work from a fixed indoor location because individuals cannot be prosecuted for selling their own sexual services. However, legal immunity from prosecution does not provide immunity from eviction or numerous consequences of criminalization beyond arrest. In criminalizing the purchase of sex, PCEPA undercut the *Bedford* decision and replicated the harms that were identified in *Bedford* by preventing sex workers and third parties from renting residential or commercial locations to establish a safe and controlled indoor workspace without the risk of eviction. This applies to sex workers attempting to lease indoor space for their own use despite the exceptions because the

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<sup>282</sup> Perrin Affidavit, April 25, 2022, at paras. 21-22.

<sup>283</sup> *Bedford*, BOA Tab 1 at para 134.

<sup>284</sup> Dr. Krusi Report at pp. 38, 41; Dr. Bruckert Report at pp. 9, 48.

purchase of sex is a crime, and using leased space for the purpose of a criminal offence is grounds to refuse a lease or to evict a tenant. The impugned provisions also prohibit third parties from establishing and operating fixed indoor locations that allow sex workers to work in association.

113. It is well recognized that working in a controlled indoor location enhances the protection of sex workers' safety, health, and autonomy.<sup>285</sup> Yet under the PCEPA, street-based sex work is reinforced as the "default".<sup>286</sup> This is particularly true for the most marginalized sex workers, who may be "excluded from the more lucrative and safer indoor sectors of the sex industry by virtue of their economic and social status".<sup>287</sup> Without supports, like a third party manager and a stable indoor location, unhoused or precariously housed sex workers often turn to working outdoors.

114. Several witnesses attested to the risk of eviction from residential and commercial spaces.<sup>288</sup> Ms. Lam detailed the eviction of a migrant sex worker after police were called to her apartment following her assault; police later informed her building management and she was subsequently evicted from her home.<sup>289</sup> Similarly, Ms. Wesley described how sex workers "often experience conflicts with landlords seeking to evict them due to their involvement in sex work" including "sex workers who have been extorted by landlords who have demand more money and/or sexual services, under the threat that they will evict them or report them to the police."<sup>290</sup> Ms. Forrester also details the impacts of the risk of eviction:

Every day that I work at home, I fear that someone is going to call the police or try to evict me. This is a reality for many of the sex workers that I work with, and it causes us to rent places that are more isolated and disconnected from supports and community."<sup>291</sup>

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<sup>285</sup> *Bedford ONSC*, BOA Tab 3 at para 421; Dr. Bruckert Report at p. 10.

<sup>286</sup> Dr. Bruckert Report at p. 8.

<sup>287</sup> Dr. Bruckert Report at p. 8.

<sup>288</sup> Cooley Affidavit at para. 28; Jane X Affidavit at paras. 21-22; Ade-Kur Affidavit at para. 44; Butler-Burke Affidavit at para. 39.

<sup>289</sup> Lam Affidavit at paras. 52-54.

<sup>290</sup> Wesley Affidavit at para. 79.

<sup>291</sup> Forrester Affidavit at para. 62. See also Jane X Affidavit, at para. 21-22.

#### iv. Barring Third Party Services Jeopardizes Sex Workers

115. As Dr. Bruckert explains, third parties play diverse roles, including through manager relationships (*e.g.*, those who “organize service transactions between clients and sex workers” and may provide other forms of assistance), associate relationships (*e.g.*, those who “facilitate or expedite the sex worker’s business”), and contractor relationships (*e.g.*, those who are “hired ... to provide specific services” like transportation, security, and web support).<sup>292</sup> Sex workers in indoor and outdoor locations both work with third parties.<sup>293</sup> The majority of third parties are women<sup>294</sup> and some third parties are sex workers themselves.<sup>295</sup> Third parties offer a wide range of services, including:

- (a) business services (*e.g.*, marketing, arranging photo shoots, client matching);
- (b) safety and security screening (*e.g.*, client screening, preventative in call strategies, at call safety procedures, emergency protocols, training workers);
- (c) sexual health services (*e.g.*, safer sex supplies, facilitating testing for sexually transmitted infections, policies on condom use);
- (d) emotional health services (*e.g.*, emotional support, counselling services);
- (e) training (*e.g.*, information on delivering specialized services, client management, safety and security protocols); and
- (f) transportation services (*e.g.*, driving to and from services, and being in close proximity in case of a safety emergency).<sup>296</sup>

116. These third parties provide critical supports that range from removing a difficult client who does not abide by the terms of a transaction, to managing a sex worker’s finances.<sup>297</sup>

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<sup>292</sup> Dr. Bruckert Report at pp. 12-21; Dr. Krusi Report at p. 33; Forrester Affidavit at paras. 49-50; Anwar Affidavit at paras. 4-12; see also, Cross-Examination of Colin Organ, April 6, 2022 [“**Organ Cross**”], Q. 108, p. 37, ln. 3-11.

<sup>293</sup> Dr. Bruckert Report at p. 25.

<sup>294</sup> Dr. Bruckert Report at p. 11.

<sup>295</sup> Dr. Krusi Report at p. 40; Dr. Bruckert Report at p. 11; Forrester Affidavit at para. 49; Clamen Affidavit at para. 78; Jane X Affidavit at paras. 24-32.

<sup>296</sup> Dr. Bruckert Report at pp. 22-24; Clamen Affidavit at para. 78; Forrester Affidavit, at para. 51; Scott Affidavit at paras. 31-33; Organ Cross, p. 37, ln. 13-25.

<sup>297</sup> Dr. Krusi Report at p. 42; Forrester Affidavit at para. 51.

Unsurprisingly, many sex workers express that they would prefer to work with a third party rather than alone.<sup>298</sup>

117. Dr. Bruckert explains some of the serious consequences of preventing third parties from working with sex workers:

- (a) on-site or on-call security is constrained, thereby limiting deterrence of inappropriate client behavior;
- (b) opportunities for marginalized sex workers are restricted as third parties may fear they heighten the risk of coming to the attention of authorities, thereby pushing these workers into less safe, street-based locations;
- (c) third parties are encouraged to be wilfully blind to the provision of sexual services, which impairs workplace safety, for example by providing access to safer sex supplies like condoms, or by openly discussing inappropriate client behaviour;
- (d) sex workers and third parties cannot be “frank during the hiring process, leading to misunderstandings about the ... nature of the work”;
- (e) to avoid creating evidence of an offence, agreements between sex workers and third parties are rarely reduced to writing, making it difficult to hold third parties accountable;
- (f) sex workers and third parties are deterred from sharing important information like safety practices, screening procedures, and crisis management with other sex workers;
- (g) it is more difficult to organize in-call locations, despite the fact that these controlled settings are “the safest work venue” as they are familiar environments with restricted access and security/deterrence measures can be “most readily implemented”; and
- (h) sex workers are vulnerable to being criminally charged, since many sex workers “move in and out of third-party work and may inhabit both roles simultaneously”, causing sex workers to be captured by the third party provisions when they assist other sex workers.<sup>299</sup>

118. The material benefit and procuring provisions make the work of third parties illegal, which causes many service providers to withhold their services because of a fear of being charged with

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<sup>298</sup> Clamen Affidavit at para. 80; Mason Affidavit at para. 8; Perrin Affidavit at paras. 7, 10, 27-28; Jane X Affidavit, at paras. 19-20; Cooley Affidavit at para. 17.

<sup>299</sup> Dr. Bruckert Report at pp. 31-35.

sex work and trafficking related offences.<sup>300</sup> This leaves third parties hesitant or unable to assist sex workers with transactions, which “effectively place[s] full responsibility for negotiation of services ... and collecting fees ... on sex workers.”<sup>301</sup> The material benefit and procuring provisions also “undermine[]the ability of sex workers to work with others who can support client screening and service negotiation”.<sup>302</sup> They can assist in establishing the expectations and boundaries that are fundamental to consent. As Ms. Forrester explains, sex workers are “prevent[ed] from having access to the most basic protections to keep [them] safe – through the design of the law”.<sup>303</sup> Recent studies have also confirmed that the restrictions on third parties under the PCEPA have increased the vulnerability of sex workers.<sup>304</sup>

119. Further, as referenced above in the discussion of *N.S.*, the exclusion contained in s. 286.2(5)(e) renders the “exceptions” to the material benefit provision fictional. This is because the majority of sex workers who work for a third party in order to access health and safety supports can only access “commercial enterprises” such as agencies, parlours, or other work settings that are proffered by third parties who incur a profit for their services, similar to third parties in other labour sectors. Businesses that provide health and safety services, such as the agency Ms. Anwar operated, are captured by the provisions. The Court of Appeal’s analysis of s. 286.2(5)(e), limited to the notion of a “cooperative” and lacking an evidentiary record, is unhelpful to this court in determining the harms that result from the prohibition of commercial enterprises.

120. Similarly, s. 286.2(5)(d) renders the exceptions in s. 286.2(4) illusory for third parties who provide meaningful health and safety supports and also facilitate the purchase of their services.

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<sup>300</sup> Forrester Affidavit at para. 54.

<sup>301</sup> Dr. Krusi Report at p. 43.

<sup>302</sup> Dr. Krusi Report at p. 46.

<sup>303</sup> Forrester Affidavit at para. 54.

<sup>304</sup> Dr. Krusi Report at p. 40; Clamen Affidavit at para. 80.

For example, a third party who directly organizes and facilitates an indoor work location for the client to purchase the sex workers' services is captured by the procuring provision – and consequently excluded from the exception in s. 286.2(4) – even though *Bedford* established that being able to work from a controlled indoor environment is vital to sex workers' safety. Likewise, a driver or receptionist who communicates with clients and facilitates the purchase to assist a sex worker with establishing their price, services, health and safety parameters, and other terms is captured by the procuring provision and excluded from s. 286.2(4). McLachlin C.J. saw how managers “could increase the safety and security of sex workers.”<sup>305</sup> In order to be effective, third parties are often implicated in directing the movement of a sex worker, arranging where the sexual encounter is to take place, providing advertising services, negotiating or facilitating the transaction and purchase of sexual services, and collecting money. The narrow scope of the exceptions renders third party services so constrained that they are effectively meaningless to enhancing safety as contemplated in *Bedford*.<sup>306</sup>

121. Perversely, the PCEPA serves to enable exploitative third parties.<sup>307</sup> Criminalization acts as a barrier to addressing harmful working relationships when they arise. As Ms. Lam explains, the impugned provisions “affect[] the quality of employment options available and reduce[] the bargaining power of sex workers.”<sup>308</sup> At Butterfly, Asian migrant sex workers have reported that they feel like they cannot leave their workplace, even if they are being mistreated, underpaid, or subject to unsafe conditions, because conditions may be similar across workplaces due to criminalization; they would need to give up their existing connections and supports; and it would

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<sup>305</sup> *Bedford*, BOA Tab 1, at para. 142.

<sup>306</sup> Mason Affidavit at para. 7.

<sup>307</sup> Dr. Bruckert Report, at p. 49.

<sup>308</sup> Lam Affidavit at para 43.

be difficult to assess the conditions at other workplaces, because of the secrecy surrounding the industry.<sup>309</sup> Workers have also reported that they have no recourse when facing workplace conflicts such as underpayment, mistreatment, harassment, and violence because reporting these issues to the authorities would effectively be admitting their involvement in sex work businesses, which would threaten their place of work and livelihood; migrant workers face the additional risk of loss of immigration status and deportation.<sup>310</sup>

**v. Limits on Association Push Sex Workers into Isolation**

122. Under the PCEPA, sex workers experience isolation across every sector. Isolation ranges from working in unfamiliar and remote locations, to being removed from others in the community who would otherwise offer supports.<sup>311</sup> By promoting isolation, the PCEPA eschews key findings in *Bedford*, including being able to work in a fixed indoor location, and in close proximity to others.<sup>312</sup>

123. All of the impugned provisions cause sex workers to avoid visibly working or associating with others in order to avoid police detection and surveillance. This has displaced sex workers from areas that were familiar and secure, where they know other sex workers and locals, to spaces that are unfamiliar and isolated, and where they see unfamiliar clients rather than regulars.<sup>313</sup>

124. For street-based sex workers, this displacement has caused them to work alone and “solicit in poorly lit or industrial areas...where it is unlikely there will be either witnesses or assistance”.<sup>314</sup>

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<sup>309</sup> Lam Affidavit at para. 43.

<sup>310</sup> Lam Affidavit at para. 44.

<sup>311</sup> Butler-Burke Affidavit at paras. 34-36; Ade-Kur Affidavit at paras. 34-36.

<sup>312</sup> *Bedford* ONSC, BOA Tab 3 at para. 421; *Bedford*, BOA Tab 1 at paras. 63-64; *Anwar*, BOA Tab 2 citing *Bedford* at para. 88.

<sup>313</sup> Forrester Affidavit, July 13, 2021, at para. 40.

<sup>314</sup> Dr. Bruckert Report at p. 10; Dr. Krusi Report at p. 17; see also, Forrester Affidavit, July 13, 2021, at paras. 16, 43.

This means that they work in removed spaces, where they are literally working “in the dark”.<sup>315</sup>

They are also left with “nowhere to go to seek refuge or safety if an encounter escalates”.<sup>316</sup>

125. Ms. Forrester explains that “it is scary to be working out there alone”<sup>317</sup> and Ms. Perrin similarly notes:

The law forces me to work in hiding, and often alone. The law pushes sex workers into darkness and into places where police do not go. And there are all kinds of people that sex workers encounter when we are pushed into these places. That is where we become more vulnerable.

If I didn’t have to hide my work, I wouldn’t be as vulnerable. In my experience, it is always on the streets where sex work becomes more dangerous. But sex work isn’t what kills us. It’s the way that we are forced to engage in sex work because of the law.<sup>318</sup>

126. Ms. Cooley explains that the impugned provisions cause sex workers to avoid associating with one another so as not to draw attention to their work and force them to work in isolation:

[T]he criminal prohibitions on sex work make it harder for [sex workers] to work in pairs on the street [and] force them to spread out on the stroll ... [T]hey would prefer to work with other sex workers, as it is easier to undertake safety measures, like recording a licence plate which helps in case a date goes badly. When sex workers are able to work together, it allows them to better screen and negotiate with clients. The Indigenous sex workers at SACRED express that being accompanied by another worker helps them to feel safe, by one evaluating if they feel safe with the client while the other pays attention to the client and the car that they are driving. These safety measures allow for information gathering so that if something happens, another person is able to help report the details. Being accompanied in the early moments of an interaction with a client is also a preventative measure that deters people from acting violently or inappropriately with a sex worker. Although Indigenous sex workers from Peers and SACRED prefer to work with others, such arrangements are difficult under the current criminal prohibitions and the environment that they create for sex workers.<sup>319</sup>

127. Ms. Forrester also echoed the consequences of isolation. She identifies as a trans and 2Spirit woman, and because of the PCEPA, she has “end[ed] up working in areas where only cis-gender women work, which sets [her] up for violence and transphobia from potential clients who

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<sup>315</sup> Forrester Affidavit at para. 40; see also, Clamen Affidavit, at para. 100.

<sup>316</sup> Forrester Affidavit at para. 46; see also, Jane X Affidavit at para. 30.

<sup>317</sup> Forrester Affidavit at para. 43. See also: Jane X Affidavit at paras. 19-23.

<sup>318</sup> Perrin Affidavit at paras. 10-11, 27.

<sup>319</sup> Cooley at paras 16-17.

are looking for cis-gender women”.<sup>320</sup> Ms. Forrester further explained that the “isolation puts a target on ... the backs of ... sex workers, exposing [them] to violent predators who know that we have to work alone”.<sup>321</sup> Ms. Perrin similarly notes “the law gives clients a lot of control and power over sex workers, because they know that no one is around to help ... keep us safe. This is particularly true for Indigenous sex workers like me”.<sup>322</sup>

128. Ms. Butler-Burke explained that for trans sex workers, working alone and in isolated conditions results in being “more likely to be subjected to overt forms of violence ... including by law enforcement and clients”.<sup>323</sup> For ASTT(e)Q participants, this has included “rape, beatings resulting in broken bones ... and in one instance, the intentional puncturing of breast implants”.<sup>324</sup>

129. Isolation also extends to indoor sex workers. As detailed above, under the PCEPA, sex workers and third parties are unable to rent a residential or commercial venue as a safe and controlled indoor workspace without the risk of criminalization and eviction.<sup>325</sup> Ms. X states that, because she fears eviction, she must let clients into her apartment building as soon as they arrive, without screening them before allowing them entry.<sup>326</sup> As a result, sex workers are forced to work in isolation in many indoor locations so as not to bring attention to the location. Witnesses also reported how the context of criminalization has pushed indoor workers from areas that were familiar and secure where they know other sex workers and locals, to areas that are unfamiliar and isolated and where they have less control over their environments and less access to supports and

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<sup>320</sup> Forrester Affidavit at para. 46.

<sup>321</sup> Forrester Affidavit, at para. 17; Cooley Affidavit at para. 21.

<sup>322</sup> Perrin Affidavit at para. 28; Cooley Affidavit at para. 19.

<sup>323</sup> Butler-Burke at para. 34.

<sup>324</sup> Butler-Burke at para. 34.

<sup>325</sup> Jane X Affidavit, at paras. 19-23.

<sup>326</sup> Jane X Affidavit, at para. 21.

services.<sup>327</sup> All of this prevents sex workers from protecting themselves from the increased risk of harm that exists in a context of isolation in any work sector.

**vi. Sex Workers are Denied Labour Standards, Occupational Health and Safety Protections, and Income-Related Government Programs**

130. The PCEPA permits sex workers to sell their own sexual services, but criminalizes the transaction and delegitimizes the work. This constrains sex workers' ability to access labour protections and formal employment standards that are available in other industries, including minimum wage, vacation, overtime, and access to recourse when their rights are violated. This also inhibits occupational health and safety standards such as recourse for unsafe workplaces and compensation for injuries and illnesses, as well as unionization and collective bargaining to establish labour standards above minimum, and benefits such as health insurance and pension plans.<sup>328</sup> This leaves sex workers without recourse in the event of workplace conflicts, unfair labour practices, discrimination, wrongful dismissal, or improper disciplinary action.<sup>329</sup> Ultimately, the impugned provisions "enable" labour exploitation,<sup>330</sup> because criminalization bars sex workers from accessing basic mechanisms to address exploitation.<sup>331</sup>

131. As Ms. Ade-Kur described, criminalization prevents Black sex workers who access Maggie's programs from accessing occupational health and safety standards or labour protections:

Maggie's participants have reported that because third parties are criminalized, managers and owners are not willing to have clear conversations about working conditions, or even inviting sex workers into discussions about their working conditions, including with respect to basic occupational health and safety standards. These concerns include: access to basic hygiene, such as showers in locker rooms; access to safer sex material; access to security; and access to outreach workers because third parties often pretend that sex work is not taking place at the establishment.<sup>332</sup>

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<sup>327</sup> Lam Affidavit, at para. 49; Jane X Affidavit at paras. 19-23.

<sup>328</sup> Dr. Bruckert Report at pp. 49-50; Dr. Krusi Report at p. 8.

<sup>329</sup> Dr. Bruckert Report at p. 49.

<sup>330</sup> Dr. Bruckert Report at p. 49.

<sup>331</sup> Dr. Bruckert Cross, Q. 392, p. 165, ln. 9-13; Dr. Abel Report at pp. 33-35.

<sup>332</sup> Ade-Kur Affidavit at para. 39.

132. Moreover, criminalization and the resulting stigmas prevents Black sex workers from adopting a number of basic measures, including:

demanding fair representation and consideration on health and safety protocols in the workplace; organizing their labour; and receiving recognition from unions and local labour boards. Criminalization also prevents Black sex workers from challenging workplace discrimination, including: the widespread use of restrictive quotas for Black women at strip clubs; requirements to appear ‘less Black’ as a condition of work, ... and unfair disciplinary measures imposed by club owners and managers.<sup>333</sup>

133. The absence of access to labour protections comes with other consequences. For example, sex workers are often unable to demonstrate a legitimate source of income, as the immunity provisions do not provide immunity from seizures or from their income declarations being used to investigate and prosecute their clients, third parties, or loved ones. This creates barriers to securing lines of credit, mortgages, and rental applications.<sup>334</sup> Moreover, their income is ineligible for the Canada Pension Plan,<sup>335</sup> and cannot be replaced through Employment Insurance and parental leave.<sup>336</sup> During the COVID-19 pandemic, many sex workers were also unable to access the Canada Emergency Relief Benefit.<sup>337</sup>

#### **vii. Stigma, Discrimination, and Targeted Violence Are Aggravated**

134. Stigma is inherent in the language and goals of the PCEPA.<sup>338</sup> It “hinges on stereotypes and reinforces/entrenches stigmatic assumptions about the sex industry, clients and third parties,” including by assuming that sex workers are “‘exploited persons’ who must be ‘protected’”.<sup>339</sup> In the words of Dr. Benoit, criminalizing sex work “legitimizes stigmatization, compounds sex

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<sup>333</sup> Ade-Kur Affidavit at para. 58.

<sup>334</sup> Dr. Bruckert Report at p. 50; Forrester Affidavit at para. 62.

<sup>335</sup> Dr. Bruckert Report at p. 50; Forrester Affidavit at para. 62.

<sup>336</sup> Dr. Benoit Report, at p. 22; Dr. Bruckert Report, at p. 50.

<sup>337</sup> Dr. Benoit Report, at p. 22.

<sup>338</sup> Dr. Benoit Report at p. 17; Dr. Benoit Cross at p. 96, ln. 19-25, p. 97, ln. 2-4; Dr. Bruckert Report at pp. 36, 38-39.

<sup>339</sup> Dr. Bruckert Report at p. 51.

workers' antagonistic relationships with law authorities, and invites aggressive law enforcement surveillance".<sup>340</sup> Stigma has profound harmful consequences for sex workers in every corner of the country,<sup>341</sup> including the reinforcement of the notion that sex workers are "deviant 'others'".<sup>342</sup> This has perpetuated sex workers being one of the most stigmatized groups in society.<sup>343</sup>

135. As Ms. Clamen explains, sex workers report "balancing their labels as criminals (because of their involvement in activities criminalized by the PCEPA) and victims (because the preamble to the PCEPA describes them as victims and sex work as exploitation). These "categorizations create different – but equally harmful – experiences with police, services, and the public".<sup>344</sup>

136. Sex workers have made clear that stigma "not only ha[s] a negative impact on their work quality but also on their job safety".<sup>345</sup> The impugned provisions have enabled "interference, stigma, harassment, and discrimination towards sex workers [to] worsen[.]".<sup>346</sup> There is an extensive evidentiary record supporting the consequences of stigma, and Ms. Wesley powerfully explains how stigma against sex workers shapes their everyday lives:

[S]ex workers are commonly targeted and harassed by neighbours and passersby in public space. These aggressors have thrown objects at sex workers, uttered death threats, and engaged in other forms of physical violence. These aggressors have told Stella participants that they are entitled to walk through their neighbourhoods without seeing sex workers since sex work is a crime.<sup>347</sup>

137. The stigma against sex work contributes to discrimination against sex workers and prevents them from accessing vital supports and services.<sup>348</sup> These impacts are compounded for sex workers

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<sup>340</sup> Dr. Benoit Report at pp. 9, 18; Dr. Benoit Cross at Q. 569, p. 192, ln. 15-19.

<sup>341</sup> Dr. Benoit Re-Examination, Q. 803, p. 267, ln. 23-25; Dr. Bruckert Cross, Q. 26, p. 19, ln. 15-20; Dr. Bruckert Report at p. 41; Jane X Affidavit at paras. 33-34.

<sup>342</sup> Dr. Benoit Report at p. 17.

<sup>343</sup> Dr. Benoit Report at p. 18.

<sup>344</sup> Clamen Affidavit, at para. 119.

<sup>345</sup> Dr. Benoit Report at p. 10.

<sup>346</sup> Dr. Benoit Report at p. 11.

<sup>347</sup> Wesley Affidavit at para. 36; Jane X Affidavit at paras. 33-37; Ade-Kur Affidavit at paras. 53-58.

<sup>348</sup> Dr. Benoit Report, at p. 24; Scott Affidavit at paras. 48-53; Wesley Affidavit at paras. 66-86; Ade-Kur Affidavit at para. 57; Jane X Affidavit, at paras. 33-37; Cooley Affidavit at para. 15.

who experience intersecting forms of discrimination.<sup>349</sup> As Ms. Forrester explains, this reinforces exclusion, preventing Indigenous sex workers from “accessing the services that [they] need to potentially save [their] lives”.<sup>350</sup> The impugned provisions “affirm the widespread notion that Indigenous women are disposable and deserving of violence”.<sup>351</sup>

138. Ms. Perrin explains how stigma impacts her life as a street-based sex worker:

[T]here is a lot of stigma towards street-level sex workers. It’s not uncommon for me to be told by people passing by that I am dirty and that I shouldn’t be on the streets ...

Some people in my community think I am just an object for sex and that anybody can pay what they want to do whatever they want to me. This stigma and devaluing of sex work, which is affirmed by the law, puts sex workers at risk...

[B]ecause of the way that street-level sex work is shunned, people don’t see me as Lanna. They don’t see me as a mother. They don’t see me as a community member. They don’t see me as an artist. They don’t see me as a land defender. They don’t see me as a service provider. They don’t see me as equal. They just see me as a whore – and all of the negative things that come along with that word. This puts me in a constant state of self defence.<sup>352</sup>

139. The notion that sex work is inherently exploitative or “bad” – which is fostered by the PCEPA and its preamble – creates stigma around sex work and encourages a culture of violence towards sex workers. It sends a message to aggressors that sex workers should expect violence in the context of their work.<sup>353</sup> As a result, sex workers experience targeted violence, which occurs when predators seek out sex workers with the intention of aggression.<sup>354</sup> As Christa Big Canoe, the Legal Advocacy Director of Aboriginal Legal Services explains, this stigma “perpetuates conditions that have allowed predators to murder, rape, and abuse sex workers with impunity”.<sup>355</sup>

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<sup>349</sup> Dr. Benoit Report, at p. 24; Dr. Bruckert Report at p. 41; Ade-Kur Affidavit at paras. 53-58.

<sup>350</sup> Forrester Affidavit at para. 18.

<sup>351</sup> Forrester Affidavit at paras. 18, 60.

<sup>352</sup> Perrin Affidavit at paras. 16-18.

<sup>353</sup> Wesley Affidavit, para 35; Dr. Bruckert Report at p. 51; Scott Affidavit at paras. 16, 48-53; Ade Kur Affidavit at paras. 49-50; Lam Affidavit at paras. 64-65.

<sup>354</sup> Atchison Report at pp. 17-19.

<sup>355</sup> McGuire Cross at Exhibit “B”, Standing Committee on Justice and Human Rights (1 March 2022), at p. 11

140. People who are often considered the most vulnerable are sought out for targeted violence for various reasons including: criminalization and avoidance of police;<sup>356</sup> lack of reporting to police when they are victimized,<sup>357</sup> as described below; and police failure to respond to violence against their communities.<sup>358</sup> Sex workers are also targets for violence because of their isolation from community,<sup>359</sup> and racism and transphobia that fuel and compound targeted violence.<sup>360</sup>

141. Ultimately, the PCEPA “increases harms and opportunities for violence against sex workers”.<sup>361</sup> Affiants below demonstrate that Indigenous, Black, migrant, and trans sex workers experience heightened targeted violence because of the increased surveillance, isolation, and displacement from communities and police services that criminalization encourages.

142. While sex work is neither inherently exploitative or violent,<sup>362</sup> the record demonstrates that instances of targeted violence occur when sex workers are subject to the stigma imposed by the PCEPA.<sup>363</sup> For Ms. Forrester, targeted violence has been a direct consequence:

... [I]n about 2018, I quickly jumped into a car with a client. We did not communicate, as we were trying to be discreet. There was nothing I could do to evaluate him. When I got into his car and closed the door, he immediately drove off. He drove around the corner, and continued to drive down the next street. Before we said a word to each other, he firmly grabbed my crotch and would not let go. I tried to get loose. But I could not escape his hands. I asked him to stop the car and let me go, but he did not stop.

I started yelling and screaming “help me, help me!” I was in a very dark residential area in the middle of the night. There were no street lights. And there was no traffic. No one was around. Just me and the client. I then opened the car door as I thought that would make him stop the car. But it did not. I continued to scream at the top of my lungs. I was literally hanging out of the moving car, while he continued to hold my crotch. My body was hitting the side of the car. He eventually let go, and I fell out of the car. No one was around to help me. There were lacerations all over my arms from trying to escape.

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<sup>356</sup> Cooley Affidavit, at para. 25

<sup>357</sup> Jane X Affidavit, at paras. 30-31.

<sup>358</sup> Jane X Affidavit, at paras. 30-31.

<sup>359</sup> Wesley Affidavit, at para. 35; Elene para 66; Cooley para 21.

<sup>360</sup> Clamen Affidavit, at para. 100; Butler-Burke Affidavit, at para 30; Ade Kur Affidavit at para 56.

<sup>361</sup> McGuire Cross at Exhibit “B”, Standing Committee on Justice and Human Rights (1 March 2022), at p. 11; Perrin Affidavit at para. 24.

<sup>362</sup> Dr. Benoit Report at p. 10; Dr. Benoit Re-Examination, Q. 803, p. 267, ln. 3-11.

<sup>363</sup> Forrester Affidavit, at para. 45.

I did not feel like I could report this incident to the police, because when I fell out of the car, he threatened to say that I stole from him. Even though I did not steal from him, I knew that I would never be believed by police. The same man did the same thing to a friend of mine shortly thereafter. He is still in the community. These are the kinds of people who prey on sex workers, and the PCEPA allows them to be violent. Many predators are still out there, because sex workers are so reluctant to report violence to the police. These predators continue to prey on sex workers because the PCEPA prevents us from taking basic measures to screen our clients. I was needlessly hurt because of these provisions, and I have to live with that.<sup>364</sup>

143. Similarly, Ms. Lam recounted experiences of targeted violence in her community:

Since 2014, we have learned of 7 Asian workers in massage parlours and the sex industry who have been murdered in Toronto, York Region, and Peel Region. Their murders are tied to the criminalization of sex work, as Asian migrant sex workers avoid detection from police and others for fear of negative criminal and immigration consequences. They are consequently isolated and targeted for violence ... due to the criminalization of sex work, Butterfly participants have often reported that they are not able to seek redress for violence and other abuses. Since it is commonly known that migrant sex workers are less likely to report incidents to the police, service providers, and others, aggressors have taken advantage.<sup>365</sup>

144. Simply put, targeted violence against sex workers is made possible when “sex workers [are] unable to maintain the tools that are essential to [their] safety<sup>366</sup> causing violence against sex workers to become “normalized and part of [their] daily experiences” under the PCEPA.<sup>367</sup> Sex workers report experiencing all forms of targeted violence under the PCEPA, including attacks with weapons, choking, and sexual assault.<sup>368</sup> In the words of Ms. Mason, “I have to work under conditions in which I could get murdered for simply trying to earn a living”.<sup>369</sup>

145. Just as the criminalization of sex work entrenches stigma, promotes discrimination, and fosters targeted violence toward sex workers, decriminalization can have the opposite effect.<sup>370</sup> Expert witnesses testified that where sex work has been legalized or decriminalized this can

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<sup>364</sup> Forrester Affidavit, at paras. 35-38; Forrester Cross, Q. 372, p. 83, ln. 14-19; Forrester Affidavit at paras. 19-20.

<sup>365</sup> Lam Affidavit, at para. 66.

<sup>366</sup> Forrester Affidavit at para. 10.

<sup>367</sup> Forrester Affidavit at para. 10.

<sup>368</sup> Forrester Affidavit at para. 10.

<sup>369</sup> Mason Affidavit at para. 31.

<sup>370</sup> Dr. Benoit Re-Examination, Q. 802, p. 266, ln. 18-23.

dissipate the associated stigma.<sup>371</sup> In New Zealand where decriminalization has been in place since 2003, “violent incidents in brothels are now rare,”<sup>372</sup> sex workers have recourse for discrimination and sexual harassment in their workplace,<sup>373</sup> and the ways sex workers are portrayed and treated by society and in the media have improved, as have relationships between sex workers and police.<sup>374</sup> In the Netherlands, following decades of legalization, fully three-quarters of citizens consider sex work an acceptable job.<sup>375</sup> A key to dismantling stigma and ending violence against sex workers lies in treating sex work as a means for many to generate income, rather than a criminal activity.

#### **viii. Police Reporting is Impaired**

146. Sex workers are “hesitant to report victimization to the police because they fear that they, and/or their colleagues, and/or their third parties may be charged with prostitution-related offences”.<sup>376</sup> Dr. Bruckert surveyed sex workers who had experienced violence or confinement at work over the past 12 months and found that only 16.5% reported an incident to the police, and less than one-third of them had a positive experience.<sup>377</sup> Ultimately, sex workers will not seek police assistance if they do not think police will be responsive, if they fear that they or their colleagues will be charged with a prostitution offence, or if they fear being harassed.<sup>378</sup>

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<sup>371</sup> Dr. Weitzer Re-Examination, Q. 542, p. 226, ln. 16-22; Dr. Abel Cross, Q. 160 p. 50 ln. 6-23.

<sup>372</sup> Dr. Abel Report, p. 40.

<sup>373</sup> Dr. Abel Report pp. 47-48

<sup>374</sup> Dr. Abel Report p. 30; Dr. Abel Cross, QQ. 160-169 p. 50 ln. 6 to p. 53 ln. 3.

<sup>375</sup> Dr. Weitzer Re-Examination, Q. 543, p. 226 ln. 25 to p. 227 ln. 11, Q. 545, p. 228, ln. 3-11.

<sup>376</sup> Dr. Bruckert Report at p. 50; see also, Clamen at para. 77.

<sup>377</sup> Dr. Bruckert Report at pp. 50-51; Dr. Bruckert Cross, Q. 433, p. 176, ln. 17-25, p. 177, ln. 1-8; Dr. Krusi Report at p. 53.

<sup>378</sup> Dr. Bruckert Report at p. 51; Dr. Krusi Report at p. 28; Perrin Affidavit at para. 29; Jane X Affidavit at para. 31; Lam Affidavit at paras. 37, 44-48; Quijano Reply Affidavit at para. 14

147. Dr. Benoit's research documents sex workers' concerns that police do not treat them fairly, are not approachable, and are not easy to speak with.<sup>379</sup> Rather, expressions of stigma and discrimination pervade sex workers' interactions with the police.<sup>380</sup> As a result, sex workers were less likely to report violence than other Canadians, both before and after the enactment of the PCEPA.<sup>381</sup> Similarly, Dr. Krusi found that "rates remained unchanged with no difference in rates of reporting violence to police in the pre-*PCEPA* (2010-2013) vs post-*PCEPA* era (2015-2017)".<sup>382</sup>

148. Dr. Bruckert found that fear of detection would prevent roughly one-third of sex workers from calling the police even if they, or another sex worker, were faced with an immediate safety emergency.<sup>383</sup> She explains that "[i]n the context of criminalization the police as a whole are perceived not as allies but as potential threats who pose a risk to ... a sex worker's livelihood, partner, liberty, and her physical and mental wellbeing".<sup>384</sup> Despite the high rates of violence towards sex workers, there is a "culture of impunity towards violence against sex workers, particularly the most marginal".<sup>385</sup> Dr. Bruckert makes clear that this is a direct consequence of criminalization:

The reasons sex workers do not report violence and do not turn to the police are consistently related to criminalization. It's criminalization that creates this antagonistic relationship, that creates a situation where sex workers are blamed. Where they're scared of being put on police databanks, even if they're not charged. Where they're fearful of not being believed. It's in the context of criminalization that all of that occurs.<sup>386</sup>

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<sup>379</sup> Dr. Benoit Report at p. 13.

<sup>380</sup> Dr. Benoit Report at p. 13; Dr. Bruckert Report at p. 41; Dr. Bruckert Cross, Q. 424, p. 173, ln. 21-25, p. 174, ln. 1-14; Dr. Krusi Report at p. 28; Forrester Affidavit paras. 22-23; Forrester Cross, Q. 355, p. 78, ln. 15-25.

<sup>381</sup> Dr. Benoit Cross, at Q. 728, p. 238 at ln. 20-25, p. 239 at ln. 1-3; Q. 734, p. 241, ln. 7-12; see also, Dr. Benoit Report at p. 13; see also, Dr. Krusi Report at p. 52.

<sup>382</sup> Dr. Krusi Report at p. 53.

<sup>383</sup> Dr. Bruckert's *Gender and Health* study concluded that 31% of sex workers reported being unable to call 911 if they or another sex worker were in a safety emergency, because of fear of police detection, see Dr. Bruckert Report, at p. 50; Dr. Bruckert Cross, Q. 470, p. 187, ln. 19-25, p. 188, ln. 1-6.

<sup>384</sup> Dr. Bruckert Reply Report at p. 15.

<sup>385</sup> Dr. Bruckert Cross, Q. 192, p. 89, ln. 20-25, p. 90, ln. 1-4, 13-15; Dr. Krusi Report at p. 28; Perrin Affidavit at para. 17; Forrester Cross, Q. 352, p. 77, ln. 20-25, p. 78, ln. 1-4.

<sup>386</sup> Dr. Bruckert Cross, Q. 480, p. 191, ln. 23-25, p. 192, ln. 1-7; Dr. Bruckert Report at p. 10.

149. Dr. Benoit found that reporting rates were even lower for Indigenous, trans, and non-binary sex workers.<sup>387</sup> Notably, Indigenous sex workers are “highly reluctant to seek police protection” in cases of violence.<sup>388</sup> Dr. Benoit’s work has further confirmed that the “criminalization of activities related to adult sexual commerce made it difficult for [sex workers] to access non-judgmental protective services”.<sup>389</sup>

150. The stigma produced by criminalization poses a barrier to reporting crimes and further exacerbates the overarching stigma associated with sex work. Sex workers disclose that “when they report incidents of victimization to the police, they are often disregarded, not believed, or are dismissed as ‘just a whore’”.<sup>390</sup> When Ms. Forrester called police while experiencing a violent incident at work, they did not arrive until hours later – leaving “more than enough time for [her] to have been seriously injured or worse”.<sup>391</sup> As a result, sex workers are left to “work with constant risks of violence because the laws and police treat [their] lives as unworthy of protection”.<sup>392</sup>

151. These realities are felt by sex workers across the industry. At Maggie’s, victim blaming by police is a common experience among community members. Ms. Forrester detailed one of these experiences:

... [I]n about 2018, one of the sex workers that I work with at Maggie’s was sexually assaulted and strangled by a client while providing sexual services at a hotel. Despite the brutal violence by a client towards this sex worker, when she reported the incident to police, she was instead charged because she had scissors in her workspace. This is a common reality for sex workers that I work with – despite experiencing violence at work, they are the ones who are charged by police. As a result, sex workers often do not report to police because they fear their experiences will be dismissed and replaced with their own criminalization.<sup>393</sup>

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<sup>387</sup> Dr. Benoit Report at p. 13.

<sup>388</sup> Dr. Krusi Report at pp. 49, 51; Perrin Affidavit at para. 17; Quijano Reply Affidavit at para. 14.

<sup>389</sup> Dr. Benoit Report at p. 18; Dr. Benoit Re-Examination, Q. 802, p. 266, ln. 10-17; Dr. Krusi Report at p. 32.

<sup>390</sup> Dr. Bruckert Report at p. 41; Dr. Benoit Report at p. 13; see also, Dr. Krusi Report at p. 52.

<sup>391</sup> Forrester Affidavit, para. 26.

<sup>392</sup> Forrester Affidavit, paras. 29-30; Dr. Bruckert Report at p. 10.

<sup>393</sup> Forrester Affidavit, para. 11.

152. Qualified immunity from prosecution for selling one’s own sexual services under the PCEPA does little to repair the relationship between sex workers and the police. As detailed above and below, the immunity provisions do not provide immunity for sex workers from numerous harms related to the criminalization of sex work, such as eviction, seizure of funds or property, deportation, and other collateral harms described in Section D, or immunity for their clients, third parties, or loved ones. As Dr. Bruckert testified, sex workers fear criminal consequences for domestic partners, who may or may not be third parties.<sup>394</sup> She noted that the PCEPA replicates the reverse onus that existed in the pre-*Bedford* legislation,<sup>395</sup> obligating domestic partners living with a sex worker to prove that they received a material benefit only “in the context of a legitimate living arrangement” or “as a result of a legal or moral obligation.”<sup>396</sup> Dr. Bruckert testified that sex workers will avoid calling the police because they fear charges against their domestic partners under the impugned provisions.<sup>397</sup>

153. At the same time, sex workers fear that they will be shoehorned into an exception to the exception, particularly when they materially benefit from another sex workers’ labour or where their work with another sex worker could be interpreted as procuring.<sup>398</sup>

154. Moreover, sex workers are often reluctant to report intimate partner violence because it would draw the attention of law enforcement. This can lead to domestic violence without recourse, where abusive partners may take advantage of the criminal context of sex work and “mobilize a sex worker’s fear of being exposed” by threatening to out them as a sex worker or report their workplace, rendering “their ability to extradite themselves from the relationship [as]

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<sup>394</sup> Dr. Bruckert Re- Examination, Q. 567, p. 221, ln. 11-16; Dr. Bruckert Cross QQ. 510-511, p. 199, ln. 10-20, p. 200, ln. 3-8.

<sup>395</sup> *Criminal Code*, s. 286.2(3); Dr. Bruckert Re-Examination, p. 220, ln. 4-25, p. 221, ln. 1-16.

<sup>396</sup> *Criminal Code*, s. 286.2(4)(a) and (b).

<sup>397</sup> Dr. Bruckert Cross at QQ. 510-511, p. 199, ln. 10-20, p. 200, ln. 3-8.

<sup>398</sup> *Criminal Code* s. 286.2(5)(d) and (e); Mason Affidavit at para. 36.

undermined”.<sup>399</sup> This danger is particularly acute where sex workers fear losing their children.<sup>400</sup> Sex workers who are parents disclose that they live with the constant fear of having their children apprehended, and for some, this fear has been realized.<sup>401</sup>

155. As a result, “predatory violence is not brought to the attention of police – allowing aggressors to victimize, and continue to victimize, with impunity”.<sup>402</sup> All of this comes at the expense of sex worker’s safety and lives. As Ms. Forrester explains, the consequences are particularly apparent for Indigenous sex workers:

Predators know Indigenous sex workers will not seek police assistance when in danger, which can make us an even bigger target of violence. Despite the heightened threats incurred by Indigenous sex workers, the lack of interest in our safety normalizes violence against us. The disregard for Indigenous lives often means that no one is held accountable when violent experiences occur.<sup>403</sup>

156. Even clients have reported that “the fear of being shamed or arrested deters them from reporting” to police when sex workers disclose that they have been victims of violence.<sup>404</sup> The impugned provisions “create[] a situation where it is difficult for managers, co-workers, or clients – those who would most likely witness violence including [intimate partner violence] in the workplace – to call authorities and report a violent partner’s behaviour”, as doing so “risks alerting police to their role and incriminating them”.<sup>405</sup>

157. The impacts of the PCEPA on the ability to report violence was evident in the 2020 murder of Marylène Levesque, a sex worker who worked in Quebec City.<sup>406</sup> Ms. Levesque was murdered

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<sup>399</sup> Dr. Bruckert Report at pp. 29 and 41.

<sup>400</sup> Dr. Bruckert Cross, Q. 503, p. 197, ln. 22-25, p. 198, ln. 1-10; Cooley Affidavit at para. 28; Cassels Reply Affidavit at para. 18.

<sup>401</sup> Wesley Affidavit at para. 83; Exhibit “III” to Clamen Affidavit; Cooley Affidavit at para. 28.

<sup>402</sup> Dr. Bruckert Report at p. 51.

<sup>403</sup> Forrester Affidavit, para. 24.

<sup>404</sup> Dr. Benoit Report at p. 13; Atchison Report at p. 23.

<sup>405</sup> Dr. Bruckert Report at p. 35.

<sup>406</sup> Wesley Affidavit at para. 64 and Exhibit “B” at p. 3.

in a hotel room where she met a client who had previously been violent at a massage parlour in the region. As Ms. Wesley explains:

One of the regular clients of the parlour had previously been convicted for murdering his ex-partner, but had since been released on parole. This client was subsequently banned from receiving services at the parlour because he had committed acts of violence. Neither the parlour nor the victim reported the violence to police, as they were aware of the criminal consequences of involvement in a sex work establishment... If management at the parlour and/or the victim had been able to contact the police or a parole officer when the client first acted violently, he would likely have been sent back to prison.<sup>407</sup>

158. If the parlour had not feared charges under the material benefit and procuring provisions, it would have been able to contact the police when Ms. Levesque's killer was first violent, which likely would have resulted in his apprehension. Ms. Wesley further explains that sex workers are unable to seek support from hotel staff because of the criminalization of sex work.<sup>408</sup> If Ms. Levesque had been able to implement safety measures like notifying hotel staff that she was with a client or requesting a check in from hotel staff, the man who murdered her might have felt a level of surveillance and deterrence and her death might have been prevented.

#### **ix. Collateral Harms Create Additional Prejudice**

159. In addition to the harms described above, sex workers face further harms including, but not limited to: the risk of detention and deportation for migrant sex workers;<sup>409</sup> rejection from jobs, rentals, or mortgages because of their engagement in the sex industry;<sup>410</sup> increased risk of child apprehension;<sup>411</sup> reinforced barriers to essential health and social supports, including for sexual

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<sup>407</sup> Wesley Affidavit at paras. 62-63.

<sup>408</sup> Wesley Affidavit at para. 64 and at Exhibit "B", p. 3.

<sup>409</sup> Clamen Affidavit at paras. 115-116; Lam Affidavit at paras. 55-58; Butler-Burke Affidavit at para. 21.

<sup>410</sup> Dr. Bruckert Report at p. 41; Mason Affidavit at para. 43; Jane X Affidavit at paras. 36 ; Ade-Kur Affidavit at para. 46.

<sup>411</sup> Cooley Affidavit at para. 28; Dr. Weitzer Reply Affidavit, at pp. 3-4; Wesley Affidavit at paras. 83-85; Ade-Kur Affidavit at para. 45; Quijano Reply Affidavit at para. 14.

health, violence, or trauma;<sup>412</sup> fewer services for sex workers;<sup>413</sup> seizure of funds during criminal investigations;<sup>414</sup> surveillance by financial institutions and suspension of bank accounts;<sup>415</sup> and impaired mobility.<sup>416</sup>

## **E. The PCEPA Does Not Achieve Its Objectives**

### **i. Demand for Sex Work Has Not Declined**

160. The PCEPA is based on the “end demand” model – also known as the “Nordic model,”<sup>417</sup> which purports to criminalize the purchase and not the sale of sex.<sup>418</sup> One objective of the PCEPA is the eradication of sex work in Canada.<sup>419</sup> When the PCEPA was enacted, Parliament may have believed that it would deter sex workers from participating in sex work by increasing the harms that they experienced. After seven years under the impugned provisions, however, it is now apparent the PCEPA has not achieved this objective. Indeed, there is no evidence – from Canada or anywhere – that the Nordic model actually decreases the demand for sex work.<sup>420</sup>

161. It is beyond dispute the PCEPA has not eradicated sex work in Canada, as sex work offences declined in the years prior to the enactment of the PCEPA and increased fairly steadily since its enactment.<sup>421</sup> Dr. Bruckert confirmed that there is no empirical evidence of any decline

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<sup>412</sup> Dr. Krusi Report at p. 49; Clamen Affidavit, at para. 120-122; Dr. Bruckert Report at p. 41; Forrester Affidavit para. 61; Mason Affidavit at para. 42; Wesley Affidavit paras 67 and 74; Cooley Affidavit at para. 27; Jane X Affidavit at paras. 34-35; Ade -Kur Affidavit at para. 47.

<sup>413</sup> Forrester Affidavit, para. 63; Clamen Affidavit at paras. 106-107; Lam Affidavit at para. 63; Quijano Affidavit at para. 13.

<sup>414</sup> Clamen Affidavit, Exhibits FF, LL and III.

<sup>415</sup> Scott Affidavit at para. 49.

<sup>416</sup> Lam Affidavit at paras. 49; Dr. Weitzer Reply Affidavit, at pp. 3-4.

<sup>417</sup> Dr. Abel Report at p. 13; Dr. Weitzer Cross-Examination, Q. 134, p. 62, ln. 7-10.

<sup>418</sup> Dr. Skilbrei Cross, QQ. QQ. 73-74 at p. 21 ln. 13-23.

<sup>419</sup> *N.S.*, BOA Tab 4 at para 57.

<sup>420</sup> Dr. Bruckert Re-Examination, Q. 560, p. 216, ln. 18-25, p. 217, ln. 1-4, 15-17; Dr. Skilbrei Cross QQ. 90-95 at p. 25 ln. 17 to p. 26 ln. 20; Dr. Krusi Report at pp. 25-26.

<sup>421</sup> Aucoin Cross, QQ. 70-71, p. 31, ln. 1-11; Aucoin Affidavit at Exhibit “A”, p. 5.

in the demand for sex work in Canada following the enactment of the PCEPA.<sup>422</sup> Although the PCEPA has exposed sex workers to danger, it has not stopped sex workers from working.<sup>423</sup>

162. When police target clients, clients may simply “seek[] out sex workers in a different area of the city”.<sup>424</sup> Dr. Krusi found that “criminalizing the purchase of sexual services did not result in less street-based sex work”.<sup>425</sup> Similarly, Dr. Skilbrei recognized that it is “very difficult” to determine a causal relationship between criminalization and the level of sex work in a jurisdiction.<sup>426</sup> In Sweden, she observed that while street prostitution appeared to have declined following the implementation of their end demand legislation, sex work may simply have moved indoors.<sup>427</sup>

163. Dr. Krusi noted evidence showing that the population of Swedish sex workers remained constant after the introduction of a Nordic model, and she concluded that “the law has been unsuccessful in meeting this [end demand] objective”.<sup>428</sup> Dr. Abel likewise observed that there are no data to suggest that the number of sex workers has declined in countries that adopted “end demand” models.<sup>429</sup> In fact, the evidence from Northern Ireland, which criminalized the purchase of sex in 2015, suggests that sex work advertisements have increased.<sup>430</sup>

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<sup>422</sup> Dr. Bruckert Re-Examination, Q. 560, p. 216, ln. 18-25, p. 217, ln. 1-4, 15-17.

<sup>423</sup> Dr. Krusi Report at pp. 25-26; Clamen Affidavit at para. 126.

<sup>424</sup> Dr. Krusi Report at p. 25.

<sup>425</sup> Dr. Krusi Report at p. 26.

<sup>426</sup> Dr. Skilbrei Cross, QQ. 91-96, p. 25 ln. 25 to p. 27 ln. 8.

<sup>427</sup> Dr. Skilbrei Cross, Q. 96, p. 26 ln. 21 to p. 27 ln. 8.

<sup>428</sup> Dr. Krusi Report at p. 23.

<sup>429</sup> Dr. Abel Affidavit, Exhibit “B”, p. 20.

<sup>430</sup> Dr. Abel Affidavit, Exhibit “B”, p. 20-21.

**ii. Sex Workers' Ability to Report Violence is Compromised**

164. Another objective of the PCEPA is encouraging sex workers to report violence. As discussed in paragraphs 146-158, however, the PCEPA has had the opposite effect. Dr. Krusi testified:

For the vast majority of workers, client criminalization presented a significant barrier to contacting police for assistance in cases of theft, fraud, or violence by non-client predators and those posing as clients ... many indicated that end-demand legislation further constrained police access and heightened participants' sense that they were unable to rely on police for support. Particularly participants were deterred from calling the police in aggressive situations due to fear of escalation, stigma, and discrimination, or facing criminalization themselves even when threatened with life-endangering violence.<sup>431</sup>

165. Additionally, the criminalization of third parties deters sex workers from reporting violence to the police because they fear that their colleagues may be charged with prostitution-related offences.<sup>432</sup>

**iii. The PCEPA Replicates and Exacerbates Harms of Prior Legislation**

166. A third objective of the PCEPA is to protect sex workers. As discussed above, the PCEPA does not do so. Expert witnesses affirmed the harms of the end demand model in Sweden, Norway and France<sup>433</sup> and described how this end-demand legislation reproduces the unsafe working conditions under previous *Criminal Code* provisions governing sex work.<sup>434</sup> Amnesty International likewise concluded that end demand legislation has produced harmful outcomes in Ireland.<sup>435</sup>

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<sup>431</sup> Dr. Krusi Cross, Q. 209, p. 103, ln. 22-25, p. 104, ln.1-3, 12-25.

<sup>432</sup> Dr. Bruckert Report at p. 50.

<sup>433</sup> Dr. Abel Affidavit, pp. 17-21.

<sup>434</sup> Dr. Krusi Report at pp. 40, 48; and Dr. Krusi Cross, QQ. 226-227, p. 112, ln. 6-20; Dr. Skilbrei Cross Q. 106 p. 30 ln. 12 to p. 31 ln. 4; Atchison Report at pp. 18-24.

<sup>435</sup> Dr. Weitzer Reply Affidavit at p. 4.

167. As Dr. Weitzer explains, end demand laws around the world “tend[] to make prostitution more precarious and dangerous for the workers”.<sup>436</sup> Dr. Benoit reached similar conclusions about the PCEPA, explaining it has:

increased, or at least continued [to] ... increase harm for sex workers ... it has not improved their life circumstances. It hasn't given them more choices in ... earning a living. It hasn't reduced violence in their lives ... it has actually not been helpful at all ... in some reports it's actually made things worse.<sup>437</sup>

## **F. Decriminalization Works Elsewhere in the World**

### **i. Decriminalization Does Not Increase Demand for Sex Work**

168. There is no evidence that decriminalizing sex work increases demand for sexual services. Rather, the evidence on this application demonstrates that decriminalization does not substantially affect demand for sex work. Evidence from New Zealand shows little impact on the number of sex workers post-decriminalization.<sup>438</sup>

169. In reviewing a 2007 study, Dr. Pratt confirmed that a comparison between Christchurch in 1999 and 2007 – before and after sex work was decriminalized in New Zealand – demonstrated that there was no meaningful increase in the number of sex workers in the city.<sup>439</sup> Dr. Pratt testified that a “very sound ... finding[] from the research, was that there had been no increase in street-based sex work” in Christchurch, New Zealand before and after decriminalization.<sup>440</sup> He made this conclusion “categorically”, noting its certainty because of the “replication of the methods used” between the studies.<sup>441</sup> In Dr. Pratt’s words, “decriminalization ... hadn’t led to an increase in street-based sex work in Christchurch”.<sup>442</sup> Dr. Weitzer came to a similar conclusion, noting that

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<sup>436</sup> Dr. Weitzer Reply Affidavit, pp. 3-4.

<sup>437</sup> Dr. Benoit Cross at p. 38, ln. 12-21.

<sup>438</sup> Dr. Abel Affidavit, Exhibit “B”, pp. 32-33.

<sup>439</sup> Dr. Pratt Cross, QQ. 129-132, p. 35, ln. 12-25, p. 36, ln. 1-15.

<sup>440</sup> Dr. Pratt Cross, Q. 132, p. 35, ln. 24-25, p. 36, ln. 1-15.

<sup>441</sup> Dr. Pratt Cross, Q. 132, p. 35, ln. 24-25, p. 36, ln. 1-15.

<sup>442</sup> Dr. Pratt Cross, QQ. 133-135, p. 36, ln. 16-25, p. 37, ln. 1-2.

the number of people involved in sex work “before and after decriminalization was fairly similar nationwide”.<sup>443</sup> Dr. Weitzer deposed that the number of customers in New Zealand has likewise remained stable before and after decriminalization.<sup>444</sup>

**ii. Decriminalization Would Address the Harms of the PCEPA Without Undermining its Objectives**

170. New Zealand provides a model for legislation that responds to many of the harms set out above. Its *Prostitution Reform Act* decriminalizes sex work and expressly aims to protect sex workers from exploitation.<sup>445</sup> Despite decriminalizing sex work, the number of sex workers has remained constant in New Zealand.<sup>446</sup> Dr. Abel found that, following decriminalization, sex work did not increase and most sex workers were safer.<sup>447</sup> In particular, she found that decriminalization reduced opportunities for exploitation, particularly because it has given sex workers more power to assert their rights.<sup>448</sup>

171. Critically, once sex work was recognized as a legitimate occupation in New Zealand, stigma towards sex workers decreased, and their ability to access non-judgmental protective and health services improved.<sup>449</sup> Dr. Weitzer notes that legalized and decriminalized systems produce better health outcomes than criminalized and partially criminalized systems.<sup>450</sup> Dr. Benoit observes that the decriminalization of sex work would allow those involved in the sex industry to

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<sup>443</sup> Dr. Weitzer Re-Examination, Q. 548, p. 231, ln. 7-11.

<sup>444</sup> Dr. Weitzer Re- Examination, Q. 548, p. 231, ln. 18-20.

<sup>445</sup> Dr. Abel Affidavit, Exhibit “B”, p. 10.

<sup>446</sup> Weitzer Report at p. 9.

<sup>447</sup> Dr. Abel Affidavit, Exhibit “B”, pp. 28-32.

<sup>448</sup> Dr. Abel Affidavit, Exhibit “B”, p. 33. These findings do not apply to migrant sex workers, who are prohibited in New Zealand from selling or exchanging sexual services, excluded from the protections of the *Prostitution Reform Act* and as a result continue to face abuses in the context of their work, see Dr. Abel Report at pp. 40-41 and Dr. Abel Cross at Q. 265 p. 83 ln. 17 to p. 84 ln. 1.

<sup>449</sup> Dr. Benoit Report at p. 19.

<sup>450</sup> Dr. Weitzer Cross, p. 65 ln. 4-7.

“access standard labour protections and regulations” and “receive the same level of non-judgmental protection and health care as other residents.”<sup>451</sup>

172. New Zealand’s experience is relevant to Canada. Dr. Skilbrei agreed in cross-examination that comparative work is “very valuable” insofar as it produces general knowledge about the sex work market and effect of law.<sup>452</sup> Dr. Skilbrei expressly agreed that New Zealand’s experience with decriminalization is relevant elsewhere.<sup>453</sup>

### **G. Canada and Ontario Have Not Answered the Applicant’s Case**

173. Canada and Ontario responded to the Applicant’s record by conflating sex work with exploitation and violence including sexual assault, human trafficking, theft, and intimate partner violence. Through Dr. Cho’ evidence, Ontario suggested that decriminalizing sex work would lead to an increase in human trafficking. Canada and Ontario’s response wholly fails to address the Applicants’ case. To be clear, nothing in this application seeks to decriminalize violence and other forms of abuse, such as forced labour/ human trafficking, forcible confinement, kidnapping, sexual acts without consent, assault, extortion, threats, intimidation, robbery, theft, fraud or harassment and the Applicants do not challenge the *Criminal Code* provisions related to these offences. The Attorneys General led this canard in *Bedford* and the courts rightly rejected it; they should do so again in the case at bar.

#### **i. Canada and Ontario Improperly Conflate Sex Work with Exploitation or Human Trafficking**

174. In their affidavits, almost all of Canada and Ontario’s fact witnesses addressed exploitation or human trafficking, rather than the consensual exchange of sexual services for consideration.

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<sup>451</sup> Dr. Benoit, Report at p. 15.

<sup>452</sup> Dr. Skilbrei Cross, QQ. 175-176 p. 54 ln. 18 to p. 55 ln. 3 & Q177 p. 55 ln. 4-14.

<sup>453</sup> Dr. Skilbrei Cross, Q. 178 p. 55 ln. 15-18.

This is attributable to “misunderstandings of the concepts at issue”.<sup>454</sup> Human trafficking is its own offence under the *Criminal Code*, and it is not challenged on this application.<sup>455</sup> As in *Bedford*, this Court should consider such evidence as merely incidental to the Applicants’ case.<sup>456</sup> This is consistent with the evidence that sex work and trafficking are frequently conflated, even though the two are different phenomena.<sup>457</sup>

175. Human trafficking occurs in many labour-intensive industries, including farming and manufacturing.<sup>458</sup> Globally, human trafficking in the sex industry accounts for a small fraction of human trafficking across industries.<sup>459</sup> As explained below, there is nothing to suggest that sex work transitions to trafficking, or that sex work is subject to an inherent risk of trafficking. According to Statistics Canada only one in five trafficking charges is laid in connection with a sex work offence.<sup>460</sup> Further, to the extent that human trafficking in the sex industry occurs, the criminalization of sex work impedes detection.<sup>461</sup>

176. Dr. Roots deposed that police have increasingly directed their efforts toward large scale anti-trafficking efforts.<sup>462</sup> However, the majority of police raids “fail to uncover trafficking activity”.<sup>463</sup> The ineffectiveness of these raids was acknowledged by police witnesses.<sup>464</sup> Instead, these raids “criminalize purchasers of sex, sex workers, and non-exploitative third parties”.<sup>465</sup> Vague efforts to identify and target human trafficking have instead “result[ed] in surveillance of

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<sup>454</sup> Dr. Roots Reply Report, at p. 1.

<sup>455</sup> Criminal Code, ss. 279.011, 279.02, 279.03, 279.04; Notice of Application.

<sup>456</sup> *Bedford ONSC*, BOA Tab 3 at para 183.

<sup>457</sup> Dr. Skilbrei Cross, QQ. 148-149 p. 44 ln. 6 to p. 45 ln. 15; Dr. Roots Report at p. 1; Cross Examination of David Correa, April 6, 2022 [“**Correa Cross**”], Q. 85, p. 45, ln. 3-5.

<sup>458</sup> Dr. Cho Cross, Exhibit “2” at p. 10.

<sup>459</sup> Dr. Weitzer Report at pp. 10-11.

<sup>460</sup> Aucoin Cross, Q. 232, p. 95, ln. 3-6.

<sup>461</sup> Dr. Weitzer Cross, Q. 231 p. 104 ln. 23 to p. 106 ln. 9.

<sup>462</sup> Dr. Roots Reply Report, at p. 4.

<sup>463</sup> Dr. Roots Reply Report at p. 5.

<sup>464</sup> Taylor Cross, QQ, 76-77, pp. 22, ln. 21-25, p. 23, ln. 1-20.

<sup>465</sup> Dr. Roots, January 2022 Reply Report, at pp. 4-5.

the sex trade by police and the public”.<sup>466</sup> Sex workers disclose that their biggest safety concern is police, rather than clients or third party managers.<sup>467</sup> The research confirms that “increased surveillance of the sex trade in the name of combatting trafficking has increased police harassment and insecurity for sex workers”.<sup>468</sup> Consequently, this has resulted in sex workers being reluctant to report violence to police, as further detailed above.<sup>469</sup>

**ii. The Purported Connection Between the “Legalization” of Sex Work and Human Trafficking is Based on a Discredited Study by a Witness that Canada Fired**

177. Ontario claims that decriminalizing sex work would increase human trafficking. This claim is premised on a single regression analysis that Dr. Cho conducted in 2012.<sup>470</sup> In that study, Dr. Cho reviewed the association between what she refers to as the “legalization” of sex work and the number of reports of human trafficking into a country.<sup>471</sup> The validity of Dr. Cho’s findings has been criticized in the academic literature,<sup>472</sup> and Dr. Skilbrei noted that Dr. Cho’s methodological flaws have been widely reported.<sup>473</sup>

178. In Dr. Cho’s first report, she misleadingly stated that she had “measured the reported index of human trafficking”.<sup>474</sup> On cross-examination, however, she conceded that her study did not address domestic trafficking, which is subject to different patterns, and which currently accounts for the overwhelming majority of human trafficking in North America.<sup>475</sup> Nor did her study

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<sup>466</sup> Dr. Roots, January 2022 Reply Report, at pp. 5-6.

<sup>467</sup> Dr. Roots Reply Report, at pp. 7-8.

<sup>468</sup> Dr. Roots Reply Report, at p. 7.

<sup>469</sup> Dr. Roots Reply Report, at p. 7.

<sup>470</sup> Dr. Cho Affidavit, Exhibit “D”.

<sup>471</sup> Dr. Cho Affidavit, Exhibit “D”, at p. 4.

<sup>472</sup> Dr. Weitzer Report at pp. 8-12.

<sup>473</sup> Dr. Skilbrei Cross, QQ. 162-166, p. 49 ln. 7 to p. 50 ln. 19.

<sup>474</sup> Dr. Cho Affidavit, Exhibit “C”, at para. 15; Dr. Cho Cross, Q. 303 p. 89 ln. 18 to p. 90 ln. 1.

<sup>475</sup> Dr. Cho Cross, Q. 229-232 p. 67 ln. 1-19; Q. 243-260 p. 70 ln. 10 to p. 75 ln. 24; UNODC 2020 Report, Dr. Cho Cross, Exhibit “2”, p. 55-56. Domestic trafficking accounts for 75% of trafficking in North America and 65% of all human trafficking globally.

address the incidence of trafficking; it considered only the number of times that certain institutions wrote reports about trafficking in a given country.<sup>476</sup>

179. Dr. Cho's two reports in this matter suggest a positive correlation between legalizing sex work and increased reports of human trafficking into a country.<sup>477</sup> However, that stark conclusion is somewhat misleading. On cross-examination, Dr. Cho also acknowledged that her data had largely been collected before the advent of the Nordic model anywhere in the world.<sup>478</sup> If Dr. Cho were conducting her study today, she deposed that she would add a new variable to address countries in which the sale of sex is permitted but the purchase of sex is criminalized.<sup>479</sup> Dr. Cho's admission is striking insofar as it acknowledges how poorly her study design matches the lived reality of Canada's Nordic model under the PCEPA.

180. Dr. Cho failed to mention these shortcomings in the reports that she prepared for Ontario. She appears to have relied on some very strategic wording of the questions that Ontario purportedly asked.<sup>480</sup> Before she was retained by Ontario, however, Dr. Cho was retained by Canada in this matter.<sup>481</sup> Dr. Cho produced a report for Canada, whereupon Canada terminated Dr. Cho's retainer.<sup>482</sup> Thereafter, Dr. Cho was retained by Ontario.<sup>483</sup> Canada and Ontario refuse to produce a copy of Dr. Cho's report for Canada.<sup>484</sup> The Court should draw the adverse inference that Dr.

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<sup>476</sup> Dr. Cho Cross, QQ. 199-203 p. 58 ln. 10 to p. 59 ln. 14; QQ. 273-287 p. 80 ln. 1 to p. 85 ln. 19; QQ. 294-296 p. 87 ln. 8 to p. 88 ln. 6.

<sup>477</sup> Dr. Cho Report, at para. 27; Affidavit of Dr. Seo-Young Cho, affirmed February 14, 2022 [**“Cho Sur-Reply Report”**] at para. 1(3).

<sup>478</sup> Dr. Cho Cross, QQ. 147-148 p. 43 ln. 11-23.

<sup>479</sup> Dr. Cho Cross Q. 149 p. 43 ln. 24 to p. 44 ln. 7.

<sup>480</sup> Dr. Cho Cross, QQ. 644-649 p. 247 ln. 25 to p. 251 ln. 20, Q. 697 p. 79 ln. 7 to p. 272 ln. 6 Ontario maintains its refusal to provide anything more than an excerpt from its instructions to Dr. Cho, despite having undertaken to produce the entirety of the document without limitations: Cho Cross, QQ. 50-59 p. 18 ln. 17 to p. 21 ln. 20; QQ. 668-672 p. 69 ln. 18 to p. 71 ln. 16.

<sup>481</sup> Dr. Cho Cross, QQ. 7-15 p. 5 ln. 15 to p. 7 ln. 19.

<sup>482</sup> Dr. Cho Cross, Q. 7 p. 5 ln. 15-23.

<sup>483</sup> Dr. Cho Cross QQ. 33-34, p. 13 ln. 22 to p. 14 ln. 14.

<sup>484</sup> Dr. Cho Cross, QQ. 7-32 p. 5 ln. 15 to p. 13 ln. 19.

Cho's report for Canada was unfavourable, which resulted in her dismissal, and that her report for Ontario omits the unfavourable aspects of her opinion.

181. In addition to Dr. Cho's methodological difficulties, Dr. Weitzer found that the poor quality of her data set undermined her conclusions. Dr. Cho's work used a single data set, the United Nations Office on Drugs and Crime's 2006 Citation Index on Human Trafficking (the "UNODC data set") for her dependent variable, namely the incidence of trafficking.<sup>485</sup> However, the UNODC data set does not measure trafficking; it measures reports of trafficking by 113 institutions that publish in English and came to the attention of the researchers.<sup>486</sup> If a report identified 200 female victims of trafficking, for example, the UNODC data set would record one female victim; if that same cohort was recorded in 200 separate reports, the UNODC data set would report 200 female victims of trafficking.<sup>487</sup>

182. The UNODC data set was skewed because it omitted reports in several UN Official Languages, such that, for example, only 1% of reports came from institutions located in Asia.<sup>488</sup> Dr. Cho admitted that she had never considered the correlation between the number of reports that covered a given country, and the number of reports of human trafficking in that country.<sup>489</sup> The UNODC further acknowledged that it had gathered its data from 1996 to 2003 and its results were contingent on the continuation of trafficking patterns from that era, which had since been

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<sup>485</sup> Dr. Cho Cross, QQ. 198-199 p. 58 ln. 2-16; Q. 213 p. 61 ln. 24 to p. 62 ln. 6; Q. 220 p. 63 ln. 23 to p. 64 ln. 2; QQ. 362-365 p. 119 ln. 2-24.

<sup>486</sup> Dr. Cho Cross, QQ. 262-270 p. 76 ln. 5 to p. 79 ln. 13; QQ. 275-280 p. 80 ln. 19 to p. 83 ln. 14; QQ. 289-295 p. 85 ln. 21 to p. 87 ln. 24. UNODC 2006 Report, Dr. Cho Cross, Exhibit "1", p. 116, FN 105: "It is not the objective of the Trafficking Database to determine the severity of the human trafficking problem based upon the number of victims in a country, but to reflect the number of times that a country is mentioned by a different source".

<sup>487</sup> UNODC 2006 Report, Dr. Cho Cross, Exhibit "1" p. 115. See also p. 116, FN 105: "It is not the objective of the Trafficking Database to determine the severity of the human trafficking problem based upon the number of victims in a country, but to reflect the number of times that a country is mentioned by a different source". See also: Dr. Cho Cross, QQ. 296-297 p. 87 ln. 25 to p. 88 ln. 12.

<sup>488</sup> UNODC 2006 report, p. 112.

<sup>489</sup> Dr. Cho Cross, QQ. 307-322 p. 91 ln. 21 to p. 99 ln. 5.

“transformed”.<sup>490</sup> Dr. Cho acknowledged that she had never updated her findings using more recent data, and she hypothesized that her findings might or might not remain valid.<sup>491</sup>

183. Ultimately, Dr. Cho’s paper cautioned that further study is required before taking any action on her research. She noted that any effort to criminalize sex work “overlooks the potential benefits that the legalization of prostitution might have on those employed in the industry. Working conditions could be substantially improved for prostitutes – at least those legally employed – if prostitution is legalized”.<sup>492</sup> Unfortunately, this caveat was omitted from Dr. Cho’s reports for Ontario.

**iii. Canada and Ontario’s Witnesses Conceded that the Impugned Provisions are Broader than Necessary to Address Exploitation**

184. On cross-examination, Canada and Ontario’s fact witnesses testified to the unnecessary overreach of the impugned provisions. These witnesses readily conceded that sex work is not inherently exploitative, and they acknowledged that sex workers can decide to engage in sex work.<sup>493</sup> The police witnesses, in particular, testified that they were focused on preventing forms of exploitation and abuse such as breach of contract, withholding payment, and intimate partner violence, but admitted that the impugned provisions are considerably broader.

**iv. The Public Communication Provision is Unnecessary and Counterproductive**

185. Police witnesses testified that the public communication provision could be invoked to arrest sex workers, but it largely goes unused, with some police services expressly advising sex

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<sup>490</sup> UNODC 2006 Report, p. 120; UNODC 2000 Report, p. 119. The UNODC’s first case of human trafficking involving the Internet dates to 2004, after the collection of the data for the 2006 UNODC data set, which took place between 1996 and 2003.

<sup>491</sup> Dr. Cho Cross, Q. 465 p. 154 ln. 16 to p. 156 ln. 13.

<sup>492</sup> Dr. Cho Affidavit, Exhibit “D”, p. 10.

<sup>493</sup> McGuire Cross, QQ. 20-22 p. 8 ln. 4-18; Rittenhouse Cross, QQ. 41-44 p. 15 ln. 12 to p. 17 ln. 21; Redsky Cross, Q. 118, p. 44, ln. 22-23.

workers that they will not be charged.<sup>494</sup> The police evidence confirmed that the public communication provision is overbroad, with one senior police officer expressing that “I wouldn’t even know how to assess what would be inappropriate, whether it’s next to a school, or a daycare ... I don’t think anybody really knows, what is it 100 metres? 200 metres? ... I would stay away from that because it’s too unknown for me”.<sup>495</sup>

186. The police witnesses testified that criminalizing sex workers gets in the way of police efforts to win their trust.<sup>496</sup> Police witnesses acknowledged that the public communication provision could nevertheless be used against clients, although this was not their practice.<sup>497</sup> Police witnesses acknowledged that the criminalization of clients forces rushed transactions on the street, which is “a negative effect”.<sup>498</sup>

#### **v. Sex Work Is Not Inherently Exploitative**

187. Police witnesses consistently testified that exploitation and violence are not inherent to sex work.<sup>499</sup> As detailed above, sex workers exercise agency and decision-making capacity, even under conditions of economic constraint and limited options.<sup>500</sup> Police witnesses acknowledged that many of the sex workers they encounter express that they do not want to leave the industry, and many enjoy sex work.<sup>501</sup> They acknowledged that there are sex workers who participate in the

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<sup>494</sup> Monchamp Cross, QQ. 49-64 p. 17 ln. 13 to p. 23 ln. 18. See also: QQ. 73-76 p. 26 ln. 25 to p. 27 ln. 17. Commander Monchamp directed counsel to the “City of Montreal’s Master Plan of Action on prostitution and Human Trafficking for the Purpose of Sexual Exploitation 2014 to 2016”: Monchamp Cross, QQ. 57-64 p. 20 ln. 15 to p. 23 ln. 18; Correa Cross, Q. 68, p. 32, ln. 25, p. 33, ln. 1-4; Cross-Examination of Maria Koniuck, March 30<sup>th</sup> 2022, [“**Koniuck Cross**”], QQ. 145-161 p. 37 ln. 9 to p. 41 ln. 11.

<sup>495</sup> Correa Cross, p. 33, ln. 25, p. 34, ln. 1-7.

<sup>496</sup> Monchamp Cross, QQ. 39-40 p. 14 ln. 6-13, Q. 43 p. 15 ln. 8-12. Rubner Cross, QQ. 65-67 at p. 18 ln. 15 to p. 19 ln. 18; Koniuck Cross, QQ. 153-154 p. 39 ln. 9-22; Cross of Organ, Q. 194, p. 68, ln. 16-19.

<sup>497</sup> Monchamp Cross, QQ. 66-68 p. 24 ln. 3-24; Koniuck Cross, QQ. 157-159 p. 40 ln. 17 to p. 41 ln. 2.

<sup>498</sup> Monchamp Cross, Q. 218 p. 73 ln. 19-23.

<sup>499</sup> Monchamp Cross, QQ. 26-28 p. 11 ln. 11-24; Rubner Cross at QQ. 48-49 p. 14 ln. 9-13; Koniuck Cross at Q. 18 p. 7 ln. 25 to p. 8 ln. 7; McGuigan Cross Q. 65 p. 19 ln. 8-15; Organ Cross, Q. 88, p. 30, ln. 24-25, p. 31, ln. 1-3.

<sup>500</sup> Dr. Benoit Report at p. 8; Forrester Reply Affidavit at paras. 4, 7.

<sup>501</sup> Correa Cross-Examination, QQ. 65-66, p. 32, ln. 6-16; Rubner Cross Q. 81 p. 23 ln. 14-22; Koniuck Cross, QQ. 129-130 p. 31 ln. 23 to p. 32 ln. 5; McGuigan Cross, QQ. 149-151 p. 44 ln. 8 to p. 49 ln. 3.

sex industry by choice and who are not exploited.<sup>502</sup> Consequently, they acknowledged that purchasing sexual services is not inherently exploitative.<sup>503</sup> As Sergeant Koniuck testified, “If it’s two consenting adults it wouldn’t be exploitative.”<sup>504</sup> Police witnesses recognized that third party involvement is not inherently exploitative, and exploitation by a third party involves more than just making a profit off a sex worker.<sup>505</sup>

188. Police witnesses testified that their investigations focus on uncovering and investigating exploitation and abuse.<sup>506</sup> However, they confirmed that the impugned provisions capture non-exploitative interactions, which they saw no need to investigate, including, for example, sex workers posting advertisements on behalf of one another,<sup>507</sup> and an escort agency that facilitates transactions with clients<sup>508</sup> or the provision of a controlled work location.<sup>509</sup> Police witnesses recognized that body rub parlors and brothels are one way in which sex workers can enjoy a safe workspace because they provide proximity to others and an indoor setting, as well as cameras and accountability.<sup>510</sup> Police witnesses were supportive of sex workers enlisting the assistance of others to keep them safe.<sup>511</sup>

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<sup>502</sup> Cross examination of Darryl Ramkissoon, April 21, 2022 [“**Ramkissoon Cross**”], Q. 268 p. 76 ln. 11-18; Koniuck Cross, Q. 18, p. 7 ln. 25 to p. 8 ln. 7; Correa Cross-Examination, p. 10 at ln. 23-25 and p. 11 at ln. 1-6 and p. 24 at ln. 12-19; Rubner Cross, QQ. 19-22 at p. 7 ln. 21 to p. 8 ln. 13; Monchamp Cross, Q. 46 p. 15 ln. 25 to p. 16 ln. 11.

<sup>503</sup> Monchamp Cross, March 30, 2022 (“Monchamp Cross”), Q. 14 p. 7 ln. 25 to p. 8 ln. 5; Koniuck Cross, Q. 22, p. 9 ln.9-13.

<sup>504</sup> Koniuck Cross p. 9 ln. 12-13

<sup>505</sup> McGuigan Cross, QQ. 27-28 p. 10 ln. 16-24; Rubner Cross, Q. 25 at p. 8 ln. 25 to p. 9 ln. 2, QQ. 35-37 p. 10 ln. 14 to p. 11 ln. 10; Koniuck Cross, Q. 24 p. 9 ln. 21 to p. 10 ln. 4; Monchamp Cross, Q. 81 p. 29 ln. 10 to p. 30 ln. 7; Q. 83 p. 30 ln. 15-25.

<sup>506</sup> Correa Cross-Examination, p. 18, ln. 13-19, p. 20, ln. 25, p. 21, ln. 1-6, p. 25, ln. 16-19; Rubner Cross, Q. 22 p. 8 ln. 8-13; Koniuck Affidavit, sworn December 20, 2021, at para. 1; Monchamp Affidavit, sworn December 15, 2021 at para. 3; McGuigan Cross, Q. 82 p. 25 ln. 15-17; Cross-Examination of Organ, Q. 101, p. 35, ln. 10-16; Cross-Examination of Organ, Q. 107, p. 36, ln. 25, p. 37, ln. 1-2.

<sup>507</sup> Monchamp Cross, QQ. 115-116 p. 41 ln. 21 to p. 42 ln. 7. See also: McGuigan Cross, QQ. 154-162 at p. 45 ln. 20 to p. 48 ln. 19.

<sup>508</sup> Rubner Cross QQ. 29-34 at p. 9 ln. 20 to p. 10 ln. 13.

<sup>509</sup> Taylor Cross, QQ. 217-218 at p. 69 ln. 24 to p. 71 ln. 1.

<sup>510</sup> McGuigan Cross, QQ. 237-241 p. 69 ln. 13 to p. 70 ln. 18 Monchamp Cross QQ. 77-80 at p. 27 ln. 22 to p. 29 ln. 9; Organ Cross at Q. 301, p. 105, ln. 8-16. This is a fact that the Supreme Court likewise acknowledged in *Bedford* at paras. 63-64.

<sup>511</sup> Correa Cross at Q. 65, p. 31, ln. 24-25, p. 32, ln. 1-4, Q. 121, p. 59, ln. 7-10; Correa Cross, Q. 61, ln. 10-12.

**vi. The Impugned Provisions Do Not Require Exploitation**

189. Police witnesses confirmed that exploitation is not a required element of the offences under the impugned provisions.<sup>512</sup> The officers agreed that the impugned provisions capture conduct that is not inherently exploitative, and that they would not pursue investigations into non-exploitative conduct.<sup>513</sup> Despite this, they simultaneously acknowledged that some police services target purchasers of sexual services under the purchasing provision, regardless of whether the exchange is exploitative.<sup>514</sup> Nevertheless, they acknowledged that decisions to target exploitative conduct are not expressed in written policies, but rather, are made at officers' discretion.<sup>515</sup>

190. Given the focus on exploitation, the police witnesses struggled to articulate why the impugned provisions were necessary and they could not rely on criminal offences of general application including threat, assault, sexual assault, forcible confinement, extortion, harassment, theft, and fraud.<sup>516</sup> Some testified that various forms of exploitation are always an independent criminal offence, apart from the impugned provisions.<sup>517</sup> Others thought that the impugned provisions were unique because they could target what amounted to inequitable business transactions.<sup>518</sup> None offered a compelling rationale for the impugned provisions.

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<sup>512</sup> Monchamp Cross, Q. 22 p. 10 ln. 18-21; Correa Cross, QQ. 150-151, p. 68, ln. 1-9; McGuigan Cross, QQ. 136-144 p. 40 ln. 16 to p. 43 ln. 8.

<sup>513</sup> See e.g.: Koniuck Cross, Q. 28 p. 11 ln. 4-9; McGuigan Cross, QQ. 126-134 p. 37 ln. 20 to p. 40 ln. 9; McGuigan Cross, QQ. 153-162 p. 45 ln. 10 to p. 48 ln. 19; Monchamp Cross, Q. 81 p. 29 ln. 10 to p. 30 ln. 7; Q. 83 p. 30 ln. 15-25.

<sup>514</sup> Koniuck Cross, QQ. 56-60, p. 16 ln. 19 to p. 17 ln. 11; McGuigan Cross, Q. 40 p. 14 ln. 2-13.

<sup>515</sup> McGuigan Cross, QQ. 164-168 p. 49 ln. 3-21; Rubner Cross, QQ. 36-39 at p. 10 ln. 18 to p. 11 ln. 23; Koniuck Cross, Q. 29 p. 10-17.

<sup>516</sup> McGuigan Cross, QQ. 191-222 p. 55 ln. 20 to p. 67 ln. 2; Rubner Cross, QQ. 138-142 at p. 39 ln. 19 to p. 40 ln. 14; Monchamp Cross, QQ. 117-134 at p. 42 ln. 8 to p. 47 ln. 13, QQ. 145-155 at p. 50 ln. 22 to p. 56 ln. 1, QQ. 187-197 p. 62 ln. 10 to p. 66 ln. 4.

<sup>517</sup> McGuigan Cross, Q. 222 p. 66 ln. 23 to p. 67 ln. 2.

<sup>518</sup> Monchamp Cross, QQ. 162-167 at p. 57 ln. 13 to p. 58 ln. 24; QQ. 117-133 at p. 42 ln. 8 to p. 46 ln. 17.

191. The police witnesses could not clearly articulate why the impugned provisions were necessary to investigate exploitation or human trafficking.<sup>519</sup> However, they confirmed that it would be wrong to use the impugned provisions to investigate human trafficking.<sup>520</sup> On the other hand, many police witnesses recognised that investigating sex workers by showing up armed, unannounced and unwelcomed to their workplace can be stigmatizing, invasive and intimidating for sex workers.<sup>521</sup>

### **PART III - ISSUES AND THE LAW**

#### **A. Issues**

192. This Application asks the Court to decide the following issues:

- (a) Do the impugned provisions contravene:
  - (i) Section 7 of the *Charter*?
  - (ii) Section 2(b) of the *Charter*?
  - (iii) Section 2(d) of the *Charter*?
  - (iv) Section 15 of the *Charter*?
- (b) If so, is the breach saved by s. 1 of the *Charter*?
- (c) If not, should the impugned provisions be struck down pursuant to s. 52 of the *Constitution Act, 1982*?

193. The Applicants respectfully submit that (a) should be determined in the affirmative, (b) in the negative, and (c) in the affirmative, with the result that the application should be allowed.

#### **B. The Impugned Provisions Contravene Section 7 of the *Charter***

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<sup>519</sup> See e.g.: Koniuck Cross (Re-examination), Q. 233 p. 60 ln. 2-8; McGuigan Cross, QQ. 191-222 p. 55 ln. 20 to p. 67 ln. 2; Ramkissoon Cross, QQ. 432-457 p. 119 ln. 18 to p. 126 ln. 10; Rubner Cross, QQ 124-136 at p. 36 ln. 25 to p. 39 ln. 14.

<sup>520</sup> McGuigan Cross, QQ. 189-190 at p. 55 ln. 9-19.

<sup>521</sup> Rubner Cross, QQ. 78-81 p. 22 ln. 7 to p. 23 ln. 17; Koniuck Cross, Q. 127 p. 31 ln. 6-18; Ramkissoon Cross, QQ. 383-387 p. 106 ln. 1 to p. 107 ln. 25; McGuigan Cross, Q. 93 p. 28 ln. 1-3; Taylor Cross, Q. 107, p. 34, ln. 4-21.

194. Section 7 of the *Charter* provides that “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>522</sup> Courts must evaluate s. 7 claims “in the light, not just of common sense or theory, but of the evidence.”<sup>523</sup>

195. The evidence on this application reveals that the impugned provisions deprive sex workers of the right to security of the person and, in extreme circumstances, the right to life, by prohibiting sex workers from making decisions concerning their own body and the conditions under which they will provide sexual services, including sexual health practices. The impugned provisions also deprive sex workers of liberty, by subjecting them to criminal liability and by impairing their bodily autonomy. These deprivations are not in accordance with the principles of fundamental justice.

**i. Section 7 of the *Charter* is engaged**

196. The impugned provisions engage the Applicants’ s. 7 rights. As in *Bedford*, the impugned provisions do not merely impose conditions on how sex workers operate. They impose *dangerous* conditions on sex work and prevent people engaged in sex work from taking steps to protect themselves.<sup>524</sup> If the PCEPA does not provide for the access to safety supports set out in *Bedford*, it cannot survive constitutional challenge.

197. Under the PCEPA, the sale of one’s own sexual services remains a permitted activity. The immunity contained in s. 286.5 of the *Criminal Code* makes clear that no criminal liability will attach to a sex worker selling her own services.

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<sup>522</sup> *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11, s. 7, Plaintiffs’ Factum, Schedule “B”.

<sup>523</sup> *Chaoulli v Quebec (Attorney General)*, [2005 SCC 35](#) [“*Chaoulli*”], BOA Tab 7 at para 150.

<sup>524</sup> *Bedford*, BOA Tab 1 at para. 60.

198. Even if this court concludes that the sale of sex is now illegal, such a finding does not alter *Bedford's* applicability to this application. The Supreme Court has upheld the s. 7 rights of individuals in the context of criminalization when their security and life were jeopardized.<sup>525</sup> The same principle holds here: while Parliament has changed the legal status of sex work, this does not preclude a finding that the Applicants' s. 7 rights are engaged.

**ii. The impugned provisions deprive sex workers of security of the person and, in extreme situations, deprive them of life**

199. A deprivation is made out where the law creates a risk to safety by preventing access to safety enhancing measures.<sup>526</sup> The overwhelming evidence on this application is that the impugned provisions, taken together, make sex workers unsafe. Undoubtedly, the PCEPA causes severe harms to the Applicants and to sex workers across the country. The PCEPA's harms take many forms, as set out in Section D above. Sex work is not itself inherently dangerous or exploitative. However, the PCEPA creates conditions that are more likely to lead to violence and other harms in the context of sex work. In extreme circumstances, the effects of the impugned provisions infringe sex workers' right to life.<sup>527</sup>

200. The impugned provisions operate together to limit sex workers' s. 7 interests in life and security of the person. As described above, the impugned provisions expose sex workers to violence, which can, in cases like Ms. Levesque's, amount to a deprivation of life. The impugned provisions also impede sex workers' ability to protect their health and access services, including healthcare.<sup>528</sup> These risks were recognized in *Bedford* and they are replicated under the PCEPA.

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<sup>525</sup> *Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44](#) ["*PHS*"], BOA Tab 8 at paras 91-92. See also: *R. v. Smith*, [2015 SCC 34](#) ["*Smith*"], BOA Tab 9 at paras 14-29; *R v Morgentaler*, [\[1988\] 1 SCR 30](#) ["*Morgentaler*"], BOA Tab 10 at 56; and *Carter v Canada (Attorney General)*, [2015 SCC 5](#), ["*Carter*"], BOA Tab 11 at paras 54-56.

<sup>526</sup> *PHS*, BOA Tab 8 at para 93.

<sup>527</sup> *Carter*, BOA Tab 11 at para 62; *Chaoulli*, BOA Tab 7 at paras 112-124.

<sup>528</sup> Dr. Benoit Report at pp. 11, 13-14; Cooley Affidavit at para. 27.

201. Additionally, as described above, the impugned provisions compromise sex workers' ability to establish consent to sexual activity and their right to personal and bodily autonomy. As the Court held in *Morgentaler*, state interference with bodily autonomy constitutes a breach of security of the person.<sup>529</sup> Justice McLachlin (as she then was) explained in *Rodriguez*, dissenting, (and adopted by Justice Abella in *Manitoba (Director of Child & Family Services) v. C.(A.)*):

Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact ... that "s. 7 was enacted for the purpose of ensuring human dignity and in individual control, so long as it harms no one else".<sup>530</sup>

202. Security of the person includes the right to control one's bodily integrity and make inherently personal and private decisions.<sup>531</sup> Consent is compromised when sex workers are unable to clearly and explicitly communicate, negotiate, and establish the terms of an encounter.

203. The ability to consent to sex on particular conditions – including the exchange of goods, services, or remuneration – goes to the core of personal autonomy, sexual autonomy, and individual dignity. It is well-established that “control over who touches one's body, and how, lies at the core of human dignity and autonomy.”<sup>532</sup> Consent requires an individual to “affirmatively communicate by words or conduct her agreement to engage” in the sexual activity in question.<sup>533</sup> In *R. v. Barton*, the Supreme Court reiterated the importance of explicit consent being freely given for every aspect of a sexual act in an encounter.<sup>534</sup> The effects of the PCEPA undermine the long-

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<sup>529</sup> *Morgentaler*, BOA Tab 11 at 56; *Blencoe v British Columbia (Human Rights Commission)*, [2000 SCC 44](#) ["*Blencoe*"], BOA Tab 12 at para 55; *R v Boudrealt*, [2018 SCC 58](#) ["*Boudrealt*"], BOA Tab 13 at para 192; *Carter*, BOA Tab 11 at para 64.

<sup>530</sup> *A.C. v Manitoba (Director of Child and Family Services)*, [2009 SCC 30](#), ["*Manitoba*"], BOA Tab 14 at para 100 citing McLachlin in *Rodriguez*, [\[1993\] 3 SCR 519](#), ["*Rodriguez*"], BOA Tab 15 at 618.

<sup>531</sup> *Morgentaler*, BOA Tab 10 at 56; *Carter*, BOA Tab 11 at para 64.

<sup>532</sup> *R v Ewanchuk*, [\[1999\] 1 SCR 330](#), ["*Ewanchuk*"], BOA Tab 16 at para 28.

<sup>533</sup> *Ewanchuk*, BOA Tab 16 at para 28.

<sup>534</sup> *R v Barton*, [2019 SCC 33](#), ["*Barton*"], BOA Tab 17 at para 88.

standing sexual assault jurisprudence on the importance of ongoing and explicit consent.<sup>535</sup>

**iii. The impugned provisions deprive sex workers of the right to liberty**

204. The right to liberty protects individuals in two ways. First, it protects individuals in the physical sense where there is physical restraint, such as an impugned penal provision with the potential for imprisonment.<sup>536</sup> It also protects the right to a sphere of personal autonomy whereby individuals can make “inherently private choices” free from state interference when those choices go to “the core of what it means to enjoy individual dignity and independence”.<sup>537</sup>

205. The impugned provisions violate the right to liberty because they impose criminal consequences, including surveillance and imprisonment, together with adverse collateral impacts, including property forfeiture and eviction. The public communication and impeding traffic provisions target street-based sex workers with direct criminal liability for soliciting clients.

206. Additionally, the immunity provided in s. 286.5 does not protect sex workers whose conduct falls within the impugned provisions. Sex workers frequently provide third party services to other sex workers.<sup>538</sup> The evidence on this application reveals that sex workers often assist each other with facilitating the purchase of each other’s services by, for example, renting in-call locations, posting an advertisement on behalf of a colleague, assisting with screening and safe calls.<sup>539</sup> Street-based third parties can assist by taking down licence plates, client descriptions,

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<sup>535</sup> *Ewanchuk*, BOA Tab 16 at para 28; *R. v. G.F.*, [2021 SCC 20](#), BOA Tab 18 at para 1.

<sup>536</sup> *Blencoe*, BOA Tab 12 at para 49; *R. v. Appulonappa*, [2015 SCC 59](#), [“*Appulonappa*”], BOA Tab 19 at para 23; *Smith*, BOA Tab 9 at para 17; *Re BC Motor Vehicle Act*, [\[1985\] 2 SCR 486](#) [“*Re BC Motor Vehicle*”], BOA Tab 20 at p. 492; *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015 SCC 7](#) [“*Federation of Law*”], BOA Tab 21 at para 71; *PHS*, BOA Tab 8.

<sup>537</sup> *Godbout v Longueuil (City)*, [\[1997\] 3 SCR 844](#) [“*Godbout*”], BOA Tab 22 at para 66; *Association of Justice Counsel v Canada (Attorney General)*, [2017 SCC 55](#) [“*Association of Justice Counsel*”], BOA Tab 23.

<sup>538</sup> Dr. Krusi Report at pp. 33, 40; Forrester Affidavit, at paras. 49-50.

<sup>539</sup> Jane X Affidavit at paras. 17-30; Wesley Affidavit, at paras. 56, 60; Scott Affidavit, at paras. 21-33; McGuigan Cross, QQ. 153-162 p. 45 ln. 10 to p. 48 ln. 19.

accompanying sex workers, making follow up calls, and helping monitor sex workers.<sup>540</sup> Even when sex workers' conduct does not fall within the ambit of the material benefit, recruiting, or advertising provisions, they are still potentially criminally liable for aiding or abetting the purchase of sexual services. Potential criminal liability *prima facie* engages the right to liberty.<sup>541</sup>

207. Further, migrant sex workers convicted of *any* of the impugned provisions face the real risk of loss of immigration status and deportation, further infringing their right to liberty.<sup>542</sup>

208. The loss of bodily autonomy also curtails sex workers' liberty interest. Liberty interests must be interpreted broadly, in accordance with the values and principles that underlie the *Charter*.<sup>543</sup> In *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, La Forest J. emphasized that "[i]n a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."<sup>544</sup> He further endorsed Wilson J.'s opinion in *Morgentaler*:

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of *autonomy in making decisions of fundamental personal importance*.<sup>545</sup>

209. The impugned provisions of the *PCEPA* impede sex workers' ability to make "decisions of fundamental personal importance" about when, how, and whether to consent to sexual activity. They compromise sex workers' right to a sphere of personal and sexual autonomy free from state

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<sup>540</sup> Forrester Affidavit, at para. 51.

<sup>541</sup> *Blencoe*, BOA Tab 12 at para 49; *Appulonappa*, BOA Tab 19 at para 23; *R v Smith*, 2015 SCC 34 at para 17; *Re BC Motor Vehicle*, BOA Tab 20 at 492; *Federation of Law*, BOA Tab 21 at para 71.

<sup>542</sup> Lam Affidavit, at paras. 55-58.

<sup>543</sup> *Blencoe*, BOA Tab 12 at para 49.

<sup>544</sup> *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, BOA Tab 24 at 368; see also *Blencoe*, BOA Tab 12 at para 49; *R v Morgentaler*, BOA Tab 10 per Wilson J. at 166, 171.

<sup>545</sup> *Morgentaler*, BOA Tab 10 at 166, Wilson J.

interference as these decisions go to “the core of what it means to enjoy individual dignity and independence”.<sup>546</sup>

**iv. The deprivations are not in accordance with the principles of fundamental justice**

210. The impugned provisions perpetuate the conditions sex workers experienced prior to *Bedford*. Just as the courts in *Bedford* held the bawdy house, avails, and communication provisions were arbitrary, overbroad, and grossly disproportionate, so too are the impugned provisions.<sup>547</sup> These principles speak to “failures of instrumental rationality” that reflect a legislative provision that is unconnected from or grossly disproportionate with its purpose.<sup>548</sup>

211. The analysis of arbitrariness, overbreadth and gross disproportionality is “qualitative not quantitative”, meaning its impact on one person suffices to establish a breach.<sup>549</sup> This analysis does not begin and end with the Preamble. The Preamble’s generalities about the inherent exploitation in sex work provide “no meaningful check on the means employed to achieve [its objectives].”<sup>550</sup> Stating the object of the PCEPA too broadly foreordains the analysis on the principles of fundamental justice.<sup>551</sup> Moreover, the dogma of inherent exploitation is directly contrary to Justice Himel’s finding that even third parties are not inherently exploitative.<sup>552</sup> In any event, the Court may accept the legislative objective, but scrutinize the policy instrument as a means to achieve that

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<sup>546</sup> *Godbout*, BOA Tab 22 at para 66; *Association of Justice Counsel*, BOA Tab 23.

<sup>547</sup> *Bedford*, BOA Tab 1 at para 96.

<sup>548</sup> *R v Brown*, [2022 SCC 18](#), BOA Tab 25 at para 72; *Bedford*, BOA Tab 1 at para 107.

<sup>549</sup> *Bedford*, BOA Tab 1 at para 123.

<sup>550</sup> *R. v. Moriarity*, [2015 SCC 55](#), ["*Moriarity*"], BOA Tab 26 at para 28.

<sup>551</sup> *Carter*, BOA Tab 11 at para 77.

<sup>552</sup> *Bedford ONSC* at para 404.

objective: “If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.”<sup>553</sup>

(1) *Arbitrariness*

212. A law is arbitrary if it limits life, liberty, or security of the person in a way that “bears no connection to its objective.”<sup>554</sup> An arbitrary law is one that is “not capable of fulfilling its objectives.”<sup>555</sup> The court does not need to assess the law’s effectiveness as a whole to find that it is arbitrary; rather, an “arbitrary effect on one person is sufficient to establish a breach of s. 7.”<sup>556</sup>

213. Even if safety is not an objective of each individual provision of the PCEPA, the provisions are arbitrary if they undercut the PCEPA’s broader goal of permitting sex workers’ access to safety supports identified in *Bedford*. In *N.S.* Justice Hoy found that the PCEPA had three overarching purposes: to reduce the demand for sex work; to prohibit the promotion of sex work; and to “mitigate some of the dangers” associated with sex work.<sup>557</sup> While it is not necessary for each provision to promote all of the objects of the PCEPA, nor can any provision vitiate any one of those objects.<sup>558</sup> That is precisely what the impugned provisions do, insofar as they interact to put sex workers in danger and deny their autonomy, as described above.

214. In *Bedford*, the Supreme Court did not consider whether any of the challenged provisions were arbitrary. Nonetheless, Himel J.’s reasoning that the avails provision was arbitrary is instructive. Justice Himel wrote:

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<sup>553</sup> *Bedford*, BOA Tab 1 at para 107, citing to Peter W. Hogg, “The Brilliant Career of Section 7 of the Charter” (2012), 58 S.C.L.R. (2d) 195, at p. 209. See also *Ewert v Canada*, [2018 SCC 30](#), BOA Tab 27 at para 71. See also: *Appulonappa*, BOA Tab 19 at paras 70-74; *R v Nur*, [2015 SCC 15](#), BOA Tab 28 at paras 85-98.

<sup>554</sup> *Bedford*, BOA Tab 1 at para 111.

<sup>555</sup> *Carter*, BOA Tab 11 at para. 83.

<sup>556</sup> *Bedford*, BOA Tab 1 at para. 123

<sup>557</sup> *N.S.*, BOA Tab 4 at para. 59.

<sup>558</sup> *Morgentaler*, BOA Tab 10 at 120. While Beetz J. considered the principle of manifest unfairness, the Supreme Court subsequently adopted this reasoning under the principle of arbitrariness: see *Chaoulli*, BOA Tab 7 at para 133.

**As stated above, the legislative objective of this provision is to prevent the exploitation of prostitutes as well as the profiting from prostitution by pimps. Evidence was presented from a number of experts that the effect of this provision is that prostitutes are not able to legally enter into certain business relationships that can enhance their safety.** The courts have interpreted the provision to extend to those who are in the business of rendering services to prostitutes, because they are prostitutes. Thus, the provision would appear to capture a security guard, a personal driver or even an assistant who answers telephone calls to pre-screen potential clientele. **Prostitutes, then, are left with some difficult choices, including working alone (which can increase vulnerability) or working with a form of illegal protection with people willing to risk criminal charges or conviction (perhaps with the very type of person this provision was intended to address). Such an effect cannot be said to be connected to or consistent with Parliament's objective, as it may actually serve to increase the vulnerability and exploitation of the very group it intends to protect.** For these reasons, I find that the living on the avails provision is inconsistent with its objective and is, therefore, arbitrary.<sup>559</sup>

215. The objectives of the PCEPA have not meaningfully changed the arbitrariness analysis. Insofar as the PCEPA is concerned with exploitation, the effect of the impugned provisions is to drive sex work underground where conditions make sex workers vulnerable to violence and labour exploitation, serve to enable exploitative third parties who are willing to operate in contravention of the law, and act as a barrier to addressing abuse. Insofar as the PCEPA is concerned with encouraging sex workers to report violence, the evidence establishes that the criminalization of their labour is a key reason they will not report. Further, insofar as the PCEPA is concerned with decreasing demand, the evidence demonstrates that it has not.

216. Even if this court finds that the sale of sex is now illegal, the impugned provisions still impose arbitrary consequences on those who engage in sex work. The evidence on this application demonstrates that people will continue to sell sex despite its legal status, and the people who suffer the most severe consequences of criminalization are those who sell sex in the context of the most limited options, and for whom income from sex work is the most vital. Some people sell sex because they have few realistic alternatives to making a living and meeting their basic needs,<sup>560</sup>

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<sup>559</sup> *Bedford ONSC*, BOA Tab 3 at para. 379. [Emphasis added]

<sup>560</sup> Clamen Affidavit at para. 98; Perrin Affidavit at paras. 2-3; Forrester Affidavit, at para. 3; Mason Affidavit at para. 3.

and much of Canada’s own evidence in this application highlights the difficult circumstances of those who engage in so-called “survival” sex.<sup>561</sup> In the context of constrained choices and limited options, some sex workers cannot avoid the PCEPA’s dangerous effects.

(2) *Overbreadth*

217. The overbreadth analysis asks whether a law that takes away rights in a way that generally supports the object of the law goes too far by denying the rights of some individuals in a way that bears no relation to the object.<sup>562</sup> Whether a law is overbroad within the meaning of s. 7 turns on the relationship between the law’s purpose and its effect.<sup>563</sup> In *Bedford*, Chief Justice McLachlin explained overbreadth:

Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. . . .

Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law’s purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*. [Emphasis in original.]<sup>564</sup>

218. The focus of the analysis “is not on broad social impacts, but on the impact of the measures on the individuals whose life, liberty, or security of the person is trammelled.”<sup>565</sup> When determining the legislative purpose, the Court must do so in a way that is “firmly anchored in the legislative text, considered in its full context, and to avoid statements of purpose that effectively

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<sup>561</sup> See: Rubner Cross, QQ. 42-47 p. 12 ln. 15 to p. 14 ln. 8; Ramkissoon Cross, QQ. 318-326 p. 90 ln. 10 to p. 91 ln. 25.

<sup>562</sup> *Bedford*, BOA Tab 1 at paras 101, 112-113.

<sup>563</sup> *Moriarity*, BOA Tab 26 at para 24; *R v Safarzadeh-Markhali*, [2016 SCC 14](#), BOA Tab 29 at para 24.

<sup>564</sup> *Bedford*, BOA Tab 1 at paras 112-113; *Appulonappa*, BOA Tab 19 at para 26.

<sup>565</sup> *Carter*, BOA Tab 11 at para 85.

predetermine the outcome of the overbreadth analysis without actually engaging in it.”<sup>566</sup>

219. The evidence on this application demonstrates that prohibiting activities related to sex work prevents sex workers – whom the PCEPA acknowledges to be vulnerable to harm – from engaging in practices that would protect them and promote their health and safety. Just as with the avails provision in *Bedford*, the material benefit and procuring provisions do not distinguish between those who exploit and harm sex workers and those who would increase their safety. The Chief Justice’s holding in *Bedford* that the avails provision was overbroad is instructive:

The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law’s objective. **The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards).** It also includes anyone involved in business with a prostitute, such as accountants or receptionists. **In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes.** The living on the avails provision is therefore overbroad.<sup>567</sup> [Emphasis added.]

220. Exploitation is not an element of *any* of the impugned offences. To the extent the PCEPA declares that all sex work is inherently exploitative, Canada and Ontario’s own fact witnesses disagreed with this premise.<sup>568</sup> Rather, the police witnesses deposed that their units are concerned with forms of exploitation – *not* the consensual sale of sexual services between adults.<sup>569</sup> The police witnesses further acknowledged that, to the extent the third party provisions capture people involved in exploitative conduct in the context of sex work, the exploitative behaviour would

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<sup>566</sup> *Moriarity*, BOA Tab 26 at para 32.

<sup>567</sup> *Bedford*, BOA Tab 1 at para. 142.

<sup>568</sup> Koniuck Cross, Q. 18, p. 7 ln. 25 to p. 8 ln. 7; Rittenhouse Cross, QQ. 41-44 p. 15 ln. 12 to p. 17 ln. 21; McGuigan Cross, Q. 65 p. 19 ln. 8-14; Monchamp Cross, Q. 14 p. 7 ln. 25 to p. 8 ln. 5; Ramkissoon Cross, Q. 268 p. 76 ln. 11-18; McGuire Cross, QQ. 20-22 p. 8 ln. 4-18; Redsky Cross, QQ. 38-44, p. 14, ln. 14-23, p. 15, ln. 1-25, p. 16, ln. 1-25, p. 17, ln. 1-6; Rubner Cross at QQ. 48-49 p. 14 ln. 9-13; Organ Cross, Q. 88, p. 30, ln. 24-25, p. 31, ln. 1-3.

<sup>569</sup> McGuigan Cross, Q. 32 p. 11 ln. 23 to p. 12 ln. 2; Cross examination of Darryl Ramkissoon, April 21, 2022 (“Ramkissoon Cross”), QQ. 187-191 p. 59 ln. 5 to p. 60 ln. 4; Koniuck Cross p. 9 ln. 12-13; Rubner Cross Q. 81 p. 23 ln. 14-22; Monchamp Cross, QQ. 26-28 p. 11 ln. 11-24.

generally be actionable under other sections of the *Criminal Code*.<sup>570</sup>

221. Several officers testified that their units do not even use the communication and impeding traffic provisions, because this would undermine sex workers' trust and diminish the ability to protect them.<sup>571</sup> Parliament's position does not withstand empirical evidence,<sup>572</sup> including evidence from sex workers themselves, and this court should not permit it to shield the impugned provisions from scrutiny under s. 7.

222. As an example of overbreadth, Ms. Scott describes her ambition to open and operate a fixed indoor workplace where sex workers can work safely and with dignity:

I had planned to open up my own brothel after the *Bedford* decision. I have had the name picked out for many years, and I even reserved the Internet domain name. I would like to put formal measures in place, such as incorporation and written contracts, as this would ensure that all workers are aware of their rights. Unfortunately, I cannot make this dream a reality because of the provisions.

I want to open a brothel in order to create a safe community. In my experience, safety is having other people around. A predator is much less likely to harm a person when they know there are other people around. If an appointment does become problematic or dangerous, there would also be more people around to stop the situation. [...]

I would implement best practices to ensure safety and security, such as: scheduling services that accommodate their individual needs and circumstances; work policy that affirms workers' right to retain full control over the services they will and will not provide; screening and keeping track of clients through bad date lists; providing training on hygiene, protection, and safer sex practices; ensuring sex workers are able to associate and work together; providing additional on-site security when needed; and safe call services when sex workers attend out-call appointments.

Importantly, I would create a policy and make it clear to clients that sex workers may leave appointments at any time if they feel uncomfortable and do not want to proceed. [...]

In addition to safety and security, I would like to create a collective space where sex workers have a sense of community and well-being [...] This type of collective space where sex workers can explicitly communicate and associate with each other is not only

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<sup>570</sup> Monchamp Cross, Q. 81 p. 29 ln. 10 to p. 30 ln. 7; Q. 83 p. 30 ln. 15-25; McGuigan Cross, QQ. 191-222 p. 55 ln. 20, to p. 67 ln. 2; Rubner Cross, QQ. 138-142 at p. 39 ln. 19 to p. 40 ln. 14.

<sup>571</sup> Monchamp Cross, QQ. 57-64 p. 20 ln. 15 to p. 23 ln. 18; Koniuck Cross, QQ. 145-150 p. 37 ln. 9 to p. 38 ln. 21; Koniuck Cross, Q. 154, p. 39 ln. 14-22; Koniuck Cross, QQ. 157-161, p. 40 ln. 17 to p. 41 ln. 14; Rubner Cross, QQ. 125-127 p. 37 ln. 17.

<sup>572</sup> Dr. Bruckert Report, at p. 51

crucial for sex workers' physical safety, but also for their physical and mental well-being.<sup>573</sup>

223. One can hardly conclude that the workplace Ms. Scott describes would be exploitative. Nevertheless, the impugned provisions not only prevent Ms. Scott from opening such a workplace, but they deprive sex workers of the ability to work in a safe and well-managed environment.

### (3) *Gross Disproportionality*

224. Gross disproportionality arises when a law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that it cannot rationally be supported.<sup>574</sup> The analysis draws a comparison between the law's purpose, taken at face value, with its negative effects on the individual claimant, and asks whether its impact is "completely out of sync" with the object of the law.<sup>575</sup> It does not consider the beneficial effects of the law for society.<sup>576</sup> Gross disproportionality is "not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm."<sup>577</sup>

225. In *Bedford*, the Chief Justice held that the bawdy house and communication provisions were grossly disproportionate in their effects.<sup>578</sup> As explained above, the purchasing, material benefit and procuring provisions of the PCEPA replicate the bawdy house provision by preventing sex workers from working from fixed indoor locations in virtually all circumstances. Likewise, PCEPA reproduces the communication provision from *Bedford* in the purchasing and communications provisions at issue in this application. Sex workers continue to experience the

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<sup>573</sup> Scott Affidavit at paras. 34-40.

<sup>574</sup> *Bedford*, BOA Tab 1 at para 120; *Carter*, BOA Tab 11 at para 89; *PHS*, BOA Tab 8 at para 133.

<sup>575</sup> *Bedford*, BOA Tab 1 at para 120; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 89.

<sup>576</sup> *Bedford*, BOA Tab 1 at para 121.

<sup>577</sup> *Bedford*, BOA Tab 1 at para 122.

<sup>578</sup> *Bedford*, BOA Tab 1 at paras. 134, 159.

effects of the *Bedford* communication provision through the combined effects of the PCEPA provisions and the pre-existing prohibition in s. 213(1).

226. Parliament's objectives of reducing demand for sex work and preventing the development of commercial interests in sex work do not justify the significant adverse effects of the impugned provisions on the lives of sex workers. The provisions deny sex workers the ability to clearly communicate and screen clients, and to safely work in fixed indoor locations and in association with others, which *Bedford* established were essential conditions to protecting sex workers. Ms. Levesque's tragic – and *preventable* – death is a case in point. As the Chief Justice put it in *Bedford*, if safety measures could have saved just one life, the severity of the harmful effects of the provisions is established.<sup>579</sup>

### **C. The Provisions Infringe s. 15 of the *Charter***

227. Section 15(1) of the *Charter* provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

228. Section 15 is an expression of the commitment to “the equal worth and human dignity of all persons.”<sup>580</sup> It stems from our “awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed.”<sup>581</sup> Sex workers have undoubtedly been discriminated against historically as a group on the basis of both (1) gender, an enumerated ground; and (2) occupational status, an analogous ground. Further, sex workers disproportionately belong to historically marginalized communities protected by s. 15.

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<sup>579</sup> *Bedford*, BOA Tab 1 at para. 158.

<sup>580</sup> *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 [“*Eldridge*”], BOA Tab 30 at para 54.

<sup>581</sup> *Quebec (Attorney General) v A*, 2013 SCC 5 [“*Quebec v A*”], BOA Tab 31 at para 332.

229. The guarantee of equality is one that is substantive, rather than formal.<sup>582</sup> The ultimate question a court must ask is “whether the challenged law violates the animating norm of substantive equality”.<sup>583</sup> To prove a *prima facie* violation of s. 15, a claimant must show that:

- (1) The impugned law, on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
  - (2) The impugned law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating the disadvantage of the group.<sup>584</sup>
- i. The provisions discriminate on gender, occupational status and intersecting grounds**

230. If a law has a disproportionate impact on members of a protected group, the first step of the s. 15 analysis has been met.<sup>585</sup> At the first stage of this test, the applicant must demonstrate that the impugned law or state action imposes differential treatment based on protected grounds, either explicitly or through adverse impact.<sup>586</sup> To evaluate the adverse impact of an impugned law or policy, courts are to look beyond the facially neutral criteria on which the law or policy is based and examine whether, in practice, the law or policy operates as “built-in headwinds” or fails to provide accommodation for members of protected groups.<sup>587</sup>

231. At this stage of the test, the legislation’s ameliorative purpose will not be sufficient to shield legislation from scrutiny.<sup>588</sup> If a claimant successfully demonstrates that a law has a

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<sup>582</sup> *R. v. Kapp*, [2008 SCC 41](#) [“*Kapp*”], BOA Tab 32 at para 15.

<sup>583</sup> *Ontario (Attorney General) v G*, [2020 SCC 38](#) [“*Ontario v G*”], BOA Tab 33at para 43; *Quebec v A*, BOA Tab 31 at para 325; *Withler v Canada (Attorney General)*, [2011 SCC 12](#), BOA Tab 34 at para 2; *Fraser v Canada (Attorney General)*, [2020 SCC 28](#) [“*Fraser*”], BOA Tab 35 at para 42; *Kapp*, BOA Tab 32 at para 14.

<sup>584</sup> *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30](#), BOA Tab 36 at paras 19-20; *Québec (Procureure générale) c. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), , BOA Tab 37 at para 25; *Fraser*, BOA Tab 35 at para 27.

<sup>585</sup> *Fraser*, BOA Tab 35 at para. 52.

<sup>586</sup> *Fraser*, BOA Tab 35 at para 81.

<sup>587</sup> *Fraser*, BOA Tab 35 at paras 53- 54. See also *Flette v. Manitoba*, [2022 MBQB 104](#), BOA Tab 38 at paras. 165-66.

<sup>588</sup> *Fraser*, BOA Tab 35 at para 69; *Eldridge*, BOA Tab 30 at para 62.

disproportionate impact on members of a protected group, they need not independently prove the protected characteristic “caused” the disproportionate impact.<sup>589</sup>

232. The provisions are facially neutral, but in practice they disproportionately affect cis and trans women, who form the vast majority of sex workers.<sup>590</sup> Notably, cis women comprise a striking 75-80% of sex workers.<sup>591</sup> As the preamble to PCEPA itself recognizes, women comprise a “disproportionate” share of the sex industry.

233. Additionally, sex workers disproportionately belong to multiple historically marginalized and intersecting communities protected by s. 15. Indigenous people,<sup>592</sup> racialized migrants,<sup>593</sup> and trans or non-binary people are also over-represented in the industry. Moreover, a disproportionate number of sex workers who work on the street are Indigenous.<sup>594</sup>

234. Likewise, the provisions draw a distinction based on occupational status, as they single out sex work as unique from other occupations and deny sex workers protections afforded to other workers. In the unique circumstances of sex work, it is worth this court reconsidering occupational status as an analogous ground. Justice L’Heureux-Dubé’s reasons in *Dunmore* are instructive:

[O]ccupation and working life are often important sources of personal identity, and there are various groups of employees made up of people who are generally disadvantaged and vulnerable. Particular types of employment status, therefore, may lead to discrimination in other cases, and should be recognized as analogous grounds when it has been shown that to do so would promote the purposes of s. 15(1) of preventing discrimination and stereotyping and ameliorating the position of those who suffer social and political disadvantage and prejudice.<sup>595</sup>

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<sup>589</sup> *Fraser*, BOA Tab 35 at para 70.

<sup>590</sup> Dr. Krusi Report at pp. 13, 15; Dr. Benoit Report, at p. 21.

<sup>591</sup> Dr. Benoit Report at p. 21; Dr. Bruckert Cross, Q. 367, p. 155, ln. 24-25, p. 156, ln. 1; Dr. Krusi Report at pp. 13-14.

<sup>592</sup> Dr. Krusi Report at pp. 13-14, 16, 19; see also, Dr. Benoit Reply Report at p. 17.

<sup>593</sup> Dr. Krusi Report at p. 14.

<sup>594</sup> Dr. Krusi, Report, pp. 14-15, 18.

<sup>595</sup> *Dunmore*, [2001 SCC 94](#), [“*Dunmore*”], BOA Tab 39 at para. 167, citing L’Heureux-Dube’s reasons in *Delisle v Canada (Deputy Attorney General)*, [\[1999\] 2 SCR 989](#), BOA Tab 40 at para 8. In *Dunmore*, L’Heureux-Dubé J. concluded that, in the context of farm workers, occupational status was an analogous ground. The majority did not consider the s. 15 issue.

235. Justice L’Heureux-Dubé noted that the workers in question, agricultural workers, suffered from pre-existing disadvantage, as they were “a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern violated.”<sup>596</sup> Their occupational status could only be changed at great cost.<sup>597</sup> It appears that the majority of the Court later adopted this reasoning in *Fraser*, where it did not question whether the occupational status of farm workers was an analogous ground.<sup>598</sup>

236. The same analysis applies here. The evidence is clear that sex workers face stigma, marginalization and exclusion from protections as a result of their occupational status. While individual sex workers will not experience this marginalization in the exact same ways, as a group they experience the vulnerabilities which are the hallmark of an analogous ground.<sup>599</sup>

**ii. The provisions perpetuate prejudice**

237. In the second step of the s. 15 analysis, the court must look at the harm that has been caused to the affected group, which may include: economic exclusion or disadvantage, social exclusion, psychological harms, physical harms, or political exclusion, viewed in light of any historical or systemic disadvantages faced by the claimant group.<sup>600</sup>

238. The *Law* contextual factors help guide analysis at this stage:

- (a) pre-existing disadvantage, if any, of the claimant group;
- (b) degree of correspondence between the differential treatment and the claimant group’s reality;

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<sup>596</sup> *Dunmore*, BOA Tab 39 at para. 168.

<sup>597</sup> *Dunmore*, BOA Tab 39 at para. 169.

<sup>598</sup> *Ontario (Attorney General) v Fraser*, [2011 SCC 20](#), ["*Ontario v Fraser*"], BOA Tab 48 at para 114.

<sup>599</sup> *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [\[1999\] 2 SCR 203](#), BOA Tab 41 at para 13.

<sup>600</sup> *Fraser*, BOA Tab 35 at para 76.

(c) whether the law or program has an ameliorative purpose or effect, including the multiplicity of interests that such a law or program attempts to balance as described in *Withler* at para 38; and

(d) the nature of the interest affected.<sup>601</sup>

239. The impugned provisions impose disadvantage on the basis of gender, occupational status, and intersecting grounds which serves to undermine the dignity of those individuals and reinforce longstanding prejudice, contrary to s. 15(1).

240. The impugned provisions perpetuate and exacerbate disadvantage against woman, as sex workers are predominately cis and trans women.<sup>602</sup> The impugned provisions also perpetuate and exacerbate disadvantage on the basis of occupational status, as they criminalize conduct that is not criminalized in other sectors and is necessary for sex workers to earn a living and work in a safe and secure manner,<sup>603</sup> and deny sex workers protections afforded to other workers. The record in this application is replete with evidence that the impugned provisions utilize unfair stereotypes about sex workers and reinforce, perpetuate and exacerbate their pre-existing disadvantage.<sup>604</sup>

241. As discussed above, the disadvantage imposed is further exacerbated for sex workers who belong to multiple intersecting enumerated and analogous grounds. In particular, sex workers from Indigenous,<sup>605</sup> racialized,<sup>606</sup> migrants,<sup>607</sup> and trans and 2Spirit<sup>608</sup> communities disproportionately experience the negative impacts of criminalization<sup>609</sup> due to the constant presence of law

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<sup>601</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, BOA Tab 41 at paras 62-87.

<sup>602</sup> Dr. Krusi Report at p. 15.

<sup>603</sup> Dr. Benoit Report at pp. 16-17.

<sup>604</sup> *Ontario v Fraser*, BOA Tab 48 at paras 114-116.

<sup>605</sup> Dr. Benoit Report at pp. 19-20; McGuigan Cross, Q. 292, p. 87 ln. 9-19; Senate Report at pp. 34-35; Dr. Krusi Report at pp. 22-23.

<sup>606</sup> Dr. Krusi Report at pp. 32-33.

<sup>607</sup> Dr. Krusi, July 13, 2021 Report at p. 12.

<sup>608</sup> Dr. Krusi, Report at pp. 20-23; Dr. Benoit Report at p. 21.

<sup>609</sup> Cassels Reply Affidavit, at para. 18; Ade-Kur Affidavit, at paras. 53-58; Wesley Reply Affidavit at para. 16.

enforcement in their lives, including police surveillance to enforce PCEPA.<sup>610</sup> Sex workers from these communities are profiled and targeted by police either under the guise of protection or because they are perceived as a threat to the wider community. Indigenous, Black, racialized, migrant and trans sex workers are either assumed to lack agency to make their own decisions, or they and their family and community members, who often perform safety enhancing roles for sex workers, are profiled as criminals and/or third parties. They are also targeted for violence by predators who know they are less likely to seek police protection because of their distrust of police and the dismal police response to violence against their communities, and are unable to report crimes against them to police without the threat of further surveillance.<sup>611</sup>

242. As Dr. Benoit explains, “Canada’s current laws exacerbate the structural disadvantage” faced by cis women, non-binary and trans people, and im/migrant workers, where the prohibitions on sex work make their “lives harder and leaves them less safe”.<sup>612</sup> This impact is also profound on Indigenous sex workers, who report higher experiences of stigma, higher rates of being robbed or attacked, higher unmet health needs, and lower confidence in police,<sup>613</sup> rendering them “much more likely to disappear and be murdered”.<sup>614</sup>

#### **D. The Provisions Violate Sex Workers’ Freedom of Expression**

243. Section 2(b) guarantees freedom of expression. Determining whether activity constitutes expressive content requires meeting a very low threshold: any activity or communication that conveys or attempts to convey meaning falls within the sphere protected by s. 2(b) of the

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<sup>610</sup> Notably, while there is a low reporting of incidents of victimization to police across the industry, rates are even lower for “more disadvantaged sex workers, including those who identified as Indigenous, non-binary, and trans”, see Dr. Benoit Report, p. 13.

<sup>611</sup> Clamen Affidavit at para. 100; Forrester Affidavit at para. 24; Dr. Bruckert Affidavit at p. 51; Dr. Bruckert Cross Q. 192 p 89 In 20-25, p. 90, ln. 1-4, 13-15; Senate Report at p. 37; Dr. Krusi report at p. 53; Cooley Affidavit at para. 25.

<sup>612</sup> Dr. Benoit Report, p. 20; Dr. Krusi Report at pp. 12, 20.

<sup>613</sup> Dr. Benoit Report, p. 19; see also, Dr. Krusi Report, pp. 51-52.

<sup>614</sup> Dr. Benoit Report, pp. 19-20.

*Charter*.<sup>615</sup> With the exception of expression which is communicated in a physically violent form, s. 2(b) protects all forms of expression, irrespective of the particular meaning or message being conveyed.<sup>616</sup>

244. In the *Prostitution Reference*, the Supreme Court held that *Criminal Code* provision that prohibited individuals from communicating for the purpose of engaging in or obtaining sexual services was inconsistent with s. 2(b).<sup>617</sup> Justice Lamer held:

There is no question, in my view that the purpose of s. 195.1(1)(c) of the *Criminal Code* is to restrict a particular range of content of expression in the name of certain state objectives. The section prohibits the communication of, or the attempt to communicate, a commercial message to any member of the public.<sup>618</sup>

245. Citing the *Prostitution Reference*, Himel J. held the *Bedford* communicating provision violated s. 2(b) of the *Charter*.<sup>619</sup> The Supreme Court did not need to consider the issue, as it had determined the provision violated s. 7.<sup>620</sup> In *N.S.*, the Crown conceded the advertising provision engaged s. 2(b), presumably for the reason Lamer J. articulated in the *Prostitution Reference*.<sup>621</sup>

246. The impugned provisions individually and together inhibit expressive content in a manner that infringes the freedom of expression under s. 2(b) of the *Charter*. Sections 213(1) and 213(1.1) inhibit communication for the purposes of selling sex in certain public places. This effectively prevents communication and negotiation, which is essential to clear and ongoing consent to the sexual activities in which sex workers and clients engage. The purchasing provision prohibits all communication to purchase a sexual service. As such, it effectively prohibits a sex worker from

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<sup>615</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1988] 1 SCR 877, BOA Tab 43 at para 81.

<sup>616</sup> *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, BOA Tab 43 at 729.

<sup>617</sup> *Reference re ss. 193 & 195.1(1)(c) of the criminal code (Man.)*, [1990] 1 SCR 1123, ["*Reference re ss. 193 & 195.1(1)(c)*"], BOA Tab 45 at 1143.

<sup>618</sup> *Reference re ss. 193 & 195.1(1)(c)*, BOA Tab 45 at 1188.

<sup>619</sup> *Bedford ONSC*, BOA Tab 3 at para. 444.

<sup>620</sup> *Bedford*, BOA Tab 1 at para. 160.

<sup>621</sup> *N.S.*, BOA Tab 4 at para. 156.

communicating and negotiating conditions to sexual activity with a client who does not communicate for fear of criminalization.

247. The material benefit, procuring, and advertising provisions prevent communication that allows sex workers to negotiate and establish the terms of service and working conditions, including conditions that impact sex workers' ability to establish clear and ongoing consent to the sexual activities in which they engage at work.

248. All of these provisions, in purpose and effect, inhibit expressive content, and constitute *prima facie* violations of s. 2(b). Insofar as *N.S.* would have qualified this right,<sup>622</sup> the evidence on this application demonstrates that the harms to freedom of expression are not trivial.

#### **E. The Provisions Violate Sex Workers' Freedom of Association**

249. Section 2(d) of the *Charter* guarantees freedom of association. The purpose of the freedom of association is to “recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.”<sup>623</sup> Section 2(d) “empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.”<sup>624</sup>

250. The impugned provisions individually and together violate the freedom of association, which includes the right to join with others in lawful, common pursuits and to establish and maintain organizations and associations. Notably, these provisions prohibit sex workers from associating with others in the pursuit of other *Charter* rights, including the right to security, personal autonomy, life, liberty, free expression, and equality. The provisions make meaningful

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<sup>622</sup> *N.S.*, BOA Tab 4 at para. 163.

<sup>623</sup> *Reference Re Public Service Employees Relations Act (Alta.)*, [1987] 1 SCR 313, BOA Tab 46 at para 86; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [“*MPAO*”], BOA Tab 47 at para 54.

<sup>624</sup> *MPAO*, BOA Tab 47 at para 58.

association “effectively impossible.”<sup>625</sup> The evidence of the effects of the impugned provisions goes far beyond the record *N.S.*, such that this court should not be bound by the Court of Appeal’s holding that the material benefit, procuring, and advertising provisions did not violate s. 2(d).<sup>626</sup>

251. While the impugned provisions have criminalized aspects of sex work, s. 286.5 of the *Criminal Code* prevents sex workers from being prosecuted for gaining a material benefit from the sale of sex or advertising. Given that Parliament has provided for this immunity, a liberal interpretation of s. 2(d) of the *Charter* is appropriate in order to protect associations that arise in the context of sex work.

252. The impugned provisions are much broader than the ban on communication in public that the Supreme Court considered in *Skinner*.<sup>627</sup> Specifically, ss. 213(1) and 213(1.1) inhibit sex workers from associating with clients in public places. The purchasing provision makes it illegal for clients to associate with sex workers anywhere, whether in person, by phone or virtually. The third party provisions prevent sex workers from entering working relationships, such as with managers, receptionists, drivers, translators, partners, peers, and security in pursuit of improved personal and workplace health and safety. The advertising provisions prevents sex workers from associating with those who assist with advertising, which could ensure clear communication between sex workers and clients.

253. In the circumstances of this case, the dissenting reasons of Justices Wilson and L’Heureux-Dubé in *Skinner* are more persuasive than the majority. Insofar as selling sex is permitted, there is

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<sup>625</sup> *Ontario v. Fraser*, BOA Tab 48 at para. 98.

<sup>626</sup> *N.S.*, BOA Tab 4 at paras. 164-169; *Bedford*, BOA Tab 1 at para 42.

<sup>627</sup> *R v Skinner*, [1990] 1 SCR 1235 [“*Skinner*”], BOA Tab 49.

a right to associate with others for this purpose.<sup>628</sup> The reason for which the parties associate is not relevant to the s. 2(d) analysis – only the fact of their association is relevant.<sup>629</sup>

254. The impugned provisions have the following impacts: (1) they prohibit sex workers from associating with others (impairing the derivative right); (2) they prevent sex workers from associating in the pursuit of other *Charter* rights, notably the right to security of person, personal autonomy, life, liberty, free expression, and equality (impairing the constitutive right); and (3) they prevent sex workers from associating with others in order to advance equitable labour practices and working conditions (impairing the purposive right).<sup>630</sup>

255. In sum, the provisions inhibit sex workers from carrying out their work, exercising personal autonomy and freedom of expression, and achieving their individual potential through interpersonal relationships and collective action.<sup>631</sup>

#### **F. The Provisions Cannot be Saved by Section 1 of the *Charter***

256. Canada bears the onus to prove that the impugned provisions are demonstrably justified in a free and democratic society.<sup>632</sup> The Applicants will address Canada’s s. 1 arguments in its reply factum. For now, it suffices to note that Canada bears an especially heavy burden with respect to the s. 7 violations.<sup>633</sup> This is so for two reasons.

257. First, the rights protected by s. 7 are fundamental and “not easily overridden by competing social interests.”<sup>634</sup> Second, a law that runs afoul of the principles of fundamental justice can rarely

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<sup>628</sup> *Skinner*, BOA Tab 49 at 1250-1.

<sup>629</sup> *Skinner*, BOA Tab 49 at 1251.

<sup>630</sup> See *MPAO*, BOA Tab 47 at paras 52-55.

<sup>631</sup> Dr. Bruckert Report at p. 50.

<sup>632</sup> *R v Oakes*, [1986] 1 SCR 103 [“*Oakes*”], BOA Tab 50 at 135-136.

<sup>633</sup> *Re BC Motor Vehicle*, BOA Tab 20 at 518; *New Brunswick v G(J)*, [1999] 3 SCR 46 [“*G(J)*”], BOA Tab 51 at para 99; *Carter*, BOA Tab 11 at para 95.

<sup>634</sup> *G(J)*, BOA Tab 51 at para 99.

be upheld as a reasonable limit, demonstrably justified in a free and democratic society.<sup>635</sup> In fact, the Supreme Court has questioned whether an arbitrary law can *ever* be justified under s. 1.<sup>636</sup>

258. The impugned provisions are arbitrary, overbroad, and grossly disproportionate. As such, the Court cannot defer to Canada's justifications for the impugned provisions.<sup>637</sup>

#### **PART IV - ORDER REQUESTED**

259. The Applicants request an Order under s. 52(1) of the *Constitution Act, 1982* declaring ss. 213(1), 213(1.1), 286.1(1), 286.2(1), 286.3(1), and 286.4 of the *Criminal Code* to be constitutionally invalid and of no force or effect. The Applicants do not seek costs of this Application and ask that no costs be awarded against them.

260. The declaration should take immediate effect. While the Supreme Court granted a suspended declaration in *Bedford*, the Court has since revised the test for granting a suspended declaration in *Ontario (Attorney General) v. G.*<sup>638</sup> The onus is on the government to demonstrate that the public interest supports a suspended declaration.<sup>639</sup> A suspended declaration is only justified in rare circumstances.<sup>640</sup> Here, where there is a serious intrusion on the Applicants' *Charter* rights, including their security of the person, the declaration should be immediate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7 day of June, 2022.

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<sup>635</sup> *G(J)*, BOA Tab 51 at para 99.

<sup>636</sup> *Chaoulli*, BOA Tab 7 at para 155.

<sup>637</sup> *Charkaoui v Canada*, 2007 SCC 9, at para 66 (“*Charkaoui*”), at para 66; *Chaoulli*, at para 155.

<sup>638</sup> *Ontario (Attorney General) v G*, BOA Tab 33.

<sup>639</sup> *ON v G*, BOA Tab 33 at para 133.

<sup>640</sup> *ON v G*, BOA Tab 33 at para 137.



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**Michael Rosenberg/Alana Robert/  
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Lawyers for the Applicants

## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *A.C. v Manitoba (Director of Child and Family Services)*, [2009 SCC 30](#).
2. *Mounted Police Association of Ontario v Canada (Attorney General)*, [2015 SCC 1](#).
3. *Association of Justice Counsel v Canada (Attorney General)*, [2017 SCC 55](#).
4. *B. (R.) v Children’s Aid Society of Metropolitan Toronto*, [\[1995\] 1 SCR 315](#).
5. *Bedford v Canada (Attorney General)*, [2010 ONSC 4264](#).
6. *Blencoe v British Columbia (Human Rights Commission)*, [2000 SCC 44](#).
7. *Canada (Attorney General) v Bedford*, [2013 SCC 72](#).
8. *Canada (Attorney General) v Federation of Law Societies of Canada*, [2015 SCC 7](#).
9. *Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44](#).
10. *Carter v Canada (Attorney General)*, [2015 SCC 5](#).
11. *Chaoulli v Quebec (Attorney General)*, [2005 SCC 35](#).
12. *Charkaoui v Canada (Citizenship and Immigration)*, [2007 SCC 9](#).
13. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [\[1999\] 2 SCR 203](#).
14. *Delisle v Canada (Deputy Attorney General)*, [\[1999\] 2 SCR 989](#).
15. *Dunmore v Ontario (Attorney General)*, [2001 SCC 94](#).
16. *Eldridge v British Columbia (Attorney General)*, [\[1997\] 3 SCR 624](#).
17. *Ewert v. Canada*, [2018 SCC 30](#).
18. *Flette et al. v The Government of Manitoba et al.*, [2022 MBQB 104](#).
19. *Fraser v Canada (Attorney General)*, [2020 SCC 28](#).
20. *Godbout v Longeuil (City)*, [\[1997\] 3 SCR 844](#).
21. *Irwin Toy Ltd. v Quebec (Attorney General)*, [\[1989\] 1 SCR 927](#).

22. *Kahkewistahaw First Nation v Taypotat*, [2015 SCC 30](#).
23. *Law v Canada (Minister of Employment and Immigration)*, [\[1999\] 1 SCR 497](#).
24. *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [\[1999\] 3 SCR 46](#).
25. *Ontario (Attorney General) v Fraser*, [2011 SCC 20](#).
26. *Ontario (Attorney General) v G*, [2020 SCC 38](#).
27. *Quebec (Attorney General) c Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#).
28. *Quebec (Attorney General) v A*, [2013 SCC 5](#).
29. *Re B.C. Motor Vehicle Act*, [\[1985\] 2 SCR 486](#).
30. *Re Public Service Employee Relations Act*, [\[1987\] 1 RCS 313](#).
31. *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [\[1990\] 1 SCR 1123](#).
32. *R v Anwar*, [2020 ONCJ 103](#).
33. *R v Appulonappa*, [2015 SCC 59](#).
34. *R v Barton*, [2019 SCC 33](#).
35. *R v Brown*, [2022 SCC 18](#).
36. *R v Boudreault*, [2018 SCC 58](#).
37. *R v Ewanchuk*, [\[1999\] 1 SCR 330](#).
38. *R v G.F.*, [2021 SCC 20](#).
39. *R v Kapp*, [2008 SCC 41](#).
40. *R c Kloubakov*, [2021 ABQB 960](#).
41. *R v Morgentaler*, [\[1988\] 1 SCR 30](#).
42. *R v Moriarity*, [2015 SCC 55](#).
43. *R v N.S.*, [2021 ONCA 605](#).

44. *R v N.S.*, [2022 ONCA 160](#).
45. *R v Nur*, [2015 SCC 15](#).
46. *R v Oakes*, [\[1986\] 1 SCR 103](#).
47. *R v Rodriguez*, [\[1993\] 3 SCR 519](#).
48. *R v Safarzadeh-Markhali*, [2016 SCC 14](#).
49. *R v Skinner*, [\[1990\] 1 SCR 1235](#).
50. *R v Smith*, [2015 SCC 34](#).
51. *Thomson Newspapers v Canada (Attorney General)*, [\[1998\] 1 SCR 877](#).
52. *Withler v Canada (Attorney General)*, [2011 SCC 12](#).

## SCHEDULE “B”

### RELEVANT STATUTES

*Criminal Code, R.S.C., 1985, c. C-46*

#### **Stopping or impeding traffic**

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

(a) stops or attempts to stop any motor vehicle; or

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.

(c) [Repealed, 2014, c. 25, s. 15]

#### **Communicating to provide sexual services for consideration**

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

#### **Definition of *public place***

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

#### **Trafficking in persons**

**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.

#### **Consent**

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

### **Presumption**

(3) For the purposes of subsections (1) and 279.011(1), evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation.

### **Obtaining sexual services for consideration**

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

(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,

(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,

(A) for a first offence, a fine of \$2,000, and

(B) for each subsequent offence, a fine of \$4,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) in the case referred to in subparagraph (a)(i),

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$500, and

(B) for each subsequent offence, a fine of \$1,000.

### **Obtaining sexual services for consideration from person under 18 years**

(2) 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 under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(a) for a first offence, six months; and

(b) for each subsequent offence, one year.

#### **Subsequent offences**

(3) In determining, for the purpose of subsection (2), whether a convicted person has committed a subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under that subsection; or

(b) an offence under subsection 212(4) of this Act, as it read from time to time before the day on which this subsection comes into force.

#### **Sequence of convictions only**

(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

#### **Definitions of *place* and *public place***

(5) For the purposes of this section, *place* and *public place* have the same meaning as in subsection 197(1).

#### **Material benefit from sexual services**

**286.2 (1)** Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

#### **Material benefit from sexual services provided by person under 18 years**

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to

imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

### **Presumption**

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

### **Exception**

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

**(a)** in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;

**(b)** as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;

**(c)** in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or

**(d)** in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

### **No exception**

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

**(a)** used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

**(b)** abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

**(c)** provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

**(d)** engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

**(e)** received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

### **Aggravating factor**

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

### **Procuring**

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

### **Procuring — person under 18 years**

(2) Everyone who procures a person under the age of 18 years to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(2), recruits, holds, conceals or harbours a person under the age of 18 who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of five years.

### **Advertising sexual services**

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

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

### **Immunity — material benefit and advertising**

**286.5 (1)** No person shall be prosecuted for

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

### **Immunity — aiding, abetting, etc.**

(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

## ***Canadian Charter of Rights and Freedoms, Constitution Act, 1982***

### **Rights and freedoms in Canada**

1 The *Canadian Charter of Rights and Freedoms* 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.

#### **Fundamental freedoms**

2 Everyone has the following fundamental freedoms:

- [...]
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- [...]
- (d) freedom of association.

#### **Life, liberty and security of person**

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

#### **Equality before and under law and equal protection and benefit of law**

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### **Affirmative action programs**

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

## ***Protection of Communities and Exploited Persons Act, S.C. 2014, c. 25***

*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*

[...]

**Preamble**

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;

Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: [...]

## APPENDIX “A”

1. This Application concerns the wellbeing and Charter rights of sex workers across Canada, and it raises serious and justiciable issues. The participation of the Alliance as a public interest standing litigant is a reasonable and effective way to bring the broad diversity of sex work and sex workers’ experiences before the Court. Because of the impugned provisions, simply identifying as a sex worker creates significant risks, including the following:

- a) prosecution for sex work offences or other criminal offences;
- b) travel restrictions, loss of immigration status, and deportation;
- c) barriers to find and maintain housing or workspace without being evicted;
- d) involvement of child protection services and child apprehension;
- e) barriers and loss of alternative or complementary employment;
- f) barriers to opening and maintaining bank accounts without the threat of having their bank accounts closed or their funds seized; and
- g) profound stigma and increased surveillance by law enforcement and other authorities.

2. The participation of the Alliance as a public interest standing litigant also ensures anonymity for individual sex workers in each of the Alliance member groups as well as the sex workers that they serve. The Alliance’s participation as a co-applicant ensures equal and effective access to justice by presenting important perspectives that may otherwise go unheard.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

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