Court File No. CV-21-00659594-0000

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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(Returnable October 3, 2022)

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PART I - INTRODUCTION

1. Both Canada and Ontario have failed to respond to the crux of the Applicants' case: the *Protection of Communities and Exploited Persons Act* (the "**PCEPA**") aggravates the harms of the pre-*Bedford* laws.[1] The impugned provisions are therefore unconstitutional for the reasons articulated by the Courts in *Bedford*, as well as a host of additional reasons. The government's choice to criminalize sex work and shroud the PCEPA in the language of exploitation does not substantially alter the constitutional analysis, nor does it justify the serious harms that the PCEPA imposes on sex workers.

2. Indeed, this window-dressing hides a serious attack on the ability of sex workers – most of whom identify as women – to make decisions of fundamental importance about their bodies. The frustration of safety-enhancing measures is vital to the Applicants' case, but so too is the denial of autonomy. The PCEPA impermissibly interferes with personal and sexual autonomy at a time when events in the United States make clear that we cannot take these rights for granted.[2]

3. The Applicants' reply factum corrects Canada and Ontario's mischaracterization of the facts. The Applicants then apply a proper characterization of the facts to refute Canada and Ontario's submissions on ss. 7 and 15 of the *Charter*. Finally, the Applicants respond to Canada and Ontario's arguments under s. 1 of the *Charter*, which cannot save the *Criminal Code* provisions here at issue.

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[1] See Appendix "A" to this factum, which illustrates the continuity of the harms identified in *Bedford*.
[2] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (Slip Opinion) ["***Dobbs***"], at p. 32, of majority opinion, Applicants' Reply Book of Authorities ["**RBOA**"] Tab 10.

PART II - THE FACTS

A. Key Facts Are Established by the Evidence

4. The evidence from the fact and expert witnesses establishes a number of key points. These points are confirmed through the extensive evidentiary record before the Court, comprised of 29 affidavits from fact witnesses, 19 expert reports, and the cross-examinations of 36 witnesses over 36 days.

i. No Evidence Suggests Sex Work is Inherently Exploitative

5. Canada contends that the PCEPA is premised on the "systemic and structural inequality" in the sex industry, where there are "risks to providers of coercion, exploitation, and violence".[3] However, Canada, as the Respondent, reasonably concedes that the sex industry includes those who make the decision to sell sexual services.[4] Ontario, as an Intervener, argues that even if sex workers may be asserting agency, it considers them all to have been exploited.[5] The Court should accept the Respondent's concession notwithstanding an Intervener's objection.

6. Despite Canada's concession to the evidentiary record, both Canada and Ontario suggest that it is outside of the Court's proper role to question Parliament's conclusion that sex work *is* inherently exploitative. However, this is a shell game. The Technical Paper merely repeats the views of prohibitionist activists that were considered and rejected in *Bedford*. Canada and Ontario embrace the Technical Paper without acknowledging that it is the government of Prime Minister Stephen Harper's effort to rewrite the facts that this Court found in *Bedford*. Considered in this light, it is clear that the claims of inherent exploitation are rotten at their core.

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[3] Factum of the Attorney General of Canada ["**AGC Factum**"] at para. 16.
[4] AGC Factum at paras. 6, 14, 34(b).
[5] Factum of the Attorney General of Ontario ["**AGO Factum**"] at paras. 98, 128.

7. In *Bedford*, Canada led a number of prohibitionist advocates as supposed expert witnesses, including Dr. Melissa Farley, Dr. Janice Raymond, and Dr. Richard Poulin.[6] Himel J. expressed skepticism about the admissibility of this evidence.[7] However, the parties did not challenge the admissibility of the evidence, and asked that the defects instead go to weight.[8]

8. Dr. Farley founded the non-profit organization, Prostitution Research and Education, where she served as the Executive Director during the *Bedford* litigation.[9] She opined that sex work was "violent regardless of the legal regime in place" where the conception of sex work as a job was a form of sexual exploitation.[10] Himel J. described Dr. Farley's evidence as "problematic", finding that "her advocacy appears to have permeated her opinions" and that her "choice of language is at times inflammatory and detracts from her conclusions".[11] This includes on the very matter of the supposed inherent exploitation in sex work. Himel J. found that Dr. Farley's "unqualified assertion … that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence".[12] Dr. Farley's bald assertions pervaded her evidence.[13] Himel J. detailed a multitude of criticisms of Dr. Farley's evidence, assigning it less weight.[14]

9. Despite these express findings, Canada has relied on Dr. Farley's work, via the Technical Paper, to justify the PCEPA. Dr. Farley's opinions feature prominently in the Technical Paper, including the view that sex work is "an extremely dangerous activity … regardless of the venue or

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[6] *Bedford v Canada,* 2010 ONSC 4264 ["***Bedford ONSC***"], Applicants' First Book of Authorities ("ABOA") Tab 3, at paras. 181, 351.
[7] *Bedford ONSC*, at para. 352, ABOA Tab 3.
[8] *Bedford ONSC*, at para. 352, ABOA Tab 3.
[9] *Bedford ONSC*, at para. 181, ABOA Tab 3.
[10] *Bedford ONSC*, at para. 345, ABOA Tab 3.
[11] *Bedford ONSC*, at paras. 353-354, ABOA Tab 3.
[12] *Bedford ONSC*, at para. 353, ABOA Tab 3.
[13] For example, see *Bedford ONSC*, at paras. 353-355, ABOA Tab 3.
[14] *Bedford ONSC*, at paras. 345-346, 353-356, ABOA Tab 3.

legal framework in which it takes place".[15] This, despite the fact that Himel J. expressly rejected Dr. Farley's evidence on this point in *Bedford*.

10. The same is true of Canada's other experts in *Bedford*. Dr. Raymond and Dr. Poulin were both advocates for the abolition of prostitution,[16] and Himel J. found them to be "more like advocates than experts offering independent opinions to the Court", observing that "they made bold, sweeping statements that were not reflected in the research".[17] This included making "statements on prostitutes [that] were based on … research on trafficked women" and providing "misleading or incorrect" citations on the average age of recruitment into sex work.[18]

11. Despite Himel J.'s criticism of these purported experts, their research continued to be the basis for the Technical Paper.[19] By relying on the Technical Paper to support their arguments about the exploitative nature of sex work, Canada and Ontario are playing a shell game. They are repackaging evidence that was not accepted in *Bedford*. Despite the ample record in the case at bar, there is no evidence from any witness – including those led by Canada and Ontario – that sex work is inherently exploitative. To the contrary, witnesses for Canada and Ontario expressly affirmed that sex work is *not* inherently exploitative.[20]

12. The Applicants' evidentiary record demonstrates the dire consequences when legislative

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[15] Technical Paper, Bill C-36, Tabled by the Minister of Justice before the Standing Committee on Justice and Human Rights, Evidence, 41-2, No. 32 (7 July 2014) ["**Technical Paper**"], at p. 4, footnotes 15-16, JAR, Tab 110, p. 11150.
[16] *Bedford ONSC*, at paras. 180, 322, 351, ABOA Tab 3.
[17] *Bedford ONSC*, at para. 357, ABOA Tab 3.
[18] *Bedford ONSC*, at para. 357, ABOA Tab 3.
[19] For example, see Technical Paper at p. 4 at footnote 15, JAR Tab 110, p. 11150, and p. 13 at footnote 67, JAR Tab 110, p. 11159.
[20] Cross-Examination of Dominic Monchamp, March 30, 2022 ["**Monchamp Cross**"], QQ. 26-28 p. 11 ln. 11-24, JAR Tab 74, p. 7127; Cross-Examination of Paul Rubner, April 28, 2022 [**"Rubner Cross"**], QQ. 48-49 p. 14 ln. 9-13, JAR Tab 84, p. 8227; Cross-Examination of Maria Koniuck, March 30 2022, [**"Koniuck Cross"**], Q. 18 p. 7 ln. 25 to p. 8 ln. 7, JAR Tab 78, p. 7461-7462; Cross-Examination of Detective Brian McGuigan, March 28, 2022 ["**McGuigan Cross**"], Q. 65 p. 19 ln. 8-15, JAR Tab 82, p. 7826; Cross-Examination of Colin Organ, April 6, 2022 [**"Organ Cross"**], Q. 88, p. 30, ln. 24-25, p. 31, ln. 1-3, JAR Tab 76, p. 7323-7324.

objectives are crafted without any basis in evidence or reality.

ii. The PCEPA Harms Sex Workers

13. Canada and Ontario claim that the PCEPA does not harm sex workers.[21] This ignores the voluminous record before the Court, which confirms that the impugned provisions create numerous serious and intersecting harms for people who sell or exchange sex. These harms are detailed at Section D of the Applicants' principal factum, and are supported by rigorous research performed following the introduction of the PCEPA.[22]

14. The Applicants, their fact witnesses, and experts all attested to these harms. By contrast, Canada's service provider witnesses, Redsky, Rittenhouse, McGuire, and Walker, did not actually address the impugned provisions and their effects on the constituencies of women that they serve. While Canada's witnesses describe the dire circumstances of some women whose lives are affected by labour exploitation, sexual violence, intimate partner violence, and/or poverty, they did not address the ways in which the PCEPA contributes to those problems, or the available protections of other *Criminal Code* provisions.[23]

15. There is no evidence demonstrating that the PCEPA benefits anyone. The ineffectiveness of the Nordic model has been confirmed in other countries.[24] Ultimately, Canada and Ontario's

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[21] AGC Factum at para. 33; AGO Factum at para. 15.

[22] For example, see *Sex Workers as Educators. Networking HIV Prevention Strategies*; *The Protection of Communities and Exploited Persons Act: A structural intervention impacting health equity for sex workers*; *Beyond the 'Missing Women Inquiry':* and *Empowering Sex Workers as Social Justice Advocates* in Exhibit "B" to the Affidavit of Dr. Andrea Krusi, affirmed July 31, 2021 ["**Dr. Krusi July Report**"] at p. 6, JAR Tab 54, p. 4776; *Gender and Health Survey* in Exhibit "B" to Dr. Bruckert Affidavit, affirmed July 13, 2021 ["**Dr. Bruckert July Report**"] at p. 10, footnote 21, JAR Tab 45, p. 3671; *An Evaluation of Sex Workers Health Access* (AESHA), in Dr. Krusi July Report at p. 6, JAR Tab 54, p. 4776.

[23] 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).

[24] Re-Examination of Dr. Bruckert, April 14, 2022, Q. 560, p. 216, ln. 18-25, p. 217, ln. 1-4, 15-17, JAR Tab 47, p. 3796-3797; Cross-Examination of Dr. May-Len Skilbrei, April 27, 2022 ["**Dr. Skilbrei Cross**"], QQ. 90-95 at p. 25

case does not negate the substantive evidentiary record which establishes the ways in which the PCEPA harms people who sell or exchange sexual services.

iii. Witnesses for the Applicants Are Not Advocates for Describing the Impacts of the PCEPA

16. Canada and Ontario suggest that the evidence from the Applicants and their witnesses is somehow compromised because many of them make policy recommendations regarding sex work.

17. Canada, as the Respondent, concedes that the evidence from all of the Applicants' expert witnesses is admissible.[25] On the other hand, Ontario, an Intervener, has advanced criticisms of the Applicants' experts. These mirror the unfounded attacks on climate scientists whose empirical research leads them to sound the alarm on climate change and recommend action. Such a view fundamentally ignores the community engagement imperatives of the granting agencies that fund social science research, which oblige researchers to connect their work to the communities they study.[26] To the extent that they support particular policy options, the Applicants' experts confirmed that this is a consequence of their extensive research on the impacts of criminalization on sex workers.

18. The Applicants and their fact witnesses shared their lived experiences on the harms of the impugned provisions, and what they know about how to make sex work safer. There is no challenge to these witnesses' credibility, and neither Canada nor Ontario led evidence from anyone

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ln. 17 to p. 26 ln. 20, JAR Tab 90, p. 8946; Dr. Krusi July Report at pp. 25-26, JAR Tab 54, pp. 4792-4795. See also: Amnesty International, Canadian Section Factum at paras. 8-10.

[25] AGC Factum at para. 76.

[26] Re-Examination of Dr. Cecilia Benoit, April 4, 2022 ["**Dr. Benoit Re-Examination**"], Q. 799, pp. 260-261, ln. 7-21, p. 262, ln. 11-15, JAR Tab 44, p. 3191-3192. Cross-Examination of Dr. Krusi, 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, JAR Tab 56, p. 4966-4967, Q. 195, p. 95, ln. 4-10, JAR Tab 56, p. 4921, Q. 198, p. 96, ln. 15-23, JAR Tab 56, p. 4921-4922; Dr. Krusi Cross, Q. 653, p. 276, ln. 20-25, p. 277, ln. 1-3, JAR Tab 56, p. 4966; Exhibit "B" to the Reply Affidavit of Dr. Benoit, affirmed January 27, 2022 [**"Dr. Benoit Reply Report"]**, p. 10, JAR Tab 43, p. 3114; Cross-Examination of Dr. Bruckert, April 14, 2022 ["**Dr. Bruckert Cross**"], Q. 172, p. 80, ln. 15-25, p. 81, ln. 1-4, JAR Tab 47, p. 3762-3763.

who actually has firsthand knowledge of sex work.

iv. The Applicants Are the Only Ones to Highlight Complex Experiences in the Sex Industry

19. Canada and Ontario have missed the mark by arguing, without evidence, that involvement in the sex industry is one of two separate experiences. Canada and Ontario suggest that there are two "groups" of sex workers: those who "freely choose" to do sex work and those who are "coerced" into selling sex. This depicts a false dichotomy, which relies on myths discussed below, and does not reflect realities in the sex industry. Canada and Ontario's misconception is unsurprising, given that they have failed to lead evidence from a single witness who is captured by the impugned provisions. Instead, they have elected to amplify the voices of witnesses who see only fragments of sex workers' lives.

20. People who sell or exchange sexual services, and people who experience exploitation and other forms of violence, are not mutually exclusive groups and they do not have competing interests. The experiences of those involved in the sex industry are diverse, and the industry is not characterized by two distinct paths that never meet. The Applicants and sex workers represented by the Canadian Alliance for Sex Work Law Reform are not a distinct group, and they share many experiences with the women who are referenced by Canada and Ontario's witnesses.

21. The Applicants tell the complex story of these overlapping experiences, which are explained at length by the experts[27] and are echoed by the Applicants' fact witnesses. For example, many sex workers have a multitude of experiences in the sex industry, including consensually selling or exchanging sex within a wide range of contexts. These contexts can include working with supportive colleagues in fair labour conditions as well as working in dangerous settings with

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[27] See Applicants' Factum at paras. 79-145.

unfair working conditions, being targeted by a predator, or experiencing sexual assault at work. As Redsky and other witnesses confirmed, these differing experiences can happen over an extensive timespan or occur within a single day.[28] While violence and exploitation are not the default experience,[29] sex workers can and do experience these harms – a risk that actualizes with greater frequency under the impugned provisions.[30]

22. Despite this reality, Canada and Ontario suggest that the Applicants represent a fringe subset of elite sex workers who seek to improve their own lives without regard for the effectiveness of the PCEPA in combatting exploitation in the sex industry.[31] Yet the evidence from the Applicants demonstrates that people from a wide-range of backgrounds work in the sex industry, with differing points of entry and lived experiences. The Applicants are women who are Indigenous, Black, Two-Spirit, trans, living with disability, and living in poverty. Like other sex workers, many of the Applicants have multiple intersecting identities and encounter various forms of inequality.[32] They have shared their stories, alongside eight other fact witnesses who are service providers working on the ground with sex workers, particularly those who experience the most difficult living and working conditions. This evidence captures a broad spectrum of experiences in the sex industry, across various sectors and realities.

23. Canada is correct to note that individuals with difficult life experience may find it

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[28] Affidavit of Diane Redsky, affirmed December 15, 2021, at para 41, JAR Tab 67, p. 6409; Affidavit of Lanna Moon Perrin, affirmed April 25, 2022, ["**Perrin Affidavit**"] at para. 35, JAR Tab 37, p. 2536; Exhibit "A" to Perrin Affidavit at pp. 101-102, JAR Tab 37, pp. 2572-2573.
[29] Exhibit "B" to Dr. Cecilia Benoit Affidavit, affirmed July 13, 2021 ["**Dr. Benoit July Report**"] at p. 10, JAR Tab 42, p. 3078; Dr. Benoit Re-Examination, Q. 803, p. 267, ln. 3-11; JAR Tab 44, p. 3193.
[30] McGuire Cross at Exhibit "B", Standing Committee on Justice and Human Rights (1 March 2022), at p. 11; Perrin Affidavit at paras. 23-29, JAR Tab 37, pp. 2533-2534.
[31] AGC Factum at paras. 6, 30, 43; AGO Factum at paras. 15-16, 98.
[32] Exhibit "B" to Dr. Krusi Affidavit, at p. 13, JAR Tab 54, p. 4783; Dr. Benoit July Report at p. 8, JAR Tab 42, p. 3076; Exhibit "X" to Affidavit of Jenn Clamen, affirmed July 13, 2021 ["**Clamen Affidavit**"], JAR Tab 10, pp. 385-391.

challenging to provide evidence in litigation.[33] But the Applicants and their fact witnesses are those very individuals who have been described as too vulnerable to come before the Court.[34] The Applicants are the only parties to provide evidence from people who are directly impacted by the impugned provisions. They are the people who Canada and Ontario present as the supposed beneficiaries of the PCEPA.[35] The Applicants, some of whom were granted leave to use pseudonyms, made the risky decision to provide evidence in this application, subjecting themselves to invasive cross-examinations and the risks associated with publicly identifying as a sex worker. Each of these witnesses has described in detail the ways in which the PCEPA harms their lives and work. While many of these witnesses have provided evidence to the Court for the Applicants, Canada and Ontario could not provide evidence from a single witness who believes they have benefited from the impugned provisions. That point bears repeating: there is *no* evidence from even a single person who says they are better off under the PCEPA.

24. The testimonies presented by the Applicants and their witnesses include experiences of violence, exploitation, and other forms of harm which are able to thrive under the PCEPA. For example, Applicant Lanna Moon Perrin has engaged in sex work for over thirty years, but she has also been trafficked, and her experiences do not significantly differ from the women described as "coerced" or "exploited" by Canada and Ontario.[36] Ms. Perrin provides nuance to her experiences in a way that is overlooked by Canada and Ontario's account of the sex industry. As a sex worker who has experienced human trafficking, Ms. Perrin shares the ways that the impugned provisions directly harmed her, including through multiple experiences of targeted violence.[37] Despite these

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[33] AGC Factum at para. 43.
[34] AGC Factum at para. 43.
[35] For example, see AGC Factum at paras. 51-52, 64.
[36] AGC Factum at para. 6; AGO Factum at para. 7.
[37] Perrin Affidavit, at paras. 34-35. JAR Tab 37, p. 2536.

difficult circumstances, Ms. Perrin emphasizes that she exercises autonomy and self-determination as a sex worker.[38]

v. Sex Workers Exercise Agency Even in the Context of Constrained Options

25. The Crowns' fiction reinforces antiquated stereotypes about sex workers. This includes the suggestion that many, if not most sex workers just do not "know" that they are being exploited.[39] This blatant denial of agency is an outdated rape myth that suggests people who sell or exchange sexual services are unable to consent to remunerated sex, particularly if they work within a context of significant individual or structural inequalities. This rape myth stems from the false notion that sex workers provide unrestricted access to their bodies and that they consent to anything that someone will pay for. These contradictory yet interdependent myths form the foundation of the Crowns' case, and overlook the reality that sex workers exercise agency to negotiate and establish the services they will provide, and for what consideration.[40]

26. Ms. Forrester explains that she and "the Indigenous women who [she] work[s] with at Maggie's Indigenous Sex Work Drum Group … have agency and autonomy over [their] bodies, and … make choices about how [they] engage in sex work".[41] This agency exists, even in the context of limited options for those who would be captured by the Crowns' notion of exploitation:

> Sex work has long been a primary source of income for myself and many of the other Indigenous women I work with at Maggie's. As Indigenous people, our employment opportunities are less varied than those of non-Indigenous people. And opportunities are even more restricted for Two-Spirit and trans Indigenous people like me. Racism and discrimination are part of our experience. We make choices within those confines. But this

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[38] Perrin Affidavit at paras. 9, 39, JAR Tab 37, pp. 2530, 2536.
[39] AGC Factum at para. 49; AGO Factum at para. 12.
[40] Dr. Benoit July Report at p. 8, JAR Tab 42, p. 3076; Reply Affidavit of Monica Forrester, affirmed January 20, 2022 ["**Forrester Reply Affidavit**"] at paras. 4, 7, JAR Tab 13, p. 1589; Dr. Krusi July Report at p. 12, at JAR Tab 54, p. 4782; Affidavit of Danielle Cooley, affirmed July 9, 2021 ["**Cooley Affidavit**"], at para. 13, JAR Tab 31, p. 2442; Exhibit "B" to the Reply Affidavit of Dr. Andrea Krusi, affirmed January 21, 2022, at p. 2, JAR Tab 55, p. 4770.
[41] Forrester Reply Affidavit at para. 4, JAR Tab 13, p. 1589.

> does not remove our ability to choose to engage in work. In fact, I have experienced less racism, discrimination, transphobia, and stigma among people in sex work (for example, sex workers, clients, and third parties) than in other employment settings.
>
> We make our own decisions, and some of us choose to engage in sex work … My decision to engage in sex work is based on my own needs. This is also the case for other Indigenous women who I work with on the street (including some who are less resourced than me). Our choices may be influenced by our needs at a given time (for example, greater financial need during a period may result in our decision to see more clients or engage in certain services), but these remain our choices – and our choices alone.[42]

27. Applicant Alessa Mason decided to engage in sex work to "seek stability, security, and resiliency" when experiencing housing insecurity.[43] Applicant Lanna Moon Perrin similarly described her decision to do sex work when she "did not have enough money to do anything" and wanted to "help sustain" herself, including by being able to pay rent, secure food, and get a pair of winter boots.[44]

28. Each of the Applicants and their fact witnesses describe the agency exercised by sex workers – which include their decision to do sex work and how they engage in the industry under the PCEPA such as their decision to engage in specific sexual acts with certain clients.[45] While many sex workers experience intersecting forms of systemic inequality, the witnesses make clear that they exercise agency, even in the context of limited options.[46] Most people who sell and exchange sexual services are not independent entrepreneurs "freely choosing" their profession, as Canada and Ontario posit; nor are they "victims coerced" into the sex industry.[47] An oversimplified framing of sex workers' agency ignore sex workers' realities. Like workers in other gendered labour markets, sex workers are exercising agency and autonomy, making fundamental decisions

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[42] Forrester Reply Affidavit, at paras. 7-9, JAR Tab 13, p. 1589-1590.
[43] Affidavit of Alessa Mason, affirmed July 13, 2021, at para. 3, JAR Tab 19, p. 1701.
[44] Perrin Affidavit at para. 2, JAR Tab 37, pp. 2528-2529.
[45] For example, see Forrester Reply Affidavit at paras 4-6, 9, 15, JAR Tab 13, pp. 1589-1591.
[46] Dr. Benoit July Report, at p. 8, JAR Tab 42, p. 3076; Forrester Reply Affidavit at paras. 4, 7, JAR Tab 13, p. 1589; Dr. Krusi July Report at p. 12, JAR Tab 54, p. 4782; Cooley Affidavit at para. 13, JAR Tab 31, p. 2442.
[47] See British Columbia Civil Liberties Association ("**BCCLA**") Factum at para. 43.

in the context of their available options. Critically, sex workers exercise bodily autonomy and many make difficult decisions in the face of constrained options – and these realities do not mean that people who sell or exchange sexual services are inherently vulnerable or that their decisions and consent are less valid.[48]

29. As Ms. Forrester explains, "[w]e do not need to be "rescued" or "saved" from sex work. The notion that we are inherently victims is insulting; it diminishes our agency and disregards our choices".[49] Like all people, sex workers exercise agency in the context of their social, economic, and cultural realities. Canada and Ontario appear to suggest that gender, race, poverty, and other forms of disadvantage can diminish agency or effectively negate it altogether. However, agency is not invalid because an individual is marginalized, nor is their consent vitiated because of their marginality or social context. Instead, sex workers from all walks of life exercise bodily autonomy in their decisions surrounding the sale and exchange of sexual services.[50]

vi. The House of Commons Standing Committee Agreed with the Applicants

30. The Applicants and their witnesses are not the only ones to describe the ways in which the PCEPA makes life more difficult for sex workers. After the Applicants submitted their factum, the Standing Committee on Justice and Human Rights released its review of the PCEPA. Having heard evidence from dozens of witnesses, the Committee recommended that "the Government of Canada recognize that protecting the health and safety of those involved in sex work is made more difficult by the framework set by the [PCEPA] and acknowledge that, in fact, the Act causes

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[48] See Ontario Coalition of Rape Crisis Centers ("**OCRCC**") Factum at paras. 39-40; Migrant Workers Action Coalition ("**MWAC**") at paras. 29-35.
[49] Forrester Reply Affidavit at para. 8, JAR Tab 13, p. 1590.
[50] See Women's Legal Education and Action Fund ("**LEAF**") Factum at para. 13; Black Legal Action Centre ("**BLAC**") at paras. 2-3.

serious harm to those engaged in sex work by making the work more dangerous."[51] The government's response to this stark conclusion is due on October 20, 2022.[52] But the Court need not wait because the Liberal Party of Canada, through its President, has long acknowledged in writing that the PCEPA is clearly unconstitutional and cannot stand.[53]

B. Response to Canada and Ontario's Submissions

i. Canada and Ontario's Attempt to Undermine the Applicants' Experts Fail

31. Ontario's criticism of the Applicants' experts focused on the methodology adopted when researching the sex industry. While Ontario recognizes that random sampling is not possible in the sex industry,[54] it suggests that there are no other reliable methods to study sex workers' experiences and thus no research on the sex industry should be completed. Ontario also asserts that the Applicants' experts, who are distinguished researchers, have sought to generalize a complex population, deriving in erroneous conclusions about the sex industry.[55]

32. Ontario's arguments are unfounded. The Applicants are the only parties to lead experts who directly conduct research on the diversity of peoples' experiences in the sex industry in Canada. The Applicants' experts are distinguished social science researchers, including qualitative researchers who teach methodology, including at the doctoral level.[56]

33. Qualitative research is particularly suitable when studying the sex industry. Dr. Krusi

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[51] Report of the Standing Committee on Justice and Human Rights, 44th Parliament, 1st Session, *Preventing Harm in the Canadian Sex Industry: A Review of the Protection of Communities and Exploited Persons Act*, June 2022, Recommendation 2, at p. 1, RBOA Tab 17.
[52] Per Standing Order 109 of the House of Commons: https://www.ourcommons.ca/procedure/standing-orders/Chap13-e.html.
[53] Exhibit "X" to Clamen Affidavit, JAR Tab 10, p 386. See also para. 40 of the Clamen Affidavit, JAR Tab 10, p. 169-170.
[54] AGO Factum at para. 51.
[55] AGO Factum at paras. 52.
[56] Dr. Bruckert Cross, Q. 14, p. 12, ln. 16-23, JAR Tab 47, p. 3745; Dr. Krusi Cross, Q. 344, p. 161, ln. 2-3, JAR Tab 56, p. 4937-4938.

explained the power of qualitative data to "speak to the lived experiences of the people who are interviewed, and … report on how they view their reality and what connections they make in experiences of their own life".[57] Qualitative research is intended to "systemically analyze people's lived experiences and bring forward how people connect different forces, social and structural forces in their lives and how that shapes their experiences".[58] As such, qualitative approaches "focus on employing methods that allow for the acquisition of deeper understandings of the human-centred processes underlying the phenomena" being studied.[59] It is the researcher's responsibility to report participants' experiences, and any "pattern of people attributing a certain cause" to their experiences of different phenomenon.[60]

34. The expert witnesses make two things clear: various research methods can be deployed to allow more generalized conclusions to be drawn when researching the sex industry, and connections can be drawn from qualitative research.[61]

35. The Applicants' experts are precluded from drawing *deterministic* causal assertions based on their research. But deterministic causal claims are only one type of causal claim, and the researchers rely on a *probabilistic* causal framework to address the limitations that studying phenomenon in real world settings create on their ability to control all of the conditions of their research. For example, the fact that heat causes ice to melt is a deterministic cause, while the fact that thalidomide causes birth defects is a probabilistic cause. But no one would doubt the causal relationship in the latter. Under a probabilistic causal framework, researchers draw upon repeated

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[57] Dr. Krusi Cross, Q. 362, p. 171, ln. 7-11, JAR Tab 56, p. 4940.
[58] Dr. Krusi Cross at Q. 363, p. 171, ln. 17-23, JAR Tab 56, p. 4940.
[59] Exhibit "B" to the Affidavit of Chris Atchison, affirmed July 13, 2021 ["**Atchison Report**"] at p. 5, JAR Tab 48, p. 4189.
[60] Dr. Krusi Cross, Q. 366, p. 173, ln. 1-6, JAR Tab 56, p. 4940-4941.
[61] Dr. Bruckert Cross, Q. 22, p. 16, ln. 2-17, JAR Tab 47, p. 3746; Dr. Bruckert Cross at Q. 30, p. 22, ln. 15 to p. 23, ln. 4, JAR Tab 47, p. 3748; Dr. Krusi Cross, Q. 357, p. 169, ln. 4-8, 13-16, JAR Tab 56, p. 4940, Q. 377, p. 178, ln. 2-5, JAR Tab 56, p. 4942; Dr. Krusi Re-Examination, Q. 725, p. 307, ln. 14 to p. 308, ln. 2, JAR Tab 56, p. 4974.

observation of relationships across different times and locations between variables of interest, such as criminal laws and their enforcement and negative health and safety outcomes. This is accompanied by greater attention to confounding and intervening influences to support a conclusion of probable cause.[62]

36. The Applicants' experts are well aware of the difficulties of sampling the sex industry. As Dr. Bruckert explained in cross-examination, various methods can be used to address these sampling challenges to produce more generalizable conclusions:

> [T]here are mechanisms to mitigate and to ensure that it is more generalizable. That we can say things about a population as a whole. And we do that through things like getting a robust sample size, recruiting widely, making sure that our sample is quite diverse … there's other mechanisms as well … In qualitative research you do interviews until you reach the point of saturation. So at some point you are hearing the same things over and over again. This does speak to the validity and reliability of the data.[63]

37. Mechanisms such as these have been leveraged by the Applicants' experts to secure "as broad [of] a sample as possible" to allow research findings to "reflect a broad spectrum of experiences".[64] These techniques have been widely used by the Applicants' experts to draw appropriate generalizable conclusions which are backed by rigorous research methodology.

38. Notably, the research by experts for the Applicants on the sex industry is not limited to a small population of sex workers in a specific location as the Crowns would suggest.[65] The research by the Applicants' experts have included thousands of participants in the sex industry,[66] across at

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[62] For example, see Dr. Krusi Cross, Q. 538, p. 232, ln. 3-14, Q. 539, p. 232, ln. 23 to p. 233, ln. 4, Q. 608, p. 259, ln. 11-20; Q. 649, p. 275, ln. 1-6.
[63] Dr. Bruckert Cross, Q. 22, p. 16, ln. 2-17, JAR Tab 47, p. 3746; see also, Dr. Bruckert Cross at Q. 30, p. 22, ln. 15 to p. 23, ln. 4, JAR Tab 47, p. 3748.
[64] Dr. Bruckert Cross, Q. 31, p. 23, ln. 15-20, JAR Tab 47, p. 3748.
[65] See: AGC Factum at paras. 84-85; AGO Factum at paras. 23, 52.
[66] For example, Dr. Benoit's research projects have included approximately 500 in person interviews with sex workers, the majority of which she conducted herself, see Dr. Benoit July Report at p. 5, JAR Tab 42, p. 3073. Dr. Bruckert has surveyed or interviewed 400+ sex workers over the past twenty-five years, see Dr. Bruckert Cross, Q. 51, p. 33, ln. 10-13, JAR Tab 47, p. 3751. Moreover, Dr. Krusi's AESHA study captures over 900 sex workers in Metro Vancouver, see Dr. Krusi Affidavit at p. 14, JAR Tab 54 p. 4784. Mr. Atchison's work has also captured over 3,100 people involved in the sex industry, see Atchsion Report at p. 4, JAR Tab 48 at p. 4188.

least twelve cities, with experiences from additional locations captured by participants who have worked in other places in Canada and abroad.[67]

39. Beyond the rigour of research methods used by the Applicants' experts in their work to recruit a broad range of participants and allow generalized conclusions to be drawn where appropriate, causal connections can be made from qualitative research in some circumstances. As Dr. Krusi explains, causality is best established through randomized controlled trials, which are not "feasible or ethical" in many situations, including the context of the impact of sex work legislation.[68]

40. As Dr. Krusi explained, the "next best, strongest methodological approach" to a randomized controlled trial is a longitudinal cohort study to "determine the strong association between different variable".[69] As such, through rigorous methodology, causation can effectively be determined.[70]

41. While Ontario claims that the Applicants tendered no evidence of any study that measured whether the PCEPA "either alleviated or exacerbated a particular thing" by measuring "that thing before and after the implementation of the PCEPA",[71] the AESHA study did just that, and was one of the research projects which leveraged a longitudinal cohort methodology which allows for probabilistic inference:

> [I]n the context of the AESHA study … we have … the most rigorous research methods both in terms of the cohort and of qualitative research of the lived experiences of sex workers and third parties to combine these two streams of evidence to make a really strong

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[67] This includes Vancouver, Victoria, Calgary, Wood Buffalo (Fort McMurray), Winnipeg, Toronto, London, Kitchener-Waterloo-Cambridge, Ottawa, Montreal, Halifax, and St. John, see Dr. Bruckert Cross at Q. 43, p. 30, ln. 2-8 and Q. 44, p. 30, ln. 17-19, JAR Tab 47, p. 3750; Dr. Benoit July Report at pp. 4, 9, JAR Tab 42, pp. 3072, 3077.
[68] Dr. Krusi Cross, pp. 168-169, JAR Tab 56, pp. 4939-4940.
[69] Dr. Krusi Cross, Q. 378, p. 178, ln. 16 to p. 179, ln. 3, JAR Tab 56, p. 4942; Q. 357, p. 169, ln. 4-8, JAR Tab 56, pp. 4939-4940.
[70] Dr. Krusi Cross, Q. 378, p. 178, ln. 16 to p. 179, ln. 3, JAR Tab 56, p. 4942; Q. 357, p. 169, ln. 4-8, JAR Tab 56, pp. 4939-4940; Q. 476, p. 212, ln. 12-18, JAR Tab 56, p. 4950.
[71] AGO Factum at para. 54.

and cohesive case for the association between the variables.[72]

42. As Dr. Krusi explains, the "empirical evidence … show how the social and structural factors shape the working conditions of sex workers",[73] which is seen "over and over" and "consistent[]" in the research across Canada and the world.[74]

ii. Canada and Ontario's Submissions Contain Factual Errors

43. Canada and Ontario's submissions contain a number of factual errors which mischaracterize the evidence in the application. These errors include the following:

(a) ***Homicide Rates***: Canada claims that the number of sex worker homicides has declined from 54 in the period of 2010-2014, to 35 in the period of 2015-2019.[75] However, Ms. Aucoin, Canada's own statistician, conceded under cross-examination that these figures have no statistical significance due to the small sample size.[76]

(b) ***Reporting to Police***: Ontario claims that in a study of marginalized sex workers, nearly 70% did not answer 'yes' to whether fear of detection would make them unable to call 911, and that 16.5% of these respondents called police when they experienced victimization.[77] This characterization of the research overlooks the alarming statistics that were uncovered: the overwhelming majority of sex workers did not call the police when experiencing victimization, and over 30% of sex workers did not call the police because of fear of detection.

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[72] Dr. Krusi Cross, Q. 357, p. 169, ln. 17-25, JAR Tab 56, pp. 4939-4940.
[73] Dr. Krusi Cross, Q. 377, p. 178, ln. 2-5, JAR Tab 56, p. 4942.
[74] Dr. Krusi Cross, Q. 378, p. 178, ln. 9-15, JAR Tab 56, p. 4942.
[75] AGC Factum at para. 57.
[76] Cross-Examination of Ms. Kathy AuCoin, April 21. 2022, ["**AuCoin Cross**"], at Q. 246, at p. 99, ln. 18 to p. 100 ln. 3., JAR Tab 86, pp. 8417-8418.
[77] AGO Factum at para. 40.

(c) ***Research Participants***: Canada claims that the empirical research has limitations because it does not include those who have been coerced into the sex industry.[78] However, the research performed by the Applicants' experts captures diverse samples of sellers.[79] As Dr. Benoit explains, research participants are not asked to identify themselves as sex workers, trafficked persons, or people who have exited prostitution.[80] They were also not asked for their stance on criminalization of the sex industry.[81] Instead, they were asked whether they had sold sexual services.[82] These studies capture individuals who no longer work in the sex industry.[83]

iii. Canada's Attempt to Supplement the Record with Jurisprudence is Improper

44. Canada's "statement of facts" engages with various reported decisions that have included charges under the impugned provisions. While Canada claims there are 45 of these decisions, they only cite 25 of them in their account of what these cases address.[84] Many of these cases involve numerous criminal offences, where the impugned provisions have been accompanied by an extensive list of serious criminal charges. This includes charges involving human trafficking,[85]

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[78] AGC Factum at para. 74.
[79] For example, see Cross-Examination of Dr. Cecilia Benoit, QQ. 132-133, pp. 56 ln 4 to p. 58, ln 16, JAR Tab 44, p. 3140-3141; Dr. Benoit Reply Report at pp. 10-11, 14, 15, JAR Tab 43, p. 3114-3115, 3118-3119; Dr. Benoit Re-Examination, Q. 798, p. 258, ln. 13-22, JAR Tab 44, p. 3191; Dr. Bruckert Cross, Q. 22, p. 15 ln. 21 to p. 16 ln. 21, JAR Tab 47, p. 3746; Exhibit "B" to Dr. Bruckert Reply Affidavit, affirmed January 20, 2022 at pp. 7-8, JAR Tab 46, pp. 3731-3732; Dr. Krusi Cross, QQ. 96, p. 50 ln. 7 to p. 52 ln. 7, JAR Tab 56, p. 4910, QQ. 292-293, p. 140 ln. 5 to p. 141 ln. 21, JAR Tab 56, pp. 4932-4933.
[80] Dr. Benoit Reply Report at p. 13, JAR Tab 43, p. 3674.
[81] Dr. Benoit Reply Report at p. 17, JAR Tab 43, p. 3678.
[82] For example, see Dr. Benoit Reply Report at p. 13, JAR Tab 43, p. 3674.
[83] Dr. Benoit Reply Report at pp. 13-14, JAR Tab 43, p. 3674-3675.
[84] AGC Factum at para. 67. The Intervener, Women's Equality Coalition, falls into the same error in their written submissions at paras. 9-12, 20, 25, 29.
[85] *R v OM*, 2019 ONCJ 552, Canada's Book of Authorities ["**CBOA**"] Tab 63; *R v Eftekhar*, 2020 ONSC 1386, CBOA Tab 51; *R v PO*, 2021 ABQB 318, CBOA Tab 65; *R v AM*, 2020 ONSC 4191, CBOA Tab 44; *R v Antoine*, 2019 ONSC 3843, CBOA Tab 45; *R v Lopez*, 2018 ONSC 4749, CBOA Tab 54; *R v Salmon*, 2019 ONSC 1574, CBOA Tab 68; *R v Gray*, 2018 NSPC 10, CBOA Tab 52; *R v Lucas-Johnson*, 2018 ONSC 3953 ["***Lucas-Johnson***"], CBOA Tab 55; *R v Crosdale*, 2018 ONCJ 800, ["***Crosdale***"] CBOA Tab 49; *R v MED*, 2022 ONSC 1899, CBOA Tab 58; *R*

kidnapping,[86] forcible confinement,[87] extortion,[88] robbery with a firearm,[89] assault with a weapon,[90] and other criminal offences involving minors.[91]

45. The record establishes that Canada is relying on a number of violent incidents that do not reflect typical experiences of the sex industry and cannot be separated from the targeted violence that prevails under the PCEPA. In Ms. Perrin's testimony to the National Inquiry on Missing and Murdered Indigenous Women and Girls, she explained that many sex workers do not have the "scary" stories that receive so much public attention and fuel assumptions about their lives.[92] The experts likewise reported that sex work is not inherently violent and that violent experiences are not the norm.[93]

46. In any event, Canada is attempting to supplement the evidentiary record by relying on the facts of criminal cases, as set out in judgments. However, these decisions are not evidence. The evidence before the Court comes from the witnesses, five of whom are current or former sex workers. The Court should pay no attention to Canada's attempts to improperly expand the record.

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c Mathieu, 2017 QCCQ 7451 [*"**Mathieu**"*], CBOA Tab 57; *R c Ayala Tafur*, 2020 QCCQ 3357, ["***Ayala Tafur***"] CBOA Tab 46.

[86] *R v Roccia*, 2020 ABQB 769, CBOA Tab 66; *Mathieu*, CBOA Tab 57.

[87] *Lucas-Johnson*, CBOA Tab 55.

[88] *R v Rouse*, 2017 NSSC 292, CBOA Tab 67.

[89] *R v OM*, 2019 ONCJ 552, CBOA Tab 63.

[90] *Ayala Tafur*, CBOA Tab 46.

[91] *R c Dubois*, 2019 QCCQ 1206, CBOA Tab 50; *R v Coburn*, 2019 NSPC 49, CBOA Tab 48; *R v Baxter*, 2019 NSPC 8, CBOA Tab 47; *Crosdale*, CBOA Tab 49; *R v Joseph*, 2018 ONSC 4646, CBOA Tab 53; *Lucas-Johnson*, CBOA Tab 55.

[92] Exhibit "A" to Perrin Affidavit at pp. 94-96, JAR Tab 37, p. 2565-2567.

[93] For example, see; Dr. Bruckert July Report at pp. 43-44, 47-48, JAR Tab 45, pp. 3704-3705, 3708-3709; Dr. Benoit July Report at p. 10, JAR Tab 42, p. 3078; Dr. Krusi July Report at pp. 16-17, JAR Tab 54, pp. 4786-4787.

iv. Experts for Canada and Ontario Cannot be Qualified

47. The Applicants have advanced serious criticisms of Dr. Haak, Dr. Cho, and Dr. Pratt, whose evidence should not be admissible because they are not properly qualified experts. None of these experts command any expertise on issues relevant to the application.

48. Beyond lacking any relevant expertise, Dr. Haak's personal views prevent her from providing an objective opinion. While the Applicants raised numerous concerns on her lack of impartiality, these challenges remain largely unaddressed. Dr. Haak is a vocal sex work abolitionist and served as an advisor to the Crown on the prosecution of the Applicant Tiffany Anwar under the impugned provisions.[94] In the circumstances, Dr. Haak cannot bring an appropriate level of objectivity to this matter.

49. As Cromwell J. explained in *White Burgess Langille Inman v Abbott and Hailburton Co*, "[e]xpert opinion evidence can be a key element in the search for truth, but it may also pose special dangers", which must be guarded against.[95] It is well-established that expert witnesses have "a duty to the Court to give fair, objective and non-partisan opinion evidence".[96] Where this "threshold requirement" is not met, an expert's "evidence should not be admitted".[97] However, even if this threshold is met, "concerns about an expert witness's independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence".[98] However, the "admissibility of the expert evidence should be scrutinized at the time

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[94] Cross-examination of Dr. Debra Haak, April 11, 2022 ["**Dr. Haak Cross**"], Q. 113 p. 45 ln. 10 to p. 46 ln. 7, JAR Tab 94, p. 9438-9439, and Q. 506 p. 204, ln. 2-5, JAR Tab 94, p. 9596.
[95] *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 ["***White Burgess***"], at para. 1, RBOA Tab 7.
[96] *White* Burgess, at paras. 2, 10, RBOA Tab 7.
[97] *White Burgess*, at paras. 2, 10, 34, 45-46, 53, RBOA Tab 7.
[98] *White Burgess*, at paras. 10, 34, 40, 45, 54, RBOA Tab 7.

it is proferred, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility".[99] Ultimately, expert evidence should be the "independent product of the expert uninfluenced as to form or content by the exigencies of litigation" and experts should assist the Court by providing an "objective unbiased opinion in relation to the matters within [their] expertise".[100]

50. Dr. Haak fails to meet these admissibility requirements, as Dr. Haak's "lack of independence renders … her incapable of giving an impartial opinion in the specific circumstances of the case".[101] Dr. Haak is not a social scientist; she is a pundit like any other in the editorial pages of a newspaper.[102] Even then, she is unable to provide an objective opinion because of her strong personal views on the subject matter. Dr. Haak has made known her "belie[f] [that] there are risks for all women and girls in society … if prostitution is normalized", and "support[s] a goal of abolition".[103] These examples highlight that Dr. Haak's evidence is "tainted by a lack of independence and impartiality" and warrants exclusion.[104]

51. Dr. Pratt lacks any knowledge or experiences on issues relating to the sex industry,[105] and Ontario has failed to adequately respond to the Applicants' criticisms of Dr. Cho. The Applicants detailed extensive concerns with Dr. Cho's qualifications and research in their factum at paragraphs 32-33 and 177-183. While Ontario maintains its confidence in Dr. Cho, the fact remains that it had to go to an obscure music school in Austria to find an expert who could support its case.

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[99] *White Burgess*, at para. 45, RBOA Tab 7.
[100] *White Burgess*, at paras. 27, 32, RBOA Tab 7.
[101] *White Burgess*, at para. 36, RBOA Tab 7, citing *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para. 106.
[102] Dr. Haak Cross, QQ. 123-126, p. 50, ln. 16 to p. 52, ln. 13, JAR Tab 94 p. 9443-9445.
[103] Dr. Haak Cross, Q. 113 p. 45 ln. 10 to p. 46 ln. 7, JAR Tab 94, p. 9438.
[104] *White Burgess*, at para. 48, RBOA Tab 7.
[105] Cross-Examination of Dr. Pratt, April 5, 2022 [**"Dr. Pratt Cross"**], at QQ. 17-20 p. 7 ln. 2-23, JAR Tab 96, p. 9681.

Dr. Cho's evidence focuses on a single discredited study that was completed over a decade ago, using data from more than two decades ago.

52. Ontario has mischaracterized Dr. Cho's work in an attempt to mask its fatal flaws. This includes by claiming that her studies capture the rates of human trafficking in a country.[106] However, Dr. Cho conceded under cross-examination that her report misstated this point, that her study did not address domestic human trafficking, and that in any event she only considered the frequency of reports of trafficking into a country.[107] Dr. Cho's studies do not provide any data to support her theories that demand increases when sex work is legalized, the "supply" of domestic sex workers is insufficient to satisfy demand, or that this results in increased demand for "victims of human trafficking".[108] Dr. Weitzer, a world-renowned empirical researcher, makes clear that "these assertions are *not* demonstrated in her study".[109] Like the rest of Ontario's submissions, Dr. Cho's assertion are not supported by evidence.[110] Notably, human trafficking offences in Canada have increased rather than decreased following the PCEPA, as confirmed by Canada's own statistical evidence.[111]

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[106] AGO Factum at paras. 73, 149.
[107] Cross-examination of Dr. Seo-Young Cho, March 18 and April 5, 2022 [**"Dr. Cho Cross"**], Q. 229-232 p. 67 ln. 1-19, JAR Tab 103, p. 10520; Q. 243-260, 70 ln. 10 to p. 75 ln. 24 JAR Tab 103, pp. 10520-10525; UNODC 2020 Report, Exhibit "2" to Dr. Cho Cross, p. 55-56, JAR Tab 103, pp. 10826-10827.
[108] Exhibit "C" to Affidavit of Dr. Seo-Young Cho, affirmed January 11, 2022, at p. 6, JAR Tab 101, p. 10399; Reply Affidavit of Dr. Ron Weitzer, affirmed January 26, 2022 ["**Dr. Weitzer Reply Affidavit**"] at p. 8, JAR Tab 61, p. 5653.
[109] Weitzer Reply Affidavit at pp. 8-9, JAR Tab 61, p. 5653-5654.
[110] Weitzer Reply Affidavit at p. 8, JAR Tab 61, p. 5653.
[111] Affidavit of Ms. Kathy AuCoin affirmed on December 15, 2021 ["**AuCoin Affidavit**"] at para. 14, JAR Tab 85 p. 8269; Exhibit "B" to AuCoin Affidavit at p. 4, JAR Tab 85 p. 8305..

PART III - ISSUES AND THE LAW

A. Characterizing the Objectives of the PCEPA

53. Canada and Ontario argue the PCEPA aims to deter and denounce prostitution, which Parliament deems inherently exploitative. Canada and Ontario suggest that the denunciation and deterrence of sex work is the "primary" objective of the PCEPA.[112] Canada and Ontario's analysis on the PCEPA's objectives is flawed in at least three respects.

54. ***First***, Canada and Ontario state the objective of the PCEPA too broadly. Canada states the objective as "reduc[ing] the demand for commercial sexual services with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it to the greatest extent possible."[113] Later in its submissions, Canada adds two further objectives of the PCEPA: "(1) to prevent situations that pose a risk of exploitation before they escalate to the level of human trafficking; and (2) to protect society, and particularly women and girls, from the harm caused by the commodification of predominantly female bodies."[114]

55. Notwithstanding that the objective of preventing the escalation of situations that pose a risk of exploitation does not appear in the legislative history or the Technical Paper, these objectives, taken together, are so broad that they short-circuit the *Charter* analysis. For example, it would be difficult to find that a legislative scheme with the objective of abolishing something "to the greatest extent possible" could ever be overbroad or grossly disproportionate in relation to the conduct it captures. The same issue arises with the objective relating to the "harm caused by the

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[112] AGC Factum at para. 194; AGO Factum at para. 149.
[113] AGC Factum at para. 133.
[114] AGC Factum at para. 190.

commodification of predominantly female bodies." This objective is so amorphous as to defy any scrutiny.

56. The Court dealt with the same issue in *Carter*. Canada suggested that the purpose of the prohibition on assisted dying was the "preservation of life." Writing for the Court, McLachlin CJ noted that adopting such an objective would distort the s. 7 review:

> defining the object of the prohibition on physician-assisted dying as the preservation of life has the potential to short-circuit the analysis. In RJR-MacDonald, this Court warned against stating the object of a law "too broadly" in the s. 1 analysis, lest the resulting objective immunize the law from challenge under the Charter (para. 144). The same applies to assessing whether the principles of fundamental justice are breached under s. 7. If the object of the prohibition is stated broadly as "the preservation of life", it becomes difficult to say that the means used to further it are overbroad or grossly disproportionate. The outcome is to this extent foreordained.[115]

57. ***Second***, the assumption underlying PCEPA – that sex work is inherently exploitative – is refuted by the expert evidence, denied by Canada's own witnesses, and based on discredited research. The Technical Paper cites "evidence" for the claim that sex work is inherently degrading. Specifically, the Technical Paper cites the work of Drs. Melissa Farley, Richard Poulin and Maddy Coy for the assertions that sex work is inherently violent and degrading.[116] This is a problematic foundation.

58. As discussed above, both Drs. Farley and Poulin were discredited in *Bedford*. Canada did not lead Dr. Coy as an expert in *Bedford*, but Ontario did in a recent case regarding the constitutionality of some of the impugned provisions, *R. v. Anwar*. In that case, McKay J. noted that Dr. Coy "desires a society which is free of prostitution" and that, during cross-examination,

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[115] *Carter v Canada (Attorney General),* 2015 SCC 5 ("*Carter*") at para. 77, ABOA Tab 11.
[116] Technical Paper, at p. 4, JAR Tab 110, p. 11150.

Dr. Coy "displayed a complete inability or unwillingness to concede that any viewpoint other than her own could conceivably be correct."[117] Justice McKay found that Dr. Coy's bias was "apparent to the point where it raises questions not only about what weight, if any, should be given to her evidence, but whether it is admissible at all under the criteria outlined in *White Burgess*."[118] It is telling that Canada did not tender evidence in this application from any of the authors of the works cited in the Technical Paper.

59. It is open to this Court to arrive at a different assessment of sex work on the basis of the evidence presented in this Application. This Court is not bound to take Parliament's assessment of the inherent exploitation of sex work as beyond scrutiny. As Abella J.A. (as she then was) wrote in *R. v. C.M.*, "when governments define the ambits of morality, as they do when they enunciate laws, they are obliged to do so in accordance with constitutional guarantees, ***not with unwarranted assumptions***."[119]

60. ***Third***, the purpose of each provision must be construed in accordance with all of the objectives of the PCEPA in mind, as well as the legislative context. The PCEPA is an interdependent legislative regime with multiple objectives. Sophisticated interpretation requires one to "identify and work with the primary objectives, the secondary considerations, and the specific functions of legislation at all levels, from the words to be interpreted and the provision in which they appear to larger units of legislation and the Act as a whole."[120] Moreover, the PCEPA was drafted as a direct response to the Court's decision in *Bedford*, which emphasized the laws' harmful effects on sex worker safety. The objective of responding to the safety concerns the Court

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[117] *R v Anwar,* 2020 ONCJ 103, at paras. 66, 81, ABOA Tab 2.
[118] *R v Anwar*, 2020 ONCJ 103, at para. 81, ABOA Tab 2.
[119] *R v CM*, 1995 CanLII 8924 (ONCA) at p. 15, RBOA Tab 1 ("***C.M.***") (emphasis added).
[120] Ruth Sullivan, *Statutory Interpretation*, 3e ed. (Irwin Law: 2016), at p. 187, RBOA Tab 9.

articulated in *Bedford* cannot be sacrificed to the other objectives which Canada and Ontario seek to place at the forefront. The objectives of the PCEPA cannot be construed to undercut one another.

61. To the extent that the Court of Appeal took a different approach in *N.S.*, Hoy J.A.'s interpretation of the material benefit, procuring, and advertising provisions was only tenable in the absence of a challenge to the purchasing provision, and an analysis of the PCEPA as a whole. That interpretation cannot stand when the impugned provisions are considered together.

B. Properly Interpreted, the Impugned Provisions Prevent Critical Safety-Enhancing Measures and Cause Profound Collateral Harms

62. Canada and Ontario suggest that the Applicants misapprehend the scope of the provisions in the PCEPA, particularly the material benefit, procuring, and immunity from prosecution provisions. To the contrary, Canada and Ontario downplay the breadth of activities covered, and the interwoven impacts of, the impugned provisions.

63. It is important to note that the purchasing provision, as the centerpiece of the PCEPA, sets the context of the other impugned provisions. The blanket prohibition contained in the purchasing provision covers all transactions between sex workers and clients, regardless of where they take place, whether there is any degree of exploitation as between the client and worker or the worker and any third party, or whether sex workers are benefiting from the services of third parties who may or may not be captured by the provisions. The purchasing provision therefore covers the maximum possible range of conduct.

64. The exceptions to the material benefit provision and the immunity provision are illusory in light of the purchasing provision. The purchasing provision significantly restricts the ability of sex workers to screen clients and communicate about issues that are central to their work and safety

and prevents sex workers and third parties from renting residential or commercial locations to establish a safe and controlled indoor workspace without the risk of eviction, thereby denying key safety-enhancing measures identified in *Bedford*. Canada and Ontario fail to address the extent to which the impugned provisions prevent sex workers from accessing those safety measures.

65. Canada and Ontario's submissions ignore realities and harms faced by sex workers, none of which the immunity or material benefit exceptions mitigate. The evidence from the Applicants highlights these realities:

(a) Despite submissions by Canada and Ontario that the PCEPA's exceptions allow sex workers to engage the services of third parties,[121] the narrow scope of those exceptions renders third party services so constrained that they are effectively meaningless to enhancing safety as contemplated in *Bedford*. The exclusions contained in s. 286.2(5)(e) renders the "exceptions" to the material benefit provision fictional because the majority of sex workers who work for a third party 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. Similarly, s. 286.2(5)(d) renders the exceptions in s. 286.2(4) illusory for third parties who provide health and safety supports and facilitate the purchase of their services, such as a third party who directly organizes an indoor work location for the client to purchase the sex workers' services;

(b) The "cooperatives" advanced by Canada and Ontario cannot exist in rented spaces as leases ordinarily include clauses forbidding criminal activity, nor can those who operate

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[121] AGC Factum at paras. 18 and 94; AGO Factum at paras. 78 and 82.

"cooperatives" open and use bank accounts as banks are instructed not to facilitate crime. Sex worker "cooperatives" would also run afoul of non-profit and cooperative regulations, which do not allow the use of those registered business models for criminal activities. At the same time, "cooperatives" would be inaccessible to many marginalized sex workers who most acutely require third party support and do not have the resources to establish their own "cooperative" regardless of whether the "cooperative" is concerned with collective or individual profit; and

(c) Ontario attempts to isolate the impacts of the impugned provisions from immigration consequences for migrant sex workers,[122] but the impugned provisions are the very source of those enormous collateral consequences, including loss of immigration status, detention, deportation from Canada and the inability to re-enter or obtain immigration status, and return to potential persecution in their country of origin.[123] Canada has minimized some of these impacts as "corollary" to the criminalization of sex work,[124] but as the Supreme Court of Canada has affirmed, "[c]ollateral consequences that affect the accused person's fundamental interests could have a more significant impact on the accused than the criminal sanction itself."[125]

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[122] AGO Factum at paras. 35 and 44.
[123] As the MWC and the Canadian Association of Refugee Lawyers ("CARL") explain in their factums at para. 18 and paras. 20-33 respectively, interactions, investigations, charges and convictions under the PCEPA trigger the inadmissibility regime under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Moreover, the *Immigration and Refugee Protection*, SOR /2002-227, bars residents with temporary status from employment in industries related to sex work: see MWAC factum at para. 19.
[124] AGC Factum at para. 105.
[125] *R v Wong*, 2018 SCC 25 at para. 72, RBOA Tab 2.

66. The Applicants and Interveners highlight these realities, which illustrate the need for the impact of the impugned provisions to include a consideration of the broader consequences of the PCEPA.[126]

i. *N.S.* is not a Complete Answer to the Application

67. Canada and Ontario would have this Court decide this application solely on the basis of *N.S.*, notwithstanding the fact that the context and record in this case are incomparable to *N.S.* This Application differs from *N.S.* in the following respects:

(a) The *Charter* challenge in *N.S.* related only to the advertising, material benefit and procuring provisions. The Court did not consider the centerpiece of the PCEPA, s. 286.1, or the s. 213 provisions for which sex workers can be prosecuted;

(b) The record in *N.S.* included only one expert witness, Chris Atchison, and did not consider the multitude of harms linked to criminalization of sex work (i.e., those which Canada characterizes as "corollary");

(c) The analysis of harms to sex workers in *N.S.* proceeded only on the basis of reasonable hypotheticals. There was no evidence from sex workers or service providers. As a result, the Court did not have the requisite evidence to make findings of the real world impact of the PCEPA; and

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[126] See Applicants' Factum at para. 159; MWAC Factum at paras. 16-21; CARL Factum at paras. 20-33; EGALE Canada & Enchanté Network Factum at para. 33; BLAC Factum at para. 6; and BCCLA Factum at para. 42.

(d) The absence of challenge on the basis of s. 15, or of a challenge interpreting s. 7 through the lens of s. 15.[127]

68. Indeed, Hoy J.A. repeatedly noted that the Applicants' arguments were "for another day."[128] *N.S.* does not foreclose the opportunity for this Court to find that the impugned provisions are unconstitutional.

C. Canada and Ontario's Response to the Applicants' Section 7 Claim are Unpersuasive

69. Canada and Ontario fundamentally mischaracterize the Applicants' burden with respect the s. 7 claim. Canada and Ontario suggest that the Applicants must demonstrate that the PCEPA produces worse outcomes than the pre-*Bedford* laws. For example, Canada suggests that the PCEPA cannot engage sex workers' right to life because the Juristat report shows a (statistically insignificant) decrease in homicides since the PCEPA was enacted.[129] Likewise, Ontario states that the Applicants' life interest is not engaged because sex workers' lives were endangered prior to the PCEPA and are presently endangered in jurisdictions in which sex work is legal.[130]

70. The Applicants' burden is not to demonstrate that the PCEPA is worse than the pre-*Bedford* laws, although in many regards it is. Rather, *Bedford* established a floor for the minimum safety measures which must be available to sex workers. Insofar as the PCEPA replicates the harms of *Bedford*, it is unconstitutional. Moreover, the effects of the provisions in the PCEPA which have no pre-*Bedford* predecessor create additional harms to sex workers. These harms are not assessed

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[127] *New Brunswick v G(J),* [1999] 3 SCR 46 at para. 115, ABOA Tab 51.
[128] *R v NS,* 2022 ONCA 160 at footnotes 4 and 14, ABOA Tab 4.
[129] AGC Factum at para. 112.
[130] AGO Factum at para. 118.

in comparison to the situation pre-*Bedford* or in other jurisdictions, but rather are assessed against the principles of fundamental justice.

i. Canada and Ontario Distract from the Crux of the Section 7 Claim

71. Canada and Ontario attempt to distract from the weight of the Applicants' s. 7 claim by setting several preliminary hurdles. These hurdles can be grouped into four categories: judicial deference; causation; occupational rights; and the legal status of sex work. None of these hurdles actually presents a bar to the Applicants' claim. In fact, Canada and Ontario raised the first three hurdles in *Bedford*, and the Supreme Court rejected them.

Judicial Deference Does Not Apply at the Outset of a Section 7 Claim

72. Both Canada and Ontario begin their attack on the Applicants' s. 7 claim by emphasizing the need for this Court to defer to Parliament's judgment.[131] As in *Bedford*, deference has "no role at this stage of the analysis."[132] This Court's consideration of the Applicants' s. 7 interests should not be coloured by a deferential attitude toward Parliament. If deference has any role to play in this application, it is at the second stage of the s. 7 test and in s. 1.

Causation is Not Assessed as a Scientific Standard

73. Canada and Ontario overstate the threshold for causation in s. 7. The Court in *Bedford* was clear that a high standard of causation does not apply to a s. 7 claim:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is ***satisfied by a reasonable inference, drawn on a***

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[131] AGC Factum at paras. 180-181, 184, 186; AGO Factum at paras. 83-87.
[132] *Canada (Attorney General) v Bedford,* 2013 SCC 72 ["***Bedford***"] at para. 90, ABOA Tab 1.

> ***balance of probabilities***. A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.[133]

74. Just as in *Bedford*, Canada says that a higher causal standard should apply to the Applicants' claim. Canada suggests that the Applicants must prove, for example, a causal link between the PCEPA and the harm to their s. 7 interests.[134] Likewise, Ontario states "there is no evidence that when the provisions are properly construed, they prevent providers from taking steps to reduce risks to their safety" and suggests that a scientific standard of causation ought to apply to the Applicants' claims.[135] Such a standard is too high for the "port of entry" for s. 7 claims.[136] In any event, the Applicants have adduced voluminous evidence – both from sex workers and experts – consistently demonstrating a causal relationship between the impugned provisions and the manifold harms that sex workers face.

The Applicants Do Not Make an Economic Rights Claim

75. Canada and Ontario argue that the Applicants' s. 7 claim must fail because there is no right to engage in sex work as an occupation.[137] This objection misses the mark and trivializes the Applicants' claim. The Applicants do not argue that the PCEPA engages their s. 7 interests by interfering with their ability to earn a living off sex work. Accordingly, the question on this application is not whether s. 7 accommodates a positive right to do sex work; the question is whether the PCEPA deprives the Applicants of their s. 7 interests in a manner which is not in accordance with the principles of fundamental justice.

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[133] *Bedford* at para. 76, BOA Tab 1 (citations omitted).
[134] AGC Factum at para. 112.
[135] AGO Factum at para. 112.
[136] *Bedford* at para. 78, BOA Tab 1.
[137] AGC Factum at paras. 107-111; AGO Factum at para. 114.

76. The Applicants' case is not like *Tanase*: the applicant in *Tanase* claimed that his license to practice dental hygiene was revoked in a manner contrary to the principles of fundamental justice. The Court of Appeal affirmed that a denial of permission to practice a profession by a regulatory body does not engage s. 7 interests.[138] By contrast, the Applicants' s. 7 claim is based on their right to be free from state-imposed deprivations of life, liberty, and security of the person, which deprivations they encounter in the course of their work. This is a recognized basis of a s. 7 claim.[139] Indeed, both Canada and Ontario raised the same objection in *Bedford*, which the Court readily dismissed, noting that "the applicants are not asking the government to put into place measures making prostitution safe."[140] If Canada and Ontario were correct on this point, *Bedford* would be incorrectly decided.

Section 7 is Engaged Even if an Activity is Criminalized

77. Canada and Ontario suggest that Parliament's decision to criminalize sex work precludes or weakens the Applicants' s. 7 claim.[141] To this end, Canada and Ontario rely on a single sentence in *Bedford* in which McLachlin C.J. noted that sex work was a "a risky — but legal — activity".[142] The Applicants' reply is twofold.

78. ***First***, the Applicants re-iterate the fact that the PCEPA does not actually impose criminal sanctions on sex workers who sell their own sexual services. As it was in *Bedford*, the sale of one's own sexual services is not an activity which Parliament has decided warrants a criminal sanction.

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[138] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482 at paras. 37-45, CBOA Tab 40.
[139] *Canada (Attorney General) v. Federation of Law Societies of Canada,* 2015 SCC 7, at paras. 69-73, ABOA Tab 21, in which the Court held that a requirement that lawyers collect certain information about their clients or face potential imprisonment violated the s. 7 rights of lawyers as a group.
[140] *Bedford* at paras. 79, 88, ABOA Tab 1.
[141] AGC Factum at paras. 102-103; AGO Factum at para. 139.
[142] *Bedford* at para. 60, ABOA Tab 1.

From the sex worker's perspective, the sale of sex remains a permitted activity, albeit one which forces sex workers to engage in a criminalized context and incur the consequences of criminalizing clients and third parties.

79. ***Second***, even if there has been a change in the legal status of sex work, the s. 7 analysis is not meaningfully different from *Bedford*. The fact that an activity is illegal does not fundamentally alter the s. 7 inquiry. Indeed, in several instances the Supreme Court has held that criminal prohibitions engaged security of the person interests in a manner unconnected to the principles of fundamental justice:

(a) *Morgentaler*: the majority of the Court held that the *Code* provisions criminalizing abortion unjustifiably interfered with bodily integrity by robbing women of decision-making power over their bodies;[143]

(b) *Carter*: the Court held that the *Code* provisions criminalizing assisted dying unjustifiably interfered with patients' ability to make decisions concerning their bodily integrity;[144]

(c) *Smith*: the Court held that the prohibition on the possession of non-dried marijuana for medical purposes unjustifiably infringed on security of the person by forcing patients to choose between a legal but inadequate treatment (i.e., dried marijuana) or an illegal but more effective one;[145]

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[143] *R v Morgentaler,* [1988] 1 SCR 30, at p. 56, ABOA Tab 11 ["***Morgentaler***"].
[144] *Carter* at para. 66, ABOA Tab 11.
[145] *R. v. Smith*, 2015 SCC 34 at paras. 14-28, ABOA Tab 9 ["***Smith***"].

(d) *PHS*: the Court held that the Minister's refusal to grant a safe injection site an exemption from the *CDSA* prohibition on the possession of certain injectable drugs deprived the site's clients of potentially life-saving medical care.[146]

80. The Supreme Court has been clear that a criminal prohibition infringes security of the person if it forces a person to choose between a legal but inadequate option and an illegal but more effective one.[147] While the fact that Parliament has used its criminal law power to address an issue may be relevant at the second stage of the inquiry, it cannot overwhelm the analysis.

ii. Canada and Ontario Insufficiently Address the Applicants' Autonomy Interests

81. The impugned provisions engage sex workers' right to security and liberty of the person as they interfere with fundamental decisions of personal importance regarding their bodily autonomy, including those related to their health, safety, and personal and sexual autonomy.[148] As explained in paragraphs 25-29, the fact that the impugned provisions interfere with sex workers' ability to make decisions in the context of their work does not segregate these decisions from their autonomy and integrity or reduce the seriousness of the provisions' impacts. Nor does it convert these fundamental decisions into questions of choice of occupation or an affirmative right to engage in sex work. The personal and sexual autonomy of an individual, including in the context of their work, is an important pillar of the rights to liberty and security.[149] The majority of the Supreme Court of the United States recently suggested in *Dobbs* that an expansive interpretation of autonomy rights – which Canadian Courts have favoured – leads inexorably to the protection

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[146] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 91, ABOA Tab 8.
[147] *Smith* at para. 18, ABOA Tab 9.
[148] Applicants' Factum at paras. 199-209. See also: Sexual Health Coalition Factum at paras. 8-14; EGALE Canada & Enchanté Network Factum at paras. 35-39; and MWAC Factum at paras. 36-39.
[149] *Morgentaler* at p. 166, ABOA Tab 11.

of sex work.[150] The majority of that Court has now taken a giant step backwards on the autonomy rights of women, something that runs counter to Canadian jurisprudence and is a course that our Courts should not follow.

82. Among other infringements, the impugned provisions impede sex workers' right and capacity to communicate and establish consent to sex. The ability to establish with who, when, and under what specific conditions one engages in specific sexual acts is of fundamental importance to one's sexual and personal autonomy. Canada's legal concept of consent to sex has evolved to reflect an intention to protect individuals', and particularly women's, sexual autonomy. This protection must also extend to include the sexual autonomy of people who sell or exchange sex.

83. As discussed in paragraphs 19 and 25, pervasive sexist and paternalistic myths assume that sex workers are either incapable of consent because sex work is cast as inherently violent and exploitive and marginalized women who sell or exchange sex are assumed to have no agency, or do not need to explicitly consent to every specific sexual act, because their consent may be automatically assumed at all times given the context of their work. Both of these rape myths negate sex workers' subjective capacity to consent and deny their right to personal and sexual autonomy.[151]

84. The PCEPA prohibits communication about the conditions of consent to sexual activity, and in so doing, the impugned provisions prevent sex workers from clearly negotiating, communicating and establishing the terms of their consent to sexual activities. This has severe

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[150] *Dobbs*, at p. 32 of majority opinion, RBOA Tab 10.
[151] See OCRCC Factum at para. 16; MWAC Factum at para. 14.

impacts on their working conditions, their health and safety, and consequently the contexts and conditions in which they negotiate consent.[152]

85. The impugned provisions undercut decades of sexual assault jurisprudence and law reform which developed to amplify the importance of clear consent to sexual activity. As recently as in *Kirkpatrick*, the Court affirmed that consent requires agreement to the "***specific*** sexual act."[153] In response to the disproportionate sexual violence experienced by women and girls, the Court acknowledged their personal autonomy and capacity to make choices about their bodies and whether or not to engage in sexual activity. The Court has confirmed that:

> Each person's ability to set the boundaries and conditions under which they are prepared to be touched is grounded in concepts as important as physical inviolability, sexual autonomy and agency, human dignity and equality […]
> Under our law of consent, all persons are able to decide to consent or not based on whatever grounds are personally meaningful to them. .. the law has no interest in why a person gave or withheld consent as their thoughts, motivations and desires are private. What matters is whether there was or was not subjective consent in fact. ***This respect for individual choice, and the personal motivations underlying it, lies at the core of sexual agency***.[154]

86. Canada and Ontario, in asking the Court to uphold the impugned provisions, essentially ask this Court to undermine the long-standing sexual assault jurisprudence regarding ongoing and explicit consent. It cannot be that a lesser standard of consent will suffice when sex is remunerated.

87. These infringements on sex workers' autonomy also perpetuate the marginalization of sex workers, contrary to the norm of substantive equality. The Court has recognized that equality is the broadest of guarantees, extending to all other *Charter* rights, and that s. 7 must be interpreted

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[152] See Applicants' Factum at paras. 79-159. See also: Sexual Health Coalition Factum at paras. 8-14; MWAC Factum at paras. 36-38; BCCLA Factum at paras. 16-18, 44; OCRRC Factum at paras. 3(c), 12, 30-34; and EGALE Canada & Enchanté Network Factum at paras. 13 and 30.
[153] *R. v. Kirkpatrick*, 2022 SCC 33 at para. 53, RBOA Tab 3 ["***Kirkpatrick***"].
[154] *Kirkpatrick* at paras. 51, 70, RBOA Tab 3.

through the lens of s. 15.[155] As discussed in paragraph 24, the provisions most severely impede the autonomy of the most marginalized sex workers.

D. Canada and Ontario's Approach to Section 15 is Inconsistent with the Guarantee of Substantive Equality

88. While Canada agrees that persons who sell or exchange sex are predominantly women, it contends that the impugned provisions do not draw a distinction based on gender because the evidence "establishes the risks of coercion and other harms for those involved in the commercial sex industry."[156] Canada further asserts that the "act of criminalizing an activity cannot, on its own, establish the grounds for a claim for discrimination," and that if there is a distinction based on gender (1) the immunities and exceptions permit sex workers to adopt safety-enhancing measures and (2) the "actual impact of the impugned provisions remains unknown."[157]

89. What Canada misses is that the PCEPA draws a distinction between sex work, which is predominantly done by women, and other types of work. While on its face the PCEPA does not draw a distinction based on gender, its effects are predominantly felt by women.[158] Moreover, Canada's approach, as articulated in its submissions, is out of step with other jurisdictions. In holding that prohibitions on same-sex intimacy constitute an unjustifiable violation of the right to equality, Courts and human rights bodies around the world have rejected the notion that criminalization on its own cannot ground a claim for discrimination.[159] As in those line of cases,

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[155] See BCCLA Factum at paras. 10, 16; EGALE Canada & Enchanté Network Factum at para. 25.
[156] AGC Factum at para. 153.
[157] AGC Factum at paras. 156, 158.
[158] LEAF Factum at paras. 11, 28-29.
[159] For example, see *Orden David v Attorney General of Antigua and Barbuda, claim no ANUHCV2021/0042* (Antigua and Barbuda, High Court) at para 88, RBOA Tab 11; *Orozco v Attorney General and others*, [2020] 2 LRC 501 at paras 258–9, RBOA Tab 12; *Navtej Singh Johar v Union of India*, (2018) Writ Petition No. 76 of 2016 at s. 15.2,

sex workers who face multiple, intersecting grounds of discrimination would most acutely experience the harmful impacts of a deprivation of the right to equality, contrary to the promise of substantive equality.

90. This Court should also reject Canada's justification of a violation of the Applicants' s. 15 rights based on a groundless claim that the impugned provisions protect women. As detailed above, there is no evidence that suggests sex work is inherently exploitative or that the impugned provisions promote the safety of sex workers, women or children. Rather, the record before the Court demonstrates that the impugned provisions create numerous, serious and intersecting harms, none of which the immunity or material benefit exceptions mitigate. As such, the impugned provisions reinforce and perpetuate structural inequality faced by sex workers, violating sex workers' right to equality by discriminating on the grounds of gender, occupational status, and numerous other intersecting grounds.[160]

E. Canada and Ontario Fail to Justify the Infringements Under Section 1

i. Little Deference is Owed

91. Canada and Ontario urge this Court to defer to Parliament's judgment on the manner in which sex work should be regulated, owing to the complex nature of the issue. Such deference is unwarranted. The fact that sex work is a complex topic does not itself end the Court's inquiry. The

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RBOA Tab 13; *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) at para 8.6, RBOA Tab 14; *Motshidiemang v Attorney General*, [2019] 4 LRC 507 at para 143, 47 BHRC 33 (Botswana, High Court) at para 115, RBOA Tab 17; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC), RBOA Tab 16. See also EGALE Canada & Enchanté Network Factum at para. 24.

[160] BLAC Factum at paras. 18-25; LEAF Factum at para. 11.

role of the judiciary encompasses "listening to claims of injustice and […] promoting values and perspectives that may not otherwise be taken seriously in the legislative process."[161]

92. Even in complex regulatory regimes in which the government is balancing competing interests, the government must demonstrate that it has assigned proper weight to each of the competing interests.[162] In a case such as this one, where both parties have adduced considerable fact and expert evidence, the Court is properly positioned to draw conclusions from that evidence and assess the effect of the impugned laws, regardless of the complexity of the subject matter. As the Court held in *Chaoulli*, Courts "are an appropriate forum for a serious and complete debate. […] In fact, if a Court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position."[163]

93. In any event, absolute bans are afforded a reduced margin of deference in s. 1 review.[164] The impugned provisions impose absolute bans on communications, purchasing and advertising, and near absolute bans on material benefits and procuring. Absolute bans are not "complex regulatory responses," which would require judicial deference.[165]

ii. The Purpose is not Pressing and Substantial

94. Canada asserts that the impugned provisions have two objectives: protecting women and girls from commodification and preventing situations from escalating to the point of human

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[161] *Chaoulli v Quebec (Attorney General),* 2005 SCC 35 at para. 89, ABOA Tab 7 ["***Chaoulli***"], quoting K. Roach, "Dialogic Judicial Review and its Critics" (2004), 23 Sup. Ct. L. Rev. (2d) 49, at pp. 69-71.
[162] *Chaoulli* at para. 95, ABOA Tab 7
[163] *Chaoulli* at para. 87, ABOA Tab 7.
[164] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199 at para 163, RBOA Tab 8 ["***RJR-MacDonald***"]; *Carter*, at para 98, ABOA Tab 11.
[165] *Carter*, at para 98, ABOA Tab 11.

trafficking.[166] This latter objective has no basis in the legislative history of the PCEPA. Some officers suggested that the provisions assist them in charging for conduct that may eventually become human trafficking, but there is no evidence this was Parliament's purpose in enacting the PCEPA. This is a classic example of an impermissible shifting of purpose.[167]

95. In addition, Ontario suggests the specific purpose of ss. 213(1) and 213(1.1) is to protect communities, and especially children, from exposure to the commercial sex trade.[168] However, neither Canada nor Ontario tendered evidence demonstrating that a substantial harm would arise to children or communities absent these provisions. An objective capable of justifying impugned legislation cannot be merely "trivial."[169] As Abella J.A. (as she then was) put it in *C.M.*, "it is not enough for a government to assert an objective for limiting guaranteed rights under s. 1; there must, in my view, also be an underlying evidentiary basis to support the assertion."[170]

iii. The means adopted are not rationally connected

96. In order to demonstrate a rational connection, Canada must show a causal connection between the impugned provisions and their stated objectives.[171] In contrast to the standard applicable to the applicant under s. 7, at the s. 1 stage the government should prove the connection by scientific evidence, where possible, and at least by reason or logic where the connection is not scientifically measurable.[172] In fact, the evidence on this application demonstrates that the

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[166] AGC Factum at para. 190
[167] *R v Big M Drug Mart Ltd.*, *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at pp. 334-336, RBOA Tab 5; *R v Zundel*, [1992] 2 SCR 731 at 760-761, RBOA Tab 4.
[168] AGO Factum at paras. 105-106.
[169] *R v Oakes*, [1986] 1 SCR 103, at pp. 138-139, ABOA Tab 50.
[170] *C.M.* at p. 2, RBOA Tab 1.
[171] *RJR-MacDonald* at para. 153, RBOA Tab 8.
[172] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1 at paras. 143-144, ABOA Tab 47; *RJR-MacDonald* at para. 154, RBOA Tab 8.

impugned provisions actually place in danger the very people whom the government claims to protect.[173]

97. Insofar as the PCEPA aims to decrease demand to protect women and girls from commodification, Canada has led no evidence demonstrating that demand has fallen.[174] Additionally, insofar as the PCEPA is concerned with preventing exploitation and human trafficking, the evidence demonstrates that the impugned provisions violate sex workers' health, safety, security and autonomy and reinforce, exacerbate, and perpetuate sex workers' disadvantage by perpetuating unsafe and exploitative working conditions,[175] while deterring sex workers from reporting violence and other abuse.[176]

iv. The provisions are not minimally impairing

98. Even if the impugned provisions are rationally connected to their objective, Canada must show that they infringe the Applicants' *Charter* rights "as little as reasonably possible" in order to achieve their objective.[177] To do so, Canada must demonstrate that the provisions are carefully tailored and fall within a range of reasonable alternatives.[178] If Canada fails to explain why a less intrusive and equally effective measure was not chosen, the impugned provisions must fail.[179] In the presence of equally effective and less intrusive measures, Canada must tender evidence for

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[173] *Smith* at para. 29, ABOA Tab 9.
[174] See Applicants' Factum at paras. 160-165.
[175] See Applicants' Factum at paras. 79-145.
[176] See Applicants' Factum at paras. 146-58.
[177] *Carter* at para. 102, ABOA Tab 11; *RJR-MacDonald* at para. 160, RBOA Tab 8; *Oakes* at p. 139, ABOA Tab 50.
[178] *RJR-MacDonald* at para 160, RBOA Tab 8.
[179] *RJR-MacDonald* at para 160, RBOA Tab 8.

why they were not chosen.[180] Canada has tendered no such evidence, and the record establishes that the impugned provisions needlessly impair fundamental rights.

99. For the majority of impugned provisions that are absolute bans, Canada can show that they are minimally impairing only if it shows that a full prohibition is necessary to achieve its objective.[181] Canada suggests that the impugned provisions are carefully crafted because they permit sex workers a margin of safety by allowing them to work "cooperatively."[182] However, as explained in paragraphs 63-65, the safety afforded by the exceptions and immunity from prosecution provisions are insufficient to mitigate the harmful interdependent and interwoven consequences of the impugned provisions. As the Applicants testified, the spectre of criminalization looms large while the impugned provisions deprive sex workers of critical safety-enhancing measures, impede their personal and sexual autonomy, violate their rights to freedom of expression and association, and reinforce, exacerbate, and perpetuate disadvantage.

v. The regime is not proportional between the deleterious and salutary effects

100. At its highest, Canada and Ontario suggest that the PCEPA allows law enforcement to target exploitative activities before they become "full blown" exploitation or human trafficking. In reality, as stated above, the evidentiary record demonstrates an utter lack of evidence of "salutary" benefits to any of the PCEPA provisions. Further, those who experience exploitation or other forms of abuse, and those who make the decision to sell or exchange sex, are overlapping

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[180] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras. 69, 76, 85-86, ABOA Tab 52.
[181] *RJR-MacDonald* at para. 163, RBOA Tab 8.
[182] AGC Factum at para. 40(a).

groups who are equally harmed by the impugned provisions and their interests are not competing, as explained in paragraphs 19-29.

101. Police officers readily admitted that they do not use s. 213 against either sex workers or purchasers.[183] While the other PCEPA provisions may be used to investigate exploitation, they are by no means essential to those investigations. When pressed on cross-examinations, no officer could articulate the specific exploitative conduct captured by the material benefit or procuring offences which would not also be captured by *Criminal Code* provisions of general application.[184] While some officers suggested the provisions were required to make contact with sex workers through under-cover operations, each officer acknowledged they do not require judicial authorization for such operations.[185]

102. Canada must demonstrate that the deleterious effects of the impugned provisions on the Applicants' *Charter* rights are proportionate to the salutary effects achieved by fulfilling their objective.[186] The more severe the effects of a measure on the Applicants' *Charter* rights, the more important their objective must be for the Court to accept that they are demonstrably justified in a free and democratic society.[187] In conducting this analysis, the Court must take full account of the

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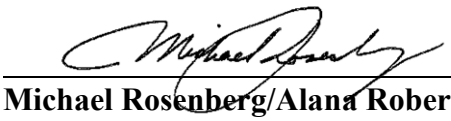
[183] Monchamp Cross, QQ. 57-64 p. 20 ln. 15 to p. 23 ln. 18, JAR Tab 74, pp. 7136-7139; Koniuck Cross, QQ. 145-150 p. 37 ln. 9 to p. 38 ln. 21, JAR Tab 78, pp. 7491-7492, Q. 154, p. 39 ln. 14-22, JAR Tab 78, p. 7493, QQ. 157-161, p. 40 ln. 17 to p. 41 ln. 14, JAR Tab 78, pp. 7494-7495; Rubner Cross, QQ. 125-127 p. 37 ln. 17, JAR Tab 84, p. 8250.
[184] McGuigan Cross, QQ. 191-222 p. 55 ln. 20 to p. 67 ln. 2, JAR Tab 82, pp. 7862-7874; Rubner Cross, QQ. 138-142 at p. 39 ln. 19 to p. 40 ln. 14, JAR Tab 84, pp. 8252-8253; 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, JAR Tab 74, pp. 7158, 7166, 7172, 7178-7182.
[185] Koniuck Cross, QQ. 133-134, p. 33 ln. 14 to p. 32 ln. 1, JAR Tab 78 at pp. 7487-7488; Rubner Cross, Q. 106 p. 33 ln. 12-15, JAR Tab 84, p. 8246; Organ Cross, April 6, 2022, Q. 92 p. 32 ln. 7-13, JAR Tab 76 at p. 7325, QQ. 283-284 p. 99 ln. 2-22, JAR Tab 76 at p. 7392.
[186] *Oakes* at 139, ABOA Tab 50.
[187] *Oakes* at 139-140, ABOA Tab 50.

severity of the deleterious effects of the impugned provisions on the Applicants' *Charter* rights.[188] In this case, the salutary effects of the impugned provisions are not established in evidence. By contrast, the deleterious effects of sex workers' *Charter* rights is severe, and in the most extreme cases the effects costs sex workers their lives.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29 day of August, 2022.



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[188] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 76, RBOA Tab 6.

APPENDIX "A"

BEDFORD HARMS CONTINUE UNDER THE PCEPA

Harms identified in Bedford	Harms that exist under the PCEPA
Inability to Screen Potential Clients Exposes Sex Workers to Danger	
Communicating prohibition (s. 213(1)(c)) makes it difficult to communicate and screen potential clients for intoxication or propensity to violence.[189] Communicating prohibition (s. 213(1)(c)) prevents sex workers from screening clients at an early, and crucial, stage of a potential transaction.[190]	The PCEPA impairs full and explicit conversations, notably at the earliest stage of the transaction, and forces rushed communications. All of this prevents sex workers from safely screening a client, a vital safety tool. Because of s. 286.1, *all sex workers in every sector* of the industry cannot safely screen potential clients. *Bedford* only addressed the harms of communication prohibitions in the context of public space, as prior to the PCEPA only communications between sex workers and clients in public space were prohibited. The PCEPA now prohibits communication *everywhere* via the s. 286.1 communication for purchasing prohibition. Section 286.1 causes clients to refuse to give identifying information to sex workers, to rush communications, and to avoid full and explicit conversation, all of which make it difficult for sex workers to engage in screening. Because of s. 286.4, sex workers are effectively prevented from creating clear and comprehensive ads, which are a vital safety tool for sex workers to screen potential clients (i.e., by requiring clients to submit identifiable information or references online). The advertising provision prohibits such safety and screening measures and exposes sex workers to harm.
Restricting Communication Prevents Sex Workers From Negotiating Health and Safety Conditions	
Communicating prohibition (s. 213(1)(c)) makes it difficult to set terms for the use of condoms or safe houses.[191]	The PCEPA impairs full and explicit conversations, notably at the earliest stage of the transaction, and forces rushed communications. All of this prevents sex workers from establishing the terms of the exchange and consent to sex. Because of s. 286.1, *all sex workers in every sector* of the industry cannot safely negotiate health and safety conditions as clients are *prohibited in all contexts* from clearly and explicitly discussing sexual services and conditions and want to limit the length of their

[189] *Bedford* at para 69.
[190] *Bedford ONSC* at para 361, ABOA Tab 3.
[191] *Bedford* at para 71.

	transactions with sex workers. *Bedford* only addressed the harms of the communication prohibitions in the context of public space, as prior to the PCEPA only communications between sex workers and clients in public space were prohibited. The PCEPA now prohibits communication *everywhere* via the s. 286.1 communication for purchasing prohibition which leads to unclear and rushed negotiations of terms and undermines sex workers' ability to communicate and establish health and safety boundaries and practices. Because of s. 286.4, sex workers are effectively prevented from creating clear and comprehensive ads. Clear ads are a tool for sex workers to negotiate and establish terms and boundaries at an early stage (i.e., by letting clients know which services they *do not* provide in advance of meeting). The advertising provision of the PCEPA prohibits this vital safety tool.
Forcing Sex Workers Into Isolation Exposes Sex Workers to Danger	
Communicating prohibition (s. 213(1)(c) displaces prostitutes from familiar areas where they may share information with each other (such as the identity of dangerous clients)[192] and be supported by friends or regular customers, to more isolated areas making them more vulnerable to increased risk of violence.[193] The bawdy-house provision (s. 210) prevents prostitutes from gaining the safety benefits of having a regular clientele[194] and from working in close proximity to others.[195] The living on the avails of prostitution (s. 212(1)(j)) provision can make prostitutes more susceptible to violence by preventing them from legally hiring supports without which prostitutes may proceed to unknown locations and be isolated with clients who have the benefit of complete anonymity with no one nearby to assist if required.[196]	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. All of the provisions cause sex workers, whether they are working indoors or in public space, 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 areas that are unfamiliar and isolated where they have less control over their environments, less access to supports and services, and where they see unfamiliar clients rather than regulars.

[192] *Bedford ONSC* at para 128.
[193] *Bedford* at para 70.
[194] *Bedford* at para 64.
[195] *Bedford* at paras 113-114; *Bedford ONSC* at para 421.
[196] *Bedford* at para 21, 67; *Bedford ONSC* at para 421.

Inability to Establish a Fixed Indoor Workplace Imperils Sex Workers[197]	
Bawdy-house provision (s. 210) forces outdoor work by preventing prostitutes from working in a fixed location.[198] Bawdy-house provision (s. 210) prevents prostitutes from working in close proximity to others who can intervene if help is needed. Bawdy-house provision (s. 210) prevents prostitutes from having a more regular clientele. Bawdy-house provision (s. 210) prevents prostitutes from establishing greater control over their physical environment and familiarity with surroundings, and setting up indoor safeguards like better screening, closed-circuit television monitoring, call buttons, audio room monitoring, receptionists and financial negotiations done in advance, security staff and response plans.[199]	The PCEPA replicates the harms identified in *Bedford* by preventing sex workers and third parties from renting any residential or commercial location to establish a safe and controlled indoor workspace and associated safeguards without the risk of eviction. As section 286.1 criminalizes the purchase of sex, sex workers are prevented from leasing indoor locations, which were proven in *Bedford* to reduce the risk of violence, because those locations will be used for illegal activity. This prevents sex workers from working in close proximity to others, from having a more regular clientele, and from implementing associated safeguards, all which was proven in *Bedford* to reduce the risk of violence. Moreover, s. 286.2(5)(e) would criminalize a landlord who is being paid rent "in the context of a commercial enterprise."
Inability to Access Third Party Services Jeopardizes Sex Workers	
The living off the avails of prostitution provision (s. 212(1)(j)) prohibits prostitutes from engaging third parties to support them. By denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person.[200]	The material benefit and procuring provisions act as barriers to sex workers accessing safety and security screening (e.g., client screening, preventative in-call strategies, out-call safety procedures, emergency protocols, training workers); sexual health services (e.g., safer sex supplies, facilitating testing for sexually transmitted infections, policies on condom use); emotional health services (e.g., emotional support, counselling services); training (e.g., information on delivering specialized services, client management, safety and security protocols); and transportation services (e.g., driving to and from services, and being in close proximity in case of a safety emergency). The exceptions to the material benefit provision do not permit the types of working arrangements which sex workers can realistically access for support. The advertising provision further endangers sex workers' security by preventing them from publishing

[197] *Bedford* at para 63.
[198] *Bedford* at para 64.
[199] *Bedford* at para 64; *Bedford ONSC* at para 121, 300-301, 313, 421, 427.
[200] *Bedford* at para 66.

	clear and comprehensive ads, which are a vital tool for screening clients and establishing terms and conditions to services in advance. Further, the advertising provision leads some sex workers who would prefer to work indoors into street-based work. By prohibiting access to third parties, the PCEPA promotes isolation and limits sex workers' ability to work in a fixed indoor location, and in close proximity to others, which constitutes a security risk for sex workers.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
2. *Bedford v Canada (Attorney General)*, 2010 ONSC 4264
3. *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7
4. *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44
5. *Carter v Canada (Attorney General),* 2015 SCC 5
6. *Chaoulli v Quebec (Attorney General),* 2005 SCC 35
7. *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9
8. *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (Slip Opinion)
9. *Motshidiemang v Attorney General*, [2019] 4 LRC 507, 47 BHRC 33 (Botswana, High Court)
10. *Mounted Police Association of Ontario v Canada (Attorney General),* 2015 SCC 1
11. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)
12. *Navtej Singh Johar v Union of India*, (2018) Writ Petition No. 76 of 2016
13. *New Brunswick v G(J)*, [1999] 3 SCR 46
14. *Orden David v Attorney General of Antigua and Barbuda*, claim no ANUHCV2021/0042 (Antigua and Barbuda, High Court)
15. *Orozco v Attorney General and others*, [2020] 2 LRC
16. *R c Ayala Tafur*, 2020 QCCQ 3357
17. *R c Dubois*, 2019 QCCQ 1206
18. *R c Mathieu*, 2017 QCCQ 7451
19. *R v AM*, 2020 ONSC 4191
20. *R v Antoine*, 2019 ONSC 3843

21. *R v Anwar*, 2020 ONCJ 103

22. *R v Baxter*, 2019 NSPC 8

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

24. R v CM., 1995 CanLII 8924 (ONCA)

25. *R v Coburn*, 2019 NSPC 49

26. *R v Crosdale*, 2018 ONCJ 800

27. *R v Eftekhar*, 2020 ONSC 1386

28. *R v Gray*, 2018 NSPC 10

29. *R v Joseph*, 2018 ONSC 4646

30. *R v Kirkpatrick*, 2022 SCC 33

31. *R v Lopez*, 2018 ONSC 4749

32. *R v Lucas-Johnson*, 2018 ONSC 3953

33. *R v MED*, 2022 ONSC 1899

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

35. *R v Oakes*, [1986] 1 SCR 103

36. *R v OM*, 2019 ONCJ 552

37. *R v PO*, 2021 ABQB 318

38. *R v Roccia*, 2020 ABQB 769

39. *R v Rouse*, 2017 NSSC 292

40. *R v Salmon*, 2019 ONSC 1574

41. *R v Smith*, 2015 SCC 34

42. *R v Wong*, 2018 SCC 25

43. *R v Zundel*, [1992] 2 SCR 731

44. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199

45. *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482

46. *Toonen v Australia,* Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

47. *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23

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: […]

CANADIAN ALLIANCE FOR SEX WORK LAW REFORM et al. Applicants	and	ATTORNEY GENERAL OF CANADA Respondent	Court File No.: CV-21-00659594-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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