Court File No. CV-21-00659594-0000

ONTARIO
SUPERIOR COURT OF
JUSTICE

BETWEEN:

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

– and –

ATTORNEY GENERAL OF ONTARIO

Intervener

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PART I: OVERVIEW

[1] The purchase of sexual services is an illegal transaction in Canada now. With the introduction of the *Protection of Communities and Exploited Persons Act* ("PCEPA")[1] in 2014, Parliament criminalized the purchase of sexual services for consideration for the first time. Parliament chose to enact an end demand prosecution model ("Nordic Model") in direct response to the Supreme Court of Canada's decision in *Bedford (Attorney General) v. Canada*.[2] After extensive consultation, Parliament determined that the dignity and equality of all citizens is protected by making the purchase of sexual services illegal and reducing the demand for the commercial sex trade with a view to abolishing it to the greatest extent possible.

[2] The provisions considered in *Bedford* criminalized various activities related to the sale of sexual services, which were primarily concerned with preventing public nuisance as well as the exploitation of those selling sexual services.[3] The issue was whether the legislation enacted to regulate a *legal* activity complied with s. 7 of the *Charter*. The Court ultimately found that the provisions infringed the security of the person because they prevented individuals selling sexual services from taking steps to protect themselves from risks arising from a legal activity.[4] The Court further found that this deprivation was overbroad, as it was disconnected from the legislative objectives of preventing exploitation and preventing nuisance.[5]

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[1] The full name of Bill C-36 is: 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, 2nd Sess, 41st Parl, 2014

[2] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 ("*Bedford*") Applicants' Book of Authorities ("ABA"), Tab 1

[3] *Bedford*, 2013 SCC 72, ABA Tab 1, at para. 4

[4] *Bedford*, 2013 SCC 72, ABA Tab 1 at paras. 59-60

[5] *Bedford*, 2013 SCC 72, ABA Tab 1 at paras. 134, 142, 159

[3] The PCEPA represents a distinctive policy choice by Parliament to enact a legislative scheme with the overall objective of deterring and denouncing the commercial sex trade while permitting those still engaged in selling their own sexual services to take the safety enhancing measures identified by the Supreme Court in *Bedford*. The focus of the Applicants' evidence and argument is on the wisdom of criminalizing the purchase of sexual services. The Applicants strongly advocate for a decriminalization of the sex industry. The intensely disputed question of which legislative framework should be selected by Parliament is not an issue to be decided by the courts. The issue before this Court is whether the legislative scheme enacted by Parliament infringes the *Charter*. It is not for this Court to consider or weigh Parliament's policy choice to enact a particular type of legislative model to regulate the commercial sex trade. Just as it is open to Parliament to criminalize or to decriminalize the simple possession of marijuana, it is open to Parliament to criminalize the purchase of sexual services. The wisdom of criminalizing the purchase of sexual services is an issue to be debated in Parliament.

[4] The evidence called by the Applicants demonstrates that they were committed to seeing a decriminalized sex trade in Canada before the PCEPA was enacted. As Parliament was not persuaded to adopt a decriminalization model, they now seek a legal solution to what remains fundamentally a political question of which policy to enact. The core policy message that emerges from the Applicants' affiants is that a decriminalized sex trade would make life better for some people who choose to sell their sexual services. In an effort to recast this message to better suit the legal framework of a *Charter* challenge, the Applicants' affiants say that criminalization of the sex trade is to blame for many of the risks and harms faced by providers of sexual services. In fact, the evidence does not support the assertion of this causal link. The Applicants' evidentiary

record does not establish a breach of *Charter* protections.

[5] The constitutional analysis begins with a consideration of the proper interpretation of the provisions. When the provisions are properly interpreted, including a consideration of the objectives of each provision and the reach of each provision, it demonstrates that the Applicants have failed to discharge their burden of establishing an infringement of the *Charter*. With respect to s. 7 of the *Charter*, any limitation on s. 7 protections are in accordance with the principles of fundamental justice. Similarly, the PCEPA does not infringe s. 15 and s. 2(d) of the *Charter*. While some of the provisions limit expression as protected by s. 2(b), the limitation is justified. The PCEPA is a carefully tailored set of offence provisions designed to achieve Parliament's objective of denouncing and deterring the commercial sex trade in order to protect the dignity and equality of all Canadians. Any *Charter* infringement is justified under s. 1 of the *Charter*.

PART II: STATEMENT OF FACTS

A. Adoption of Canada's Factual Statements

[6] Ontario recognizes that the regulation of the commercial sex trade is a "complex and delicate matter".[6] Ontario adopts the description by Canada about the choice of language in this context in paragraph 8 of Canada's factum and specifically adopts the terms and definitions set out in paragraphs 9, 10 and 11 of Canada's factum.[7] Ontario adopts Canada's statement of facts described in its factum at paragraphs 12 to 88. Ontario also relies on the facts set out below.

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[6] *Bedford*, 2013 SCC 72, ABA Tab 1 at para. 165

[7] Note: Ontario uses the language and terms used by witnesses when describing their evidence to maintain the accuracy of the evidence. For example, if a witness uses the term sex worker, Ontario will use that term when quoting or describing the evidence of that witness.

B. The Sex Industry in Canada

[7] The sex industry in Canada includes consensual, coerced and exploited providers. Mr. Atchison acknowledged that there can be coercion, desperation and exploitation reflected in the stories they hear about how people become involved in the sex industry.[8]

[8] A significant majority of providers of sexual services are women and the vast majority of purchasers of sexual services are men.[9] Some of the experts, including Dr. Bruckert, attempted to draw comparisons between the sex industry and other industries that are female-dominated such as cleaners, salons and hairdressers.[10] However, Dr. Bruckert could not identify another industry where primarily women provide services for primarily men.[11]

[9] In the John's Voice project, which surveyed 861 purchasers of sexual services, virtually all of the participants identified as male with an average age of 41.6, and 94.5% had graduated from high school with 720 out of 861 having completed some kind of post-secondary education.[12] Almost 70% of the participants reported an annual salary in 2007 of $50,000 or more.[13] Mr. Atchison agreed that these findings were similar to what they discovered in later research about purchasers.[14]

[10] In "Dispelling Myths and Understanding Realities", a publication authored by Cecilia Benoit and relied on by many of the Applicants' experts, it is reported that of the sex workers they spoke to, fewer than 40% had graduated from high school and the

[8] Atchison cross Q 927 p. 504, JAR Tab 53, p. 4496
[9] Bruckert cross Q 546 p. 210, JAR Tab 47, p. 3795
[10] Bruckert cross Q 548-549 p. 212-213, JAR Tab 47, p. 3795-3796
[11] Bruckert cross Q 554 p. 214, JAR Tab 47, p. 3796
[12] Atchison cross Q 803-813 p. 392-394, JAR Tab 51, p. 4429
[13] Atchison cross Q 820-824 p. 395-396, JAR Tab 51, p. 4429-4430
[14] Atchison cross Q 825 p. 396, JAR Tab 51, p. 4430

median income from sex trade activities over the previous 12 months was $18,000.[15]

[11] Although Mr. Atchison himself relied on "Dispelling Myths and Understanding Realities" to support broad claims about the sex industry[16], he would not agree that the picture that emerges is that overall, those purchasing sexual services have more education, more stable employment and higher incomes than the people who are providing the sexual services.[17]

[12] Inspector Correa said that most human trafficking offences in Toronto are rooted in the sale of sex. He explained that in many cases, what the seller initially believed to be a consensual working arrangement developed into a long-term exploitative and damaging relationship.[18] Inspector Correa observed that many of the victims he has encountered have histories of poverty, child abuse, sexual abuse, family instability, and a combination of mental health and addiction issues.[19] This is consistent with findings by Dr. Benoit.[20]

[13] Detective Staff Sergeant Taylor observed that he has seen a spectrum of power imbalance in the relationships between sellers and third parties that ranges from financially symbiotic, to parasitic, to exploitative, and often the nature of the power imbalance is not evident at the outset of an investigation. He explained that the difference between the sex trade offences and the human trafficking offences is the

[15] Atchison cross Q 827-837 p. 397-399, JAR Tab 51, p. 4430
[16] See for example the claims related to fn 8 and fn 18 in Mr. Atchison's report, JAR Tab 48, p. 4192, p. 4202
[17] Atchison cross Q 838 p. 401, JAR Tab 51, p. 4431
[18] Correa affidavit para. 51, JAR Tab 97, p. 10160
[19] Correa Affidavit para. 56, JAR Tab 97, p. 10161
[20] Benoit et. al., *Dispelling Myths and Understanding Realities*, JAR Tab 52, Exhibit 8, at p. 28 JAR Tab 44, p. 3299, p. 31, JAR Tab 44, p. 3302

degree to which the third party has tilted the power imbalance to meet the definition of exploitation under s. 279.04.[21]

[14] Even the Applicants' experts acknowledged the overlap between human trafficking and the sex industry in Canada. As Mr. Atchison explained[22]:

> "Yes, I would agree that there are people whose sexual services are sold in accordance to the legal definition detailed in section 279, and I would agree that there are people who subjectively interpret their experiences as exploitative and I would agree that there a wide variety of other conditions through which people experience the sex industry. It's not black and white. It's not either their exploited or they're not…"

C. The Applicants' Evidence does not Establish that the PCEPA Causes Harm

i) Context of the Applicants' Evidence

[15] The Canadian Alliance for Sex Work Law Reform ("the Alliance") formed in 2012 for the purpose of advocating for law reform, including decriminalization of the sex industry.[23] Jenn Clamen has personally been advocating for decriminalization of sex work since 2002.[24] In order to be a member of the Alliance, each member group must support the full decriminalization of sex work.[25] Prior to the enactment of the PCEPA, the Alliance and several of its member groups advocated for decriminalization by meeting with Ministers and policy makers, submitting written briefs and speaking before committees in the House of Commons and the Senate.[26]

[16] Many of the Applicants' affiants are long-time advocates for the decriminalization of sex work or belong to organizations that have this mandate, and were opposed to the

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[21] Taylor Affidavit para. 8, JAR Tab 99, p. 10271
[22] Atchison cross Q 706 p. 351-352, JAR Tab 51, p. 4418-4419
[23] Clamen cross, Q 20-21,24 p. 11-12,13, JAR Tab 11, p. 1519, 1520
[24] Clamen cross, Q 33, p. 16, JAR Tab 11, p. 1520
[25] Clamen cross, Q 41-43, p. 18-19, JAR Tab 11, p. 1521
[26] Clamen Affidavit paras. 16-17, JAR Tab 10, p. 162-163

PCEPA before it was enacted.[27]

[17] The four experts put forward by the Applicants in furtherance of their argument that the risks and harms associated with the sex industry are caused by the PCEPA are Dr. Benoit, Dr. Bruckert, Dr. Krusi, and Mr. Atchison. All of these experts resisted being characterized as an advocate for the decriminalization of the sex industry in Canada[28], and yet all acknowledged having made public statements supporting decriminalization of the sex trade in Canada, including before the PCEPA was enacted.[29]

[18] Although some of the Applicants' experts and witnesses who purported to speak for large numbers of providers assert that sex workers are unable to take certain steps or are experiencing certain impacts as a result of the PCEPA, often the evidence from the Applicants' affiants who were speaking to their own personal experience in the sex trade, and the other evidence before this court told a very different story.

ii) The Evidence Does Not Establish that the PCEPA Displaces Providers to More Isolated and Dangerous Environments

[19] Dr. Bruckert alleges in her report that criminalization of clients moves street-based sex workers to more isolated areas. Dr. Bruckert agreed that if the targeting of clients

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[27] Forrester cross Q 114 p. 25, JAR Tab 14, p. 1602, Q 136 p. 29, JAR Tab 14, p. 1603, Scott cross, Q 25, p. 11, JAR Tab 16, p. 1655, Jane X cross Q 59 p. 15, Q 68 p. 17, Q 72 p. 17-18, Q 84,86 p. 20, JAR Tab 18, p. 1688-1689, Wesley cross Q 21 p. 10, JAR Tab 24, p. 2140, Q 25 p. 11, JAR Tab 24, p. 2140, Q 78-79 p. 32-33 JAR Tab 24, p. 2145-2146, Ade-Kur cross Q 31-21 p. 11, JAR Tab 30, p. 2400, Cooley cross Q 13 p .8, JAR Tab 32, p. 2449, Quijano cross Q 43 p. 14, JAR Tab 34, p. 2476, Q 18 p. 8, JAR Tab 34 p. 2519, Moon Perrin cross Q 50 p. 18, JAR Tab 38, p. 2594

[28] Benoit cross Q 86 p. 38, JAR Tab 44, p. 443136, Bruckert cross Q 243-244 p. 110-111, JAR Tab 47, p. 3770, Atchison cross Q 443 p. 254, JAR Tab 51, p. 4394, Krusi cross Q 685-686 p. 287, JAR Tab 56, p. 4969

[29] Benoit cross Q 102 p. 43, JAR Tab 44, p. 3137, Bruckert cross Q 251 p. 113, JAR Tab 47, p. 3771, Atchison cross Q 429 p. 248, JAR Tab 51, p. 4393, Q 442 p. 254, JAR Tab 51, p. 4394, Krusi cross Q 233 p. 113-144, JAR Tab 56, p .4926, Q 689 p. 288, JAR Tab 56, p. 4969, Q 696-697 p. 292-293, JAR Tab 56, p. 4970-4971

by police were to drop, then she would expect there to be a corresponding benefit to the safety of sex workers, and we would see fewer street-based sex workers moving to isolated areas.[30]

[20] In fact, the total number of individuals accused of sex-trade related offences did drop in the 5 years after the PCEPA was enacted as compared to the 5-year period prior to the enactment of the PCEPA. The total number of women accused went from 3012 in 2010-2014 to 268 in 2015—2019 and the total number of men accused went from 4515 to 3367 during those same periods. The number of individuals accused in purchasing-related offences also dropped significantly after the enactment of the PCEPA. In the period 2010-2014, 3,910 men were accused of stopping or communicating offences under s. 213. After the PCEPA was enacted, between 2015 and 2019, 211 men were accused of offences contrary to s. 213(1) or (1.1) and 2,304 men were accused of purchasing sexual services contrary to s. 286.1(1).[31]

[21] Monica Forrester states that the PCEPA reduces Indigenous sex workers' ability to obtain assistance from outreach workers because it displaces them into isolated areas.[32] However, she also said that between her outreach work and Indigenous-specific programming, she personally comes into contact with about 150 Indigenous sex workers each week.[33] Part of the work of the outreach team at Maggie's involves going to the locations where street-based sex workers are working and gathering.[34] Maggie's

[30] Bruckert cross Q 339 p. 145-146, JAR Tab 47, p. 3779
[31] Table 4, Statistics Canada Juristat, *Crimes related to the sex trade: Before and after legislative changes in Canada"*, released June 21st 2021, JAR Tab 85, Exhibit A, p. 8299
[32] Forrester affidavit para 16, JAR Tab 12, p. 1568
[33] Forrester cross Q 178 p. 38, JAR Tab 14, p. 1605
[34] Forrester cross Q 191-192 p. 40-41, JAR Tab 14, p. 1605-1606

looks at different areas within the city of Toronto that are known for sex work, and they visit those neighborhoods to find sex workers and offer support.[35]

[22] In relation to her own street-based sex work, Ms. Forrester testified that she primarily goes to a "stroll" that she's familiar with that is known to be a place where trans sex workers are. A stroll is a particular location that sex workers work from. She explained that clients who are looking for transgendered women go to that particular stroll.[36] Ms. Forrester also explained that there are different strolls for different types of sex workers all over the city of Toronto.[37]

[23] Dr. Krusi claims in her report at p. 17 that "Research in Canada has shown that criminalization of communication in public spaces displaces street-based sex workers to isolated or industrial areas". She discusses 3 articles in support of this assertion, none of which support her claim. The first article does not distinguish between criminalization for sex trade offences and criminalization for illegal drug use[38], so it cannot speak specifically to the impact of criminalization of communication in public. The second article examines a small population of individuals who were forced to move locations because of construction in the area, however it does not distinguish between the actions of police, private security guards and bylaw officers when examining the reasons sex workers moved locations.[39] Additionally, it does not compare whether the sample population actually experienced greater violence in the new location. The third article describes the impact of gentrification efforts related to the Vancouver Olympics, and

[35] Forrester cross Q 210-212 p. 45-46, JAR Tab 14, p. 1607
[36] Forrester cross, Q 237, p. 50-51, JAR Tab 14, p. 1608
[37] Forrester cross, Q 242 p. 52, JAR Tab 14, p. 1608
[38] Krusi cross Q 590-596, p. 253-255, JAR Tab 56, p. 4961
[39] Krusi cross Q 606-610 p. 258-260, JAR Tab 56, p. 4962-4963

concludes that the most significant barrier to health and safety for men in the sex work industry is stigma.[40] None of these studies show that criminalization of sex work displaces street-based sex workers to more dangerous environments.

iii) The Evidence does not Establish that the PCEPA Prevents Screening Clients and Negotiating Terms

[24] Mr. Atchison testified that his research has shown that for most sex workers, the primary way a commercial sex transaction is initiated is through an online advertisement, but that generally an online advertisement will contain a means of contacting the provider such as an email address, phone number or link to another website belonging to the provider or a business.[41] Mr. Atchison's research shows that the average number of communication exchanges that take place before a physical encounter is 4.2.[42]

[25] Alessa Mason is a trans woman who, since 2014, has worked independently doing in-calls from her residence. Ms. Mason currently advertises on multiple websites, and her ads include a phone number and a link to her website which provides more information about Ms. Mason and the means to contact her by email.[43] Ms. Mason's website provides information about Ms. Mason's rates and lists the specific services she provides and the specific services she cannot or will not provide.

[26] Ms. Mason said that the majority of her clients now prefer to text with her instead of talk on the phone.[44] Whether the initial conversation happens by phone, text, or email, Ms. Mason will send a follow up "intro text" that contains information she wants them to

[40] Krusi cross Q 628 p. 266, JAR Tab 56, p. 4964
[41] Atchison cross Q 190-192 p. 116-118, JAR Tab 50, p. 4258-4259
[42] Atchison cross Q 197 p. 120, JAR Tab 50, p. 4259
[43] Mason cross Q 49 p. 18, JAR Tab 20, p. 1718
[44] Mason cross. Q 77 p. 26-27, JAR Tab 20, p. 1720

know. Further negotiation usually takes place in person.[45] Ms. Mason observed that clients have expressed many reasons why they may be reluctant to provide their last name, including fear of being arrested for purchasing sexual services, and also concern about being outed as a client to their community and being judged for that.[46]

[27] Mr. Atchison agreed that there are many reasons why a client might not be willing to provide the kind of identifying information a provider is looking for, including desire for privacy and security and personal perceptions of risk.[47] Research conducted under the previous legal regime where purchasing was not criminalized showed that many purchasers of sexual services reported actively attempting to hide their sex buying from others and experienced anxiety or worry at the thought of being "outed as buyers".[48] Mr. Atchison agreed that trying to hide their activities from a spouse or partner could be a reason why some purchasers might not want to provide their true name or cell number to a provider.[49]

[28] Alessa Mason agreed that much of the terminology that is used in the sex industry to describe particular acts is not new and has existed for a long time in this context.[50] Ms. Mason has been using many of these acronyms and terms in her ads and communications with clients since she began working in the sex trade prior to the enactment of the PCEPA.[51]

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[45] Mason cross. Q 82-94 p. 28-32, JAR Tab 20, p. 1720-1721
[46] Mason cross. Q 75 p. 26, JAR Tab 20, p. 1720
[47] Atchison cross Q 202 p. 124, JAR Tab 50, p. 4260
[48] Atchison cross Q 217-218 p. 129, JAR Tab 50, p. 4262
[49] Atchison cross Q 220 p. 130, JAR Tab 50, p. 4262
[50] Mason cross Q 105 p .36, JAR Tab 20, p. 1772
[51] Mason cross Q 107-111 p .36-38, JAR Tab 20, p. 1772-1773

[29] Mr. Atchison testified that the sex industry has always had its own lexicon, and some of the lexicon is geographically specific.[52] Mr. Atchison agreed that there are sex industry norms when it comes to certain terminology.[53] Mr. Atchison was one of the authors of a paper that looked at the content of sex work advertisements that were collected in 2012 prior to the enactment of the PCEPA.[54] In this paper, many standard industry terms are identified such as "GFE" (girlfriend experience), "BFE" (boyfriend experience), "full service" (full intercourse). Terminology like this was frequently used in advertisements prior to the enactment of the PCEPA, when advertising sexual services was not illegal.[55] Mr. Atchison was not aware of any evidence to show that the use of language in advertisements has changed since the enactment of the PCEPA.[56]

[30] In her report on p. 47, Dr. Krusi discusses a paper titled "Sex workers' experiences and occupational conditions post-implementation of end-demand criminalization in Metro Vancouver." The authors looked at the question of whether police harassment or the presence of police reduced the ability of street-based sex workers to screen and negotiate in a post-PCEPA environment, but they were unable to discover a statistically significant association.[57] In other words, it was not established that police presence in a post-PCEPA environment caused a reduced ability for sex workers to screen and negotiate.

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[52] Atchison cross Q 231 p. 140, JAR Tab 50, p. 4264
[53] Atchison cross Q 232-233 p. 140-142, JAR Tab 50, p. 4264-4265
[54] Kille et al, "A Content Analysis of Health and Safety Communications Among Internet-Based Sex Work Advertisements: Important information for Public Health", JAR Tab 50 exhibit 3, p. 4324, Atchison cross Q 606 p. 314, JAR Tab 51, p. 4409
[55] Atchison cross Q 252 p. 147, JAR Tab 50, p. 4266
[56] Atchison cross Q 255-256 p. 151-152, JAR Tab 50, p. 4267
[57] Krusi cross Q 320 p .153, JAR Tab 56, p. 4936

iv) The Evidence does not Establish that the PCEPA Makes Sex Workers Less Likely to Call 911

[31] Dr. Benoit agreed that the reason it's important to consider the ability of sex workers to report violence to police is because sex workers face concerning levels of violence.[58] Mr. Atchison, on the other hand, asserted that violent interactions are "rare", even in the street-based portion of the sex industry where there is the post potential for violent interactions to occur.[59]

[32] Although Dr. Benoit wrote on p. 13 of her report that "when victimization does occur in sex work it is less likely to be reported to police", she clarified that she is not saying that sex workers are less likely to report victimization now than previously, nor does she have any evidence to show that fear of police or fear of being treated unfairly by police has gotten worse since PCEPA.[60]

[33] Dr. Krusi discussed a study by McBride et al called "Underreporting of violence to police among women sex workers in Canada". This study looked at a subset of the AESHA cohort in Vancouver to see if any change in reporting practices prior to and after the implementation of PCEPA could be detected. They found in their group that rates of reporting violence to police remained unchanged after the enactment of the PCEPA.[61] The most common reasons given for not reporting violence to police after the enactment of the PCEPA were a) feeling the violence wasn't serious enough to report (35.9%), b) not trusting the police (28.4%) and c) having negative past experiences when reporting

[58] Benoit cross Q 705 p. 231-232, JAR Tab 44, p. 3184
[59] Atchison cross Q 261-263 p. 157-158, JAR Tab 50, p. 4269
[60] Benoit cross Q 735-736 p. 241-242, JAR Tab 44, p. 3187
[61] Krusi report p. 53, JAR Tab 54 p. 4823

violence to police (15.1%).[62]

[34] Mr. Atchison testified that there are a variety of different reasons sex workers may be reluctant to report victimization to police, both before and after the implementation of the PCEPA.[63]

[35] Elene Lam stated in her affidavit that for many Butterfly participants, their greatest fear is deportation.[64] Ms. Lam explained that some people do not have a work permit to work in Canada at all, and some people can legally work in Canada but the *Immigration Refugee and Protection Act* and its regulations prohibits them working for employers that offer strip tease, erotic dance, escort services or erotic massages.[65] She agreed that fear of deportation is something that could cause a sex worker to be reluctant to reach out police.[66]

[36] Ellie Ade-Kur explained that anti-Black racism plays a role in the discrimination faced by Black sex workers, and agreed that some of the reasons Black sex workers fear reporting violence and abuse to the police is because either they have had a negative experience with the police in the past, or they know someone else who has.[67] Ms. Ade-Kur indicated awareness of a number of anti-racism measures the Toronto Police Service has said they are beginning to incorporate, and agreed that any attempts to address anti-Blackness in a community could be a potentially useful exercise.[68]

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[62] McBride et. al., "Underreporting of Violence to Police among Women Sex Workers in Canada", at Table 1, JAR Tab 56 exhibit 15, p. 5224, Krusi cross Q 356 p. 166, JAR Tab 56, p. 4939
[63] Atchison cross Q 279 p. 165, JAR Tab 50, p. 4271
[64] Lam affidavit at para 55, JAR Tab 27, p. 2232
[65] Lam cross Q 225 p. 115-116, JAR Tab 28, p. 2336, Q 228 p. 118, JAR Tab 28, p. 2337
[66] Lam cross Q 256 p. 139, JAR Tab 28, p. 2342
[67] Ade-Kur cross Q 245-246 p. 86, JAR Tab 30, p. 2419
[68] Ade-Kur cross Q 248-253 p .87-88, JAR Tab 30, p. 2419-2420

[37] One reason sex workers did not call 911 under the previous legal regime has been removed with the enactment of the PCEPA. Dr. Benoit agreed that prior to PCEPA sex workers were reluctant to report violence to police for a variety of reasons, including fear of being arrested and charged in relation to their own sex work.[69] Alessa Mason confirmed this was the case for her.[70]

[38] Prior to the enactment of the PCEPA, Monica Forrester said that she was not able to contact police for help, and when she was raped she did not call the police because she faced incarceration if her sex work was discovered because she had been through a mandatory diversion program previously after being arrested for prostitution.[71]

[39] In her affidavit, Ms. Forrester described an occasion where she did, in fact, call the police for assistance in the fall of 2017, after the enactment of the PCEPA.[72] Although Ms. Forrester was unhappy that it took police several hours to attend her residence, on her own account she was in a place of safety and not in any immediate threat when she called 911. When police arrived, they took down details of the account and conveyed to Ms. Forrester that an investigation would take place, but they could not promise any particular outcome.[73]

[40] Several of the Applicants' experts referred to the paper "Sex Worker's Access to Police Assistance".[74] This study looked at 200 sex workers who were targeted for the

[69] Benoit cross Q 737-738 p. 242, JAR Tab 44, p. 3187
[70] Mason cross Q 22-28 p. 9-10, JAR Tab 20, p. 1716
[71] Forrester cross, Q 136 p. 29, JAR Tab 14, p. 1603
[72] Forrester cross Q 358-381 p. 79-85, JAR Tab 14, p. 1615-1617, Q 399-404, p. 90-92, JAR Tab 14, p. 1618
[73] Forrester cross Q 409-414, p. 93-94, JAR Tab 14, p. 1619
[74] Crago et. al. "Sex Workers' Access to Police Assistance in Safety Emergencies and Means of Escape from Situations of Violence and Confinement under an "End Demand" Criminalization Model: A Five City Study in Canada, JAR Tab 44 exhibit 17, p. 3575

study because they were amongst the most marginalized and vulnerable, and therefore most likely to experience violence.[75] Of these sex workers, almost 70% of them did not answer "yes" to whether someone's fear of detection would make them unable to call 911.[76] For the 70% of people that did not say that someone's fear of detection would make them unable to call 911, only 16.5% of them actually called police when they experienced victimization. This means that there is something other than fear of detection by police explaining why so many of them did not call 911.[77] The researchers did not ask participants whether they were more or less likely to call 911 after the enactment of PCEPA.[78]

v) The PCEPA is not the Cause of Stigma and Collateral Consequences

[41] Stigma relating to sex work is a complex phenomenon and there are numerous sources of stigma for sex workers, not all of which are related to the legal status of the sex industry.[79] Stigma was identified as a significant problem for sex workers in Canada prior to the enactment of the PCEPA.[80] In the context of New Zealand, decriminalization of sex work has not been a path to significantly reducing the stigma experienced by sex workers.[81]

[42] Ms. Lam agreed that when she speaks about "law enforcement officers", she groups police officers, CBSA officers and by-law enforcement officers into that same

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[75] Benoit cross Q 760 p. 248, JAR Tab 44, p. 3188
[76] Benoit cross Q 775-777 p. 252, JAR Tab 44, p. 3189, Atchison cross Q 357 p. 205, JAR Tab 50, p. 4281
[77] Atchison cross Q 365 p .207, JAR Tab 50, p. 4281
[78] Bruckert cross Q 198-199 p. 92-93, JAR Tab 47, p. 3765-3766
[79] Benoit cross Q 574-576 p. 193-194, JAR Tab 44, p. 3175, Atchison cross Q 257 p. 154-155, JAR Tab 50, p. 155
[80] Benoit cross Q 441-444 p. 157, JAR Tab 44, p. 3166, Atchison cross Q 258 p. 155, JAR Tab 50, p. 4268
[81] Krusi cross Q 532-533 p. 229-230, JAR Tab 56, p. 4955

category, and that Butterfly participants don't always know which type of officer they've dealt with when describing an interaction.[82]

[43] Dr. Roots cites publications by Ms. Lam in saying that "police" raids in relation to massage parlours have increased in Toronto since the enactment of PCEPA. Dr. Roots alleges that this contradicts[83] Inspector Correa's assertion that the majority of the TPS Human Trafficking Investigations do not involve massage parlours or holistic spas and there has been no change in this approach since the enactment of PCEPA.[84] Inspector Correa explained that Toronto City Bylaw are a separate entity from the Toronto Police Service, and they have their own mandates and responsibilities in respect of Bylaw enforcement of holistic spas and massage parlours that are independent of the mandate and responsibilities of the Toronto Police Service.[85] Dr. Roots acknowledged that Toronto massage parlours and holistic spas are subject to municipal by-laws and regulation.[86]

[44] Elene Lam testified that in the aftermath of the *Bedford* decision from the SCC in December 2013, the criminal law was not being enforced and many sex workers were not being targeted by police during that time, but Asian and migrant sex workers were still being arrested because of immigration issues.[87]

[82] Lam cross Q 237-239 p. 126-127, JAR Tab 28, p. 2339
[83] Roots cross Q 869 p. 342, JAR Tab 41, p. 3838
[84] Roots cross Q 851-871 p. 336-343, JAR Tab 41, p. 2837-2839
[85] Correa cross Q 70 p. 33, JAR Tab 98, p. 10194
[86] Roots cross Q 897-898 p .350-351, JAR Tab 41, p. 2840-2841
[87] Lam cross Q 57-58 p. 23-24, JAR Tab 28, p. 2313

vi) The Expert Opinions on Causation are not Supported by their own Research

The Opinions Are Largely Based on Data Collected Before the Enactment of the PCEPA

[45] Dr. Benoit has been involved in two studies that purported to look at the impact of the PCEPA on sex workers: the Structural Intervention study and Empowering Sex Workers as Social Justice Advocates.[88]

[46] The Structural Intervention study was a qualitative study involving 60 sex workers in Victoria, British Columbia. It was intended to examine whether the PCEPA has alleviated or exacerbated health inequities for sex workers as compared to before the new laws were implemented[89]. However, Dr. Benoit agreed that the only publication that has resulted from this study was not a comparative paper in that it did not look at data that was collected before and after the implementation of PCEPA.[90] Dr. Benoit agreed that this study is not representative of sex workers in Victoria and is not generalizable to other regions of Canada. Dr. Benoit also agreed that the questions did not ask participants directly about the impact of the laws, including the PCEPA.[91]

[47] The Empowering Sex Workers as Social Justice Advocates study[92] was initially intended to gather data to better understand the impact of the PCEPA, however the project evolved to focus on mobilizing sex workers around their occupational and social rights.[93] In relation to this project, Dr. Benoit decided not to partner with knowledge users whose views on sex work did not directly align with the core participating community

[88] Benoit cross Q 173 p. 72, JAR Tab 44, p. 3144
[89] Benoit cross Q 629 p .211, JAR Tab 44, p. 3179
[90] Benoit cross Q 672 p. 222, JAR Tab 44, p. 3182
[91] Benoit cross Q 290-308 p. 110-115, JAR Tab 44, p. 3154-3155
[92] Benoit cross Q 310-323 p. 115-119, JAR Tab 44, p. 3155-3156
[93] Benoit report at p. 4, JAR Tab 42, p. 3072

groups belonging to the Alliance.[94]

[48] Dr. Bruckert has been involved in one study since the enactment of the PCEPA that has generated data.[95] This study was called the Gender and Health Study and resulted in the Crago et. al. publication "Sex Workers' Access to Police Assistance".[96] Dr. Bruckert was not the principal investigator on this study.[97] Dr. Bruckert explained that her reports filed in this case rely primarily on the Management Project data[98] which was a qualitative study involving 75 third parties and 47 sex workers beginning in 2010.[99] All of the data for this project was collected prior to the enactment of the PCEPA.[100]

[49] Mr. Atchison has been involved in two studies that have collected relevant data from participants after the enactment of PCEPA – The Network Analysis Project and the Structural Intervention study.[101] Both of these projects involved the same group of participants.[102] There are no publications or reliable results that have arisen from the Structural Intervention Study.[103] Mr. Atchison did not cite any publications in his report that resulted from the Network Analysis Project.[104]

[50] Much of Dr. Krusi's evidence is based on data generated from the AESHA project

[94] Benoit cross Q 328-332, p. 121-122, JAR Tab 44, p. 3157
[95] Bruckert cross Q 50 p. 32 JAR Tab 47, p. 3750, Q 211-221 p. 98-102, JAR Tab 47, p. 3767-3768
[96] Bruckert cross Q 169-170 p. 79, JAR Tab 47, p. 3762
[97] Bruckert cross Q 171-172 p. 79-81, JAR Tab 47, p. 3762-3763
[98] Bruckert cross Q 59 p. 37, JAR Tab 47, p. 3752
[99] Bruckert cross Q 63-64 p. 38-39, JAR Tab 47, p. 3752, Bruckert report at p. 6, JAR Tab 45, p. 3666
[100] Bruckert cross Q 108 p. 59, JAR Tab 47, p. 3757
[101] Atchison cross Q 535 p. 290, JAR Tab 51, p. 4403
[102] Atchison cross Q 538 p. 291, JAR Tab 51, p. 4403
[103] Atchison cross Q 539-541, p. 292 JAR Tab 51, p. 4404
[104] Atchison cross Q 554-561, p. 296-298 JAR Tab 51, p. 4405

which is a longitudinal study involving 900 sex workers in Metro Vancouver.[105] Some of the studies referred to by Dr. Krusi include data from a subset of this cohort gathered after the enactment of the PCEPA. However, none of those studies demonstrate that the provisions of the PCEPA cause harm to sex workers.

Generalizations and Causal Inferences from Qualitative Research

[51] The Applicants' experts are sociologists, criminologists and health researchers who primarily engage in empirical qualitative research[106] about the adult consensual sex industry. When looking to make findings about an entire population, random sampling is better at achieving a representative sample than non-random sampling. But in order to obtain a random sample you first have to have a full list of the population.[107] For that reason, random sampling is not possible when it comes to the sex trade in Canada.[108]

[52] When an attempt is made to generalize about the entirety of the sex industry based on a sample that only includes one segment of a diverse and complex industry, this produces unreliable and erroneous conclusions.[109] Additionally, it can be misleading when personal narratives are taken as representative of what is happening more broadly.[110]

[53] Qualitative data can enhance our understanding of quantitative results, but qualitative research is not intended to speak to causal relationships.[111] Mr. Atchison

[105] Krusi report at p. 6, Tab 54, p. 4776
[106] Roots cross Q 92 p. 31, JAR Tab 40, p. 2652, Bruckert cross Q 14 p. 12, JAR Tab 47, p. 3745, Krusi cross Q 344 p. 161, JAR Tab 56, p. 4938, Benoit cross Q 46 p. 24, JAR Tab 44, p. 3132
[107] Benoit cross Q 112-114 p. 49-50, JAR Tab 44, p. 3139
[108] Benoit cross Q 115 p. 50, JAR Tab 44, p. 3139
[109] Atchison report at p. 10, JAR Tab 48, p. 4194
[110] Roots cross Q 830-831 p. 326-327, JAR Tab 41, p. 2834-2835
[111] Krusi cross Q 361-363 p. 170-171, JAR Tab 56, p. 4940

explained that in social and health sciences, often when a causal assertion is made what that really means is "I'm seeing a link between X and Y". Mr. Atchison testified that he shies away from making causal assertions because, in his view, to make a causal assertion the researcher must have identified that the "cause" precedes the "effect" in time, there is an association between the two, and they have eliminated all possible plausible rival explanations.[112] Mr. Atchison acknowledged that "… I would say that those types of causal assertions cannot be made because social phenomenon, in and of themselves, are incredibly complex, and the problem we have is that we cannot rule out all rival plausible explanations for the phenomenon that we're observing. And that, in and of itself, makes finding these types of causal relations --- well, I would say, yes, impossible."[113]

The Claims that the PCEPA Causes Harms Are Not Supported by the Research Cited

[54] In order to say that PCEPA has either alleviated or exacerbated a particular thing, you would have to have a measure of that thing before and after the implementation of the PCEPA.[114] The Applicants have tendered no evidence of any such study. Throughout their evidence the Applicants' experts make unfounded causal claims about the impact of PCEPA on sex workers, erroneously citing their own work and work of their peers as support for these causal claims.

[55] At p. 23 of his report, Mr. Atchison claims that "recent research reveals that laws targeting clients and third parties not only exacerbate antagonism between sex workers and police but they actually decrease the odds that sex workers will call 911 to report

[112] Atchison cross Q 88 p. 48-50, JAR Tab 50, p. 4241-4242
[113] Atchison cross Q 89 p. 51, JAR Tab 50, p. 4242
[114] Benoit cross Q 630-631 p. 211-212, JAR Tab 44, p. 3179

any danger or victimization that they experience or witness". In support of this claim Mr. Atchison cites a single authority: "Sex Workers' Access to Police Assistance in Safety Emergencies" by Crago et al.[115]

[56] Mr. Atchison acknowledged that this study was not a comparative study that compared data from pre-PCEPA and post-PCEPA time periods.[116] He acknowledged that there was no data referred to in this article that would allow a pre-PCEPA and post-PCEPA comparison, and this article doesn't provide any data to support that the unrepresentative sample of sex workers from this study are less likely to report violence to police now than before the PCEPA was enacted.[117]

[57] Mr. Atchison conceded that the research does not actually show a decrease in the odds that sex workers will call 911.[118] Mr. Atchison also conceded that the research does not show that the laws have exacerbated antagonism between sex workers and police.[119] Mr. Atchison acknowledged that the language used in his report is "overstepping the association" and said that it was not his intention to make a bold assertion of causality.[120]

[58] When talking about the impact of the PCEPA on sex workers reporting victimization to police, Dr. Bruckert agreed that it is generally accepted that only 5-10%

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[115] Crago et. al. "Sex Workers' Access to Police Assistance in Safety Emergencies and Means of Escape from Situations of Violence and Confinement under an "End Demand" Criminalization Model: A Five City Study in Canada, JAR Tab 44 exhibit 17, p. 3575
[116] Atchison cross Q 338 p. 197, JAR Tab 50, p. 4279, Q 374 p. 212, JAR Tab 50, p. 4282
[117] Atchison cross Q 382-383 p. 216-217, JAR Tab 50, p.4 283-4284
[118] Atchison cross Q 386 p. 218, JAR Tab 50, p. 4284, Q 389-390 p. 220-222 JAR Tab 50, p. 4284-4285
[119] Atchison cross Q 393 p. 223-224, JAR Tab 50, p. 4285
[120] Atchison cross Q 394 p. 225, JAR Tab 50, p. 4286

of sexual assaults are reported to police in Canada[121], that intimate partner violence is also significantly under-reported[122], and that there is a broad spectrum of reasons why women do not turn to the criminal justice system, including fear of reprisal and fear of the perpetrator or financial dependence on the perpetrator.[123] In spite of these acknowledgments, Dr. Bruckert would not agree that factors other than the criminalization of sex work might influence a sex worker's decision whether or not to report victimization to the police.[124]

[59] At page 11 of her report, in discussing problems sex workers face keeping safe and accessing non-judgmental protective and health services, Dr. Benoit claims that "(r)esearch done before Bedford and since the enactment of PCEPA shows how criminalization of the work of sex workers inevitably multiplies and worsens [these] problems for them". Dr. Benoit cites 2 articles in footnote 14 for this causal assertion that criminalization worsens safety risks for sex workers. The first article, "Well, It Should Be Changed for One, Because It's Our Bodies" was published in 2017 but describes research conducted before Bedford that involved asking sex workers "what do you know about the laws surrounding sex work?"[125].

[60] The second article, "Centering Sex Workers' Voices In Law and Social Policy" was published in 2021 and reports on the responses of 60 sex workers in Victoria, BC to the question "what changes are needed to improve health, safety and rights for workers and what would be your dream list of services sex workers need right now". Participants

[121] Bruckert cross Q 489 p. 194-195, JAR Tab 47, p. 3791
[122] Bruckert cross Q 492 p. 195, JAR Tab 47, p. 3791
[123] Bruckert cross Q 496-500 p. 196-197, JAR Tab 47, p. 3791-3792
[124] Bruckert cross Q 480-483 p. 191-193, JAR Tab 47, p. 3790-3791
[125] Benoit cross Q 501-5-7 p. 173-174, JAR Tab 44, p. 3170

were not asked about the impact of PCEPA on them, nor about how sex work has changed for them as a result of PCEPA.[126] Neither article demonstrates that *criminalization of sex work* has worsened the problems identified as claimed by Dr. Benoit.

[61] On page 17 of her report, Dr. Krusi cites 3 articles as support for the proposition that factors related to criminalization *produce* harms associated with prostitution.[127] In relation to the first article,[128] Dr. Krusi agreed that the authors were not able to say that any of the harms identified were *caused* by the criminalization of sex work.[129] In relation to the second article[130], Dr. Krusi agreed that the authors say that decriminalization of sex work may be one way of reducing the incidence of HIV infection amongst sex workers and their clients. However, Dr. Krusi acknowledged that the authors do not say that criminalization of sex work *causes* increased HIV infections.[131] The third article cited[132] doesn't even make any claims about criminalization causing increased violence or decreased health outcomes for sex workers.[133]

D. Dr. Cho's Expert Evidence is Admissible

[62] The Applicants challenge Dr. Cho's qualifications to provide evidence in this proceeding on the basis that she has no expertise specific to the Canadian context, and

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[126] Benoit cross Q 522-527 p. 178-179, JAR Tab 44, p. 3171
[127] Krusi cross Q 370-380 p. 173-180, JAR Tab 56, p. 4941-4942
[128] Platt et. al. " Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies", JAR Tab 56, exhibit 16, p. 5232
[129] Krusi cross Q 444-445 p .201, JAR Tab 56, p. 4948
[130] Shannon et. al., "Global Epidemiology of HIV Among Female Sex Workers: Influence of Structural Determinants", JAR Tab 56, exhibit 17, p. 5286
[131] Krusi cross Q 476-477 p. 212, JAR Tab 56, p. 4950
[132] Bruckert and Hannem, "Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work", JAR Tab 56, exhibit 19, p. 5330
[133] Krusi cross Q 527-528 p. 228-229, JAR Tab 56, p. 4954-4955

that the research that she describes in her evidence was published in 2012, using data collected between 1996 and 2003.[134] However, the nature of Dr. Cho's expertise and the relevance of her evidence does not depend on familiarity with the sex trade in Canada, nor the recency of the data used in her analysis.

[63] Dr. Cho is an empirical economist who has conducted an economic multi-regression analysis, employing quantitative methods and data, of the relationship between a country's sex trade policy and the incidence of human trafficking in that country. She holds a PhD in Economics from the University of Goettinggen in Germany, and she has been a researcher, lecturer, or assistant professor in the field of economics at various universities and academic institutes in Germany and Austria since 2011. She has been published 19 times in peer-reviewed journals, and the article that reports on the research that is the subject of her evidence was published in the peer-reviewed journal, *World Development*. Dr. Cho has served on the editorial board of the *Journal of Human Trafficking* since 2015. She is a properly qualified expert on economic research on human trafficking and her evidence is necessary, as this type of economic analysis is outside the ordinary knowledge of a trier of fact.[135]

[64] All of the other experts who provided evidence in this case engage primarily in empirical qualitative research[136]. Quantitative research, and in particular, economic analysis that utilizes large quantities of data and multiple regression analysis, is

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[134] See paras. 32 and 33 of the Applicants' factum

[135] *White Burgess Langille Inman v. Abbott and Haliburton Co*, 2015 SCC 23, Respondent's Book of Authorities ("RBA") Tab 42 at paras. 22-24; *R. v. Abbey*, 2009 ONCA 624 RBA Tab 20 at paras. 74-76; *R. v. Mohan*, [1994] 2 SCR 9, RBA Tab 31 at 20

[136] Roots cross Q 92 p. 31, JAR Tab 40, p. 2652, Bruckert cross Q 14 p. 12, JAR Tab 47, p. 3745, Krusi cross Q 344 p. 161, JAR Tab 56, p. 4938, Benoit cross Q 46 p. 24, JAR Tab 44, p. 3132

fundamentally different[137] than qualitative research. Unlike qualitative research, quantitative economic analysis can be used to identify a causal relationship between sex trade policy and human trafficking.[138]

[65] Dr. Cho's analysis shows that legalization or decriminalization of the sex trade has the effect of increasing the magnitude of human trafficking, regardless of the type of legalization model employed.[139] Dr. Cho' evidence is one piece of evidence the court may consider as relevant to the following issues in this case:

a. Whether a consensual commercial sex industry can be separated from coerced and trafficked providers of sexual services;
b. The pressing and substantial nature of the PCEPA's primary objective of reducing the demand for prostitution;
c. Whether there is rational connection between the legislative provisions and this objective; and
d. The balancing of the salutary and deleterious effects of the legislation

[66] The Applicants declare without any evidence that Dr. Cho was "fired" by Canada because the report she produced for them was unfavourable, and that her report for Ontario omits the unfavourable aspects of her opinion. This claim is completely without merit or support. The nature of Dr. Cho's retainer by Canada, and any work she produced as a result of that retainer is protected by litigation privilege. There is no adverse inference that can be drawn against Canada for claiming this privilege, as they did not have exclusive control of the witness; Dr. Cho was called by Ontario. There is no adverse inference that can be drawn against Ontario as Ontario has not failed to call

[137] Cho report at paras 1-6, JAR Tab 101, p. 10397-10398
[138] Cho cross Q 594-597, p. 217-220, JAR Tab 104, p. 10971-10974
[139] Cho cross Q 605, p. 226, JAR Tab 104, p. 10980

the witness.[140]

[67] There is absolutely no basis upon which the court could conclude that Dr. Cho's report for Canada contained unspecified "unfavourable" portions. Dr. Cho's report for Ontario is entirely consistent with her peer-reviewed paper from 2012 addressing the same research, which was attached as Exhibit D to her affidavit. The Applicants had a full opportunity to explore Dr. Cho's opinion and her 2012 publication. In their factum, the Applicants claim that Dr. Cho's research has been discredited. The Applicants assert that Dr. Skilbrei noted that Dr. Cho's methodological flaws have been widely reported[141], however they failed to mention that Dr. Skillbrei then clarified that it was not Dr. Cho's methodology that was criticized, but rather criticisms have been made that the data relied upon by Dr. Cho is a problematic source of data.[142]

[68] Dr. Cho was cross-examined at length about the data she relied on, and she explained during her testimony, as she did in her report, that while the data was imperfect and posed challenges, she was able to employ established and well-recognized econometric methodologies to sufficiently account for the limitations in the data.[143] Professor Weitzer conceded that other economists have used the same data set to conduct regression analyses.[144]

[69] In cross-examination, Professor Weitzer said that because he was not an

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[140] *Lambert v. Quinn* (1994), 68 O.A.C. 352 (Ont. C.A.), Ontario's Book of Authorities ("OBA"), Tab 1 at paras. 13-15; *Grigor v. Johal*, [2008] B.C.J. No. 2651, OBA Tab 2 at paras. 67-74
[141] Applicants' factum at para. 177
[142] Skillbrei cross Q 197 p. 51, JAR Tab 90, p. 8972
[143] Cho report at paras. 8, 13, 14, 17, 26, JAR Tab 101, p. 10398, p. 10401, p. 10402, p. 10404
[144] Weitzer cross Q 368-373, p. 162-163, JAR Tab 63, p. 5918-5919

economist, he was not able to comment on Dr. Cho's qualifications.[145] Professor Weitzer agreed that the field of economics is a different field of study from criminology and sociology, which are his fields of study.[146] Professor Weitzer has taught courses on qualitative research methods, but never on quantitative methods or economics.[147] Professor Weitzer agreed that he is not an expert in economics[148] or in quantitative research methods.[149]

[70] In spite of this, the Applicants ask this Court to place determinative weight on Professor Weitzer's criticisms of Dr. Cho's peer-reviewed, published, economic research. As Dr. Cho explained in her response to Professor Weitzer's affidavit[150], these criticisms are based on a misunderstanding of economic methods and analysis. Unfortunately, these misunderstandings were mirrored and amplified by counsel for the Applicants during the cross-examination of Dr. Cho, as well as in the arguments made in the Applicants' factum.

[71] Professor Weitzer and counsel for the Applicants incorrectly conflate the UNODC citation index (the raw data upon which Dr. Cho conducted an economic regression analysis) with the UNODC Report (which reported on the same data but in a way that employed only a simple comparative analysis).[151] Professor Weitzer and counsel for the Applicants incorrectly equated cross-country comparisons performed by others and the

[145] Weitzer cross Q 354 p. 158, JAR Tab 63, p. 5917
[146] Weitzer cross Q 387, p. 166, JAR TAB 63, p. 5919
[147] Weitzer cross Q 394-395, 387, p. 170-171, JAR Tab 63, p. 5920-5921
[148] Weitzer cross Q 389 p 168, JAR Tab 63, p. 5920
[149] Weitzer cross Q 405, p. 176, JAR Tab 63, p. 5922
[150] Cho Response Report, JAR Tab 102, p. 10439
[151] Cho cross Q 242-244, p. 70, JAR Tab 103, p. 10520, Q 253-254, p. 73, JAR Tab 103, p. 10523, Q 276-277, p. 81 JAR Tab 103, p. 10531, Q 496-499 p. 170-172 JAR Tab 103, p. 10620-10622, Weitzer report at p. 9 para. 4, JAR Tab 61, p. 5654

causal regression analysis done by Dr. Cho.[152] As Dr. Cho explained at length, the nature of the regression analysis she conducted accounts for weaknesses in the dataset in a way that a simple comparative analysis does not.[153]

[72] The Applicants imply it was a failure on Dr. Cho's part not to update her findings using more recent data[154], but such a thing was not even possible. UNODC has not published a citation index like the one Dr. Cho relied upon since 2006.[155] The nature of the data reported by the UNODC is different now and focuses on answering different questions.[156] The fundamental conclusion of Dr. Cho's research, that there is a causal link between a country's sex trade policy and the incidence of human trafficking, is not altered by the fact that Canada's sex trade laws are different now than they were when her analysis was conducted. Although the Applicant asserts that Dr. Cho hypothesized that her findings might or might not remain valid[157], this was not her evidence. Dr. Cho explained that the fundamental relationship between the legal status of the sex trade and the incidence of human trafficking remained a valid conclusion, notwithstanding changes in recruitment, exploitation and enforcement practices globally.[158]

[73] Dr. Cho's evidence provides this Court with the foundation to make a factual finding that there is a causal link between a country's sex trade policy and the prevalence of human trafficking in that country. Specifically, in a country where the commercial sex

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[152] Cho cross Q 429, p .140, JAR Tab 103, p. 10590, Weitzer cross Q 513-517, p. 215-216, JAR Tab 63, p. 5932
[153] Cho cross Q 266, p. 77, JAR Tab 103, p. 10527, Q 308 p. 92, JAR Tab 103, p. 10542, Q 349-352 p. 113-115, JAR Tab 103, p. 10563 –10565, Q 357 p. 117-118, JAR Tab 103, p. 10567-10568, Q 480 p. 160-161, JAR Tab 103, p. 10610-10611
[154] Applicants' factum para. 182
[155] Cho cross Q 380-381 p .124, JAR Tab 103, p. 10574
[156] Cho cross Q 426 p. 138-139, JAR Tab 103, p. 10588-10589
[157] Applicants' factum para. 182
[158] Cho cross Q 493-494 p. 168-169, JAR Tab 103, p. 10618-10619

trade is allowed, the probability of facing a higher level of incidence of human trafficking is greater than other countries where the commercial sex trade is prohibited. This factual finding is relevant to considering whether Parliament, when making the policy choice to criminalize the purchase of sexual services, acted on a "reasoned apprehension of harm"[159] with the potential increased prevalence of human trafficking as one possible harm.[160] It is also relevant to the s. 1 analysis.

PART III: SUBMISSIONS

[74] Ontario adopts the legal submissions of Canada set out in paragraphs 90 to 195 of its factum. Ontario provides the additional submissions below.

A. Statutory Interpretation of the Provisions

Principles of Statutory Interpretation

[75] The Supreme Court has established that the starting point of constitutional analysis is in fact statutory interpretation because the issue is whether the legislation "properly construed" infringes *Charter* rights. As the Court recently explained in *R. v. JJ*: "Before determining the constitutionality of the impugned provisions, it is first necessary to interpret them." [161]

[76] The Court in *JJ* also provided the following guidance on how to interpret legislation:

> The modern principle of statutory interpretation assists us in this exercise: ". . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. Driedger, *Construction of*

[159] *R. v. Malmo-Levine*, 2003 SCC 74, RBA Tab 30 at paras. 5, 78, 177
[160] Dr. Cho's research is referred to in the Technical Paper on p. 13, footnote 69, JAR Tab 110 p. 11159
[161] *R. v. JJ*, 2022 SCC 28, OBA Tab 3 at paras. 13, 17

> *Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).
>
> As a rule, "[c]ourts must presume that Parliament intended to enact constitutional, [*Charter*-compliant] legislation and strive, where possible, to give effect to this intention" (*Mills*, at para. 56; see also R. Sullivan, *Statutory Interpretation* (3rd ed. 2016), at pp. 307-8; *R. v. Ahmad*, 2011 SCC 6, [2011] 1 S.C.R. 110, at paras. 28-29). Furthermore, this Court stated in *Mills* that "if legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional" (para. 56, referring to *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1078).[162]

B. *NS* Has Shifted the Legal and Factual Landscape

[77] The Ontario Court of Appeal upheld the constitutionality of the material benefit, procuring and advertising provisions in the recent decision of *NS*. *NS* is a landmark decision for many reasons. First and foremost, it is the first appellate decision in Canada to determine the constitutionality of the three offences in relation to ss. 7, 2(b) and 2(d) of the *Charter*. As the appellate court in Ontario, its decision is binding on this Court.[163]

[78] Secondly, the *NS* decision cleared up any confusion about the reach of the three offences considered in that case. The fundamental dispute on the s. 7 *Charter* analysis was whether providers working cooperatively would be caught by the material benefit and procuring offences and whether providers were able to take the safety measures identified in *Bedford* without the providers of those safety services being subject to criminal prosecution. The defence in *NS* argued that providers and third parties would be at risk of prosecution for material benefit and procuring because of the broad reach of the provisions. The Court of Appeal made it clear that providers who are working cooperatively would not be liable for the material benefit or procuring offences. Providers

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[162] *R. v. JJ*, 2022 SCC 28, OBA Tab 3 at paras 17-18

[163] *R. v. Comeau*, 2018 SCC 15, OBA Tab 4 at para. 26; *R. v. Sullivan*, 2022 SCC 19, OBA Tab 5 at paras. 65, 80

working independently or cooperatively are able to hire a receptionist, driver and/or security.[164] One provider can also provide advice to another provider without fear of criminal liability.[165] The Court of Appeal in *NS* fully detailed the reach and scope of the three offences.

[79] Prior to the *NS* decision, there was confusion and misunderstanding about the application of the three provisions.[166] The Applicants' evidence is replete with examples of the Applicants and fact witnesses stating their belief that the PCEPA prevents providers from working together and that the PCEPA prevents access to the safety measures identified in *Bedford*.[167] Indeed, a primary basis of the Applicants' claim that the PCEPA violates s. 7 is based on an assertion that the *Bedford* harms are replicated in the PCEPA and providers are not able to take the safety measures identified in *Bedford*. With the exception of Lana Moon Perrin, all of the Applicants' affidavits were sworn prior to the February 24th 2022 decision by the Court of Appeal in *NS*. Although the affiants did not have the benefit of the guidance from the Court of Appeal about the scope of these provisions, the *Charter* analysis conducted by this Court must be undertaken with the provisions "properly construed" by the Court of Appeal in *NS* and

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[164] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 123

[165] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 91, 93, 111-113

[166] This is perhaps best demonstrated by the conflicting lower level decisions on whether the three offences infringed s. 7 of the *Charter*. See *R. v. Anwar*, 2020 ONCJ 103, ABA Tab 2; *R. v. MacDonald*, 2021 ONSC 4423, OBA Tab 7

[167] See for example: Forrester cross Q 145-158, p. 31-34, JAR Tab 14, p. 1603-1604, Q 277-281, p. 59-60, JAR Tab 14, p. 1610, Scott cross Q 94-99 p. 27-29, JAR Tab 16, p. 1659-1660, 102-117, p. 29-35, JAR Tab 16, p. 1660-1661, Jane X Affidavit paras. 19-20, JAR Tab 17, p. 1678, Mason Affidavit paras. 32-33, JAR Tab 19, p. 1708, para. 40, JAR Tab 19, p. 1710, Wesley affidavit para. 60, JAR Tab 22, p. 1765, Ade-Kur cross Q 206-212 p. 72-74, JAR Tab 30, p. 2415-2416, Q 289 p. 103, JAR Tab 30, p. 2423, Cooley cross Q 45 p. 17-18, JAR Tab 32, p. 2452, Moon Perrin Affidavit para. 26, JAR Tab 37, p. 2534, Moon Perrin cross Q 68-69 p. 22, JAR Tab 38, p. 2598, Butler-Burke cross Q 60-61 p. 21-22, JAR Tab 26, p. 2206, Atchison cross Q 172-176 p. 105-107, JAR Tab 50, p. 4256, Krusi cross Q 468-469 p. 208-209, JAR Tab 56, p. 4949-4950

not based on any misapprehension of the scope of the provisions held by the Applicants and their fact witnesses.

[80] For this reason, the evidentiary record tendered by the Applicants in this case does not meet the narrow "new evidence" exception to vertical *stare decisis* on the constitutionality of the material benefit, procuring and advertising provisions in relation to ss. 7, 2 (b) and 2 (d) of the *Charter*.[168] First, the Court of Appeal in *NS* had an evidentiary record before it. The defence called Chris Atchison as an expert witness.[169] His will say and his testimony described aspects of the operation of the sex trade in Canada based on select research studies. Mr. Atchison has also been called as an expert by the Applicants in this case. Further, the nature of the evidentiary record tendered in this case does not meet the threshold described in *Bedford* as evidence "that fundamentally shifts the parameters of the debate".[170] The evidence tendered includes evidence from the pre and post *Bedford* time period. But the "debate" must be guided by the provisions "properly construed" and the Applicants' evidentiary record, primarily gathered and collected before the *NS* judgment, does not reflect the correct interpretation of the material benefit, procuring and advertising provisions. The approach to vertical *stare decisis* is strict.[171] The Applicants' have not met the high threshold to revisit *NS*.

[81] In the event that this Court determines that the *Charter* claims for material benefit,

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[168] *R. v. Comeau*, 2018 SCC 15, OBA Tab 4 at paras. 30-37; *R. v. Sullivan*, 2022 SCC 19, OBA Tab 5 at para. 80

[169] *R. v. NS*, 2021 ONSC 1628, OBA Tab 6 at paras. 23-38

[170] *Bedford*, 2013 SCC 72, ABA Tab 1 at paras. 44-46; *Carter v. Canada (Attorney General)*, 2015 SCC 5, ABA Tab 11 at para. 44

[171] *R. v. Comeau*, 2018 SCC 15, OBA Tab 4 at paras. 41-43

procuring and advertising will be considered anew, the Court of Appeal's statements on the objectives of the PCEPA, and the objectives and interpretation of the three offences remain authoritative as they are matters of statutory interpretation that are not dependant on extrinsic evidence.

[82] The clarification provided in *NS* also impacts the utility of the empirical research relied on by the Applicants in this case for similar reasons. As previously stated, Ontario adopts Canada's description in paragraphs 84 to 87 of its factum as to why the empirical research fails to establish a causal relationship between the PCEPA and the harms identified by the Applicants as part of their s. 7 claim. In addition, Ontario argues that the qualitative empirical research is of limited assistance to this Court in considering the s. 7 *Charter* claims because the qualitative research was conducted before the impact of *NS* could be measured or fully understood. For example, Dr. Roots described in cross-examination that third parties such as security guards and drivers can be criminalized without exploitation being present.[172] But *NS* has clarified that security guards and drivers would not be liable for material benefit or procuring offences if no exploitation was present[173]. Dr. Roots herself noted that one of the issues with research is how things can change between the point in time that research is conducted and the time research is actually published.[174] Not enough time has passed to measure how having three of the offences "properly construed" will impact on the operation of the commercial sex trade. As a result, the qualitative research relied on by the Applicants and their experts offers little assistance in assessing the *Charter* claims.

[172] Roots cross-examination, Q 122-125 p. 42-44, JAR Tab 40, p. 2655
[173] Exploitation referring to the exceptions listed in s. 286.2(5) which lists circumstances where the exceptions do not apply such as when violence is used or threatened.
[174] Roots cross-examination, Q 252, p. 99, JAR Tab 40, p. 2669

C. The Provisions Do Not Infringe s. 7 of the *Charter*

(i) Deference to Legislative Policy Choices

[83] In *Bedford,* the Supreme Court reaffirmed that it was open to Parliament to impose limits on how and where prostitution may be conducted. McLachlin CJ (as she then was) recognized that "the regulation of prostitution is a complex and delicate matter", and that "[i]t will be for Parliament, should it choose to do so, to devise a new approach".[175]

[84] Parliament responded with the PCEPA. The wisdom of Parliament's policy choice is a matter for the legislature. The issue for this Court is whether the means chosen to implement that policy choice accords with s. 7 of the *Charter*.

[85] The distinct roles of Parliament and the courts is well established. Parliament has the power to make policy choices and to enact legislation reflecting those policy choices.[176] The task of the courts is to determine if the legislation conforms to the *Charter*. When considering criminal offences and conformity with s. 7 of the *Charter*,

> The task of the Court in relation to s. 7 of the *Charter* is not to micromanage Parliament's creation or continuance of prohibitions backed by penalties. It is to identify the outer boundaries of legislative jurisdiction set out in the Constitution. Within those boundaries, it is for Parliament to act or not to act. The appellant, together with the appellants in *Malmo-Levine* and *Caine*, has mounted an extensive attack on the wisdom of criminalizing the simple possession of marihuana. The Court's concern is not with the wisdom of the prohibition but solely with its constitutionality. We have concluded that it is within Parliament's jurisdiction to criminalize the possession of marihuana should it choose to continue to do so, but it is equally open to Parliament to decriminalize or otherwise soften any aspect of the marihuana laws that it no longer considers to be good public policy.[177]

[86] As *Malmo-Levine* made clear, it is open to Parliament to make policy choices

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[175] *Bedford*, 2013 SCC 72, ABA Tab 1 at para. 165

[176] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, ABA Tab 8 at para. 105

[177] *R. v. Clay*, 2003 SCC 75, RBA Tab 24 at para. 4

criminalizing certain conduct or decriminalizing certain conduct: "Challenges to the wisdom of a legislative measure …should be addressed to Parliament".[178] In *Malmo-Lavine*, Gonthier and Binnie JJ. writing for the majority, set out the ongoing "controversy" over the criminalization of simple possession of marijuana. The applicants challenged the constitutionality of the criminal prohibition for simple possession on the basis that the evil effects of the criminal prohibition, as documented in the evidence, outweighed its benefits. The majority held that Parliament was entitled to act on "reasoned apprehension of harm." It is a matter for Parliament to determine "what is *not* criminal as well as what is." Additionally, caution must be exercised in relation to claims about the alleged ineffectiveness of legal measures because "some deference [must] be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills."[179]

[87] Under s. 7 of the *Charter*, the claimant bears the burden of showing (1) a deprivation of life, liberty or security of the person, and (2) that the deprivation does not accord with the principles of fundamental justice.[180]

(ii) Defining the Legislative Objectives

[88] A law's compliance with s. 7 of the *Charter* turns on a proper assessment of the law's objective. The Court of Appeal in *NS* described how the Supreme Court in *Bedford* provided guidance on how to approach the s. 7 analysis, starting with the correct articulation of the legislative objectives: "When an impugned provision engages s. 7, its purpose must be identified to determine whether the impairment of the s. 7 right is in

[178] *R. v. Malmo-Levine*, 2003 SCC 74, RBA Tab 30 at paras. 5, 78, 177
[179] *R. v. Malmo-Levine*, 2003 SCC 74, RBA Tab 30 at paras. 5, 78, 177
[180] *R. v. JJ*, 2022 SCC 28, OBA Tab 3 at para. 116

accordance with the principles of fundamental justice." [181]

[89] The Court in *NS* explained how the s. 7 analysis focusses on the objective of the specific provision under consideration:

> It is clear from *Bedford* that the s. 7 analysis turns on the purpose of the particular provision that is impugned. In *Bedford*, the purpose of each provision had previously been determined and the court assessed overbreadth and gross disproportionality against those purposes. Here, in the absence of binding authority, the application judge had to assess the purpose of each provision [emphasis in original].[182]

The guidance provided in *NS* on how to approach the s. 7 analysis also highlights how the application judge in that case had to determine the objective of each impugned provision because there was no binding authority. In the present case, *NS* is binding authority setting out the objectives of the material benefit, procuring and advertising offences.

Objective of The Purchasing Offence – s. 286.1

[90] Section 286.1 criminalizes communication for the purpose of obtaining sexual services for consideration and obtaining sexual services for consideration.[183] Section 286.5 provides immunity from prosecution for one who sells their own sexual services.

[91] The purchasing offence is the heart of the asymmetrical prosecution model Parliament chose to enact. Section 286.1 criminalizes the purchase of sexual services making the commercial sex trade an illegal practice. The objective of the offence is to reduce the demand for sexual services by criminalizing those who create the demand

[181] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 43
[182] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 46
[183] *R. v. Coburn*, 2021 NSCA 1, OBA Tab 8 at para. 19

for the commercial sex trade (purchasers).[184] Significantly, while the communications of the purchaser are caught by the offence, the communications (and actions) of the provider are not since the provider is subject to the immunity provision in s. 286.5.

Objective of The Material Benefit Offence – s. 286.2

[92] Section 286.2 criminalizes receiving a material benefit from sexual services for consideration in parasitic, coercive or exploitative circumstances. "Exploitative" in this context does not mean that exploitation as defined in s. 279.04 must be present. Parliament has recognized that when a third party has an economic interest in the sale of someone else's sexual services, this is a potentially coercive and exploitative situation, even though the specific definition of exploitation in s. 279.04 may not be satisfied.[185]

[93] The material benefit offence is the modern conception of the living on the avails offence struck down in *Bedford*. It criminalizes receiving a financial or other material benefit obtained by or derived from the commission of the purchasing offence. However, the scope of the offence was narrowed with legislated PCEPA exceptions (s. 286.2(3)) in order to permit providers to enter into non-exploitative family and business relationships. The exceptions were carefully crafted to limit the criminal reach of the offence. Indeed, two of the express exceptions permit a person who provides sexual services for consideration, on certain terms, to hire bodyguards, drivers and receptionists. The provisions found unconstitutional in *Bedford* did not permit such

[184] *Technical Paper*, at p. 5, JAR Tab 110, p. 11151

[185] This is demonstrated by the cases with only s. 286 charges and no human trafficking charges are laid. See for example *R. v. Ochrym*, 2021 ONCA 48, RBA Tab 33; *R. v. Esho*, 2017 ONSC 6152, OBA Tab 9; *R. v. Morgan*, 2018 ONSC 596, OBA Tab 10

safeguards. Section 286.2(5), provides exceptions to the exceptions, proscribing when the exceptions do not apply.[186]

[94] The offence targets those who would exploit providers, consistent with the PCEPA's objectives of continuing to denounce and prohibit the development of economic interests in the exploitation of the prostitution of others, as well as the institutionalization and commercialization of the sex trade.[187] The PCEPA exemptions from prosecution under the material benefit provisions are not available where the person received the benefit "in the context of a commercial enterprise that offers sexual services for consideration" (s. 286.2(5)(e)).

[95] The Court of Appeal in *NS* made it clear that providers working together would not meet the definition of "commercial enterprise". As a result, providers working together would not be caught by the material benefit offence. As the Court explained, the cooperative is not engaged in or concerned with profit. It operates on a shared cost basis. It is the opposite of an enterprise concerned with profit. Each individual sex worker, not the cooperative, is concerned with profit.[188] This is the critical distinction between a "cooperative" and a "commercial enterprise" such as an escort agency or brothel. The owner and/or operator of the escort agency or brothel is concerned with profit for the business while providers working together or helping each other are not.

[96] The Court in *NS* explains that simply making a profit would not be sufficient to meet the definition of a commercial enterprise since commercial enterprise was intended

[186] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 24-25
[187] *Technical Paper*, at p. 6, JAR Tab 110, p. 11152
[188] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 74

to involve "profiteering", in the pejorative sense of the term. The Court stated: "a "commercial enterprise" in s. 286.2(5)(e) necessarily involves the making of a profit derived from third party exploitation of the sex worker. In other words, it involves the making of a profit from the commodification of sexual activity by a third party". [189]

[97] The objective of the offence is to denounce and prohibit economic interests and the commercialization of sexual services for consideration.

Objective of The Procuring Offence – s. 286.3

[98] The preamble to the PCEPA recognizes that exploitation is inherent in the commercial sex trade. The Applicants argue that sex work is not inherently exploitative, and therefore the underlying premise of the PCEPA is flawed. This argument fails to appreciate that it is open to Parliament to determine that the commercial sex trade is inherently exploitative even if an individual provider made a conscious choice to participate in the commercial sex trade.[190] An assertion by a single provider (or many providers) that they freely choose to sell sexual services for consideration does not undermine Parliament's view that exploitation is an immutable characteristic of the commercial sex trade.[191]

[99] The objective of the procuring offence is to denounce and prohibit the promotion of entry into the commercial sex trade in order to protect communities, human dignity and equality. Promoting participation in the commercial sex trade encourages an activity

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[189] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 76-77
[190] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 131
[191] See *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, OBA Tab 11 at paras. 67-79, per Karakatsanis J.; at paras. 229-234; at paras 137-138, per Moldaver J. (concurring); per Kasier J. (dissenting, but not on this point), holding that Parliament may legislate in relation to matters of morality under the criminal law power.

that Parliament considers inherently exploitative. Section 286.3 gives effect to this purpose by prohibiting a wide range of conduct intended to procure a person to offer or provide sexual services for consideration and conduct engaged in for the purpose of facilitating an offence under s. 286.1(1).[192]

[100] The Court of Appeal in *NS* clarified that the scope of all the conduct captured in the second mode of the *actus reus* of the procuring offence is significantly narrowed by their purpose requirement. The conduct captured in the second mode is only an offence if it is done *for the purpose* of facilitating an offence under s. 286.1. Facilitating an offence under s. 286.1 is narrower than facilitating commercial sex work. As the Court explained in *NS*, the offence in s. 286.1 is *obtaining* for consideration or communicating with anyone for the purpose of obtaining for consideration the sexual services of a person. The offence is not *providing* sexual services for consideration. The purpose requirement in s. 286.3 is therefore tied directly to the asymmetrical prosecution model adopted by the PCEPA. The Crown must prove that the accused intended to assist the principal in the commission of the offence in s. 286.1, the *purchase* (not the sale) of sexual services.[193]

[101] As the Court of Appeal explained in *NS*, the purpose of the procuring offence does not include giving effect to the safety-related objective of the PCEPA with respect to those who continue to sell their sexual services for consideration. The aim of s. 286.3 is to prohibit the promotion of entry or participation into the commercial sex trade. Section 286.3 is concerned with their safety by discouraging entry into and deterring participation

[192] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 121; Preamble to PCEPA, JAR Tab 105, p. 11047; *Technical Paper*, at p. 6, JAR Tab 110, p. 11152
[193] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 107-108, 114

in an activity that Parliament views as inherently exploitative and exposing risks of violence to those who engage in it. The safety related objective of the PCEPA with respect to those who continue to sell their sexual services for consideration is given effect by other provisions.[194]

Objective of The Advertising Offence – s. 286.4

[102] Section 286.4 prohibits everyone from knowingly advertising an offer to provide sexual services for consideration, including advertising in print media or on the internet.[195] The immunity provision only applies to providers of their own sexual services and not those who assist providers in posting advertisements.[196]

[103] As the Court of Appeal explained in *NS*, s. 286.4 has "a single purpose: to reduce the demand for the provision of sexual services for consideration in order to protect communities, human dignity and equality."[197]

Objective of The Community Harm Offences: The Impede Traffic Offence – s. 213(1) and The Communicating In or Next To a School, Playground or Daycare Centre Offence – s. 213(1.1)

[104] In response to *Bedford*, Parliament replaced the communicating offence in s. 213(1)(c) of the *Criminal Code*. Now, except impeding traffic in a public place for the purpose of a commercial sex transaction, or communicating for that purpose in public places in or next to school grounds, playgrounds or day care centres, communications and actions in public by a provider relating to their own sexual services are no longer criminalized.

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[194] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 122
[195] *Technical Paper,* at p. 6, JAR Tab 110, p. 11152
[196] *R. v. Gallone*, 2019 ONCA 663, RBA Tab 26 at para. 99
[197] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 152

[105] The objective of the impeding traffic offence is to protect residents of communities where the sale of sexual services occurs. This objective is tied to the PCEPA's broader goal of protecting communities and specifically children from the harms of the commercial sex trade.[198]

[106] The objective of the communicating offence is also connected to the PCEPA goal of protecting communities. The purpose of the offence is to protect children from exposure to the commercial sex trade which Parliament views as a harm in and of itself. Parliament considers exposure of children to the sex trade as a harm because it risks normalizing a gendered and exploitative practice and there is also the risk of exposure to additional harms such as exposure to drug-related activities and dangerous paraphernalia.[199]

(iii) The Provisions Do Not Engage s. 7 Rights with Two Exceptions

[107] Ontario's acknowledges that s. 213 engages the Applicants' liberty interest since immunity is not available for that offence. Ontario also acknowledges that Tiffany Anwar's liberty interest is engaged, since as an owner of an escort agency, she is subject to prosecution for the material benefit offence. Ontario's position is that these two deprivations accord with the principles of fundamental justice and no infringement of s. 7 results. Subject to these two noted exceptions, the other provisions do not engage s. 7 rights because when the provisions are "properly construed", the provisions do not limit the Applicants' right to life, liberty or security of the person. The Applicants have failed to demonstrate that the legislation has a "sufficient causal connection" to the alleged breach of their right to life, liberty or security of the person.

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[198] *Technical Paper*, p. 9-10, JAR Tab 110, p. 11155-11156
[199] *Technical Paper*, p. 9-10, JAR Tab 110, p. 11155-11156

Attribution is not Causation in Law

[108] The Applicants and their fact witnesses have genuinely held strong beliefs that the PCEPA is the cause of the harms they have identified as being present in the commercial sex trade. They also strongly believe that decriminalization is the only way to eliminate these harms. Indeed, almost all of the Applicants and their fact witnesses advocate for decriminalization and for the repeal of the PCEPA. Ontario does not challenge the *bona fides* of these strongly held beliefs held by the Applicants and their fact witnesses. However, the mere assertion that the PCEPA is the source of the harm does not mean that causation has been established in the legal analysis considering whether s. 7 is engaged.

[109] The Applicants and their fact witnesses have identified harms under PCEPA that in fact were identified as harms under the *Bedford* laws. The source of these harms may arise from many different things ranging from stigma to the inherent nature of the commercial sex trade to different legislative schemes. The personal beliefs of the Applicants and their fact witnesses that the harms they have identified are caused by the PCEPA is insufficient to meet the causal threshold set out in *Bedford* to engage s. 7 rights.

[110] Many of the Applicants' affiants speak about "criminalization" being the cause of certain things when it is not clear what exactly they mean by "criminalization". Sometimes it appears they are talking about the impact of non-criminal laws and regulations[200] and sometimes it appears that they are equating stigma with

[200] Ex. Clamen cross p. 45-51, JAR Tab 11, p. 1528-1529, Lam cross Q 237-239 p. 126-127, JAR Tab 28, p. 2339

criminalization.[201] Additionally, sometimes it appears the witnesses are engaging in a logical fallacy by using evidence that criminalization hasn't made something better to argue it is either the cause of the thing existing in the first place, or it has made the thing worse.[202]

[111] These assertions that the PCEPA is the cause of the harms and risks they identify are further undermined by the prevalence of misinformation and misunderstanding amongst their witnesses about the scope of the provisions.[203] When someone incorrectly believes the law prevents them from taking certain safety measures, it is understandable that they also incorrectly believe that the law is to blame for the increased risks to their safety that result. However, when the behaviour of sex workers or third parties who can assist sex workers is influenced by their incorrect understanding of what the law permits and prohibits, it is that incorrect belief that is responsible for any resulting risk or harm, not the PCEPA. Mr. Atchison testified that an unreasonable fear of the law based on an inaccurate perception can sometimes have an impact on behavior greater than the law itself.[204]

[112] As set out above, the expert evidence relied on by the Applicants cannot establish a causal relationship between the alleged harms and the PCEPA. There is no evidence

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[201] Ex. Cooley cross Q 41 p. 16-17, JAR Tab 32, p. 2451-2452, Q 49 p. 19, JAR Tab 32, p. 2452
[202] Ex. Benoit cross Q 86 p. 38, JAR Tab 44, p. 3136
[203] See for example: Forrester cross Q 145-158, p. 31-34, JAR Tab 14, p. 1603-1604, Q 277-281, p. 59-60, JAR Tab 14, p. 1610, Scott cross Q 94-99 p. 27-29, JAR Tab 16, p. 1659-1660, 102-117, p. 29-35, JAR Tab 16, p. 1660-1661, Jane X Affidavit paras. 19-20, JAR Tab 17, p. 1678, Mason Affidavit paras. 32-33, JAR Tab 19, p. 1708, para. 40 JAR Tab 19, p. 1710, Wesley Affidavit para. 60, JAR Tab 22, p. 1765, Ade-Kur cross Q 206-212 p. 72-74, JAR Tab 30, p. 2415-2416, Q 289 p. 103, JAR Tab 30, p. 2423, Cooley cross Q 45 p. 17-18, JAR Tab 32, p. 2452, Moon Perrin Affidavit para. 26, cross Q 68-69 p. 22, JAR Tab 38, p. 2598, Butler-Burke cross Q 60-61 p. 21-22, JAR Tab 26, p. 2206, Atchison cross Q 172-176 p. 105-107, JAR Tab 50, p. 4256, Krusi cross Q 468-469 p. 208-209, JAR Tab 56, p. 4949-4950
[204] Atchison Q 882 p. 463-465, JAR Tab 52, p. 4486

that when the provisions are properly construed, they prevent providers from taking steps to reduce risks to their safety as identified in *Bedford*. Indeed, the only empirical research that does present a causal relationship is the work of Dr. Cho which indicates that there is a causal link between a country's sex trade policy and the incidence of human trafficking.

When s. 7 is Engaged: "Life, Liberty and the Security of the Person"

[113] Section 7 will only be engaged when the claimant can demonstrate, on a balance of probabilities and by way of reasonable inference, that the government act has a "sufficient causal connection" with a limitation on an individual's right to life, liberty or security of the person.[205]

[114] Section 7 protects "life, liberty and the security of the person". The omission of "property" from the text reduces the scope of the right to exclude economic rights. When considering economic related rights within "liberty" and "security of the person", the extent will be narrow to ensure that s. 7 does not expand to encompass corporate and economic rights.[206] The Supreme Court has not recognized pursuing a particular occupation as a right protected by s. 7.[207] The Ontario Court of Appeal has specifically declined to recognize a constitutional right to practice a profession.[208]

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[205] *Bedford*, 2013 SCC 72, ABA Tab 1 at para. 76

[206] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, ABA Tab 44 at para. 96; *Dywidag Systems International Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, OBA Tab 12 at para. 6; *R. v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713, OBA Tab 13 at 786; Reference re ss. 193 and 195.1 of Criminal Code (Prostitution Reference), [1990] 1 S.C.R. 1123, ABA Tab 45 per Lamer J at para. 71

[207] See *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, OBA Tab 14 at para. 46: the appellants' alleged right to operate VLTs at their place of business cannot be characterized as a fundamental life choice. It is purely an economic interest. The ability to generate business revenue by one's chosen means is not a right that is protected under s. 7 of the *Charter*.

[208] *Tanase v. College of Dental Hygienists of Ontario*, 2021 ONCA 482, RBA Tab 40 at para. 40-45

[115] The Supreme Court has clarified that the right to life protected by s. 7 is engaged when the law "imposes death or an increased risk of death on a person, either directly or indirectly."[209] Concerns about autonomy and quality of life have traditionally been treated as components of the liberty and security of the person rights.

[116] Liberty includes freedom from physical restraint. It is well established that s. 7 is triggered when a law contains the possibility of imposing imprisonment whereas the imposition of a fine as punishment does not fall within the scope of the liberty right.[210] In *Re B.C. Motor Vehicle Act*, Lamer J. left open whether imprisonment as an alternative to the non-payment of a fine could trigger s. 7.[211] The Ontario Court of Appeal has held that where the risk of imprisonment is too remote, such as the risk of imprisonment for non-payment of a fine for a provincial offence, the liberty interest is not triggered because the court will not speculate about the intermediate steps between the operation of the provision and the possible deprivation of liberty.[212] Liberty also encompasses the right to make "fundamental personal choices free from state interference", but that does not extend "unconstrained freedom" to the individual.[213]

[117] To demonstrate an interference with security of the person, an applicant must show either (1) interference with bodily integrity and autonomy, including deprivation of control over one's body: or (2) serious state-imposed psychological stress. [214] State conduct reaches the high threshold for a deprivation of psychological security of the

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[209] *Carter v. Canada (Attorney General)*, 2015 SCC 5, ABA Tab 11 at para. 62
[210] *R. v. Pontes*, [1995] 3 S.C.R. 44, OBA Tab 15 at para. 47
[211] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, ABA Tab 20 at para. 86
[212] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, OBA Tab 16 at para. 49
[213] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, ABA Tab 12 at para. 54
[214] *Carter v. Canada (Attorney General)*, 2015 SCC 5, ABA Tab 11 at paras. 66-67

person only if it constitutes interference "with an individual interest of fundamental importance," such as interference with "profoundly intimate and personal choices of an individual."[215]

The Provisions Do Not Engage "Life"

[118] The provisions do not deprive the Applicants of "life" as defined by s. 7 of the *Charter*. Ontario adopts Canada's submissions in paragraph 112 of its factum. Ontario also notes that the tragic death of a trans migrant sex worker referred to in the affidavit of Ms. Butler-Burke occurred in 2012, before the enactment of the PCEPA.[216] Also, New Zealand, where the sex trade was decriminalized in 2003, has sadly continued to have providers be the victims of homicides.[217] The Applicants have failed to establish a sufficient casual connection between the PCEPA and the right to "life" protected by s. 7.

"Liberty" Interest is Engaged in Limited Circumstances

[119] As noted above, Ontario agrees with Canada that s. 213 engages the Applicants' liberty interests as s. 213 sets out summary conviction offences for which providers may be liable for and the immunity provision does not apply. Ontario also agrees that the liberty interest of the Applicant Tiffany Anwar is engaged as the owner of an escort agency who is liable for prosecution for the material benefit offence. As the immunity provision in s. 286.5 applies to providers engaging in conduct captured by the purchasing, material benefit, procuring and advertising offences, the other Applicants have failed to establish that their liberty interest is engaged. Further, when the material

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[215] *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, ABA Tab 12 at paras. 81-86
[216] Butler-Burke Affidavit, para. 22, JAR Tab 25, p. 2169
[217] Abel Affidavit, p. 40, JAR Tab 57, p. 5454

benefit and procuring offence is "properly construed", as set out in *NS*, providers giving advice to other providers, providers or any third parties providing services such as security and reception work, and providers working cooperatively are not captured by the offences.

The Provisions Do Not Engage "Security of the Person"

[120] The evidence does not demonstrate that under PCEPA sex workers cannot take necessary steps to protect themselves. Under the PCEPA, sex workers can now lawfully take all of the steps identified in *Bedford* that were necessary to ensure dangerous conditions were not imposed on sex workers engaged in what was, at the time, a lawful activity. While the evidence of the Applicants establishes that providing paid sexual services continues to be associated with risks and harms, the evidence does not establish that those risks and harms are caused by the PCEPA, nor that the PCEPA prevents providers from taking steps to reduce risks to their safety.

[121] As explained earlier, the evidence of the Applicants does not demonstrate that the PCEPA prevents sex workers from screening clients or negotiating terms, it does not demonstrate that the PCEPA displaces sex workers to locations that place them in increased danger, and it does not demonstrate that it causes sex workers to be less likely to access police assistance when they are in danger.

[122] Security of the person is not infringed simply because Parliament has not enacted a policy that makes sex work safe. Indeed, the recognition that sex work could not be made safe for everyone, is one of the reasons Parliament seeks to abolish the sex trade by reducing demand for paid sexual services and discouraging people from entering and

remaining in the sex trade.[218]

[123] Security of the person does not include the right to engage in commercial sexual transactions. While security of the person may include the right to control one's bodily integrity and personal autonomy in the sense of being free from unwanted bodily interference, it cannot extend to an affirmative right to engage in prohibited acts.

[124] The Applicants' reliance on the SCC case law concerning consent in the context of sexual assault is misplaced. When the SCC said that "control over who touches one's body, and how, lies at the core of human dignity and autonomy"[219], this is because being touched in a sexual manner without consent is a profound violation and act of violence. Being deprived of the ability to engage in a sexual act does not result in the same kind of violence to one's personal dignity and autonomy. Furthermore, the PCEPA doesn't limit what type of consensual physical or sexual acts individuals may engage in – it simply makes it an offence to turn those acts into a *commercial* transaction. This does not engage the right to security of the person.

[125] Further, the advertising offence does not limit the Applicants' security of the person. The Court of Appeal in *NS* recognized the important distinction that advertising is not communication while outlining the scope of the advertising offence and whether it engaged s. 7 rights. The Court in *NS* concluded that it did not because "any impairment of security of the person because, as a result of s. 286.4, providers of sexual services for consideration use vaguer language in their advertisements is, on this record,

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[218] *Technical Paper*, p. 3-4, JAR Tab 110, p. 11149 - p. 11150; Hon. Denise Batters, second reading of Bill C-36. Senate Debates 41-2, Issue 86 (9 Oct 2014, p. 2256), JAR Tab 150, p. 12029

[219] *R. v. Ewanchuk*, [1999] 1 SCR 330, ABA Tab 16 at para 28

trivial."[220] In this case, we have the same evidentiary record that was before the Court in *NS*. Mr. Atchison testified that while advertisements use coded language, there was no evidence to show that the use of language in advertisements has changed since the enactment of the PCEPA.[221] Furthermore, Mr. Atchison testified that while most commercial sex transactions are initiated through an online advertisement, those ads provide a means of communicating with the seller and the average number of communication exchanges that takes place before a physical encounter is 4.2[222] Officer Taylor explained that providers in rural areas of the OPP's jurisdiction do not rely on advertising but this is because of how the commercial sex trade operates in those specific areas. He also included examples of postings for sexual services which demonstrate how the "coded" or "vague" postings still convey meaning and permit further communication.[223]

[126] Since security of the person does not include a right to pursue a particular occupation, individuals like Tiffany Anwar (who desires to own an escort agency) and Valerie Scott (who desires to own a micro brothel) cannot rely on s. 7 protection to assert economic rights. Similar to the Applicants in *Siemans v. Manitoba (Attorney General)* who wished to operate video game terminals, operating a particular type of business is not a fundamental life choice.[224] The Supreme Court has determined that generating revenue by one's preferred means is not protected by s. 7.

(iv) Any Infringement Accords with the Principles of Fundamental Justice

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[220] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 147-150
[221] Atchison cross Q 255-256 p. 151-152, JAR Tab 50, p. 4267
[222] Atchison cross Q 197 p. 120, JAR Tab 50, p. 4259
[223] Exhibit B to affidavit of DSS Taylor, JAR Tab 99, p. 10283-10297
[224] *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, OBA Tab 14 at para. 46

[127] Properly interpreted, the impugned provisions comply with s. 7. Even if s. 7 requires that the state refrain from imposing limits on the ability of persons engaged in illegal activity from taking steps to make themselves safer, there is no basis to conclude that the provisions prevent providers from taking such precautions.[225] Even if the provisions could be said to engage the type of safety concerns articulated in *Bedford*, that is merely the "port of entry" for the s. 7 claims.[226] The Applicants must still show that the provisions do not comply with the principles of fundamental justice. Ontario submits that all of the provisions of the PCEPA accord with the principles of fundamental justice: they are not arbitrary, overbroad, or grossly disproportionate.

The Provisions are not Arbitrary

[128] The overarching purpose of the PCEPA "is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible".[227] The PCEPA treats the purchase of sexual services as inherently exploitative and views those who sell their own sexual services as "victims who need support and assistance, rather than blame and punishment". The objective of the PCEPA is in stark contrast with *Bedford*, where the Court rejected the argument that the true purpose of the predecessor provisions was to target the commercialization of prostitution or promote the values of dignity and equality.[228]

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[225] *PHS Community Services Society v. Canada (Attorney General)*, 2011 SCC 44, ABA Tab 8 at paras. 89-94

[226] *Bedford*, 2013 SCC 72, ABA Tab 1 at paras. 78, 81-91

[227] *Technical Paper*, at p. 3, JAR Tab 110, p. 11149; *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 59

[228] *Bedford*, 2013 SCC 72, ABA Tab 1 at paras. 137-138

[129] The purchasing, material benefit, procuring and advertising offences further the overall goal of the PCEPA. These provisions are not arbitrary as they are carefully designed to further the overall objective of the PCEPA: reducing the demand for the commercial sex trade. The Court of Appeal in *NS* clarified that reducing the demand for the commercial sex trade is the overall objective of the PCEPA, notwithstanding that it permits providers the ability to take some safety measures as identified in *Bedford*.[229] It cannot be said that these provisions are not connected to this overall objective.

[130] The objective of the purchasing offence is directly tied to the PCEPA's objective of reducing the demand for sexual services since the offence criminalizes purchasers, those who create the demand for the commercial sex trade.

[131] The material benefit provision targets those who would benefit from the sexual services of others. This ties directly to Parliament's purpose of discouraging third parties from developing economic interests in the sexual exploitation of others. Combined with the statutory exceptions, this provision is tailored to the goals of deterring and abolishing the purchase of sexual services.[230]

[132] Similarly, the procuring offence is aimed directly at those who encourage others to become involved in the sale of sexual services. This offence has the obvious goal of preventing third parties from encouraging others to enter the sex trade.[231] Section 7 does not prevent Parliament from criminalizing those who encourage others to take up an inherently exploitative and illegal occupation.

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[229] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 62-63
[230] *Technical Paper*, at pp. 6-7, JAR Tab 110, p. 11152-11153
[231] *Technical Paper*, at pp. 8-9, JAR Tab 110, p. 11154-11155; *R. v. Ochrym*, 2021 ONCA 48, RBA Tab 33 at paras. 31-34, leave to appeal ref'd, 2021 CanLII 61402 (SCC)

[133] The advertising provision is also closely tied to the purpose of the *PCEPA*. As the Court of Appeal stated in *NS*, the objective of the advertising offence is "to reduce the demand for the provision of sexual services for consideration in order to protect communities, human dignity and equality."[232] This again is directly linked to the overall purpose of the PCEPA.

[134] Section 213 is the only offence that does not directly aim to reduce demand for the commercial sex trade. Nevertheless, s. 213 is rationally connected to the PCEPA's objective of denouncing and deterring the commercial sex industry. These provisions seek to protect the community by preventing one of the harms of the commercial sex trade: normalizing a gendered and exploitative practice. As a result, it is not arbitrary.

The Provisions are not Overbroad

[135] Further, none of the provisions are overbroad. None of the provisions capture situations that are unconnected to the objective of the offence. The prosecution of purchasers of sexual services is directly connected to reducing demand for the commercial sex trade. Providers have immunity for s. 286.1 which demonstrates how the offence is carefully calibrated to not overreach. The material benefit, procuring and advertising offences are all tailored in a way that targets those who engage in the prohibited behaviours. Again, those who sell only their own sexual services, alone or cooperatively with other providers, cannot be subject to prosecution. Any other person who benefits from the sale of another's sexual services, who procures anyone to participate in the sale of sexual services, or who advertises the sale of sexual services,

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[232] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at para. 152; See *R. v. Jeffers*, [2019] O.J. No. 1711 (C.J.), OBA Tab 17 at paras. 51, 74; *R. v. Boodhoo*, 2018 ONSC 7205, OBA Tab 18 at paras. 38-41

is properly caught by the legislation. Indeed, Parliament recognized the inherent risk of exploitation in circumstances where one individual is in control of how a provider operates in the sex trade, particularly when that individual is motivated by profit. Criminalizing the development of profit motivated interest in the sale of another person's sexual services does not render the procuring and material benefits overboard as the provisions are directly connected to the objective of deterring and denouncing the commercial sex trade and properly interpreted, do not overreach in application

[136] The purpose of s. 213 is to protect children and communities from exposure to the commercial sex trade, as exposure normalizes a gendered and exploitative practice. Section 213(1) prohibits conduct that would make commercial sex transactions a visible a disruptive presence in the community. Section 213(1.1) prohibits conduct that would expose children to commercial sex transactions. Both of these provisions target conduct that would promote the normalization of the sex industry. As a result, s. 213(1) and s. 213(1.1) do not capture conduct that is unconnected to the objective of these offences.

The Provisions are not Grossly Disproportionate

[137] Finally, none of the effects of the offences are grossly disproportionate to Parliament's goals. The offences in ss. 286.1, 286.2, 286.3 and 286.4 are serious offences targeting exploitative conduct that has a disproportionate impact on women and children. Given the targeted nature of the offence provisions, there is nothing disproportionate about the challenged provisions. The offences in s.213 are summary conviction offences and impose reasonable and modest limitations on where and how providers of sexual services may communicate for the purpose of engaging in illegal commercial sex transactions.

[138] Further, the collective impact of the PCEPA provisions is not grossly disproportionate to the legitimate interests Parliament is seeking to advance. When the offence provisions are considered as a whole and operating together, their effects are entirely proportionate to Parliament's important goal of keeping people safe by reducing the demand for prostitution with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it to the greatest extent possible. The suite of provisions is a critical tool for law enforcement to investigate circumstances of exploitation and coercion not otherwise captured by other *Criminal Code* offences, and in particular, not captured by the human trafficking offences which contain a prescribed definition of exploitation in order to apply.[233]

[139] Section 7 does not protect the right to engage in illegal activities. *Bedford* turned in part on the fact that the state action prevented the providers from taking steps to protect their safety while engaging in a legal activity. But the same analysis does not apply here. The activity that the providers wish to engage in is itself unlawful. And more importantly, the goal of the legislation is to deter anyone from engaging in this activity or encouraging others to do so. Statutory provisions that discourage providers from participating in the unlawful activity accord with the principles of fundamental justice, even if they engage s. 7 interests. The offence provisions of the PCEPA, properly interpreted and understood, are carefully tailored to achieve Parliament's aim of denouncing and deterring the commercial sex trade while permitting providers to take the safety steps enunciated in *Bedford*. The offence provisions accord with the principles

[233] In some cases where both s. 286 charges are laid, and human trafficking charges are laid, there is insufficient evidence of human trafficking. See for example: *R. v. Gracia*, 2020 ONCJ 31, OBA Tab 19; *R. v. AM*, 2020 ONSC 4191, OBA Tab 20

of fundamental justice.

D. The Provisions Do Not Infringe s. 15 of the *Charter*

[140] Ontario does not have additional submissions on why the provisions do not infringe s. 15 of the *Charter*.[234]

E. Section 2(b) of the *Charter*

The section 2(b) argument is resolved by *Bedford*

[141] The claimants in *Bedford* argued that the communication for the purpose (s. 213(1)(c) was an unjustified infringement of s. 2(b) of the *Charter*. The Supreme Court rejected this argument, finding that it was resolved by the *Prostitution Reference*. [235] Nothing has changed since *Bedford* to justify revisiting this conclusion in this case.

[142] Ontario, as it did in *NS*, accepts that the advertising provision engages s. 2(b). However, it is readily justified under s. 1. Indeed, it should be noted that the legislative objective accepted by Dickson C.J. in the *Prostitution Reference*, upheld in *Bedford*, was to take "solicitation for the purposes of prostitution off the streets and out of public view".[236] The PCEPA has the explicit goal of seeking to eradicate the commercial sex trade by reducing demand, due to its inherently exploitative nature. This current objective is of great importance and is directly furthered by the prohibition on advertising, which self-evidently seeks to reduce demand.

[143] Indeed, the entire purpose of advertising is to increase demand. The *Charter* does

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[234] As noted, Ontario adopts the legal submissions of Canada, including its submission on s. 15 at paragraphs 140 to 161 of its factum.

[235] *Bedford*, 2013 SCC 72, ABA Tab 1 at para. 46; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, ABA Tab 45 at 1134 – 1140 (per Dickson C.J.)

[236] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123, ABA Tab 45 at 1134 – 1140 (per Dickson C.J.)

not guarantee a right to encourage potential purchasers to commit an offence under the *Code*. Indeed, the Supreme Court has upheld restrictions on advertising in the context of *legal* products, as Parliament could show that the measures were aimed at deterring consumption of those products.[237] This is all the more true in the context of advertising an illegal product that is inherently exploitative and dangerous. The advertising offence's limitation on s. 2(b) is justified under s. 1 of the *Charter*.

[144] Ontario also concedes that s. 213 breaches the Applicants' s. 2(b) right as it restricts communications by providers near a school ground, playground or daycare centre. However, this limitation on expression is justified under s. 1. Section 213 is carefully tailored as it does not restrict all communications by providers but only those communications near the three enumerated public places in keeping with its objective to protect children from exposure to the commercial sex trade.[238] The provision is rationally connected to this objective. It is minimally impairing as it does not prevent communications by providers in any other public places. The benefits of the provision are proportionate to any harmful effects as the prohibited expression is commercial in nature and is in fact related to an illegal transaction. The infringement is justified under s. 1 of the *Charter*.

F. The Provisions Do Not Infringe s. 2 (d) of the *Charter*

[145] None of the provisions infringe s. 2(d) of the *Charter*. Section 2(d) has typically arisen in the context of labour relations, governing the rights of employees to come

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[237] *JTI MacDonald Corp v. Canada* (AG), 2007 SCC 30, RBA Tab 5
[238] *Technical Paper*, p. 9-10, JAR Tab 110, p. 11155-11156

together to pursue workplace goals. As the Supreme Court has summarized, s. 2(d):

> protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[239]

[146] Importantly, s. 2(d) protects the act of coming together. If a claimant seeks to protect the underlying activities that the association wishes to undertake, that protection must come from elsewhere in the *Charter*. [240] In this case, there is no constitutional right to sell sexual services individually. Sections. 2(d) does not offer the protections the Applicants seek.[241]

[147] Even if this Court finds that *NS* is not binding authority that the material benefit, procuring and advertising provisions do not infringe s. 2(d), its reasoning is authoritative and applies to both those three offences and the other provisions:

> This case is not about unionized employees and the impact on collective bargaining; nor is it about persons engaging in lawful work. It is about persons who are providing sexual service for consideration, contrary to law. In adopting a variant of the Nordic model, Parliament rejected an approach that would characterize persons who provide sexual services for consideration as "workers" and prostitution as legal sex "work".
>
> Moreover, s. 2(d) will only be infringed where the state precludes activity because of its associational nature: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 125. Only the associational aspect of the activity is protected. The PCEPA does not prevent individuals from joining or forming an association in the pursuit of a collective goal. Rather, it precludes both individuals and groups from undertaking certain activities, subject to the exceptions and immunities already described in these reasons [emphasis in original].[242]

[148] The fact that the PCEPA does not prevent individuals form joining or forming an

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[239] *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1, ABA Tab 47 at para. 66
[240] *Working Families Ontario v. Ontario*, 2021 ONSC 4076, OBA Tab 21 at paras. 83-89; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, RBA Tab 13 at para. 125
[241] *Yuen v. Canada (Ministry of Citizenship and Immigration)*, [2000] F.C.J. No. 2120, OBA Tab 22 at paras. 8-9 (C.A.)
[242] *R. v. NS*, 2022 ONCA 160, ABA Tab 4 at paras. 168-169

association in pursuit of a collective goal is best demonstrated by the work of the Alliance itself and the work of its 25 member groups. As Jenn Clamen explains in her affidavit: "As a collective, the Alliance has been instrumental in advancing the movement for decriminalization of sex work in Canada, and bolstering the voices of Canadian sex workers on the international stage. Members of the Alliance work together to advance sex work law reform, sex workers' rights, and community well-being."[243] The PCEPA has not prohibited the "collective" work of the Alliance and its member groups.

G. Section 1

[149] Ontario joins Canada in arguing that any *Charter* infringement is justified by s. 1 of the *Charter*. Ontario also relies on the evidence of Dr. Cho that there is an increased probability of higher rates of human trafficking if the commercial sex trade is allowed. This evidence is relevant to why the PCEPA's overall objective of denouncing and deterring the commercial sex trade is pressing and substantial. The potential for increased levels of human trafficking is one of the social harms that Parliament wished to protect against through the enactment of the PCEPA.[244] In addition, Dr. Cho's evidence about the potential increased prevalence of human trafficking if the commercial sex trade is allowed is also relevant to how the salutary effects of the provisions outweigh any deleterious effects. Parliament's legislative choice of the PCEPA, an end demand prosecution model, has the potential to guard against an increase in human trafficking rates which is one of the salutary effects of the legislation that must be measured.

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[243] Clamen Affidavit, para. 23, JAR Tab 10, p. 164
[244] *Technical Paper*, p. 13, JAR Tab 110, p. 11159

PART IV: ORDER SOUGHT

[150] Ontario seeks an order dismissing the application without costs.

All of which is respectfully submitted this 3rd day of August, 2022 by

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counsel for the Attorney General of Ontario.

Meaghan Cunningham,
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SCHEDULE A
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Yuen v. Canada (Ministry of Citizenship and Immigration), [2000] F.C.J. No. 2120 (C.A.)

SCHEDULE B
Relevant Legislative Provisions

***Criminal Code*, RSC,** 1985 c C-46, s. 213, s 279.04, s 286.1, s 286.2, s. 286.3(1), s. 286.4, s 286.5

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.

Exploitation

279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service.

Factors

(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused
(a) used or threatened to use force or another form of coercion;
(b) used deception; or
(c) abused a position of trust, power or authority.

Organ or tissue removal

(3) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them, by means of deception or the use or threat of force or of any other form of coercion, to have an organ or tissue removed.

Commodification of Sexual Activity

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

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. 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.

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 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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