

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

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

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener

- and -

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WOMEN'S EQUALITY COALITION, and WOMEN'S LEGAL EDUCATION AND
ACTION FUND (LEAF)**

Interveners

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

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August 10, 2022

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PART I - OVERVIEW

1. Black sex workers are uniquely vulnerable to the criminalization of sex work because of structural and systemic anti-Black racism in policing and the criminal punishment system. As such, the Black Legal Action Centre (BLAC) submits that under s. 15, this Court should consider how historic and ongoing anti-Black racism shapes the impact of the provisions on Black sex workers. This analysis is key to assessing whether the impugned provisions create a distinction based on race, and impose burdens which reinforce, perpetuate, or exacerbate disadvantage.¹

PART II - THE FACTS²

A. Black sex workers' experiences

2. The *Protection of Communities and Exploited Persons Act*³ frames the exchange of sexual services as inherently exploitative; however, the evidence demonstrates that Black sex workers exercise agency in their work, and cite a variety of reasons for selling and exchanging sexual services.⁴

3. Adult Black sex workers have diverse backgrounds, incomes, ages, genders, sexual orientations, and migration status.⁵ Some Black sex workers view the sale of sexual services as preferable to their past experiences of exclusion and discrimination in the formal employment

¹ *Fraser v Canada (Attorney General)*, 2020 SCC 28 [“*Fraser*”], at [para 27](#), **Book of Authorities of the Applicants** [“**ABA**”], **Tab 35**.

² BLAC adopts the facts as stated by the Applicants and further relies on the following evidence set out below.

³ Protection of Communities and Exploited Persons Act, SC 2014, c 25 [“**PCEPA**”], **Schedule B**.

⁴ Affidavit of Ellie Ade Kur, affirmed July 12, 2021 [“**Ade Kur Affidavit**”], at para 25, **Joint Application Record** [“**JAR**”], **Tab 29, p 2367**. Reasons include: money; housing; supporting family members; accessing food; access to drugs; saving for future goals; the need to cover unintended/emergency expenses; and seeing their particular area of sex work as the best fit for them in terms of skillsets and what they enjoy doing.

⁵ Ade Kur Affidavit, at paras 15-25, **JAR, Tab 29, pp 2365-2367**. Ms. Ade Kur’s affidavit is based on her personal interactions with sex workers in the Maggie’s community, and information reported to and consolidated by Maggie’s. It does not include personal identifying information of Black sex workers due to privacy concerns and confidentiality obligations: Ade Kur Affidavit, at para 26, **JAR, Tab 29, p 2367**.

sector.⁶ Indeed many Black sex workers “see sex work as a form of care work” and some report finding “freedom and empowerment in structuring their own work and lives.”⁷ Black sex workers, particularly Black trans women are, and have always been, at the “forefront of [...] sex workers’ rights advocacy.”⁸

4. Black sex workers, like other members of Black communities, are impacted by anti-Black racism, which “often depicts Black people as exploitative and perpetrators of violence and crime.”⁹ They are disproportionately targeted with “racial and social profiling,”¹⁰ police carding, surveillance and detention without arrest. They experience disproportionate rates of violent victimization, including by the police.¹¹ Black cis and trans women, and Black sex workers in particular, are simultaneously over-policed and under-protected.¹² Black trans sex workers,

⁶ Affidavit of Jenn Clamen, affirmed July 13, 2021 [“Clamen Affidavit”], at para. 48, **JAR, Tab 10, p 172**.

⁷ Ade Kur Affidavit, at para 54, **JAR, Tab 29, p 2375**; Affidavit of Monica Forrester, affirmed July 13, 2021 [“Forrester Affidavit”], at paras 3, 13, **JAR, Tab 12, pp 1565, 1567-1568**; Reply Affidavit of Monica Forrester, affirmed January 20, 2022 [“Forrester Reply Affidavit”], at para 23, **JAR, Tab 13, p 1594**.

⁸ “ASTT(e)Q’s Annual Report 2018-2010”, Clamen Affidavit, Ex NNN, at p 3, **JAR, Tab 10NNN, p 1374**; Terri-Jean Bedford is a Black woman and the lead Applicant in [Canada \(Attorney General\) v Bedford](#), 2013 SCC 72, **ABA, Tab 1**; Monica Forrester, one of the Applicants in this case, is a “Black and Indigenous 2Spirit trans woman”: Forrester Affidavit, at para 3, **JAR, Tab 12, p 1565**.

⁹ Ade Kur Affidavit, at para 55, **JAR, Tab 29, p. 2375**; “POWER on What Works for Sex Workers”, Clamen Affidavit, Ex SSS, at p 1341, **JAR, Tab 10SSS, p 1471**.

¹⁰ “Expert Report of Dr. Chris Bruckert”, Affidavit of Dr. Chris Bruckert, affirmed January 20, 2022, Ex B [“Bruckert Reply Report”], at pp 14-15, **JAR, Tab 46B, pp 3738-3739**; Ade Kur Affidavit, at para 50, **JAR, Tab 29, p 2374**; “Alliance’s Report on Recommendations for Reform”, Clamen Affidavit, Ex Y, at p 269, **JAR, Tab 10Y, p 399**; Reply Affidavit of Sandra Wesley, affirmed January 25, 2022 [“Wesley Reply Affidavit”], at paras 17-23, 38-44, **JAR Tab 23, pp 1898-1901, 1906-1909**; “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 Student in Canada”, Transcript of the cross-examination of Dr. Chris Bruckert, held April 14, 2022 [“Bruckert Transcript”], Ex 6, at p 2, **JAR, Tab 47.6, p 4095**; Transcript of the cross-examination of David Correa, held April 6, 2022 [“Correa Transcript”] at Q 170-179, **JAR, Tab 98, p 10235-10238**; Transcript of the cross-examination of Andrew W. Taylor, held April 22, 2022 [Taylor Transcript”] at Q 137-138, **JAR, Tab 100, p 10344**.

¹¹ “Sex Workers’ Access to Police Assistance...”, Bruckert Transcript, Ex 6, at p 12, **JAR, Tab 47.6, p 4105**.

¹² Ade Kur Affidavit, at paras 50, 55, 57, **JAR, Tab 29, pp 2374-2376**; “Alliance’s Submission to the International Commission of Jurists”, Clamen Affidavit, Ex JJ, at p 449, **JAR, Tab 10JJ, p 579**; “Sex Workers’ Access to Police Assistance...”, Bruckert Transcript, Ex 6, at p 8, **JAR Tab 47.6, p 4101**; “HIV Legal Network Report on the Perils of ‘Protection’”, Clamen Affidavit, Ex III, at pp 28-29, **JAR, Tab 10III, pp 1210-1211**; “Expert Report”, Affidavit of Dr. Chris Bruckert, affirmed July 13, 2021, Ex B [“Bruckert Report”], at p 10, **JAR, Tab 45B, p 3671**.

particularly Black trans women and non-binary sex workers, are disproportionately impacted by criminalization as compared to their Black cis counterparts.¹³

5. Black sex workers report experiencing discrimination when seeking to work with agencies, strip clubs and massage parlours which prioritize hiring white or non-Black people of colour.¹⁴ Black sex workers who are dark-skinned also experience colourism, a particular kind of discrimination based on skin tone.¹⁵ As a result, Black sex workers are some of the “most marginalized” in the industry, and are highly visible in street-based sex work, which, because of criminalization, can be the most dangerous work.¹⁶

6. Criminalization impacts Black sex workers in a number of harmful ways:

- a) Black sex workers report being prevented from demanding fair health and safety protocols in the workplace; organizing their labour; and, challenging workplace discrimination (e.g. the widespread use of restrictive quotas for Black women in strip clubs, or requirements to appear “less Black” as a condition of work);¹⁷
- b) Black sex workers who work in other forms of employment¹⁸ also report facing the risk that they will be ‘outed’ to their employers (or prospective employers); face termination, discipline, and reprisal; or lose out on employment opportunities without

¹³ Forrester Affidavit, at para 22, **JAR, Tab 12, pp 1569-1570**; Affidavit of Nora Butler-Burke, affirmed July 13, 2021 [“Butler-Burke Affidavit”], at paras 50-53, **JAR, Tab 25, pp 2178-2179**.

¹⁴ Ade Kur Affidavit, at para 35, **JAR, Tab 29, p 2370**; “Challenges: Ottawa-area workers speak out”, Bruckert Transcript, Ex 5, at p 20, **JAR Tab 47.5, p 3979**.

¹⁵ Experiences of discrimination include: being turned away from work; required by managers or owners of strip clubs to pay higher club fees than other worker; pressured [...] to charge less than other sex workers; disproportionately targeted by the police; and, more severely discriminated against by the general public. See Ade Kur Affidavit, at para 17, **JAR, Tab 29, pp 2365-2366**.

¹⁶ Bruckert Reply Report, at p 7, **JAR, Tab 46B, p 3731**; PCEPA Committee Report – *HOC*, Report to the Standing Committee on Justice and Human Rights, 44-1, *Preventing Harm in the Canadian Sex Industry: A review of the Protection of Communities and Exploited Persons Act* (22 June 2022) [“PCEPA Review”], at p 46, in the Factum of the Respondent, The Attorney General of Canada, at para 21, footnote 39; “POWER on What Works for Sex Workers”, Clamen Affidavit, Ex SSS, at pp 17, 23, **JAR, Tab 10SSS, pp 1457, 1463**; Affidavit of Chris Atchison, affirmed July 13, 2021, Ex B [“Atchison Report”], at p 18, **JAR Tab 48B, p 4202**.

¹⁷ Ade Kur Affidavit, at paras 38-40, 58, **JAR, Tab 29, pp 2371, 2376**; Bruckert Report, at pp 49-51, **JAR, Tab 45B, pp 3710-3712**;

¹⁸ Black sex workers accessing supports at Maggie’s Toronto Sex Workers Action Project are typically engaged in sex work as a form of supplementing their income from another job: Ade Kur Affidavit, at para 22, **JAR, Tab 29, pp 2366-2367**.

legal recourse. Black sex workers also report facing the risk of being ‘outed’ in educational settings, and receiving no support from school administration;¹⁹

- c) Black sex workers report that upon disclosing their work to medical practitioners they are faced with verbal abuse, inappropriate touching, and sexual harassment. Black sex workers who are parents often face the threat of having medical practitioners report them to child protection authorities on the basis that they are engaged in criminal activity;²⁰
- d) Some Black sex workers report that ex-partners or other adults in a child’s life have reported them to child protection authorities because they engage in sex work;²¹
- e) Black sex workers report being evicted or threatened with eviction, upon a landlord discovering the nature of their work;²² and,
- f) Black sex workers report being told by aggressors that the police will not believe or assist them because of their race and the criminality of sex work.²³

PART II - QUESTION IN ISSUE

7. BLAC submits the impugned provisions violate the s. 15 *Charter* rights of Black sex workers to substantive equality.

PART III - LAW AND ARGUMENT

A. Substantive equality requires an intersectional analysis

8. The constitutionality of the impugned provisions is a racial justice issue requiring an intersectional analysis of the Applicants’ s. 15 *Charter* claim.

9. An intersectional analysis recognizes that the combined effect of multiple systems of oppression produces unique impacts, which can be obscured when searching for an archetypal

¹⁹ Ade Kur Affidavit, at para 46, **JAR, Tab 29, p 2373**.

²⁰ Ade Kur Affidavit, at para 47, **JAR, Tab 29, p 2373**.

²¹ Ade Kur Affidavit, at para 45, **JAR, Tab 29, p 2372-2373**.

²² Ade Kur Affidavit, at paras 44-45, **JAR, Tab 29, pp 2372-2373**.

²³ Ade Kur Affidavit, at para 49, **JAR, Tab 29, p 2373-2374**.

form of discrimination.²⁴ The Supreme Court of Canada and human rights tribunals have repeatedly recognized the importance of applying an intersectional lens that accounts for interlocking and overlapping systems of oppression.²⁵ The Federal Court of Appeal has held that a failure to conduct an intersectional analysis can amount to a legal error by omitting significant discriminatory impacts.²⁶

10. BLAC submits this Court’s analysis should account for multiple grounds of oppression and how these interact and collectively impact Black sex workers’ experiences based on their varied social locations. Specifically, BLAC submits that an intersectional approach under s. 15: (i) is founded upon consideration of the historic, social, political, and economic disadvantage of the claimant group;²⁷ and, (ii) recognizes that distinctive forms of targeting, stereotyping and stigmatization, which stem from multiple grounds of discrimination such as race, gender, sexuality, and migration status, can be the source of discrimination.²⁸

11. When conducting an intersectional analysis, this Court should be guided by the Human Rights Tribunal of Ontario’s decision in *Baylis-Flannery* where, in a sexual harassment claim by a Black woman against her employer, the Tribunal recognized that discrete, siloed analysis of racism or sexism, under a ‘single-axis model’ does not adequately account for the interaction of

²⁴ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp 645-646 [per Justice L’Heureux-Dubé, J., dissenting].

²⁵ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 [“Law”], at para 94, **ABA, Tab 42**; *Withler v Canada*, 2011 SCC 12 [“Withler”], at para 58, **ABA, Tab 34**; *Fraser*, at [para 116](#), **ABA, Tab 35**; *Baylis-Flannery v. DeWilde (Tri Community Physiotherapy)*, 2003 HRTO 28, at [para 145](#) [“Baylis-Flannery”]; *Matias v The Hudson’s Bay Company and another*, 2022 BCHRT 17, at [para 38](#); *Radek v Henderson Development (Canada) and Securiguard Services (No. 3)*, 2005 BCHRT 302, at [paras 464-465](#).

²⁶ *Turner v Canada (Attorney General)*, 2012 FCA 159, at [paras 48-49](#).

²⁷ *Fraser*, at paras 56-57 76-77, **ABA, Tab 35**.

²⁸ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, at para 61 [per L’Heureux-Dubé J., concurring], **ABA, Tab 41**.

race and gender in Black women's experiences.²⁹ Intersectional analysis has emphasized the unique impacts of racism and sexism on Black women as these are the impacts which are most often obscured when the target of racism is presumed to be a Black cis man, and the target of sexism is presumed to be a white cis woman.³⁰

B. The historic and ongoing impacts of anti-Black racism are critical to conducting an intersectional analysis

12. Anti-Black racism is a system of inequities in power, resources, and opportunities that discriminate against people of African descent.³¹ In *R v Morris*,³² this Court found that anti-Black racism relies on present-day stereotypes and associations between Blackness and criminality, violence, and immorality, and stems from the unique and distinct history and legacy of colonialism, enslavement, and segregation in Canada. Even after slavery was abolished in 1834, these stereotypes persisted in policy-making and fueled segregation and discrimination in employment, housing, and education. The Court in *Morris* acknowledged the impact of this history manifests in the current social, political, and economic marginalization of Black people and includes continued health and social inequities, such as lower socio-economic status, higher unemployment, significant poverty rates, and disproportionate involvement in the child welfare and criminal punishment systems.³³

²⁹ *Baylis-Flannery*, at [para 145](#).

³⁰ *Ibid.*

³¹ *AA v P.R.Y.D.E. Learning Centres Inc.*, 2020 HRTO 1020, at [para 66](#).

³² *R v Morris*, 2018 ONSC 5186 [*"Morris ONSC"*].

³³ *Ibid.*, at [para 22](#), and Appendix A, "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario."

(i) **Black communities are disproportionately criminalized**

13. Criminal law has been used, not just as a tool of law and order, but has perpetuated the ongoing marginalization and mass criminalization of Black communities to devastating effects.³⁴ Studies and empirical research since the 1970's have repeatedly found that Black people are more likely to experience proactive and aggressive policing³⁵ and are more likely to be stopped, questioned, arrested, searched, charged, assaulted and killed by police.³⁶ As a result, Black people experience disparities in pre-trial detention, sentencing, and release conditions,³⁷ leading to mass incarceration in provincial and federal prisons.³⁸

14. Appellate courts and tribunals have repeatedly recognized the disproportionate criminalization of Black people as relevant to *Charter* analysis under ss. 8 and 9, *Highway Traffic Act*, criminal sentencing, and police use of force cases.³⁹ Accordingly, it is appropriate for this Court's s. 15 analysis to take into account systemic racism in policing when assessing how the impacts of the impugned provisions, exacerbate, rather than improve, marginalization in the lives of Black sex workers.

³⁴ For example, the “war on drugs” and mandatory minimum sentences. *R v Jackson*, 2018 ONSC 2527, at paras 40-47. [“*Jackson*”]. *R v Le*, 2019 SCC 34, at paras. 90-97; *R v Ahmad*, 2020 SCC 11, at para. 25; *R v C.P.*, 2021 SCC 19, at paras. 88-89; See also *R v Kirkpatrick*, 2022 SCC 33, at para. 165 (concurrency).

³⁵ *R v Le*, 2019 SCC 34, at paras 87, 90, 94-97 [“*Le*”]; *R v Grant*, 2009 SCC 32, at paras 154-155.

³⁶ “For Identification: Report of the Standing Committee on Public Safety and National Security of the House of Commons, “Systemic Racism in Policing in Canada”, dated June 2021”, Transcript of the cross-examination of Brian McGuigan, held March 28, 2022 [“*McGuigan Transcript*”], Ex B, at pp 1, 24, 55, 57, 60, **JAR Tab 82B, pp 7989, 8010, 8041, 8043, 8046**; *Le*, at paras 91-97.

³⁷ *Morris ONSC*, at para 22.

³⁸ *R v Morris*, 2021 ONCA 680, at paras 40, 123 [“*Morris ONCA*”].

³⁹ *Le*, at paras 90-91, 94, 97; *R v Theriault*, 2021 ONCA 517, at para 143; *Morris ONCA*, at paras 13, 39, 106; *Morris ONSC*, at paras 9, 21; *Abbott v Toronto Police Services Board*, 2009 HRTO 1909, at para 45.

(ii) **Intersection of systemic racism, sexism, and transphobia in stereotyping Black cis and trans women**

15. BLAC submits this s. 15 Court’s analysis must consider the impact that racist stereotypes will have on the way that the laws are enforced against Black sex workers. Systemic racism, sexism, and transphobia work together to criminalize Black cis, and trans women.⁴⁰ For example, stereotypes about hypersexuality, disposability, and invisibility attached to Black women’s bodies are inextricably linked to a historical context where those stereotypes were used as justification for sexual violence towards Black women by enslavers.⁴¹ These racialized and gendered stereotypes persist, and Black cis and trans women are frequently perceived to be sex workers – by the police and the general public – and are then subjected to the stigmas associated with sex work.⁴² Police have also relied on the racist and sexist archetypes of: the Black male “pimp,” thought to be dangerous and aggressive;⁴³ the hypersexual, disposable Black female sex worker, often categorized as an accomplice to violence;⁴⁴ and the sexually deviant trans woman;⁴⁵ juxtaposed against who is seen as a “victim,” often constructed as “white.”⁴⁶

⁴⁰ Misogynoir and transmisogyny allow for an intersectional analysis of multiple forms of oppression and help to inform how Black cis and trans sex workers are disproportionately criminalized.

⁴¹ “HIV Legal Network Report ...”, Clamen Affidavit, Ex III, at p 28, footnote 30, citing R. Maynard, “Do Black Sex Workers’ Lives Matter? Whitewashed Anti-Slavery, Racial Justice, and Abolition,” in *Red Light Labour: Sex Work, Regulation, Agency, and Resistance*, ed. E. Durisin, E. van der Meulen and C. Bruckert (UBC Press: 2018), at p 284, **JAR, Tab 10III, p 1210**. [“Maynard”]

⁴² Butler-Burke Affidavit, at para. 52, **JAR, Tab 25, p 2179**; Danardo Jones & Elizabeth Sheehy, “*R v Desjourdy: A Narrative of White Innocence and Black Danger*”, online: (2021) 99:3 Canadian Bar Review 611-644 <<https://ssrn.com/abstract=3988932>>, at pp 621-623, 639-643; Maynard, at pp 287-288.

⁴³ *R. v. Ferguson-Cadore and O’Grady*, 2016 ONSC 4872, at paras. [6](#), [9](#), [30](#); Bruckert Report, at pp 40, 47, **JAR, Tab 45B, pp 3701, 3708**; Bruckert Reply Report, at p 12, **JAR, TAB 46B, p 3736**.

⁴⁴ “Alliance’s Submission on Bill 251”, Clamen Affidavit, Ex DD, at p. 4, **JAR Tab 10DD, p 517**; “POWER on What Works for Sex Workers”, Clamen Affidavit, Ex SSS, at p 31, **JAR, Tab, p 1471**.

⁴⁵ Butler-Burke Affidavit, at paras 50-52, **JAR, Tab 25, pp 2178-2179**.

⁴⁶ “Alliance’s Submission on Bill 251”, Clamen Affidavit, Ex DD, at p 4, **JAR, Tab 10DD, p 517**; “HIV Legal Network Report ...”, Clamen Affidavit, Ex III, at pp 28-29, **JAR, Tab 10III, pp 1210-1211**; Bruckert Report, at p 47, **JAR, Tab 45B, p 3708**.

C. Black sex workers are disproportionately burdened by the impugned provisions

16. The impugned provisions work together to create a criminalized environment in which Black sex workers are particularly vulnerable. The **public communication** (s. 213(1.1)), **stopping traffic** (s. 213(1)), and **purchasing** (s. 286.1) provisions impede Black sex workers' ability to openly discuss terms of services and manage a client's expectations; these are forms of communication that are critical to establishing consent and practicing safer sex.⁴⁷ The **advertising** provision (s. 286.4) also impedes upfront communication about critical information regarding services offered, price, location, and requirements for safer sex.⁴⁸ Without these communications, Black sex workers report tense and dangerous dynamics, including that clients seek to push boundaries, receive services sex workers do not want to provide, or shortchange or not pay sex workers.⁴⁹

17. The impacts of criminalizing third parties (through the **material benefit** (s. 286.2(1)) and **procuring** (s. 286.3(1)) provisions) are heightened for Black sex workers who are stereotyped, stigmatized, and criminalized when working together.⁵⁰ Due to anti-Black racism and stereotyping, Black sex workers are often characterized as "pimps" when working with other sex workers, for example, while sharing space, sharing supports, and splitting costs for services like drivers, booking, and screening support.⁵¹ The criminal prohibitions entrench the "pimp" stereotype by further criminalizing Black sex workers and stigmatizing their chosen associations which are

⁴⁷ Ade Kur Affidavit, at paras 28-29, **JAR, Tab 29, p. 2368.**

⁴⁸ Ade Kur Affidavit, at paras 31-32, **JAR, Tab 29, p 2369.**

⁴⁹ Ade Kur Affidavit, at paras 28-29, **JAR, Tab 29, p 2368.**

⁵⁰ "Expert Report", Affidavit of Katrin Roots, affirmed January 26, 2022, Ex B ["Roots Report"], at pp 1-3, **JAR, Tab 39B, pp 2629-2631**; Ade Kur Affidavit, at para 36, **JAR, Tab 29, p 2370.**

⁵¹ "Getting Past the Pimp", Ade Kur Affidavit, Ex A, **JAR, Tab 29A, pp 2380-2393**; Bruckert Report, at pp 11-30, 40, **JAR, Tab 45B, pp 3672-3691, 3710**; Bruckert Reply Report, at pp 11-13, **JAR Tab 46B, pp 3735-3737.**

intended to create safer working environments.⁵² Further, Black sex workers who are permanent residents or foreign nationals risk the double punishment of criminal inadmissibility if convicted under the **procuring** provision, thereby increasing their vulnerability to immigration consequences and further criminalization.⁵³

18. The combined effect of the provisions also forces Black sex workers to work in isolated and unsafe conditions such as parks, alleyways and industrial areas because clients are worried about being surveilled, questioned, or arrested by the police in well-lit or well-populated public places.⁵⁴ This is particularly harmful for Black sex workers who are highly visible in street-based work, and are subject to the added burdens of anti-Black racist targeting and harassment, attacks from the public and potential clients, racial profiling and targeted harassment from police, and complaints from surrounding community members.⁵⁵

19. The criminalization and stigmatization of sex work also prevent Black sex workers from reporting violence or abuse they experience.⁵⁶ Aggressors often tell Black sex workers that the police will not believe or assist them because of their race and the criminality of sex work.⁵⁷ For some, experiences of not being taken seriously by police, combined with stereotypes of criminality, lead them to retreat into less visible spaces.⁵⁸ This exposes Black sex workers to a

⁵² Ade Kur Affidavit, at paras 36-7, 41-42, **JAR, Tab 29, pp 2370, 2371-2**; Roots Report, at pp 1-3, **JAR, Tab 39B; pp 2629-2631**; Clamen Affidavit, at para 83, **JAR, Tab 10, p 183**.

⁵³ BLAC adopts the submissions of CARL and MWAC, on the intersections between subsection 36(1)(a) of the *Immigration and Refugee Protection Act* and the *Criminal Code*.

⁵⁴ Ade Kur Affidavit, at para 30, **JAR, Tab 29, p 2368**.

⁵⁵ Ade Kur Affidavit, at paras 30-32, 53 **JAR, Tab 29, p 2368-2369, 2375**.

⁵⁶ Ade Kur Affidavit, at para 50, **JAR, Tab 29, p 2374**; “Article Underreporting of Violence to Police among Women Sex Workers in Canada...”, Transcript of the cross-examination of Andrea Krusi, held April 19, 2022, [“Krusi Transcript”], Ex 15, at p 258, **JAR, Tab 56.15, p 5219**; “HIV Legal Network Report ...”, Clamen Affidavit, at pp 28-29, **JAR, Tab 10III, p 1210-1211**.

⁵⁷ Ade Kur Affidavit, at para 49, **JAR, Tab 29, p 2373-2374**.

⁵⁸ Forrester Affidavit, at paras 21-30, **JAR, Tab 12, pp 1569-1571**; Ade Kur Affidavit, at paras 49-50, **JAR, Tab 29, pp 2373-2374**; “Article Underreporting of Violence to Police

heightened risk of violence and prevents them from seeking remedies and recourse when they face violence and abuse.⁵⁹

20. The Applicants' record demonstrates the devastating impact the reliance on racist, sexist and gendered stereotypes can have on vulnerable and marginalized communities.⁶⁰ When criminalization occurs in an environment where Black sex workers are already heavily stereotyped and stigmatized, criminalization further reinforces Black cis and trans sex workers' subjection to police surveillance and abuse,⁶¹ resulting in unique "vulnerabilities to violence," and exacerbating the phenomenon of being "over-policed and under-protected."⁶²

21. Black people are more likely to experience proactive policing, and for Black sex workers, it can be traumatic and harmful.⁶³ Even if sex workers are not experiencing the same rates of sex-trade related charges as the pre-PCEPA rates,⁶⁴ they are still experiencing the harms caused by the threat of criminalization (e.g. police surveillance, racial profiling, over-policing). As many courts

among Women Sex Workers in Canada...", Krusi Transcript, Ex 15, at p 258, **JAR, Tab 56.15, p 5219**; "HIV Legal Network Report ...", Clamen Affidavit, at pp 28-29, **JAR, Tab 10III, p 1210-1211**.

⁵⁹ Ade Kur Affidavit, at para 50, **JAR, Tab 29, p 2374**; "Article Associations between sex work laws and sex workers' health...", Krusi Transcript, Ex 16, at pp 45-46, **JAR, Tab 56.16, p 5276-5277**.

⁶⁰ Affidavit of Dr. Cecilia Benoit, affirmed July 13, 2021, Ex B, at pp 9-11, 17-18, 24, **JAR, Tab 42B, p 3077-3079, 3085-3086, 3092**; Bruckert Report, at pp 37-49, 51, **JAR, Tab 45B, pp 3698-3710, 3712**; Clamen Affidavit, at paras 100, 119, **JAR Tab 10, pp 188, 194**; Affidavit of Sandra Wesley, affirmed July 12, 2021, at paras 35-6, 66-86, **JAR, Tab 22, pp 1757-8, 1766-1772**; Affidavit of Jane X, affirmed July 10, 2021, at paras 30-31, 33-37, **JAR, Tab 17, pp 1680-1682**; Ade Kur Affidavit, at paras 49-50, 53-58, **JAR, Tab 29, pp 2375-2376**; Affidavit of Valerie Scott, affirmed July 10, 2021, at paras 16, 48-53, **JAR, Tab 15, pp 1641, 1650-1651**; Affidavit of Danielle Cooley, affirmed July 9, 2021, at paras 15, 25, **JAR, TAB 31, pp 2442, 2445**; Forrester Affidavit, at paras 18-20, 60, **JAR, Tab 12, pp 1568-1569, 1578**; Affidavit of Lana Moon Perrin, affirmed April 25, 2022, at paras 16-18, **JAR, Tab 37, pp 2531-2532**; Affidavit of Elene Lam, affirmed July 12, 2021, at paras 64-65, **JAR, Tab 27, p 2234**; "Standing Committee on Justice and Human Rights – March 1, 2022", Transcript of the cross-examination of Cora-Lee McGuire, held April 8, 2022, Ex B, at p 11, **JAR, Tab 65B, p 6371**.

⁶¹ Butler-Burke Affidavit, at paras 49-53, **JAR, Tab 25, pp 2178-2179**; Maynard, at pp 287-288; "POWER on What Works for Sex Workers", Clamen Affidavit, Ex SSS, at pp 27, 31, **JAR Tab 10SSS, p 1467,1471**.

⁶² Bruckert Transcript, Ex 6, at pp 2, 9, **JAR, Tab 47.6, pp 4095, 4102**; Butler-Burke Affidavit, at para 50, **JAR, Tab 25, p 2178**.

⁶³ Bruckert Reply Report, at p 14, **JAR, TAB 46B, p 3738**.

⁶⁴ Factum of the Attorney General of Ontario Intervener, at para 20.

and tribunals have found, over-policing is “more than an inconvenience,” it is harmful, especially to an already marginalized and vulnerable population.⁶⁵

22. The impugned provisions create a “constant police presence, social and racial profiling, harassment, surveillance, arrest and detention – all of which contribute to isolation and vulnerability to violence.”⁶⁶ When forced to work in a criminalized environment, the exceptions embedded within the PCEPA do not act as an actual shield for sex workers. The overarching harms that flow from the purchasing provision are too complex, insidious and violent to be quelled by the exceptions.⁶⁷ For example, contrary to *Bedford*, the purchasing provision prevents sex workers and third parties from renting indoor locations to establish safe and controlled workspaces without the risk of eviction.⁶⁸ Further, the “exceptions to the exception” within the legislation do not take into account the unique, real, and lived experiences of the Black sex workers who face severe harms from criminalization and are forced to structure their work relationships differently.⁶⁹

(i) The impacts of the provisions extend beyond criminal liability

23. The provisions have widespread impact in the lives of Black sex workers, exacerbating the systemic inequities they already experience in employment, education, health care, child custody/access, and housing.

24. The denial of workers’ rights and protections to Black sex workers impairs their existing racial, social, and economic disadvantages⁷⁰ by exacerbating their economic insecurity, pay

⁶⁵ *Le*, at para 95.

⁶⁶ “Alliance’s Report on Recommendations for Reform”, Clamen Affidavit, Ex Y, at p 7, **JAR, Tab 10Y, p 399**.

⁶⁷ Factum of the Applicants, at paras 73-76.

⁶⁸ *Bedford*, at [para 134](#), **ABA, Tab 1**; Affidavit of Dr. Andrea Krüsi, affirmed July 13, 2021, Ex B [“Krusi Report”], at pp 38, 41, **JAR, Tab 54B, pp 4808, 4811**.

⁶⁹ Ade Kur Affidavit, at paras 33-42, **JAR, Tab 29, p 2369-2372**.

⁷⁰ Ade Kur Affidavit, at paras 38-40, 58, **JAR, Tab 29, pp 2371, 2376**; Bruckert Report, at pp 49-51, **JAR, Tab 45B, pp 3710-3712**.

inequity and the disproportionate rates of unemployment faced by Black people.⁷¹ In educational settings, being ‘outed’ without administrative support heightens issues already faced by Black communities in accessing educational opportunities free from discrimination.⁷² Negative experiences with health care professionals under a criminalized regime disproportionately affects Black sex workers in unique ways, given that the structural determinants of health, including anti-Black racism, already negatively impact Black communities’ access to health care services and health outcomes.⁷³ Threats, or actual reports made, to child protection authorities also uniquely impact Black sex workers by exacerbating the pervasive anti-Black racism in child welfare in Ontario, where Black children are disproportionately removed from their families.⁷⁴ Finally, evictions for ‘criminality’ by Black sex workers’ landlords, exacerbate homelessness, and precarious housing/housing insecurity, which already disproportionately affect Black communities.⁷⁵

25. As a result, the impugned provisions create an “interconnected regime”⁷⁶ that reinforces, perpetuates, and exacerbates the legacies of brutality against Black communities and the ongoing harms posed by the criminal punishment system. They prevent Black sex workers from engaging in practices that would make their work safer and create stigmas in other areas of their lives.⁷⁷ The

⁷¹ *Morris ONSC*, at para [22](#).

⁷² *Morris ONSC*, Appendix “A”.

⁷³ “Article The Double-Edged Sword of Health and Safety COVID-19 and the Policing and Exclusion of Migrant Asian Massage Workers in North America”, Transcript of the cross-examination of Katrin Roots, held April 25, 2022 [“Roots Transcript”], Ex 8, at p 4, **JAR, Tab 41.8, p 2954**.

⁷⁴ See *Morris ONSC*, Appendix “A”: Where child protection authorities are involved in disputes or allegations involving Black children/families, outcomes are disproportionately negative (e.g. Black children are more likely to be removed from their family’s care).

⁷⁵ *Jackson*, at para [27](#).

⁷⁶ Factum of the Applicants, at para 79.

⁷⁷ Transcript of the cross-examination of Ellie Ade Kur, held March 1, 2022 [“Ade Kur Transcript”], Q 126-127, **JAR, Tab 30, p 2408-2409**.

unique vulnerabilities faced by Black sex workers because of their race, gender, and occupational status are compounded, not improved, by the impugned provisions.

E. Response to Canada’s s. 15 Submissions

(i) A *prima facie* s. 15 breach can be established in the face of structural limitations on statistical evidence

26. Contrary to Canada’s submissions on the adequacy of the social science evidence,⁷⁸ *Fraser* confirmed that claimants are not required to lead evidence of a statistical causal correlation between the law and the harms visited upon the group.⁷⁹ Rather, the Supreme Court held that courts must account for the structural impacts of marginalization when assessing evidence proffered in support of a s. 15 claim.⁸⁰

27. Accordingly, when assessing evidence of the disproportionate impact of the impugned provisions on Black sex workers, this Court must consider the historic and ongoing under-documentation, by federal, provincial, and municipal governments, and Canadian police services, of anti-Black racism in policing and the criminal punishment system.⁸¹ Further, while studies on the impact of criminalization on access to police assistance have included Black sex workers and drawn conclusions from the experiences of Black sex workers, issues with sample size have impeded statistical analysis.⁸² In such circumstances, *Fraser* permits this Honourable Court to

⁷⁸ Factum of the Respondent, at paras 72-75, 79-85.

⁷⁹ *Fraser*, at [paras 60-61](#), **ABA, Tab 35**.

⁸⁰ *Fraser*, at [para 57](#), **ABA, Tab 35**.

⁸¹ “For Identification: Report of the Standing Committee on Public Safety and National Security of the House of Commons...”, dated June 2021”, McGuigan Transcript, Ex B, at pp 61, 69-72, **JAR, Tab 82B, pp 8047, 8055-8058**. Of note, the findings in the *Sex Trade Juristat* are not disaggregated by race.

⁸² “Article Sex Workers’ Access Police Assistance in Safety Emergencies...”, Bruckert Transcript, Ex 6, at p 8, **JAR, Tab 47.6, p 4101**.

place significant weight on available evidence, including from Black sex workers of their experiences under the PCEPA.⁸³

(ii) The government’s purpose is not a consideration under s. 15

28. Contrary to Canada’s submission that the PCEPA’s “objective of protecting those vulnerable to coercion by third parties” is relevant in the s. 15 inquiry, the focus of the s. 15 inquiry is on the harms of the law on the claimant group.⁸⁴ The question of whether the distinction is justified is for s. 1.

(iii) Parliament’s choice to criminalize sex work does not shield the effects of the impugned provisions from s. 15 Charter scrutiny

29. Canada’s position is inconsistent with Supreme Court jurisprudence⁸⁵ and, if accepted, would put s. 15 out of the reach of Black communities grappling with the systemic, disproportionate, violent, and lethal impacts of policing and the criminal punishment system.

30. Black lives matter. The rights of Black sex workers to equal benefit and protection of the law cannot be sacrificed to shield a harmful legislative scheme, simply because Parliament has selected the *Criminal Code* as the vehicle for that scheme.

PART IV - ORDER REQUESTED

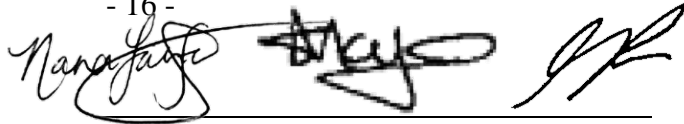
31. BLAC takes no position on the outcome of this Application, but respectfully requests that it be determined in accordance with BLAC’s submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of August, 2022.

⁸³ Ade Kur Affidavit, at paras 36-39, 42, 48-50, 56-60, **JAR, Tab 29, pp 2370, 2372-2373, 2375-2377**; Ade Kur Transcript, Q 126-127, 135, 154, 201, 229, 233, **JAR, Tab 30, pp 2408-2409, 2411, 2415, 2417-2418**; Forrester Affidavit, at paras 10-65, **JAR, Tab 12, pp 1567-1580**; Forrester Reply Affidavit, at paras 6, 8, 10, 19-22, **JAR, Tab 13, pp 1589, 1590, 1592-1593**; “HIV Legal Network Report ...”, Clamen Affidavit, Ex III, pp 25-26, **JAR, Tab 10III, pp 1207-1208**.

⁸⁴ *Fraser*, at [para 79](#), **ABA, Tab 35**.

⁸⁵ [*Canada \(Attorney General\) v PHS Community Services Society*](#), 2011 SCC 44, at paras [102-104](#), **ABA, Tab 8**.

Three handwritten signatures in black ink are positioned above a horizontal line. The first signature on the left is 'Nana Yanful', the middle one is 'Saneliso Moyo', and the one on the right is 'Geetha Philipupillai'.

**Nana Yanful / Saneliso Moyo / Geetha
Philipupillai**

Lawyers for the Intervener,
The Black Legal Action Centre

**SCHEDULE “A”
LIST OF AUTHORITIES**

Case Law

1. [Fraser v Canada \(Attorney General\)](#), 2020 SCC 28
2. [Canada \(Attorney General\) v Mossop](#), [1993] 1 SCR 554
3. [Law v Canada \(Minister of Employment and Immigration\)](#), [1999] 1 SCR 497
4. [Withler v Canada](#), 2011 SCC 12
5. [Baylis-Flannery v. DeWilde \(Tri Community Physiotherapy\)](#), 2003 HRTO 28
6. [Matias v The Hudson’s Bay Company and another](#), 2022 BCHRT 17
7. [Radek v Henderson Development \(Canada\) and Securiguard Services \(No. 3\)](#), 2005 BCHRT 302
8. [Turner v Canada \(Attorney General\)](#), 2012 FCA 159
9. [Corbiere v Canada \(Minister of Indian and Northern Affairs\)](#), [1999] 2 SCR 203
10. [AA v P.R.Y.D.E. Learning Centres Inc.](#), 2020 HRTO 1020
11. [R v Morris](#), 2018 ONSC 5186
12. [R v Le](#), 2019 SCC 34
13. [R v Ahmad](#), 2020 SCC 11
14. [R v C.P.](#), 2021 SCC 19
15. [R v Kirkpatrick](#), 2022 SCC 33
16. [R v Grant](#), 2009 SCC 32
17. [R v Morris](#), 2021 ONCA 680
18. [R v Theriault](#), 2021 ONCA 517
19. [Abbott v Toronto Police Services Board](#), 2009 HRTO 1909
20. [R v Ferguson-Cadore and O’Grady](#), 2016 ONSC 4872
21. [Canada \(Attorney General\) v. Bedford](#), 2013 SCC 72
22. [R v Jackson](#), 2018 ONSC 2527
23. [Canada \(Attorney General\) v PHS Community Services Society](#), 2011 SCC 44

Articles

1. Robyn Maynard, “Do Black Sex Workers’ Lives Matter? Whitewashed Anti-Slavery, Racial Justice, and Abolition,” in *Red Light Labour: Sex Work*,

Regulation, Agency, and Resistance, ed. E. Durisin, E. van der Meulen and C. Bruckert (UBC Press: 2018)

2. Danardo Jones & Elizabeth Sheehy, "[R v Desjourdy: A Narrative of White Innocence and Black Danger](https://ssrn.com/abstract=3988932)", online: (2021) 99:3 Canadian Bar Review 611-644 <<https://ssrn.com/abstract=3988932>>

**SCHEDULE “B”
RELEVANT STATUTES**

Criminal Code of Canada, RSC 1953-1954, c 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.

Obtaining sexual services for consideration

286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
 - (i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
 - (A) for a first offence, a fine of \$2,000, and
 - (B) for each subsequent offence, a fine of \$4,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) in the case referred to in subparagraph (a)(i),

(A) for a first offence, a fine of \$1,000, and

(B) for each subsequent offence, a fine of \$2,000, or

(ii) in any other case,

(A) for a first offence, a fine of \$500, and

(B) for each subsequent offence, a fine of \$1,000.

Obtaining sexual services for consideration from person under 18 years

(2) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(a) for a first offence, six months; and

(b) for each subsequent offence, one year.

Subsequent offences

(3) In determining, for the purpose of subsection (2), whether a convicted person has committed a subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under that subsection; or

(b) an offence under subsection 212(4) of this Act, as it read from time to time before the day on which this subsection comes into force

Sequence of convictions only

(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

Definitions of *place* and *public place*

(5) For the purposes of this section, *place* and *public place* have the same meaning as in subsection 197(1).

Material benefit from sexual services

286.2 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

Material benefit from sexual services provided by person under 18 years

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit

- (a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;
- (b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;
- (c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or
- (d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the

service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

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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