

**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

- and -

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REFUGEE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, PARENTS
AGAINST CHILD TRAFFICKING COALITION, DEFEND DIGNITY, EGALE
CANADA AND THE ENCHANTÉ NETWORK, EVANGELICAL FELLOWSHIP OF
CANADA, MIGRANT WORKERS ALLIANCE FOR CANADA, ONTARIO COALITION
OF RAPE CRISIS CENTRES, SEXUAL HEALTH COALITION, WOMEN'S
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OVERVIEW

1. Egale Canada (“Egale”) and the Enchanté Network (“TEN”) intervene jointly to address the particular and pernicious effects of the impugned provisions on the rights of trans¹ sex workers and male sex workers who provide services to male clients (“MSM sex workers”).
2. There is both overlap between these categories (some MSM sex workers are also trans) and considerable diversity within them. Many trans and MSM sex workers – like cis women sex workers – are also Indigenous, racialized, and/or migrants, and are subjected to disadvantage and discrimination on the basis of those identities and their various intersections with gender identity and/or actual or perceived sexual orientation. Egale and TEN recognize that trans and MSM sex workers’ experience of sex work and of the impacts of the impugned provisions are as varied and diverse as workers themselves, and have sought to reflect that diversity in these submissions.
3. Egale and TEN submit that:
 - a. the impugned provisions perpetuate and exacerbate the disadvantage of trans and MSM sex workers and violate their right under s 15 of the *Charter* to substantive equality without discrimination on the analogous grounds of gender identity and/or sexual orientation;
 - b. the guarantee of substantive equality informs the interpretation and application of s 7 of the *Charter*; and
 - c. in determining whether the impugned provisions violate s 7 of the *Charter*, the court must therefore have regard to the disproportionate and particular effects of those provisions on trans and MSM sex workers’ rights to liberty and security of the person.

PART I - STATEMENT OF FACTS

4. Egale and TEN accept and adopt the facts as stated by the Applicants, and specifically rely on the evidence set out below.²

¹ Egale and TEN use the term “trans” to refer to all genders other than cisgender, including but not limited to transgender, Two Spirit, and non-binary.

² Notably, this evidence was not available to the Court of Appeal in *R v N.S.*, and its determination that some of the impugned provisions are *Charter*-compliant therefore did not reflect their impact on trans and MSM sex workers.

A. Trans Sex Workers

5. Trans people appear more likely than cisgender people to engage in sex work. One study estimated that 14 percent of trans people in Ontario had engaged in sex work at some time, and 3 percent were current sex workers.³ Trans people’s engagement in sex work is both responsive and resistant to transphobia and intersecting forms of discrimination in various ways.

6. Trans-specific reasons for engaging in sex work may include employment discrimination, housing insecurity, and the need to pay for gender-affirming health care.⁴ Many trans people encounter significant barriers in accessing gender-concordant identity documents and essential gender-affirming health care, and are subjected to discrimination and stigma when seeking employment, housing, and education.⁵ For some trans individuals, especially trans women, sex work is a solution to systemic barriers to employment.⁶ This was one of the reasons applicant Monica Forrester, a Black and Indigenous 2Spirit trans woman, entered the industry. As she notes, sex work, unlike other jobs, does not require “identity documents or previous work experience, and does not create the same barriers related to race and gender identity that exist in other sectors.”⁷

7. Trans-specific reasons for engaging in sex work may also include access to community and affirmation of gender identity.⁸ Many trans sex workers report that “their experiences of sex work were affirming of their gender – both in terms of being seen and having their gender identity recognized, as well as being a means to access the community, information, resources, and health

³ Trans PULSE Canada, “Health and Well-Being Among Trans and Non-Binary People Doing Sex Work”, Affidavit of Jenn Clamen, affirmed July 13, 2021 [Clamen Affidavit], Ex KK, **JAR, Tab 10, p 583**.

⁴ *Ibid.*

⁵ Affidavit of Nora Butler Burke, affirmed July 13, 2021 [Butler Burke Affidavit], paras 9-10, 26-27, **JAR, Tab 25, pp 2164, 2170-2171**; Clamen Affidavit, para 48, **JAR, Tab 10, p 172**.

⁶ POWER, “The Toolbox: What Works for Sex Workers”, Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1478**.

⁷ Affidavit of Monica Forrester, affirmed July 13, 2021 [Forrester Affidavit], para 13, **JAR, Tab 12, pp 1567-68**.

⁸ Trans PULSE Canada, “Health and Well-Being Among Trans and Non-Binary People Doing Sex Work”, Clamen Affidavit, Ex KK, **JAR, Tab 10, p 583**; Butler Burke Affidavit, para 26, **JAR, Tab 25, p 2171**.

care required for their transitions.”⁹ Trans women in particular are “subject to routine denials of their womanhood, including exclusion from women-only spaces and services, limited access to proper identity documents, and transphobic interpersonal relationships. Sex work provides many trans women with empowering experiences of being accepted, desired, and valued as women.”¹⁰

8. Ms. Forrester reports being misgendered by police and service providers and unsafe in public spaces.¹¹ Police have mocked, dehumanized, and humiliated her while working, and said derogatory things about her work and her identity as a trans woman.¹² She contrasts these experiences with her experience of sex work:

While police and members of the public use methods of disempowerment to try to degrade my humanity, sex work has allowed me to feel validated in who I am – particularly as a trans woman. I have met people who value and respect me.... I am able to engage with clients who embrace my gender identity and do not discriminate against me because of who I am.¹³

Like other sex workers,¹⁴ Ms. Forrester also indicates that engaging in sex work improved her self-esteem, stating, “Sex work was empowering because my clients accepted and loved me as a Black and Indigenous 2Spirit trans woman. This helped me to love myself.”¹⁵

9. For applicant Alessa Mason, a trans woman living with a disability, sex work has not only allowed her to secure a stable income and enabled her to afford gender-affirming health care, but had also been “incredibly affirming” of her gender identity. As she states, “I have a sense of pride in what I do, and it makes me feel worthy. My clients treat me in a way that makes me feel worshiped, divine, and loved. They affirm my gender identity as a woman, and my being.”¹⁶

⁹ Clamen Affidavit, para 48, **JAR, Tab 10, p 172.**

¹⁰ Butler Burke Affidavit, para 28, **JAR, Tab 25, p 2171.**

¹¹ Forrester Affidavit, para 66, **JAR, Tab 12, p 1580.**

¹² Forrester Affidavit, para 22, **JAR, Tab 12, pp 1569-1570.**

¹³ Forrester Affidavit, para 66, **JAR, Tab 12, p 1580.**

¹⁴ POWER, “The Toolbox: What Works for Sex Workers”, Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1478.**

¹⁵ Reply Affidavit of Monica Forester, affirmed January 20, 2022, para 23, **JAR, Tab 13, p 1594.**

¹⁶ Public Affidavit of Alessa Mason, affirmed July 13, 2021 [Mason Affidavit], para 48, **JAR, Tab 19, p 1712.**

10. Some trans sex workers see sex work as an “integral part” of cultural identity, noting that trans identities and sex work have been “welded together in many cultural and class contexts”.¹⁷ They also emphasize the relationship between sex work and trans rights and equality, noting that trans sex workers have historically engaged in “personal, political, and community struggles, which have created a social climate in which individuals can change sex more easily”, and that their intimate and sexual relations with clients “contribute[] to greater openness, appreciation and understanding”.¹⁸ Ms. Mason similarly states that her work “helps demystify and disillusion trans women’s bodies and trans gender sexuality” and is for her “a source of dignity, resilience, strength, and power.”¹⁹

11. While many trans sex workers report a variety of benefits from engaging in sex work, they also encounter transphobia and transmisogyny within the industry, and have to navigate a number of additional barriers. Those barriers are heightened for racialized and/or migrant trans women due to racism and xenophobia in the sex industry.²⁰ As a result of their marginalization, trans sex workers tend to work independently rather than in collective spaces.²¹ Escort agencies and massage parlours generally employ only cis women.²² Ms. Mason reports that she was invited to work at an indoor agency but the offer was rescinded when they learned she is trans, with the result that she continues to operate independently.²³ Being trans makes working with others less feasible,²⁴ and trans sex workers tend to be more isolated than other sex workers.²⁵ As a result of ignorance

¹⁷ POWER, “The Toolbox: What Works for Sex Workers”, Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1480**.

¹⁸ *Ibid.*

¹⁹ Mason Affidavit, para 49, **JAR, Tab 19, p 1712**.

²⁰ Butler Burke Affidavit, para 23, **JAR, Tab 25, pp 2169-2170**.

²¹ Butler Burke Affidavit, para 23, **JAR, Tab 25, pp 2169-2170**.

²² Butler Burke Affidavit, para 24, **JAR, Tab 25, pp 2170**.

²³ Mason Affidavit, para 33, **JAR, Tab 19, p 1709**; public transcript of the cross-examination of Alessa Mason, held March 7, 2022 [Mason Transcript], qq 35-39, **JAR, Tab 20, p 1716-1717**.

²⁴ Mason Transcript, q 136, **JAR, Tab 20, pp 1724-1725**.

²⁵ ASTT(E)Q, “Brief to the Standing Senate Committee”, Clamen Affidavit, Ex M, **JAR, Tab 10, p 310**; Mason Transcript, q 168, **JAR, Tab 20, p 1727**.

and transphobia, they have restricted access to support services.²⁶

12. Due to transphobia and other – often related – factors, many trans sex workers continue to work on the street, where they are particularly vulnerable to harassment and violence,²⁷ and are profiled, surveilled, and targeted by police on the basis of their gender identity.²⁸ Encounters with police are frequently transphobic and especially transmisogynistic. Transmisogyny results not only in trans women being denied protection but also in their being framed as aggressors or criminals.²⁹ Trans sex workers who report crimes have themselves been charged with various offences, which further discourages them from contacting police in times of need.³⁰ Those who are also Indigenous, Black, racialized and/or migrant are even more likely to be over-policed and under-protected.³¹

13. For all sex workers, communication with clients is essential to establishing clear and continuing consent. For trans sex workers in particular, communication is also essential to ensuring that prospective clients understand their gender identities and bodily realities. Ms. Mason explains that as a trans woman who has retained her penis, she needs her clients to understand her body and its capabilities before they engage her services. On occasions when that understanding has not been established in advance, she has experienced transphobic and violent responses.³²

14. Criminalization creates specific harms for trans sex workers, who, as Ms. Mason describes, “provide services that are particular to our bodies and lived experiences.”³³ The impugned provisions have increased trans sex workers’ physical and social isolation and exposed them to

²⁶ *Ibid.*

²⁷ Butler Burke Affidavit, para 24, **JAR, Tab 25, p 2170**; ASTT(e)Q, “Brief to the Standing Senate Committee”, Clamen Affidavit, Ex M, **JAR, Tab 10, p 310**.

²⁸ Clamen Affidavit, para 76, **JAR, Tab 10, pp 180-181**.

²⁹ Butler Burke Affidavit, para 50, **JAR, Tab 25, p 2178**.

³⁰ Clamen Affidavit, para 77, **JAR, Tab 10, p 181**; Butler Burke Affidavit, para 51, **JAR, Tab 25, pp 2178-2179**.

³¹ 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”, Transcript of the cross-examination of Dr. Cecilia Benoit, held April 4, 2022, at Ex 17, **JAR, Tab 44, pp 3576-3588**.

³² Mason Affidavit, para 24, **JAR, Tab 19, p 1706**.

³³ *Ibid.*

unsafe working conditions. They have also impaired trans sex workers' ability to take steps to protect their own and each others' safety and well-being, including by posting ads for others (s 286.4); booking rooms for or making referrals to others (party liability under 286.1), and communicating clearly with prospective clients to establish shared understandings and expectations and vet them for transphobia (ss 213(1), 213(1.1) and 286.1)).

15. The displacement of street-based sex workers to more remote and secluded areas has particular effects on trans sex workers. Ms. Forrester generally works in a location or "stroll" predominantly used by trans sex workers, where clients have an understanding or expectation of who they will be encountering.³⁴ As a result of the impugned provisions, however, she has not only been pushed to more isolated and industrial spaces but also ends up working in areas where only cis women work, which puts her at greater risk of violence and transphobia from potential clients who are seeking cis sex workers. This risk is compounded by the fact that, as a result of the provisions, there is no time to establish her gender identity at the outset of an interaction.³⁵

16. The dispersal of trans sex workers has also led to "the fragmentation of trans sex workers' lives and communities."³⁶ One affiant reports that in Montreal, there were historically centralized locations, including both "strolls" and bars, in which trans sex workers worked together. These locations were known to clients, and served as "a source of safety and security where trans sex workers could work collectively, organize, and share information."³⁷ While there is always some turnover in bars and clubs, the locations that have closed since the impugned provisions came into force have not been replaced.³⁸

³⁴ Forrester Transcript, qq 229-243, **JAR, Tab 14, p 1608**.

³⁵ Forrester Affidavit, para 46, **JAR, Tab 12, p 1575**; see also Krusi et al., "Intersection of sex work-related stigma and policing", Affidavit of Andrea Krusi, affirmed July 13, 2021, Ex B, **JAR, Tab 54, pp 4875-4877** (discussing the effects of displacement of trans sex workers from previously existing strolls due to gentrification).

³⁶ Butler Burke Affidavit, para 24, **JAR, Tab 25, p 2170**.

³⁷ Butler Burke Affidavit, para 32, **JAR, Tab 25, p 2172**.

³⁸ Butler Burke Affidavit, para 33, **JAR, Tab 25, p 2173**.

17. Current and former sex workers within the trans sex work community often live and/or work together, and trans sex workers are more likely to receive services from and provide services to other sex workers.³⁹ Many trans sex workers see these arrangements and the provision of services such as screening and referring clients – which may give rise to party liability – as “intimate forms of community solidarity and kinship”, such that the criminalization of these activities has had a devastating effect on their sense of belonging.⁴⁰ It also profoundly undermines trans sex workers’ ability to take steps to ensure that client encounters are safe, respectful, and affirming. As Ms. Mason notes, “I cannot provide other sex workers with client referrals, or refer clients to other trans sex workers. It is a very important safety measure for trans sex workers to be able to share and refer clients who have been screened and vetted for transphobia.”⁴¹

18. Trans sex workers also need to vet new clients. The impugned provisions create significant barriers to doing so. As a result of the purchasing, communicating, and impeding traffic provisions, in-person communications are likely to be rushed and anxious if they occur at all. As a result of the purchasing and advertising provisions, ads and online and text communications frequently use acronyms and coded language, which increases the likelihood of misunderstanding and misalignment of expectations. Clients of trans sex workers may well fear transphobic as well as other forms of stigma if they are arrested, and therefore be especially reluctant to engage in full and frank communication which increases their risk. The combined effect of the impugned provisions is to deny trans sex workers – however and wherever they work – opportunities to meaningfully assess the risk that prospective clients will be disrespectful, degrading, or dangerous in relation to their gender identity.

³⁹ Butler Burke Affidavit, para 55, **JAR, Tab 25, p 2180.**

⁴⁰ Butler Burke Affidavit, para 56, **JAR, Tab 25, p 2180.**

⁴¹ Mason Affidavit, para 39, **JAR, Tab 19, p 1710.**

B. MSM Sex Workers

19. MSM sex workers' engagement with sex work is similarly shaped by and contends with homophobia, and MSM sex workers are also marginalized within the sector. There are fewer services and supports available to them,⁴² and relatively little focus on the specific experiences, rights, and needs of MSM sex workers in discussions about sex work.⁴³ Despite these limitations, the evidence is clear that the impugned provisions create particular harms for MSM sex workers.

20. Many clients of MSM sex workers are in heterosexual relationships, are not open about the fact that they have sex with men, and experience both external and internalized homophobia.⁴⁴ Their reactions to engaging in sexual contact with a man, in some cases for the first time, can be unpredictable. As one MSM sex worker describes, homophobia may cause them to freak out, be in denial, or become aggressive and physical.⁴⁵ Clients of MSM sex workers may also be particularly fearful of arrest and exposure not only as purchasers but as persons who have sex with men, and thus unwilling to engage in any communication in public or clear and explicit communication online or by text. The direct and indirect barriers to communication created by the impugned provisions impair MSM sex workers' ability to screen and vet clients for homophobia and foster safety, dignity and respect in their encounters.

21. The displacement of sex workers also has particular effects on MSM sex workers. MSM sex workers in Vancouver reported that the loss of an MSM "stroll" disrupted their social networks and sense of community.⁴⁶

⁴² Maggie's Annual Report 2018-2019, Clamen Affidavit, Ex TT, **JAR, Tab 10, p 781**; POWER, "The Toolbox: What Works for Sex Workers", Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1477**.

⁴³ RÉZO submission on Bill C-36, Clamen Affidavit, Ex Q, **JAR, Tab 10, p 329**; POWER, "The Toolbox: What Works for Sex Workers", Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1475**.

⁴⁴ *Ibid.*, **JAR, Tab 10, p 330**; *ibid.*, **JAR, Tab 10, p 1474**.

⁴⁵ POWER, "The Toolbox: What Works for Sex Workers", Clamen Affidavit, Ex SSS, **JAR, Tab 10, p 1474**.

⁴⁶ Argento et al, "The loss of Boystown and transition to online sex work", Transcript of cross-examination of Andrea Krusi, held April 19, 2022, Ex 22, **JAR, Tab 56, p 5385** (discussing displacement resulting from gentrification).

PART II – POINTS IN ISSUE

22. The impugned provisions violate the rights of trans and MSM sex workers to substantive equality as guaranteed by s 15, and to liberty and security of the person as guaranteed by s 7.

PART III – SUBMISSIONS

A. Section 15

23. The impugned provisions violate trans and MSM sex workers' right to substantive equality. Although facially neutral, they (1) impose specific burdens on trans and MSM sex workers on the analogous grounds of gender identity⁴⁷ and/or sexual orientation⁴⁸; and (2) do so in a manner that reinforces, perpetuates, and exacerbates the disadvantage experienced by trans people and men who have sex with men.⁴⁹

24. The criminal law has been and remains profoundly implicated in that disadvantage. The impugned provisions are part of a long history of the use of criminal and quasi-criminal law to punish, stigmatize, and seek to eradicate practices and persons deemed sexually “deviant” and harmful to communities and morality. This includes most obviously the *Criminal Code* offences of buggery and gross indecency,⁵⁰ but also those related to bawdy houses, indecent acts, and obscenity. The bawdy house provision, struck down by the Supreme Court in *Bedford*, was used to target not only sex workers but also men who have sex with men, including in the infamous 1981 Toronto bathhouse raids. A variety of other facially neutral laws have also been used by state agents to target 2SLGBTQI spaces and communities.⁵¹ This history demonstrates that, contrary to the respondent's submissions,⁵² the act of criminalizing an activity *can*, on its own, establish the

⁴⁷ *Centre for Gender Advocacy v Attorney General of Quebec*, 2021 QCCS 191 at paras [104-107](#).

⁴⁸ *Egan v Canada*, [1995] 2 SCR 513.

⁴⁹ *Fraser v Canada*, 2020 SCC 28 at para [27](#).

⁵⁰ *Criminal Code of Canada*, RSC 1953-1954, c 5, ss 147 and 149, respectively.

⁵¹ See e.g. *Little Sisters Book and Art Emporium v Canada*, 2000 SCC 69; *R v Hornick*, [2002] OJ No 1170.

⁵² Respondent's Factum at para 156.

grounds for a claim of discrimination.⁵³ Indeed, the criminal law has been both a driving force and a significant site of discrimination against, stigmatization of, and harm to 2SLGBTQI individuals and communities. The impugned provisions sadly continue that legacy.

25. The impairment of trans and MSM sex workers' equality rights also has implications for the court's determination whether the impugned provisions violate other *Charter* guarantees. The right to substantive equality "applies to and supports all other rights guaranteed by the *Charter*"⁵⁴ and the "interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights" including "the scope of protection offered by s. 7."⁵⁵ The rights guaranteed by s 7 must be viewed through the lens of s 15 in order to ensure that the courts' interpretation of the Constitution "responds to the realities and needs of all members of society."⁵⁶ In interpreting and applying s 7, the court must therefore have regard to the equality rights of trans and MSM sex workers, and the disproportionate and particular deprivations of their s 7 interests.

B. Section 7

(i) The Approach Adopted by Parliament

26. The respondent submits that the criminalization of the purchase of sexual services constitutes a "fundamental legislative shift that necessarily impacts the section 7 analysis."⁵⁷ The effect of the purchasing provision cannot be assessed in isolation, however, but must be considered in light of the statutory scheme as a whole. Parliament expressly adopted an "asymmetrical" approach to criminalization, making it an offence to purchase but not to sell sexual services. This

⁵³ In *R v C.M.* (1995), 23 OR (3d) 629 (CA), the court struck down s 159 of the *Criminal Code*, which prohibited anal intercourse unless both parties were at least 18 years old, as discriminatory on the basis of age. Abella JA (as she then was), concurring in the result, held that the provision also discriminated on the basis of sexual orientation and could not be saved by the mere assertion that it protected young people against the risk of HIV transmission.

⁵⁴ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at p 185.

⁵⁵ *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 at para 112.

⁵⁶ *Ibid* at para 115.

⁵⁷ Respondent's Factum at paras 102-103.

approach is fundamentally premised on the view that sex workers should not be subjected to blame or punishment.⁵⁸ Sex workers are therefore afforded immunity from prosecution for offences in relation to their own sexual services.⁵⁹ While Parliament did not provide that the sale or advertising of sex workers' own services is *not* an offence, it is not one for which they can be held criminally liable.⁶⁰ In other words, regardless of whether the provisions criminalize the *sale* of sex, they are explicitly intended not to criminalize *sell*ers.

27. This has significant implications for determining whether the impugned provisions engage sex workers' section 7 interests, and if so, whether they are in accordance with the principles of fundamental justice. The fact that Parliament has now made it an offence to purchase sexual services does not prevent this court from finding that the criminalization of purchasers impairs the s 7 interests of sex workers themselves. The Supreme Court has repeatedly recognized that individuals' rights to life and security of the person may be impaired as a result of others' exposure to criminal sanction.⁶¹ The new offence of purchasing demands, rather than forecloses, consideration of the impact of criminalization on sex workers' s 7 rights.

(ii) The Impugned Provisions Violate the s 7 Rights of Trans and MSM Sex Workers

28. The impugned provisions violate trans and MSM sex workers' rights to liberty and security of the person both disproportionately and in specific ways.

29. Trans sex workers are at greater risk of being deprived of liberty under ss 213(1) and (1.1) given that they are both more likely to be engaged in street-based work as a result of transphobia

⁵⁸ Technical Paper, Bill C-36, Tabled by the Minister of Justice before the Standing Committee on Justice and Human Rights, Evidence 41-2, No 32 (7 July 2014), **JAR**, Tab 110, p 11155; *HOC Debates* 41-2, No 32 (7 July 2014), **JAR**, Tab 112, p 11189; *Senate Debate*, 41-2, Issue 91 (30 October 2014), **JAR**, Tab 153, p 12106.

⁵⁹ Subsections 286.5(1) and (2).

⁶⁰ *R v N.S.*, 2022 ONCA 160 at para 128.

⁶¹ *Canada (Attorney General) v PHS Community Services*, 2011 SCC 44 [*PHS*] at para 91; *Carter v Canada (Attorney General)*, 2015 SCC 5. See also *R v Morgentaler*, [1988] 1 SCR 30 and *R v Smith*, 2015 SCC 34, in which defendants successfully challenged provisions under which they were charged as violating the s 7 rights of *others*.

and transmisogyny, and more visible to and profiled by police as a result of their gender identity. These provisions also have particular impacts on trans and MSM sex workers' security of the person. They prevent street-based trans sex workers from communicating with clients about their gender identity, and impede both trans and MSM sex workers' ability to screen prospective clients for trans- and/or homophobia. Both provisions may also displace trans- and MSM-specific "strolls", disrupting communities and increasing exposure to harassment and violence.

30. The impugned offences created by s 286 similarly engage trans and MSM sex workers' security of the person. As noted above, the criminalization of purchasing carries an increased and specific risk of exposure and stigmatization for clients of trans and MSM sex workers, and thus creates heightened barriers to the communication necessary for vetting and establishing clear and shared expectations, and explicit and continuing consent. Further, potential criminal liability for offences in relation to other sex worker's services – including aiding and abetting their purchase – has significant implications for trans and MSM sex workers, who are marginalized within the sector and face additional barriers in accessing services. Trans sex workers are disproportionately likely to work independently, and therefore much more dependent on one another for assistance and support. Given the risk of trans- and homophobic abuse and assault, trans and MSM sex workers are particularly reliant on vetting by and referrals from other trans and MSM sex workers – activities that may give rise to criminal liability as parties to the purchase of others' services.

31. In *PHS*, the Supreme Court held that while prohibiting drug possession by users *anywhere* engaged their liberty interests, prohibiting possession at the Insite facility additionally engaged their rights to life and to security of the person. Criminalization thus constituted a deprivation of all s 7 interests for persons who, faced with constrained choice about *whether* to engage in an illegal activity, exercised their agency with respect to *how* they engaged in that activity – and took

steps to do so in a manner that better protected their health, safety, and wellbeing.⁶²

32. That deprivation was found to accord with the principles of fundamental justice because of the “safety valve” of the Ministerial exemption.⁶³ The safety valve here – immunity from prosecution for offences involving one’s *own* sexual services – is far more limited in scope and entirely insufficient to cure the arbitrariness, overbreadth, and gross disproportionality of the impugned provisions. Criminalizing sex workers for working together informally in community to address unsafe conditions and enhance security and wellbeing is both antithetical to the stated purposes of the provisions and grossly disproportionate to any harms associated with sex work.

33. In addition, as the respondent acknowledges, criminalization has harmful collateral effects. It impairs sex workers’ ability to access social services and obtain alternative or complementary employment, and exposes them to a variety of risks including eviction and property forfeiture. Again, the impact of these harms will be more pronounced for MSM and especially trans sex workers, who already face significant and discriminatory barriers in securing alternative employment and housing and in accessing services. These collateral effects are qualitatively different from those considered by the Supreme Court in *Malmo-Levine*, which flowed from the claimant’s potential prosecution and/or conviction for criminal offences.⁶⁴ Here, in contrast, the harms can result from sex workers’ activities in relation their own sexual services – activities for which they cannot be prosecuted. Sex workers are thus effectively penalized for conduct for which Parliament has explicitly affirmed they are not morally blameworthy, a clear violation of s 7.

34. The deprivations set out above impact trans and MSM sex workers disproportionately but not exclusively. The impugned provisions also impair the s 7 interests of at least some trans sex

⁶² *PHS* at paras 92, 99-100.

⁶³ *Ibid.* at paras 112-114. The Court went on to hold that the Minister’s failure to grant an exemption violated s 7.

⁶⁴ *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at paras 172-175.

workers in a manner that is specifically and intimately tied to their gender identity.

35. Although they are distinct interests, the guarantees of liberty and security of the person both protect personal autonomy, individual dignity, and bodily integrity – including the right to make fundamental choices concerning one’s own body free from state interference.⁶⁵

36. As previously described, some trans sex workers experience sex work as an aspect of trans cultural identity; as an expression, recognition, and affirmation of their gender; and as a means of fostering trans inclusion and equality. For these sex workers, the liberty to engage in sex work cannot be reduced to what the respondent frames as the choice of sex work as a profession. Sex work in this context is not merely about economic or property rights but also the expression of core aspects of identity and the enjoyment of dignity.

37. Similarly, personal autonomy and bodily integrity as aspects of security of the person are not restricted to the negative right to be free from unwanted bodily interference, but embrace an affirmative right to engage in consensual sexual activity with other adults. Viewed through a substantive equality lens and in light of the history and continued reality of discrimination against 2SLGBTQI individuals and communities in and through the criminal law, it is readily apparent that the guarantee of security of the person is engaged by prohibitions on consensual sexual activity, especially when that activity is intimately and inextricably tied to identity. Being deprived of the ability to engage legally in certain forms of consensual sexual activity can impair the right to bodily integrity, personal autonomy, and dignity as well as the right to substantive equality.⁶⁶

38. The Supreme Court has repeatedly recognized the close and inseparable connection between sexual conduct and identity, noting that some practices may be so central to the identity

⁶⁵ *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66; *A.C. v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 100; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64.

⁶⁶ See Ontario’s factum at paras 123-124. Egale and TEN agree that this deprivation does not result in the same *kind* of violence as sexual assault but maintain that it nevertheless engages protected interests.

of a protected and vulnerable minority that condemnation of those practices is an affront to their human dignity and personhood.⁶⁷ That connection is not severed simply because the sexual conduct in question involves consideration.

39. The connection between sexual practices and identity, dignity, and personhood also does not depend on the practices in question being either universal among or exclusive to a particular community. Of course, most trans individuals do not engage in sex work and most sex workers are not trans – and those sex workers who are trans have diverse and varied experiences of sex work. The fact that some trans sex workers may experience sex work solely as a source of livelihood does not, however, alter the conclusion that for other trans sex workers there are other dimensions to sex work that additionally bring it within the sphere of personal autonomy protected by s 7.⁶⁸ There is nothing novel in recognizing that the same activity may or may not engage a protected interest depending on its significance to the individual.⁶⁹

PART IV – ORDER SOUGHT

40. Egale and TEN take no position on the outcome of this application but request that it be determined in accordance with these submissions, and that no costs be awarded for or against them.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 10th day of August, 2022



**Adriel Weaver & Melanie Anderson
Counsel for Egale and TEN**

⁶⁷ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 69; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 122-124; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 at para 97.

⁶⁸ Egale and TEN recognize that some cis sex workers may also experience sex work in similar ways, and that sex work engages the personal autonomy of *all* sex workers as described in the applicants' submissions.

⁶⁹ For example, cf *Malmo-Levine, supra* (no violation where consumption of marijuana is a "lifestyle choice") and *Smith, supra*; *R v Parker* (2000), 49 OR (3d) 481 (CA) (violation where consumption is of medical marijuana).

SCHEDULE “A”

LIST OF AUTHORITIES

1. [*Centre for Gender Advocacy v Attorney General of Quebec*](#), 2021 QCCS 191
2. [*Egan v Canada*](#), [1995] 2 SCR 513.
3. [*Fraser v Canada*](#), 2020 SCC 28
4. [*Little Sisters Book and Art Emporium v Canada*](#), 2000 SCC 69
5. *R v Hornick*, [2002] OJ No 1170
6. [*R v C.M.*](#) (1995), 23 OR (3d) 629 (CA)
7. [*Andrews v Law Society of British Columbia*](#), [1989] 1 SCR 143
8. [*New Brunswick \(Minister of Health and Community Services\) v G. \(J.\)*](#), [1999] 3 SCR 46
9. [*R v N.S.*](#), 2022 ONCA 160
10. [*Canada \(Attorney General\) v PHS Community Services*](#), 2011 SCC 44
11. [*Carter v Canada \(Attorney General\)*](#), 2015 SCC 5.
12. [*R v Morgentaler*](#), [1988] 1 SCR 30
13. [*R v Smith*](#), 2015 SCC 34
14. [*R v Malmo-Levine; R v Caine*](#), 2003 SCC 74
15. [*Godbout v Longueuil \(City\)*](#), [1997] 3 SCR 844
16. [*A.C. v Manitoba \(Director of Child and Family Services\)*](#), 2009 SCC 30
17. [*Carter v Canada \(Attorney General\)*](#), 2015 SCC 5
18. [*Trinity Western University v British Columbia College of Teachers*](#), 2001 SCC 31
19. [*Saskatchewan \(Human Rights Commission\) v Whatcott*](#), 2013 SCC 11
20. [*Law Society of British Columbia v Trinity Western University*](#), 2018 SCC 32
21. [*R v Parker*](#) (2000), 49 OR (3d) 481 (CA)

SCHEDULE “B”

RELEVANT STATUTES

Criminal Code of Canada, RSC 1953-1954, c 5

147 Every one who commits buggery or bestiality is guilty of an indictable offence and is liable to imprisonment for fourteen years.

149 Every one who commits an act of gross indecency with another person is guilty of an indictable offence and is liable to imprisonment for five years.

Criminal Code of Canada, RSC 1985, c C-46

Parties to offence

21 (1) Every one is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

Common intention

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

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**

**ATTORNEY GENERAL
OF CANADA**

**ATTORNEY GENERAL
OF ONTARIO ET AL**

Court File No. CV-21-00659594-0000

Applicants - and - Respondents - and -

Interveners

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE INTERVENERS,
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