

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-

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE INTERVENER
MIGRANT WORKERS ALLIANCE FOR CHANGE

Date: August 10th, 2022

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PART I: OVERVIEW

1. Despite its professed purpose of protecting marginalized communities, the impugned provisions of the *Protection of Communities and Exploited Persons Act (PCEPA)*¹ are not experienced by migrant sex workers as protection, but rather as a core part of an interwoven carceral web of laws and policies that exacerbate vulnerabilities and compounds patterns of systemic discrimination and marginalization against predominantly racialized migrant sex workers - patterns that rehearse a long history of targeting and exclusion in Canadian law.

PART II: INTERVENER’S POSITION WITH RESPECT TO THE LEGAL ISSUES

2. With respect to the legal issues, the intervener Migrant Workers Alliance for Change (MWAC) argues the following:

- a. The Court ought to adopt an intersectional lens in its s. 15(1) analysis.
- b. The discriminatory harms that flow from the application of the impugned provisions to migrant sex workers ought to be understood within a historical context of systemic discrimination and marginalization.
- c. The impugned provisions currently visit ongoing adverse and disproportionate impacts on migrant sex workers, including to their *Charter*-protected rights.

PART III: STATEMENT OF ARGUMENT

A. The Court ought to adopt an intersectional lens in its s. 15(1) analysis

i. Evidence of MWAC as an intervener cannot be understood without reference to migrant sex workers’ intersectional experiences

3. MWAC makes this intervention as a membership-based organization of migrants which engages and supports migrant sex workers who are directly impacted by the impugned provisions currently under constitutional review and have thus accumulated significant experience in understanding the connection between criminal law enforcement, immigration law enforcement, barriers to accessing to basic supports, and deportation as it pertains to migrant sex workers and other migrants who support them.²

4. “Migrant” in this case pertains directly to the status of “non-citizen”, which has been recognized as an analogous ground of discrimination under s. 15(1).³ Some migrants have permanent

¹ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [PCEPA].

² Motion Record of the Proposed Intervener: Migrant Workers Alliance for Change (10 February 2022) at para 12.

³ *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143; *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689; *Lavoie v Canada*, 2002 SCC 23 (CanLII), [2002] 1 SCR 769 at para 45.

status, but the vast majority have precarious immigration status such as temporary work visas, refugee claimant status, international students, or are excluded from status entirely (undocumented). All of MWAC's members are migrants.

5. Further, many of the migrant sex workers MWAC works with are racialized and particularly of Asian background (including Chinese, Indian, Thai, Malay, Vietnamese, and Korean).⁴ Due to the criminal inadmissibility regime in the *Immigration and Refugee Protection Act (IRPA)*⁵, for migrant sex workers, being convicted or charged with the impugned *Criminal Code*⁶ provisions may automatically trigger serious immigration consequences: immigration detention, loss of status, loss of access to refugee claims, deportation, and prohibition from re-entry to Canada in the future.⁷

6. Understanding the impact of the impugned provisions on the lives of migrant sex workers cannot be done without taking into account the unique and intersecting ways in which sex, gender, occupational status, race, national/ethnic origin, and non-citizenship status all materially inform migrants' experiences by structuring, reproducing, and exacerbating disadvantage and prejudice. For instance, it makes no sense to talk about the experiences of immigration detention and deportation after police raids without reference to non-citizenship, or about the necessity of having access to third parties and clients for language translation without reference to race and national/ethnic origin.

7. The experiences of migrant sex workers under the *PCEPA* thus cannot be captured by a 'single-axis' model of discrimination that treats each ground as exclusive from the rest. Applying an intersectional lens is therefore not only *normatively* sound, but in this case *required* to understand the very evidence adduced by migrant sex workers in the case at bar.

ii. An intersectional approach to s. 15(1) is supported by the case law

8. The feasibility of intersectionality as a doctrinal approach in understanding structural inequality in s. 15 jurisprudence has been previously recognized by the Supreme Court. In *Law* the Court held: "[t]here is no reason in principle...why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or a synthesis of, the grounds listed in s. 15(1)".⁸ Later that year, the dissenting opinion of four justices of the Supreme Court in *Corbiere*⁹ applied

⁴ Affidavit of Elene Lam, (12 July 2021) at para 12, Joint Application Record at 2219 [Lam Affidavit].

⁵ *Immigration and Refugee Protection Act*, SC 2001, c 27 at ss 33-44 [IRPA].

⁶ *Criminal Code*, RSC, 1985, c C-46 [Criminal Code].

⁷ See Factum of the Intervener: Canadian Association of Refugee Lawyers (10 August 2022).

⁸ *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 SCR 497 at para 94 [Law].

⁹ *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 SCR 203 [Corbiere].

intersectionality on the basis of race and sex in their s. 15(1) analysis of pre-existing disadvantage that the “ordinary resident” on-reserve voting requirement in the *Indian Act*¹⁰ would exacerbate:

Aboriginal women, who can be said to be doubly disadvantaged on the basis of both sex and race, are among those particularly affected by legislation relating to off-reserve band members, because of their history and circumstances in Canadian and Aboriginal society.¹¹

9. In the 2011 case of *Withler*, a unanimous Supreme Court wrote about the problems of a formalistic “mirror comparator group” approach to equality claims, arguing that it “overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination.”¹² The Court then adopts the core of the argument that MWAC is advancing in the case at bar: that not only is an intersectional lens in equality *feasible* but in many cases it is *required* to make legally visible the realities of the law as it impacts real people on the ground:

An individual’s or a group’s experience of discrimination may not be discernible with reference to just one prohibited ground of discrimination, but only in reference to a conflux of factors, any one of which taken alone might not be sufficiently revelatory of how keenly the denial of a benefit or the imposition of a burden is felt.¹³

10. The most recent and extensive articulation of an intersectional approach to s. 15(1) can be found in *Fraser*.¹⁴ There, the majority of the Supreme Court states that the very *purpose* of the s. 15(1) inquiry *includes* the intersectional protection of people “who are members of more than one socially disadvantaged group in society”.¹⁵ In applying the s.15(1) test, the majority argues that it is unnecessary to recognize a new analogous ground of family/parent status because a “robust intersectional analysis of gender and parenting — as this case shows — can be carried out under the enumerated ground of sex, by acknowledging that the uneven division of childcare responsibilities is one of the ‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to women in Canadian society.”¹⁶

11. Likewise, a robust intersectional s. 15 analysis in this case does not require that formalistically every relevant enumerated or analogous ground is advanced in order to acknowledge

¹⁰ *Indian Act*, RSC 1985, c I-5 at s 77(1) [*Indian Act*].

¹¹ *Corbiere*, *supra* note 9 at para 72.

¹² *Withler v Canada*, 2011 SCC 12 at para 58 [*Withler*].

¹³ *Ibid.*

¹⁴ *Fraser v Canada (Attorney General)*, 2020 SCC 28 [*Fraser*].

¹⁵ *Ibid* at para 77.

¹⁶ *Ibid* at para 116.

the disproportionate adverse impacts that flow from operation of the impugned provisions on migrant sex workers and to take into account evidence regarding those impacts.

B. The discriminatory harms that flow from the application of the impugned provisions to migrant sex workers ought to be understood within a historical context of systemic discrimination and marginalization

i. Chinese and Asian migrant sex workers have historically been targeted and excluded through the nexus of immigration and criminal law

12. The intersectional targeting and exclusion through law and policy of Asian migrant sex workers as a consequence of their race, gender, and occupational status has a long history in Canada. The *very first ban* in Canadian immigration law on the grounds of race and/or gender was implemented in 1885, with section 9 of the *Chinese Immigration Act* directing that “no permit to land shall be granted [...] to any Chinese woman who is known to be a prostitute.”¹⁷

13. The policy rationale for policing and excluding Chinese migrant sex workers through this law can be found in the 1885 *Report of the Royal Commission on Chinese Immigration*.¹⁸ The Report articulates in no uncertain terms the racial imaginary of Chinese migrant sex workers that justifies their exclusion, the key elements of which can be summarized as follows:

- a. Prostitution as characteristic of most Chinese women: “The Chinese are the only people coming to the continent the great bulk of whose women are prostitutes.”¹⁹ This view marked Chinese women as legitimate targets for increased surveillance and state scrutiny because of their racialized inclination for sex work.
- b. Chinese sex workers are inherently passive: “Chinese women have generally submitted passively and helplessly to this imposition, degradation, and slavery, to be sold and bought and transported at the will of their masters.”²⁰ This view justified ignoring the agency, autonomy, and self-determination of Chinese sex workers.
- c. Chinese sex workers are disparately immoral and corrupting influences: “The evidence is that Chinese prostitutes are more shameless than white women who follow the same pursuit, as though...educated for it from their cradle.”²¹ This view

¹⁷ [Chinese Immigration Act](#), 1885, c 71 at s 9. Notably, only Chinese female sex workers were targeted for a ban. Chinese immigration in general was dissuaded in the Act through the imposition of a racist \$50 head tax.

¹⁸ [Report of the Royal Commission on Chinese Immigration: Report and Evidence](#) (1885), Sessional Paper no 54a.

¹⁹ *Ibid* at lxxix.

²⁰ *Ibid* at 202.

²¹ *Ibid* at 222.

characterized Chinese sex workers' existence as undesirable and immoral elements that needed to be cleaned up and removed through exclusionary laws.

- d. Chinese sex workers are disease vectors: “Little boys, not old enough to understand the passions of the race...had been enticed by these women into their dens for the mere purpose of inoculating them with [syphilis].”²² In addition to greater public health scrutiny, this view also saw Chinese sex workers as threatening the reproductive health and purity of the white race in Canada.
- e. Chinese sex workers are inherently accepting of lower wages and compensation: “The high value attached to money by the Chinese would make their prostitutes more accessible to boys than white ones.”²³ This view is an extension of the broader racialization of Chinese migrant workers as inherently predisposed to accepting lower wages and worse working conditions, which made them *unfair competition* for white labour and justified their deportation as a policy response.

14. While much of this racial stereotyping may seem archaic, its legacies continue to live on through persistent and common tropes that Asian migrant sex workers are predisposed to being “victims of trafficking” and “ignorant” because they face “language barriers and social isolation”.²⁴ The legacy stereotype of the Asian sex worker as naive, passive, and incapable of consenting to sex work bolsters the belief that they need to be “saved” by police, resulting in police raids that predominantly target and shut down Asian-operated massage businesses and the arrest and charging of third parties and clients who associate with Asian sex workers.²⁵ Mutual aid and support networks that assist Asian sex workers are, in a similar vein, incorrectly framed as exploitative organized crime rings or otherwise suspicious illegal elements.

15. Furthermore, these racial tropes contribute to the dehumanizing stigma against Asian migrant sex workers as immoral, sinful, illegal, and corrupting elements in society. As a result, Asian migrant sex workers are legally and socially isolated, face increased barriers to accessing basic social services and support networks, which in turn leads to increased targeting by violent perpetrators, who take advantage of their state-imposed isolation and societal exclusion. The cumulative impact of this

²² *Ibid* at 217.

²³ *Ibid* at lxxix.

²⁴ Lam Affidavit, *supra* note 4, para 15 at 2220.

²⁵ *Ibid* at para 64; SWAN, “Criminalising clients endangers Asian, immigrant and migrant women in sex work” (10 September 2014) at 2, Joint Application Record at 321.

interconnected criminalization, stigma, and isolation has frequently been fatal: at least 7 Asian sex workers were murdered in the Greater Toronto Area since 2014.²⁶

ii. The marginalization and exclusion of migrant sex workers is systemic and is not experienced through *PCEPA* in isolation, but as a broad ‘carceral web’

16. As its name and preamble suggest, the *PCEPA* purports to provide for the protection of sex workers from “exploitation” as well as the “risks of violence posed to those who engage in [the industry]”.²⁷ Yet the criminal provisions in the *PCEPA* are frequently not experienced by migrant sex workers as *actual protection* from exploitation and risks of violence in sex work, but rather as a core part of the complex and multiscalar “carceral web” of laws - including federal criminal and immigration laws, provincial anti-trafficking laws, and municipal bylaws - that workers must navigate and frequently evade in order to survive.²⁸

17. The interrelated operation of these laws speak to the *systemic* nature of marginalization and exclusion that migrant sex workers experience *through the law*. Although the focus of the case at bar surrounds the constitutionality of the impugned *PCEPA* provisions, migrant sex workers do not experience the impact of these provisions in isolation from other interrelated coercive laws and associated policing. For instance, a 2019 needs assessment of 52 Asian migrant sex workers in Toronto found that the “majority of the participants reported unpleasant or unsafe experiences with law enforcement officers, including feeling discriminated against and harassed in their workspaces, as well as receiving fines and tickets for questionable infractions.”²⁹

18. One of the ways in which this carceral web operates is through criminal charges and convictions under *PCEPA*, which automatically triggers the criminal inadmissibility regime under the *IRPA*. Section 36 of the *IRPA* acts as a node by which criminal charges and convictions can result in removal of status, detention and deportation for any non-citizens.³⁰ This section contains provisions that can result in even Canadian permanent residents losing their status if they are convicted or plead guilty and receive a prison sentence of more than 6 months for a given offence (which is possible with the purchasing, material benefit, procuring or advertising offences), or if the offence that they

²⁶ *Ibid* at para 66.

²⁷ *PCEPA*, *supra* note 1 at preamble.

²⁸ Judy Fudge, et al, “[Caught in the Carceral Web: Anti-Trafficking Laws and Policies and Their Impact on Migrant Sex Workers](#)” (2021) at 5.

²⁹ Lam Affidavit, *supra* note 4 at 2242.

³⁰ *IRPA*, *supra* note 5 at s 36.

are convicted of, or plead guilty to, carries a maximum prison sentence of 10 or more years, regardless of the actual sentence (which includes the material benefit and procuring offences).³¹

19. With respect to residents with temporary (non-permanent) status, the *Immigration and Refugee Protection Regulations (IRPR)* entirely bars them from legally engaging in sex work, and more broadly any sort of employment in a wide range of industries deemed to be related to sex work.³² Notably, these sex work employment prohibitions do not apply to citizens or permanent residents, but *only* to migrants with non-permanent status. The deleterious impacts of these provisions were recognized by Parliament in June 2022, when the Standing Committee on Justice and Human Rights recommended that “the Government of Canada table legislation to repeal sections 183(1)(b.1), 196.1(a), 200(3)(g.1) and 203(2)(a) of the *Immigration and Refugee Protection Regulations*, which unfairly put migrant sex workers at elevated risk of violence and danger by making them unable to report these incidents without fear of deportation.”³³

20. Beyond the nexus of criminal and immigration laws, migrant sex workers also experience the adverse impacts of other interrelated punitive and coercive laws aimed at targeting and eliminating the sex work industry for their ostensible “protection”. For instance, migrant sex workers can lose housing from *PCEPA* investigations. The Ontario *Residential Tenancies Act* allows for eviction of tenants “if the tenant or another occupant of the rental unit commits an illegal act or carries on an illegal trade, business or occupation or permits a person to do so”.³⁴ This has resulted in migrant sex workers losing housing when the landlord discovers the tenant is involved in sex work.³⁵ Punitive municipal bylaws that try “to make it unfeasible for body rub centres to operate economically, or to remove their licenses due to too many infractions”³⁶ and exclusionary zoning requirements that isolate businesses associated with the sex industry in areas that are virtually empty and unlit in the evening, also contribute to this wider carceral web which entraps migrant sex workers.

21. While it has been suggested that the *PCEPA* is not the cause of many of the interrelated consequences that the carceral web visits upon migrant sex workers³⁷, this does not reflect lived

³¹ *Ibid* at s 36(1).

³² [Immigration and Refugee Protection Regulations](#), SOR/2002-227 at ss 183(1)(b.1), 196.1(a), 200(3)(g.1), 203(2)(a) [*IRPR*].

³³ Standing Committee on Justice and Human Rights, “[Preventing Harm in the Canadian Sex Industry: A Review of the Protection of Communities and Exploited Persons Act](#)” (June 2022), 44 Parl 1, 1st Sess at 48-49.

³⁴ *Residential Tenancies Act*, 2006, SO 2006, c 17 at s 61 [*Residential Tenancies Act*].

³⁵ Butterfly (Asian and Migrant Sex Workers Support Network), “[Submission to the House of Commons Standing Committee on Justice and Human Rights: Review of the Protection of Communities and Exploited Persons Act](#)” (February 2022) at 9 [Butterfly JUST submission].

³⁶ Fudge, et al, *supra* note 28 at 26.

³⁷ See Factum of the Intervener: Attorney General of Ontario (3 August 2022) at paras 35, 41, 44.

reality. Potential criminal law violations are frequently the “first domino” that gives rise to joint investigations and raids involving multiple law enforcement bodies against migrant sex workers³⁸. It is also the legal trigger that invokes the consequences of immigration status loss, arrest, detention, and deportation³⁹; loss of municipal licenses to work legally as a holistic health practitioner⁴⁰; and loss of housing.⁴¹ In other words, criminalization as reflected through *PCEPA* is at the very *core* of the interwoven and interdependent carceral web and its systemic impacts on migrant sex workers.

C. The impugned provisions visit adverse and disproportionate impacts on migrant sex workers, including on their *Charter*-protected rights

i. The impugned provisions produce state-sanctioned isolation which greatly diminishes access to critical support networks and social services

22. Migrant sex workers face tremendous state-sanctioned societal isolation as a result of sex work criminalization and interrelated carceral impacts. Because they are often newcomers with precarious status in a foreign country facing linguistic and cultural barriers, they usually have severely diminished access to social services and support networks due to their intersecting grounds of sex, gender, occupational status, race, national/ethnic origin, and non-citizenship status.

23. Thus, in order to survive under these conditions, migrant sex workers have a long history of creating “mutual aid” networks in their communities consisting of other migrant workers, clients, employers, family and friends who all collaborate to develop models and strategies to support workers, particularly in times of need.⁴² At times, these mutual aid networks can be life-saving: as demonstrated by during the worst of the COVID-19 pandemic, where mutual aid networks provided migrant sex workers unable to work and excluded from the Canada Emergency Response Benefit with “cash aid, housing supports and free grocery delivery” while facing ongoing criminalization that brings heavy surveillance and police raids into their everyday lives.⁴³ The impugned provisions make the work of mutual aid networks riskier, more dangerous, and impede their overall effectiveness.

³⁸ Canadian Alliance for Sex Work Law Reform and Pivot, “Joint Submission for Canada’s Review before the UN Committee on the Elimination of All Forms of Discrimination Against Women, 65th Session” (October 2016), Joint Application Record at 539; Canadian HIV/AIDS Legal Network, “The Perils of “Protection”: Sex Workers’ Experiences of Law Enforcement in Ontario” (2019) at 18, Joint Application Record at 1200 [Perils of Protection].

³⁹ Factum of the Intervener: Canadian Association of Refugee Lawyers, *supra* note 7.

⁴⁰ Fudge, et al, *supra* note 28 at 27.

⁴¹ *Residential Tenancies Act*, *supra* note 34.

⁴² Elene Lam, et al, “The Double-Edged Sword of Health and Safety: COVID-19 and the Policing and Exclusion of Migrant Asian Massage Workers in North America” (2021) 10:5 Social Sciences 157, Joint Application Record at 2959, 2964 [“Double-Edged Sword”]. Over 40% of respondents in a survey of 103 migrant sex workers in Toronto during the pandemic said that they were not able to access government support and relief.

⁴³ *Ibid* at 2964.

24. Due to ss. 286.2 (material benefit) and 286.3 (procurement), *PCEPA* further exacerbates the isolation that threatens migrant sex workers by casting a wide and indiscriminate net of criminal provisions that captures third parties who seek to aid migrant sex workers. These third parties include: receptionists who help screen clients and file paperwork, other sex workers who pool resources for personal protective equipment, drivers who transport workers and call for help when things go badly, janitorial staff who keep premises clean and hygienic, and management at sex work establishments.⁴⁴ Family members, friends, as well as other retired sex workers who provide supports can be implicated as third parties under the material benefit and procurement provisions as well. The lack of any exploitation element in these offenses aggravate the sweeping nature of these provisions, leading to charges being laid for entirely routine activities such as answering phones, booking appointments, or providing a place to work and stay.⁴⁵

25. The provisions criminalizing purchasing and communication for the purpose of purchasing under ss. 286.1 and 213(1.1) have had the impact of endangering and at times severing supportive relationships that migrant sex workers have with clients. Despite common stereotypes, most clients are just regular people seeking intimacy - there are some who are very supportive and some who are problematic and abusive.⁴⁶ For migrant sex workers, clients are also often a crucial resource, particularly as workers navigate Canadian society and systems as newcomers.⁴⁷ Clients may provide income supports to new migrants; interpret and translate; drive them to health appointments; refer them to important services and resources; help them navigate bureaucratic systems and programs; help them report labour violations, sexual assault, or robbery; and provide shelter in difficult financial times or situations of abuse.⁴⁸

26. The prohibition on advertising in s. 286.4 has made it more difficult for migrant sex workers to find one another and build resilient communities. Mutual aid organizations such as Butterfly have noted that following the enactment of *PCEPA*, Butterfly outreach workers have had a much more difficult time connecting with peers, as they depend on these advertisements to locate and provide supports to migrant sex workers. In the past, the simple act of putting up an advertisement by migrant sex workers would be assisted by friends, family and clients as workers would rely on these individuals to assist with language translations and access to technology. However, the prohibition of

⁴⁴ Lam Affidavit, *supra* note 4, para 32 at 2224.

⁴⁵ *Ibid*, para 42 at 2228.

⁴⁶ [Butterfly JUST submission](#), *supra* note 35 at 4.

⁴⁷ *Ibid*.

⁴⁸ Lam Affidavit, *supra* note 4, paras 25-27 at 2223.

advertising has prevented these third parties from helping migrant workers by making it more dangerous and legally risky to support workers.⁴⁹

27. Since the enactment of *PCEPA*, members of mutual aid networks for migrant sex workers have been investigated and criminally charged even in the absence of the exploitation.⁵⁰ This indiscriminate criminal charging and the entrenchment of sex work into the criminal regime not only forces migrant sex workers underground to avoid law enforcement, but significantly deters supporters and migrant worker peer communities from providing mutual aid. Butterfly participants have reported that despite the risk from third party provisions, those third parties who are still willing to help provide far more limited support due to fear of working too closely with them and being perceived by authorities as controlling them.⁵¹

28. Migrant sex workers are mainly racialized newcomers without pre-existing networks. Without these mutual aid networks and supportive communities surrounding them, their isolation is intensified and they are subjected to more dangerous and even deadly situations. The state-sanctioned isolation imposed by the *PCEPA* provisions on migrant sex workers and the diminished access to mutual aid and supports that results is thus a *prima facie* violation of their s. 2(d) rights to freedom of association and s. 7 rights to life, liberty, and security of the person.

ii. The impugned provisions reduce workplace safety and criminalize one of the few sources of economic livelihood for migrant sex workers

29. Exploitative working conditions exist in many industries where MWAC organizes and provides supports, including agriculture, caregiving, construction, hospitality, and sex work. Labour exploitation may involve conditions such as excessive hours of work, low wages, disrespectful behaviour from management, colleagues, and deficient working conditions such as poor heating. Rather than address the root causes of this exploitation, the criminalization of sex work encourages overregulation via criminal, immigration and other laws. This overregulation isolates workers, maintains precarious working conditions, and excludes the application of labour protections that could address exploitation at work. While in the case of sex work, the common view may associate low wages or excessive hours with exploitation and trafficking necessitating a criminal response, in

⁴⁹ *Ibid*, para 23 at 2222.

⁵⁰ *PCEPA*, *supra* note 1 at preamble.

⁵¹ [Butterfly JUST submission](#), *supra* note 35 at 4.

other migrant-heavy industries, such as agricultural work, the common view is that this as a problem of inequitable working conditions which can be improved by stronger labour protections.⁵²

30. Criminalization serves as a significant barrier to improving workplace conditions and occupational health and safety. Perpetrators take advantage of the knowledge that migrant sex workers' workplaces are surveilled and criminalized. In one case, a Butterfly member reported that her indoor place of work had been targeted by armed robbers *four times in a single week*, leading to physical injuries and an atmosphere of trepidation among the women who worked there. In the words of the member, the robbers treated the women like they were "a money machine", yet they could not call the police.⁵³ Migrant sex workers have even reported that because of the criminalization of purchase and third party involvement, some massage parlour managers prohibit the presence of condoms, given their risk of being used as evidence in inspections and prosecutions.⁵⁴

31. Due to the criminalization of most aspects of the sex work industry through *PCEPA*, migrant sex workers face many challenges in addressing abusive workplace conditions. For example, the vast majority of Butterfly participants who have been injured in the workplace have not reported these injuries or sought compensation through the law.⁵⁵ Participants echoed the refrain that *PCEPA* is the "first domino" and core of the carceral web that migrant sex workers are trapped in: many reported that due to the criminalization of sex work under *PCEPA* they had no recourse when facing other workplace conflicts, such as underpayment, mistreatment, harassment, and even violence. They feared that reporting and enforcing their legal rights would effectively be admitting their involvement in sex work businesses and invite criminal repression, which would threaten the sex worker's workplace and livelihood. The risk is even greater for migrant workers, who fear loss of immigration status and deportation.⁵⁶

32. The holistic operation of the *PCEPA* provisions - particularly those around material benefit, procurement, and purchase - is to impose *conditions of secrecy* within workplace settings that diminish workplace safety and impede collective organizing. So intense are these conditions of secrecy that even when working at the same massage parlour for instance, some migrant sex workers report that they may not disclose their real identities to one another because of the risk involved.

⁵² Tara Santini, et al, "[Migrant Sex Workers' Labour and Employment Rights](#)" (October 2017) at 4-5.

⁵³ Butterfly (Asian and Migrant Sex Workers Support Network), "Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers" (April 2018) at 24, Joint Application Record at 2295 [Behind the Rescue].

⁵⁴ Lam Affidavit, *supra* note 4, para 39, at 2226-2227.

⁵⁵ *Ibid*, para 44 at 2228.

⁵⁶ [Butterfly JUST submission](#), *supra* note 35 at 7.

When workers feel that they cannot safely share much information with one another, they also cannot share tips, resources, and strategies that are necessary to build collective power and achieve meaningful safety and security.⁵⁷

33. Under s. 286.1, many clients are now unwilling to provide their true identities and remain vague about their contact information, making it much harder for migrant sex workers and those who work with them to screen clients for safety. Since the criminal provisions distance third parties from migrant sex workers and workers from each other, workers do not have safe access to assistance from third parties and sex workers to screen clients and resolve difficult or violent situations at work.⁵⁸

34. Finally, the impact of criminalization under the *PCEPA* provisions affects the quality of employment options available and reduces the bargaining power of migrant sex workers, particularly in a context where they may have very few alternative economic options. A 2019 needs assessment of migrant sex workers in the *PCEPA* era found that many migrant sex workers voluntarily left their prior jobs in non-sex industry sectors (e.g., factories or restaurants) due to substandard working conditions, workplace injuries, and low pay in order to start working in the sex industry. Participants reported that these substandard conditions were exacerbated by factors such as age discrimination, language barriers, lack of opportunities, and refusal to recognize pre-existing credentials.⁵⁹

35. Many of the respondents reported that working in the sex industry provides a relatively stable source of employment and income, as well as free time, flexible working hours, and autonomy, which they were unable to access in their previous jobs in factories and restaurants.⁶⁰ The impugned provisions in this case effectively criminalizes one of the few sources of economic livelihood and denies self-determination for migrant sex workers who are already intersectionally marginalized in society by the material impacts of structural racism, xenophobia, and heteropatriarchy.

iii. The impugned provisions strip personal autonomy, ability to give and withdraw consent, and bodily integrity away from migrant sex workers

36. The right to security of the person under s. 7 includes a person's right to control their own bodily integrity. It is engaged where the state interferes with personal autonomy and a person's ability to control their own physical or psychological integrity.⁶¹ As mentioned in the historical legal

⁵⁷ Perils of Protection, *supra* note 39 at 31, at 1213.

⁵⁸ [Butterfly JUST Submission](#), *supra* note 35 at 5.

⁵⁹ Anna Malla, et al, "Beyond Tales of Trafficking: A Needs Assessment of Asian Migrant Sex Workers in Toronto" (2019) at 10, Joint Application Record at 2246.

⁶⁰ *Ibid* at 11, at 2247.

⁶¹ [R v Morgentaler](#), 1988 CanLII 90 (SCC), [1988] 1 SCR 30 at 56.

context, migrant and particularly Asian sex workers have long been racialized as passive victims who submit helplessly to conditions of degradation and exploitation. This racial imaginary intersects with the stigma conveyed by *PCEPA* that sex work is inherently immoral and wrong, creating a set of agency-denying assumptions that Asian migrant women in the sex industry are naive, passive, are trafficking victims, and thus need to be saved by the state.⁶²

37. The criminal prohibitions on communication, purchasing, and advertisement, are experienced by migrant sex workers as severe restrictions to their rights to articulate, give, and withdraw consent. The provisions create blanket criminalization with respect to every sex work transaction (prohibition on purchase) and the ability to articulate what services are and are not offered and on what terms and conditions (prohibitions on communication and advertisement).

38. In particular, the criminalization of advertising through s. 286.4 has impeded the ability of migrant sex workers to establish effective and ongoing consent. Once prohibitions on advertising came into force under *PCEPA*, migrant sex workers have reported that some websites shut down, increased fees, or introduced proof of identification requirements that created unique challenges for them given their non-citizen status. Prior to the prohibition on advertising, sex workers could describe themselves, the services offered and not offered, as well as price. But since advertising sexual services is now illegal, postings need to be vague. This creates barriers to consent. Butterfly participants reported that misunderstandings with clients have become more frequent, as it is not clear from the outset what services are and are not available.⁶³

39. Further, one of the knock-on effects of advertising in the sex industry is that it allows migrant sex workers to find different employers or employment opportunities when their existing working arrangements are problematic. The prohibition on advertising reduces these options and thus the ability of migrant sex workers to safely canvass alternatives to potentially unfair or unsafe working conditions, making it harder for workers to leave these work environments if they wish to. Altogether, the impact of the criminal provisions against communication, purchasing, and advertisement *prima facie* violate migrant sex workers' s. 7 rights to security of the person as well as their s. 2(b) rights to freedom of expression.

iv. The impugned provisions reduce physical safety and security of the person by increasing risk of arrest, detention, deportation, and related state violence

⁶² [Butterfly JUST Submission](#), *supra* note 35 at 2.

⁶³ Lam Affidavit, *supra* note 4, para 21, at 2222.

40. It is trite to say that migrant sex workers, who are politically, economically, and socially disenfranchised by racism, sexism, and non-citizenship, are among some of the most marginalized communities in Canada and thus ought to be protected from the “social harm” and “exploitation” that *PCEPA* purports to address through criminalizing purchase and other activities involved in sex work.⁶⁴ Yet the evidence from migrant sex workers suggest that this is not the case. Not only do the *PCEPA* provisions further socially and physically isolate migrant sex workers from community supports and prevent them from seeking help when targeted for criminal activity, police and law enforcement are in fact experienced as *one of the primary perpetrators* of violence, fear, and insecurity among migrant sex workers.

41. For instance, a 2018 survey conducted by Butterfly of 61 Asian migrant workers in spa and wellness centres in Toronto found that the community overall held significantly antagonistic views of law enforcement, with 60% of the respondents saying they had negative perceptions of bylaw enforcement and police officers. The majority of the respondents (62.2%) said that they were not likely to seek help from law enforcement. Many respondents reported that law enforcement and police officers did not respect them as workers (40%), treated them as criminals (37.8%), or unjustifiably punished them (13.3%). 24.4% viewed them as neutral, while only 15.6% viewed them in a positive light.⁶⁵

42. While respondents also reported negative aspects of working in holistic centres, overwhelmingly their main concerns were inspections and/or raids (65.5%) and being fined and charged (44.8%). Half of the respondents had been arrested, issued tickets, or received fines. Crucially, *more than one-third reported that they had been abused or harassed by bylaw enforcement or police officers*. A significant number (22%) of workers had been insulted or verbally abused, and some (12%) were physically or sexually assaulted by law enforcement officers. Participants reported incidents where law enforcement have: requested sexual favours from sex workers; searched them without warrants; seized money and valuables; and engaged in intimidation and other abuse. In one example, an officer asked a respondent to show them her underwear, searched her place without a warrant, and then issued her three tickets in one week for challenging their behaviour, demonstrating both a flagrant misuse of policing power as well as sexual and psychological harassment.⁶⁶

⁶⁴ *PCEPA*, *supra* note 1 at preamble.

⁶⁵ Elene Lam, “[Survey on Toronto Holistic Practitioners’ Experiences with Bylaw Enforcement and Police](#)” (May 2018) at 18.

⁶⁶ *Ibid* at 5.

43. As a result of criminalization of sex work under *PCEPA* and the assumption that migrant sex workers need to be “rescued”, joint law enforcement raids frequently target migrant sex workers’ places of work under the guise of combatting human trafficking. However, when these raids do not turn up what archetypal examples of exploitative pimps and passive victims, these anti-trafficking raids often transform into anti-sex worker and anti-migrant raids by which criminal and immigration sanctions are imposed on intersectionally marginalized women.⁶⁷

44. In a 2018 report that followed 18 cases of migrant sex workers’ experiences with raids and investigations conducted by Canadian law enforcement agencies, workers detailed numerous human rights violations. These violations included: arbitrary arrests and detainment (including arbitrary refusal of bail and detention used as leverage to pressure workers to “voluntarily” leave the country); degrading, cruel, and inhumane treatment (putting chains on wrists and legs, being stripped searched repeatedly, and not allowed to shower or change clothes for a week); privacy violations (being forced to disclose their sex work to friends and family when they did not want to be outed); theft of their property (including jewelry, phones, and money); and inability to access social supports (medical, interpretation, counselling, legal representation).⁶⁸ In the end, 15 of the 18 migrant women were deported.⁶⁹ These patterns show that enforcement of the impugned provisions contribute *directly* to systemic violations of the s. 7 rights of migrant sex workers to life, liberty, and security of the person.

PART IV – SUBMISSIONS ON COSTS AND ORDER REQUESTED

45. MWAC does not seek costs, asks that no costs be ordered against it, and takes no position on the ultimate outcome of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 10th DAY OF AUGUST 2022

Vincent Wan Shun Wong

Counsel for the Intervener, Migrant Workers Alliance for Change

⁶⁷ Behind the Rescue, *supra* note 53 at 4, at 2275.

⁶⁸ *Ibid* at 28-31, at 2299-2302.

⁶⁹ *Ibid* at 4, at 2275.

SCHEDULE A – TABLE OF AUTHORITIES

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