

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

**AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING),
ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, AWCEP ASIAN
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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 EQUALITY
COALITION, and WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)**

Interveners

FACTUM OF THE INTERVENERS

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August 10, 2022

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Table of Contents

PART I – OVERVIEW	14
PART II – STATEMENT OF FACTS.....	15
PART III – POINTS IN ISSUE, LAW & ARGUMENT	16
A. Purpose of the Impugned Provisions	16
B. All impugned provisions engage s. 7 by impeding the ability to negotiate consent and safer sex practices	16
C. Third party provisions engage s. 7 by preventing working conditions that protect sexual health	20
D. All impugned provisions impede access to health services.....	21
E. Infringements of s. 7 are not in accordance with the principles of fundamental justice...	24
F. All impugned provisions infringe s. 2(b) by impeding communication for the purpose of negotiating consent	26
(i) The infringement of s. 2(b) cannot be upheld under s. 1	27
SCHEDULE “A” - LIST OF AUTHORITIES	29
SCHEDULE “B” - RELEVANT LEGISLATIVE PROVISIONS	30

PART I – OVERVIEW

1. Action Canada for Sexual Health and Rights (“Action Canada”), the HIV & AIDS Legal Clinic Ontario (“HALCO”), and the Coalition des organismes communautaires québécois de lutte contre le sida (“COCQ-SIDA”; collectively, the “Sexual Health Coalition”) intervene jointly in this application to address the ways in which the impugned provisions place the health of sex workers at risk.

2. HALCO and COCQ-SIDA have experience and expertise advocating for the health and rights of people living with and most at risk of HIV. Action Canada has expertise on both the right to autonomy and the negative effects of the criminal law on access to health and reproductive care for people who sell or trade sex.

3. The Sexual Health Coalition submits that the impugned provisions, including those introduced by the *Protection of Communities and Exploited Persons Act* (the “PCEPA”), breach sex workers’ s. 7 rights to life, liberty, and security of the person under the *Canadian Charter of Rights and Freedoms* (the “Charter”) by:

- a. Impeding their ability to negotiate consent to sexual activity, including safer sex practices, which is central to personal autonomy;
- b. Preventing third parties from creating working conditions that protect sexual health;
and
- c. Impeding access to health services both by exacerbating stigma and isolating sex workers.

None of the infringements are in accordance with the principles of fundamental justice.

4. The impugned provisions also breach sex workers’ s. 2(b) rights by impeding communication for the purpose of negotiating consent to sexual activity. None of the above breaches can be saved by s. 1.

PART II – STATEMENT OF FACTS

5. The Sexual Health Coalition accepts and adopts the facts as stated by the Applicants, and specifically relies on the following evidence.

6. Canada’s international commitments to address HIV and other sexually transmitted infections (“STIs”) include its endorsement of the United Nations’ Sustainable Development Goals, as well as the Joint United Nations Program on HIV/AIDS (“UNAIDS”) and the World Health Organization’s (“WHO”) global health sector strategies to address HIV, viral hepatitis, and sexually transmitted infections.¹ Sustainable Development Goal (“SDG”) 3.3 specifically aims to end the AIDS epidemic by 2030. Both the WHO and UNAIDS have strongly endorsed decriminalization of all aspects of sex work in pursuit of this goal.² In 2020, UNAIDS proposed a new set of targets to make the achievement of SDG 3.3 possible.³ One of these targets is that “less than 10% of countries have punitive legal and policy environments that deny or limit access to services”,⁴ including that “less than 10% of countries criminalize sex work, possession of small amounts of drugs, same-sex sexual behaviour, and HIV transmission, exposure or non-disclosure by 2025.”⁵ An international study found that decriminalization of sex work would have the effect of averting 33-46% of HIV infections among female sex workers in the next decade.⁶

¹ Affidavit of Sandra Wesley, affirmed July 12, 2021, Exhibit D [Wesley Affidavit] at 1, Joint Application Record [JAR], Tab 22D, p 1857.

² Transcript of the cross-examination of Andrea Krüsi, held April 19, 2022 [Krüsi Cross], Exhibit 14 at 2, JAR, Tab 56.14, p 5209; Krüsi Cross, Exhibit 17 at 12, JAR, Tab 56.17, p 5297.

³ Wesley Affidavit, Exhibit B, p 3, JAR, Tab 22, p 2050; Reply Affidavit of Sandra Wesley, affirmed January 25, 2022, Exhibit B [Wesley Reply, Exhibit B] at 3, JAR, Tab 23B, p 2050.

⁴ Wesley Reply, Exhibit B at 44, JAR, Tab 23B, p 2091.

⁵ Wesley Reply, Exhibit B at 59, JAR, Tab 23B, p 2106.

⁶ Krüsi Cross, Exhibit 17, JAR, Tab 56.17, p 5287; Kate Shannon et al, “Global epidemiology of HIV among female sex workers: influence of structural determinants” (2015) 385:9962 *The Lancet* 55 at 56, DOI: <[0.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4)> [perma.cc/MZ5M-KH24].

PART III – POINTS IN ISSUE, LAW & ARGUMENT

A. Purpose of the Impugned Provisions

7. The purposes of the impugned provisions include protecting the health and safety of sex workers. Most of the impugned provisions challenged in this case were introduced by the PCEPA as a direct response to the Supreme Court of Canada’s decision in *Attorney General of Canada v Bedford*.⁷ The Court of Appeal for Ontario in *R v NS*, a challenge to some of the impugned provisions, identified one of the purposes of the PCEPA as ensuring that people who provide their sexual services for consideration “can avail themselves of the safety-enhancing measures identified in *Bedford*.”⁸ *Bedford* identified the risk of contracting HIV and other STIs as a primary health and safety concern against which sex workers were entitled to protect themselves.⁹ Even if this Court adopts only the limited safety-related purpose identified in *NS*, the Sexual Health Coalition submits that protections against HIV and other STI transmission fall within the ambit of the safety-enhancing measures Parliament intended to allow.

B. All impugned provisions engage s. 7 by impeding the ability to negotiate consent and safer sex practices

8. The impugned provisions engage the right to liberty. Liberty includes “the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference” where such choices go “to the core of what it means to enjoy individual dignity and independence”.¹⁰ There are few decisions more inherently private and

⁷ *R v NS*, [2022 ONCA 160](#) at [para 62](#) [*NS*]; See also the *Protection of Communities and Exploited Persons Act*, [SC 2014 c 25](#) [PCEPA] extended title: *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.

⁸ *NS* at [para 63](#).

⁹ *Canada (Attorney General) v Bedford*, [2013 SCC 72](#) at [paras 64, 71](#) [*Bedford*].

¹⁰ *Godbout v Longueuil (City)*, [\[1997\] 3 SCR 844](#) at [para 66](#); See also *R v Morgentaler*, [\[1988\] 1 SCR 30](#) at [166, 171](#). [*Morgentaler*]; *B (R.) v Children’s Aid Society of Metropolitan Toronto*, [\[1995\] 1 SCR 315](#) at [para 80](#); *Blencoe v. British Columbia (Human Rights Commission)*, [\[2000\] 2 SCR 307](#) at [para 49](#).

central to personal autonomy and dignity than the choice of who to have sex with and how.¹¹

Consent is also instrumentally important to ensure sex workers can insist on safer sex practices, including the use of condoms, to reduce the risk of HIV, other STIs, and unwanted pregnancy.

9. All persons have the right to place conditions on the sexual activity in which they will engage. The impugned provisions place limits on sex workers' ability to negotiate those conditions. Contrary to the Respondent's assertion, the personal choice at issue is not the choice of occupation.¹² Neither is the dispute about an affirmative right to engage in commercial sexual transactions, as the Attorney General of Ontario asserts.¹³ At issue is the fundamental personal choice of who to have sex with and under what conditions.

10. The impugned provisions also engage the right to security of the person. "Personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these."¹⁴ Parliament has affirmed the importance of sexual consent to "promote gender equality and protect individuals' personal autonomy to make choices about their bodies and whether or not to engage in sexual activity".¹⁵ In *Bedford*, the Supreme Court of Canada recognized that impeding preventive health measures, including the ability to negotiate condom use, engaged security of the person.¹⁶ Recently, it also recognized that the use of a condom is part of the "sexual activity in question" and that negotiating condom use can be central to negotiating consent to sexual activity.¹⁷

¹¹ *R v Kirkpatrick*, [2022 SCC 33](#) at [para 51](#) [*Kirkpatrick*].

¹² Factum of the Respondent at para 107.

¹³ Factum of the Attorney General of Ontario at paras 123-124.

¹⁴ *Rodriguez v British Columbia (Attorney General)*, [\[1993\] 3 SCR 519](#) at [587-588](#).

¹⁵ *Kirkpatrick* at [para 30](#).

¹⁶ *Bedford* at [paras 64, 71](#).

¹⁷ *Kirkpatrick* at [paras 49, 63-64](#) and [104](#).

11. Each of the impugned provisions directly impede the ability of sex workers to negotiate consent, and specifically to negotiate safer sex precautions.¹⁸ This increases the risk of HIV, other STIs, and unwanted pregnancy. Where the law creates a risk to health by preventing access to health-protecting measures, it engages s. 7.¹⁹ The fact that immunities may apply to sex workers involved in selling their own sexual services does not put the rights infringements outside the scope of s. 7. The Supreme Court of Canada 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.²⁰ Moreover, the infringements of sex workers' liberty and security of the person outlined above go beyond the risk of imprisonment.

12. The purchasing provision (s. 286.1(1)) impedes the ability to negotiate safer sex practices by criminalizing communication for the purpose of purchasing sex, making clients reluctant to engage in explicit conversations about the conditions of the exchange in advance for fear that the conversation could attract criminal liability.²¹ According to Dr. Benoit, "the ability to negotiate over the terms and conditions of the sexual services offered and sought before meeting in person is linked to workers feeling more autonomy over sexual health practices and feeling more empowered compared to those whose first encounter with clients is face-to-face."²²

¹⁸ Affidavit of Valerie Scott, affirmed July 10, 2021 at para 44, JAR, Tab 15, p 1649; Public Affidavit of Alessa Mason, affirmed July 13, 2021 [Mason Affidavit] at para 26, JAR, Tab 19, pp 1706-7; Benoit Expert Report at 15, JAR, Tab 42B, pp 3083.

¹⁹ *Canada (Attorney General) v PHS Community Services*, [2011 SCC 44](#) at [para 93](#) [PHS].

²⁰ PHS at [para 91](#); *Carter v Canada (Attorney General)*, [2015 SCC 5](#); See also *Morgentaler*; *R v Smith*, [2015 SCC 34](#).

²¹ Expert Report of Dr. Andrea Krüsi dated July 13, 2021, [Krüsi Expert Report] at 27-29, JAR, Tab 54B, pp 4797-9, citing Andrea Krüsi et al, "Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study" (2014) 4:6 *BMJ Open* e005191 (JAR, Tab 54B, p 4826), DOI: <[10.1136/bmjopen-2014-00519](#)> [[perma.cc/6489-WXXY](#)]; Affidavit of Monica Forrester, affirmed July 13, 2021 [Forrester Affidavit] at paras 31-32, JAR, Tab 12, pp 1571-2; Mason Affidavit at paras 10, 12, JAR, Tab 19, p 1703; Affidavit of Elene Lam, affirmed July 12, 2021 [Lam Affidavit] at para 31, JAR, Tab 27, p 2224; Affidavit of Jenn Clamen of the Canadian Alliance for Sex Work Law Reform, affirmed July 13, 2021 [Clamen Affidavit] at paras 69-70, JAR, Tab 10, pp 178-9.

²² Expert Report of Dr. Cecilia Benoit dated July 13, 2021 [Benoit Expert Report] at 13-14, JAR, Tab 42B, pp 3081-2.

13. The public communication provisions (ss. 213(1) and (1.1)), in combination with the purchasing provision, force rushed conversations in outdoor settings that are not conducive to clearly establishing consent and conditions.²³ The advertising provision (s. 286.4) inhibits sex workers' ability to clearly communicate the services they do and do not provide, including requirements such as condom use, because advertisements must be vague.²⁴ The criminalization of third parties under the material benefit (286.2(1)) and procuring (286.3(1)) provisions also limit the ability of third parties to assist sex workers in communicating and negotiating the terms of the interaction, including safer sex requirements, to clients in advance, as explained further below.²⁵

14. The rights infringements that result from the criminalization of sex work parallel the historical criminalization of abortion in Canada. The circumstances that lead people to seek an abortion, or to sell or trade sex, are complex and can be constrained by economic, social and interpersonal forces. Individuals who choose to seek an abortion may experience coercion and limited choices. Decriminalizing abortion does not equate to supporting reproductive coercion or the structural inequalities that may limit a person's options. Instead, recognizing the agency of individuals to make fundamental decisions about their own bodies is especially important in circumstances where their choices are constrained.²⁶ This is equally true whether applied to abortion or selling or exchanging sex. Moreover, just as criminalizing abortion did not stop women from seeking abortion but instead made the procedure less safe (and thereby violated

²³ Expert Report of Dr. Chris Bruckert, affirmed July 13, 2021 [Bruckert Expert Report] at 9, 31, JAR, Tab 45B, pp 3670, 3692; Transcript of the cross-examination of Dr. Chris Bruckert, held April 14, 2022 [Bruckert Cross] at q 337-338, JAR, Tab 47 at p 3779; Lam Affidavit at para 31, JAR, Tab 27, p 2224; Affidavit of Ellie Ade Kur, affirmed July 12, 2021 [Ade Kur Affidavit] at para 29, JAR, Tab 29, p 2368; Clamen Affidavit at paras 59-60, 63, 67, JAR, Tab 10, pp 176-8.

²⁴ Bruckert Expert Report at 37, JAR, Tab 45B, p 3698; Forrester Affidavit at paras 57, JAR, Tab 12, p 1578; Lam Affidavit at paras 22-23, JAR, Tab 27, p 2222; Ade Kur Affidavit at para 31, JAR, Tab 29 p 2369; Clamen Affidavit at paras 89, 93, JAR, Tab 10, pp 185-6.

²⁵ Bruckert Expert Report at 23-24, 31 JAR, Tab 45B, pp 3684-5, 3692; Krüsi Expert Report at 43, JAR, Tab 54B, p 4813; Clamen Affidavit at para 79, JAR, Tab 10, p 182.

²⁶ Benoit Expert Report at 8, JAR, Tab 42B, p 3076.

s. 7),²⁷ so too do the impugned provisions increase the risk of HIV, other STIs, and unplanned pregnancy while failing to eliminate sex work. As the Supreme Court held in *R v Morgentaler* when it struck down the criminal prohibition on abortion, “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person”.²⁸

15. Regardless of this court’s decision on whether selling one’s own sexual services is now illegal in Canada (and the Sexual Health Coalition adopts the Applicant’s assertion that it is a permitted activity),²⁹ Charter rights do not end where criminalization begins. In *PHS Community Services*, the Supreme Court of Canada recognized that although Parliament could choose to criminalize drug use, “when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter”.³⁰

C. Third party provisions engage s. 7 by preventing working conditions that protect sexual health

16. The third party provisions that prohibit receiving a material benefit from selling sexual services (286.2(1)) and recruiting or procuring a person to provide sexual services (286.3(1)) both engage sex workers’ right to security of the person. The evidence establishes that access to administrative and security services from third parties can improve sex workers’ occupational health and safety.³¹ However, the third party provisions prevent employers from developing and implementing safer sex policies and other workplace health and safety practices for their

²⁷ *Morgentaler* at [58-59](#).

²⁸ *Morgentaler* at [56](#).

²⁹ Factum of the Applicants at paras 197-198.

³⁰ *PHS* at [paras 102, 105](#).

³¹ Krüsi Expert Report at 45, JAR, Tab 54B, p 4815 citing Bronwyn McBride et al. “Third Parties (Venue Owners, Managers, Security, etc.) and Access to Occupational Health and Safety Among Sex Workers in a Canadian Setting: 2010-2016.” (2019) 109: 5 *American journal of public health* 792-798, (Krüsi Cross, JAR, Tab 56.12, p 5192) DOI: <[10.2105/AJPH.2019.304994](https://doi.org/10.2105/AJPH.2019.304994)> [perma.cc/TZ5J-FLUZ].

workers.³² Imposing even beneficial policies could be classified as “exercising control, direction or influence” over sex workers.³³ Such policies implemented in the context of a commercial enterprise would not be exempt under the material benefit provision due to 286.2(5)(e). This creates a risk of criminal liability for third parties.³⁴

17. The evidence establishes that third parties also avoid facilitating STI testing, providing condoms, other safer sex materials or contraceptives, or keep them hidden, for fear that these would implicate them in an offence under PCEPA during a raid or inspection.³⁵ In contrast, following decriminalization in New Zealand, Dr. Abel’s research found that brothels became more likely to display safer sex information and to have condoms available on the premises.³⁶

18. The third party provisions engage sex workers’ right to security of the person because they prevent third parties from playing safety-enhancing roles with respect to sexual health, which interferes with sex workers’ bodily integrity and puts their health at risk.

D. All impugned provisions impede access to health services

19. The impugned provisions exacerbate the stigma around sex work and the isolation of sex workers, both of which impede access to health services.³⁷ By looking to “reduce, and to the greatest extent possible eliminate, the commercial sex industry³⁸”, the approach underlying

³² Krüsi Expert Report at 42, JAR, Tab 54B, p 4812 citing S Anderson et al, “Condoms and sexual health education as evidence: impact of criminalization of in-call venues and managers on migrant sex workers access to HIV/STI prevention in a Canadian setting. *BMC international health and human rights*” (2016) 16:1 *BMC international health and human rights* 1-10 (JAR, Tab 54B, p 4812, footnote 40), DOI: <doi.org/10.1186%2Fs12914-016-0104-0> [perma.cc/NQ7W-4EVE]; Ade Kur Affidavit at paras 39-40 JAR, Tab 29 p 2371.

³³ *Criminal Code*, [RSC 1985 c C-46](#), s. [286.3\(1\)](#) [Code].

³⁴ *Code*, [ss. 286.2\(1\), \(5\), 286.3\(1\)](#).

³⁵ Bruckert Expert Report at 23-24, 31 JAR, TAB 45B, pp 3684-5, 3692; Krüsi Expert Report at 44, JAR, Tab 54B, p 4814; Ade Kur Affidavit at para 39, JAR, Tab 29 p 2371; Clamen Affidavit at para 84, JAR, Tab 10, p 183; Lam Affidavit at para 39, JAR, Tab 27, pp 2226-7.

³⁶ Expert Report of Dr. Gillian Abel dated July 11, 2021 [Abel Expert Report], Exhibit B at 30, 32, JAR, Tab 57B, pp 5444, 5446. In Dr. Abel’s post-decriminalization survey, 96% of brothel-based sex workers reported always using condoms in the previous 12 months.

³⁷ Dr. Cecilia Benoit defines stigma as a phenomena which separates individuals from others based on socially given judgments and reduces the bearer from a complete, accepted person to a tainted and discounted one: Benoit Expert Report at 17, JAR, Tab 42B, p 3085.

³⁸ Factum of the Respondent at para 94.

PCEPA conveys the message that sex work is immoral and wrong and perpetuates the stigma associated with sex work, including that it is an inherently risky occupation.³⁹

20. The evidence clearly demonstrates that sex workers avoid seeking healthcare services due to stigmatization, concerns about discrimination, and judgemental services.⁴⁰ Those who do seek healthcare services may avoid being forthright to avoid inappropriate assumptions about their work, including drug use, exploitative partners and unsafe sex practices.⁴¹ Dr. Benoit reports that 40% percent of sex workers who shared their occupation with a healthcare provider experienced negative treatment.⁴² Providers are also more likely to focus on the involvement in sex work rather than the actual medical issues for which the sex worker sought care.⁴³

21. Conversely, legalization can help normalize sex work and decrease stigma.⁴⁴ Sex workers in legalized and decriminalized countries demonstrate improved health outcomes, including awareness of health conditions and risk factors.⁴⁵

22. The criminalization of sex work and related activities also makes health outreach more difficult by keeping people who sell or trade sex isolated and fearful of authorities. The public

³⁹ Lam Affidavit at para 62, JAR, Tab 27, p 2234; Krüsi Expert Report at 51-52, JAR, Tab 54B, pp 4821-2.

⁴⁰ Benoit Expert Report at 13, JAR, Tab 42B, p 3081; Wesley Affidavit at para 67, JAR, Tab 22, p 1766; Wesley Reply at para 29, JAR, Tab 23, p 1903; Affidavit of Danielle Cooley, affirmed July 9, 2021 [Cooley Affidavit] at para 27, JAR, Tab 31, p 2445; Clamen Affidavit at para 121, JAR, Tab 10, p 194.

⁴¹ Bruckert Expert Report at 41 JAR, Tab 45B, p 3702; Affidavit of Jane X, affirmed July 10, 2021 [Jane X Affidavit] at paras 33-34, JAR, Tab 17, pp 1681-2; Clamen Affidavit at para 122, JAR, Tab 10, p 194; Mason Affidavit at para 42, JAR, Tab 19, pp 1710; Wesley Affidavit at para 74, JAR, Tab 22, p 1769; Forrester Affidavit, JAR, Tab 12, p 1579.

⁴² Benoit Expert Report at 14, JAR, Tab 42B, p 3082, citing Benoit, C. (2019). Canadian sex workers weigh the costs and benefits of disclosing their occupational status to health providers. *Sexuality Research and Social Policy* 16 (3), 329–341.

⁴³ Wesley Affidavit at para 74, JAR, Tab 22, p 1769; Wesley Reply at para 29, JAR, Tab 23, p 1903; Forrester Affidavit, JAR, Tab 12, p 1579; Ade Kur Affidavit at paras 47-48, JAR, Tab 29 p 2373; Jane X Affidavit at para 34, JAR, Tab 17, pp 1681-82.

⁴⁴ Transcript of the re-examination of Ronald Weitzer, held May 4, 2022 at q 542 , JAR, Tab 63, p 5934

⁴⁵ Abel Expert Report, JAR, Tab 57B, p 5442; Transcript of the re-examination of Dr. Cecilia Benoit, held April 25, 2022 at q 802, p 266, ln. 18-23, JAR, Tab 44, p 3193; Reply Affidavit of Ronald Weitzer, affirmed January 26, 2022, Exhibit C at para 9, JAR, Tab 61, p 5649 citing Jessica McCann, Gemma Crawford, and Jonathan Hallett, “Sex Worker Health Outcomes in High-Income Countries of Varied Regulatory Environments: A Systematic Review,” (2021) 18:8 *International Journal of Environmental Research and Public Health* 1- 16, (JAR, Tab 61C, p 5649, footnote 5) DOI: <<https://doi.org/10.3390/ijerph18083956>> [perma.cc/5UM9-QXSA].

communication provisions (ss. 213(1) and (1.1)) and the purchasing provision (286.1(1)) displace sex workers and clients to isolated, remote, and unfamiliar areas to evade law enforcement.⁴⁶ This weakens informal support networks among sex workers and makes it harder for frontline service providers or outreach workers to maintain contact with sex workers.⁴⁷ Criminalizing clients and third parties also restricts the safety of worksite options, including by preventing the establishment of “in-call locations” for fear of coming to the attention of authorities, even though they are proven to be the safest sex work venue.⁴⁸

23. By exacerbating the stigmatization and isolation of sex workers, the impugned provisions create barriers impeding sex workers’ access to services, including counseling, outreach, protection, sexual and reproductive health services, HIV and STI prevention, testing, treatment, and care. The Public Health Agency of Canada (“PHAC”) specifically identified the criminalization of the purchase and trade of sex as a barrier to positive health outcomes of people living with, or at risk of, sexually transmitted and blood borne infections.⁴⁹ It recommends to “[r]eview and revise laws, policies, and programs that affect determinants of health leading to an increased risk of transmission or affect the effectiveness of related programs and services”.⁵⁰

24. The criminalization of sex work and related activities pushes sex workers away from services, including health care services. The impairment to health does not come from engaging in sex work *per se* but rather comes from the criminalization of sex work and related activities that forces sex workers to work in risky circumstances fuelled by stigma and isolation. State action that

⁴⁶ Clamen Affidavit at paras 67, 71, JAR, Tab 10, pp 178-9; Ade Kur Affidavit at para 30, JAR, Tab 29, p 2368-9; Krüsi Expert Report at 28, JAR, Tab 54B, p 4798; Bruckert Expert Report at 9, JAR, Tab 45B, p 3670; Forrester Affidavit, JAR, Tab 12, pp 1574-5; Cooley Affidavit at para 25, JAR, Tab 31, p 2445.

⁴⁷ Clamen Affidavit at paras 67, 71, JAR, Tab 10, pp 178-179; Ade Kur Affidavit at para 40, JAR, Tab 29 p 2371.

⁴⁸ Bruckert Expert Report at 33-34 JAR, Tab 45B, pp 1952-3.

⁴⁹ Wesley Affidavit, Exhibit D, JAR, Tab 22D, p 1853; Public Health Canada, *Reducing the health impact of sexually transmitted and blood-borne infections in Canada by 2030: A pan-Canadian STBBI framework for action*, (Ottawa, Ontario) 2018, online (pdf): <www.canada.ca/en/public-health/services/reports-publications/accelerating-our-response-five-year-action-plan-sexually-transmitted-blood-borne-infections.html> [perma.cc/Z7PX-KZEF].

⁵⁰ *Ibid.*

is likely to impair an individual's health and access to health services implicates both the right to security of the person and the right to life under s. 7.⁵¹

E. Infringements of s. 7 are not in accordance with the principles of fundamental justice

25. The infringements of the right to life, liberty, and security of the person of individuals who sell or trade sex are both overbroad and grossly disproportionate. The parties agree that one object of the PCEPA is to enable sex workers to protect their safety until such time as sex work is eradicated. That object must apply to all of the impugned provisions as all provisions operate together. If this court adopts the limited safety-related purpose identified in *NS* and discussed above at paragraph 7, precautions against the transmission of infectious diseases and unwanted pregnancy certainly fall within the ambit of the safety-enhancing measures identified in *Bedford* that Parliament intended to allow.

26. The principle of overbreadth applies when a law captures some conduct that bears no relation to its purpose.⁵² The Supreme Court of Canada explained the principle of overbreadth in *Bedford*: “[t]he evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore “inconsistent” with the objective.”⁵³ The impugned provisions actively undermine the PCEPA's safety-related objective by capturing and prohibiting conduct that could protect the health and safety of people who sell and trade sex. This overreach is especially damaging for sex workers who have experienced exploitation and constrained choice and have few options to protect their health – the very people the PCEPA purports to protect.

27. The Respondent's police witnesses admit that the communication provisions are overbroad.⁵⁴ The Parliamentary Standing Committee on Justice and Human Rights on the PCEPA

⁵¹ *PHS* at [para 93](#); *Rodriguez* at [587-588](#); *Chaoulli v Quebec (Attorney General)*, [\[2005\] 1 SCR 791](#) at [para 43](#); *Morgentaler* at [59](#).

⁵² *Bedford* at [para 112](#).

⁵³ *Bedford* at [para 119](#).

⁵⁴ Transcript of the cross-examination of David Correa, held April 6, 2022, at q 70, JAR, Tab 98, p 10194-5.

was also concerned with the overly broad manner in which the impugned provisions operate, concluding that “a broad group of sex workers, clients and others are subject to criminalization, despite a lack of exploitation”.⁵⁵ For example, the third party provisions go beyond preventing exploitation by prohibiting *safety-enhancing* third party conduct, like establishing and communicating safer sex requirements in sex work establishments, providing condoms and other safer sex materials, and providing training to workers on safer sex practices.⁵⁶ This is precisely the type of non-exploitative conduct the Supreme Court of Canada identified in *Bedford* as overbroad with respect to the living on the avails provision.⁵⁷

28. The principle against gross disproportionality applies where the seriousness of the deprivation is totally out of sync with the objective of the measure.⁵⁸ A grossly disproportionate effect on one person is sufficient to violate this principle.⁵⁹ For example, if even one person is infected with HIV because the impugned provisions directly impeded their ability to insist on safer sex practices, one person’s autonomy is undermined by the inability to otherwise establish who to have sex with and under what conditions, or one person is unable to access HIV testing and treatment due to isolation and stigma caused by the impugned provisions, the law’s effects would be grossly disproportionate.

29. The evidence shows that the impugned provisions directly affect sex workers’ ability to protect themselves against HIV and other STIs and access health care.⁶⁰ Dr. Krüsi’s expert report cites two systematic reviews that establish an independent link between criminalization of sex

⁵⁵ Report of the Standing Committee on Justice and Human Rights, 44th Parl 1st sess, *Preventing Harm in the Canadian Sex Industry: A review of the Protection of Communities and Exploited Persons Act* (22 June 2022) at 40, online: <www.ourcommons.ca/DocumentViewer/en/44-1/JUST/report-4/>.

⁵⁶ Krüsi Expert Report at 41-42, JAR, Tab 54B, pp 4811-2; Forrester Affidavit at para 50, JAR, Tab 12, p 1576.

⁵⁷ *Bedford* at [para 142](#).

⁵⁸ *Bedford* at [para 120](#).

⁵⁹ *Bedford* at [para 122](#).

⁶⁰ Wesley Affidavit, Exhibit C at 20, JAR, Tab 22C, p 1839: Ville de Montreal, “Ville sans Sida Montreal: Common Action Plan 2019-2020” (November 2018), online (pdf): <www.montrealsanssida.ca/wp-content/uploads/2018/11/Plan_d-Action_commun_2019-2020.pdf> [perma.cc/BT4T-ZNKW].

work, poorer access to health and social care services, and higher rates of HIV infection among sex workers.⁶¹ This internationally established link has proven true for the individual affiants as outlined above. Their evidence uniformly attests to the ways in which the impugned provisions, individually and in combination, impede sex workers in asserting their personal autonomy, including negotiating consent to safer sex practices, and accessing appropriate health services.

F. All impugned provisions infringe s. 2(b) by impeding communication for the purpose of negotiating consent

30. All of the provisions, taken as a comprehensive legislative scheme, combine to infringe s. 2(b) of the Charter in a manner that cannot be justified. The Respondent and the Attorney General of Ontario rightly concede that the communication provisions (ss. 213(1) and (1.1)) and the advertising provision (s. 286.4) infringe sex workers' s. 2(b) rights, and the Respondent concedes that s. 286.1(1) constitutes a *prima facie* breach of purchasers' s. 2(b) rights.⁶² Although the Sexual Health Coalition submits that all impugned provisions infringe freedom of expression, it will focus its submissions on the ways in which the communication, purchasing and advertising provisions conspire to limit the free expression of people who sell or trade sex.

31. The type of speech being curtailed is not merely commercial expression. The Supreme Court of Canada in *R v Keegstra* directs courts to apply a contextual, rather than categorical, approach to freedom of expression.⁶³ As Justice Himel found in the application decision in *Bedford*, the purpose of the communication between sex workers and clients includes guarding

⁶¹ Krüsi Expert Report at 17, JAR, Tab 54B, p 4787 citing Lucy Platt et al, "Associations between sex work laws and sex workers' health: A systematic review and meta-analysis of quantitative and qualitative studies" (2018) 15:12 *PLoS medicine* e1002680 (Krüsi Cross, JAR, Tab 56.16, p 5232), DOI: <doi.org/10.1371/journal.pmed.1002680> [perma.cc/SAD5-TQHK]; Kate Shannon et al, "Global epidemiology of HIV among female sex workers: influence of structural determinants" (2015) 385:9962 *The Lancet* 55-71, (Krüsi Cross, JAR, Tab 56.17, p 5286), DOI: <[0.1016/S0140-6736\(14\)60931-4](https://doi.org/10.1016/S0140-6736(14)60931-4)> [perma.cc/MZ5M-KH24].

⁶² Factum of the Respondent at para 169.

⁶³ *R v Keegstra*, [1990] 3 SCR 697 at 766-767.

personal autonomy, bodily integrity, and personal security, which are “at or near the core of expression s. 2(b) of the Charter seeks to protect”.⁶⁴ Contrary to the findings in the *Prostitution Reference*⁶⁵ and *R v NS*, the ultimate commercial nature of the interaction is incidental to the purpose of the speech that precedes it.⁶⁶

32. As described above, the evidence establishes that frank and detailed communication prior to the sexual encounter is essential to establish consent, including agreement to safer sex practices. Given the vital purposes of the communication, the burden on the Respondent to justify the infringement is particularly high.

(i) *The infringement of s. 2(b) cannot be upheld under s. 1*

33. The Sexual Health Coalition will focus its submissions on the final stage of the *Oakes* test. Any benefits of the impugned provisions (which have not been demonstrated) are not worth the costs to sex workers, and particularly to sex workers living with HIV.

34. Considering the effect of each provision in isolation, as the Respondent does, is an artificial approach that downplays the real-world harms of the provisions when they inevitably work in combination. The advertising provision forces the use of vague language, which cannot include requirements for safer sex practices or limits on the services offered.⁶⁷ A later opportunity to discuss conditions of consent in more detail is illusory. The purchasing and public communication provisions force rushed communications in which clients are unwilling to have explicit

⁶⁴ *Bedford v Attorney General of Canada*, [2010 ONSC 4264](#) at paras 460-462.

⁶⁵ *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [\[1990\] 1 SCR 1123](#)

⁶⁶ We adopt the Canadian Civil Liberties Association’s submissions on section 2(b), and specifically its submissions on the effect of the *Prostitution Reference* on the s. 2(b) analysis.

⁶⁷ Bruckert Expert Report at 37, JAR, Tab 45B, p 3698; Forrester Affidavit at para 57, JAR, Tab 12, p 1578; Lam Affidavit at paras 22-23, JAR, Tab 27, p 2222; Ade Kur Affidavit at para 31, JAR, Tab 29, p 2369; Clamen Affidavit at paras 89, 93, JAR, Tab 10, pp 185-6.

conversations because communication for the purpose of purchasing is illegal,⁶⁸ and sex workers are unable to take the time they need to negotiate consent for fear of prosecution under s. 213.⁶⁹

35. For sex workers living with HIV, the consequences of constrained expression are especially dire. In Canada, individuals living with HIV can be convicted of aggravated sexual assault, among other offences, for not disclosing their HIV positive status to their sexual partner prior to sexual activity that poses a realistic possibility of transmission.⁷⁰ In some circumstances, an individual is required by law to either disclose their HIV status prior to a sexual encounter or negotiate the use of a condom in order to avoid conviction.⁷¹ Limiting this type of expression not only engages their liberty, but constitutes a serious deleterious effect. The impugned provisions make it difficult, if not impossible, for sex workers to safely disclose their HIV status to clients or negotiate condoms.

PART IV – ORDER REQUESTED

36. The Sexual Health Coalition takes no position on the outcome of this application but respectfully requests that it be determined in accordance with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 10th day of August, 2022



per: Robin Nobleman, Léa Pelletier-Marcotte
& Ryan Peck
Counsel for the Sexual Health Coalition

⁶⁸ Krüsi Expert Report at 27-29, JAR, Tab 54B, pp 4797-9 citing Andrea Krüsi et al, “Criminalisation of clients: reproducing vulnerabilities for violence and poor health among street-based sex workers in Canada—a qualitative study” (2014) 4:6 *BMJ Open* e005191 (JAR, Tab 54B, p 4826), DOI: <[10.1136/bmjopen-2014-00519](https://doi.org/10.1136/bmjopen-2014-00519)> [perma.cc/6489-WXXY]; Forrester Affidavit at paras 31-32, JAR, Tab 12, pp 1571-2; Mason Affidavit at paras 10, 12, JAR, Tab 19, p 1703; Lam Affidavit at para 31, JAR, Tab 27, p 2224; Clamen Affidavit at paras 69-70, JAR, Tab 10, pp 178-9.

⁶⁹ Bruckert Expert Report at 9, 31 JAR, Tab 45B, pp 3670, 3692; Bruckert Cross at q 337-338, JAR, Tab 47 at p 3779; Lam Affidavit at para 31, JAR, Tab 27, p 2224; Ade Kur Affidavit at para 29, JAR, Tab 29, p 2368; Clamen Affidavit at paras 59-60, 63, 67, JAR, Tab 10, pp 176-8.

⁷⁰ *R v Mabior*, [2012 SCC 47](#) at [para 4](#).

⁷¹ *Ibid.*

SCHEDULE “A” - LIST OF AUTHORITIES

1. *B (R.) v Children’s Aid Society of Metropolitan Toronto*, [\[1995\] 1 SCR 315](#)
2. *Bedford v Attorney General of Canada*, [2010 ONSC 4264](#) (Ont Sup Ct)
3. *Blencoe v. British Columbia (Human Rights Commission)*, [\[2000\] 2 SCR 307](#)
4. *Canada (Attorney General) v Bedford*, [2013 SCC 72](#)
5. *Canada (Attorney General) v PHS Community Services*, [2011 SCC 44](#)
6. *Carter v Canada (Attorney General)*, [2015 SCC 5](#)
7. *Chaoulli v Quebec (Attorney General)*, [\[2005\] 1 SCR 791](#)
8. *Godbout v Longueuil (City)*, [\[1997\] 3 SCR 844](#)
9. *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [\[1990\] 1 SCR 1123](#)
10. *R v JTC*, [2013 NSPC 88](#)
11. *R v Keegstra*, [\[1990\] 3 SCR 697](#)
12. *R v Mabior*, [2012 SCC 47](#)
13. *R v Morgentaler*, [\[1988\] 1 SCR 30](#)
14. *R v NS*, [2022 ONCA 160](#)
15. *R v Smith*, [2015 SCC 34](#)
16. *Rodriguez v British Columbia (Attorney General)*, [\[1993\] 3 SCR 519](#)

SCHEDULE “B” - RELEVANT LEGISLATIVE PROVISIONS

Criminal Code, RSC, 1985 c C-46, [s. 213](#), [s 286.1](#), [s 286.2](#), [s. 286.3\(1\)](#), [s. 286.4](#), [s 286.5](#)

Stopping or impeding traffic

213 (1) Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,

- (a) stops or attempts to stop any motor vehicle; or
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.
- (c) [Repealed, 2014, c. 25, s. 15]

Communicating to provide sexual services for consideration

(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person — for the purpose of offering or providing sexual services for consideration — in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.

Definition of *public place*

(2) In this section, *public place* includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

Commodification of Sexual Activity Obtaining sexual services for consideration

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

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

(A) for a first offence, a fine of \$2,000, and

(B) for each subsequent offence, a fine of \$4,000, or

(ii) in any other case,

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

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

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

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

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

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

(ii) in any other case,

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

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

Obtaining sexual services for consideration from person under 18 years

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

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

(b) for each subsequent offence, one year. **Subsequent offences**

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

(a) an offence under that subsection; or

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

Sequence of convictions only

(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;
- (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.

Protection of Communities and Exploited Persons Act, [SC 2014, c 25, s 45.1](#)

Preamble

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it

creates a demand for prostitution;

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;

Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution;

CANADIAN ALLIANCE FOR SEX WORK LAW REFORM et al. -and-
Applicants

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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