CITATION: Canadian Alliance for Sex Work Law Reform **v.** Attorney General 2023 ONSC 5197
COURT FILE NO.: CV-21-659594
DATE: 20230918

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	*H. Michael Rosenberg, Alana Robert, Holly Kallmeyer, Tara Santini, James Lockyer,* for the Applicants
AND:	
ATTORNEY GENERAL OF CANADA Respondent	*Michael H. Morris, Gail Sinclair, Joseph Cheng & Andrea Bourke*, for the Respondent, Attorney General of Canada
AND:	
ATTORNEY GENERAL OF ONTARIO Intervenor	*Deborah Krick, Meaghan Cunningham,* for the Intervenor Attorney General of Ontario
AND:	
AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), ASSOCIATION FOR REFORMED POLITICAL ACTION, AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, BLACK LEGAL ACTION CENTRE, VRIDGENORTH WOMEN'S MENTORSHIP & ADVOCACY SERVICES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, PARENTS AGAINST CHILD TRAFFICKING COALITION, DEFEND DIGNITY,	*Gerald Chipeaur & Tory Hibbitt,* for the Intervenor Defend Dignity *John Sikkema,* for the Intervenor, The Evangelical Fellowship of Canada *Cara Zwibel,* for the Intervenor, Canadian Civil Liberties Association *Jamie Liew & Molly Joeck,* for the Intervenor, Canadian Association of Refugee Lawyers (CARL) *Jacqueline L. King & Matilda Lici,* for the Intervenor, BridgeNorth Women's Mentorship & Advocacy Services *Alexi N. Wood & Laura MacLean,* for the Intervenor, Amnesty International, Canadian Section (English Speaking) *Andre Schutten & Tabitha Ewert,* for the

EGALE CANADA AND THE EXCHANTE NETWORK, EVANGELICAL FELLOWSHIP OF CANADA, MIGRANT WORKERS ALLIANCE FOR CANADA, ONTARIO COALITION OF RAPE CRISIS CENTRES, SEXUAL HEALTH COLAITION, WOMEN'S EQUALITY COALITION and WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

Intervenors

Intervenor, The Association for Reformed Political Action (ARPA) Canada

Nerissa Yan & Jennifer Flood, for the Intervenor, Asian Equality for Women

Nana Yanful, Saneliso Moyo & Geetha Philipupillai, for the Intervenor, The Black Legal Action Centre

Danny Kastner, Akosua Matthews & Ruth Wellen, for the Intervenor, The British Columbia Civil Liberties Association

Adriel Weaver & Dan Sheppard, for the Intervenors, Egale Canada and the Enchante Network

Angela Chiasson & Marcus McCann, for the Intervenor, Ontario Coalition of Rape Crisis Centres

David Elmaleh, for the Intervenors, Parents Against Child Trafficking Coalition

Vincent Wan Shun Wong, for the Intervenor, Migrant Workers Alliance for Change

Janine Benedet & Gwendoline Allison, for the Intervenor, Women's Equality Coalition

Robin Nobleman, Ryan Peck & Lea Pelletier-Marcotte, for the Intervenor, Sexual Health Coalition

Pam Hrick, Jihyun Rosel Kim & Dragana Rakic, for the Intervenor. Women's Legal Education and Action Fund

) **HEARD:** October 3, 4,6 ,7, 2022

R.F. GOLDSTEIN J.

REASONS FOR DECISION

"The regulation of prostitution is a complex and delicate matter."

\- Chief Justice McLachlin, *R. v. Bedford, 2010*.

I. Introduction

[1] For many years the status of prostitution in Canada, or sex work as I will call it in these reasons, was somewhat ambiguous. The sale or purchase of sex was not a criminal offence. Everything surrounding it was. In her decision in *Bedford* striking down several sex-work related sections of the *Criminal Code* as unconstitutional, Justice Himel of this court observed:

> Prostitution *per se* is not illegal in Canada, although many prostitution-related activities are prohibited by provisions in the *Criminal Code*. The applicants' case is based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful business in a safe environment.[1]

[2] *Bedford* made its way to the Supreme Court of Canada. That Court agreed with Himel J.: the *Criminal Code* sections relating to keeping a common bawdy house, living off the avails of prostitution, and communication for the purpose of prostitution were unconstitutional.[2] The Court suspended the declaration of invalidity for one year. The government considered and Parliament debated the response. Parliament ultimately adopted a Canadian variation of the "Nordic Model". The Nordic Model treats sex work as an inherently harmful activity that harms women and girls, negatively impacts marginalized groups (especially racialized and Indigenous women and girls) and harms the communities in which it takes place. The result was the *Protection of Communities and Exploited Persons Act*, which passed the House and Senate and received Royal Assent in November 2014 (which I will refer to either as "**the challenged offences**" or, collectively, "**PCEPA**", depending on the context).[3]

[3] The legal status of sex work is no longer ambiguous. The purchase of sex is prohibited. Sex work is no longer legal, but sellers of their own sexual services are immune from prosecution. Parliament also prohibited other activities around sex work, such as procuring, advertising, stopping traffic, and communicating for the purposes of sex work near a school, a daycare centre, or a playground. Although advertising is prohibited, sex workers are immune from prosecution for advertising their own sexual services. Parliament also created an offence of receiving a material benefit from sex work but created exceptions for non-exploitive third-party relationships.

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[1] *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 102 O.R. (3d) 321 ("***Bedford (SCJ)***"), at para. 8. At various places in these reasons, where the context requires, I simply refer to *Bedford* without attributing a court.

[2] *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 ("**Bedford (SCC)**").

[3] Protection of Communities and Exploited Persons Act, S.C. 2014, c. 25 ("**PCEPA**")."

[4] The Applicants say that all the challenged offences are unconstitutional. They argue that, individually and collectively, the challenged offences violate s. 7, s. 2(b), s. 2(d), and s. 15 of the *Charter* and cannot be saved by s. 1. The heart of their argument is that PCEPA replicates the harms in the original, pre-*Bedford* laws, thus engaging the s. 7 interests of sex workers and third parties who work with sex workers.

[5] The Applicants consist of five current or former sex workers (Monica Forrester, Valerie Scott, Lana Moon Perrin, Jane X, Alessa Mason), one former escort service manager (Tiffany Anwar), and one organization (The Canadian Alliance for Sex Work Law Reform, which I will refer to as "**CASWLR**"). The Attorneys General have not challenged the standing of any of the Applicants. The Court granted intervenor status to several organizations. The intervenors filed facta and made submissions. The Court did not permit the intervenors to file evidence.

[6] The Applicants challenge the following offences:

- s. 213(1): stopping or attempting to stop motor vehicle traffic in a public place or impeding the free flow of pedestrian or vehicular traffic in a public place, for the purpose of offering or providing or obtaining sexual services for consideration (the "**stopping traffic offence**");
- s. 213(1.1): communicating with anyone in a public place next to a schoolground, playground, or daycare centre for the purpose of offering or providing sexual services for consideration (the "**communication offence**");
- s. 286.1(1): purchasing, or communicating with anyone for the purpose of purchasing sexual services (the "**purchasing offence**");
- s. 286.2(1): receiving a material or financial benefit knowing that it is obtained from the purchase of sexual services (the "**material benefit offence**");
- s. 286.3(1): procuring, recruiting, holding, concealing, or harbouring a person who provides sexual services for consideration (the "**procuring offence**"); and,
- s. 286.4(1): advertising an offer to provide sexual services (the "**advertising offence**").

[7] The Applicants do not challenge the constitutionality of provisions of the *Criminal Code* dealing with sex work by persons under 18. They also do not challenge the human trafficking provisions.

[8] My duty on this Application is not to decide whether, as a matter of policy, Parliament was right to adopt the Nordic Model, or should have opted for decriminalization and regulation,

or should have simply not legislated at all. My duty is solely to determine whether the legislative scheme is *Charter*-compliant.[4] The Applicants may or may not be right that decriminalization and regulation of sex work are better policy choices. But that is a decision for Parliament, not this court.

[9] The Supreme Court in *Bedford (SCC)* explicitly indicated that Parliament may regulate sex work. In doing so, Chief Justice McLachlin, writing for a unanimous Supreme Court, recognized that the issue is very complicated:

> I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the Charter. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.[5]

[10] PCEPA was an explicit response to the Supreme Court's decision in *Bedford (SCC)*. I find that it is constitutional. I make the following specific findings:

- None of the challenged offences violate s. 7 of the Charter.
- As conceded by the Attorney General of Canada, the stopping traffic, communications, and advertising offences, as well as the communications aspect of the purchasing offences violate s. 2(b) of the *Charter*. They are saved by s. 1.
- The procuring and material benefit offences do not violate s. 2(b) of the *Charter*.
- None of the challenged sections violate s. 2(d) of the *Charter*.
- None of the challenged sections violate s. 15 of the *Charter*.

[11] I also make four observations that are critical to the disposition of this Application:

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[4] See the comments of Himel J. in *Bedford (SCJ)*, at para. 25.
[5] *Bedford (SCC)*, at para. 165.

- First, there is no constitutional "right" to engage in sex work. Parliament has the power to prohibit it. It is contrary to law to exchange sexual services for consideration; but sex workers are immune from prosecution for selling or advertising their own sexual services.
- Second, the Applicants' evidence, especially the expert evidence, betrays a basic misunderstanding and misreading of the challenged offences.
- Third, sex workers should understand that PCEPA, properly interpreted, does not prohibit them from accessing safety measures, working in association with each other, and accessing the services of non-exploitive third parties. Sex workers can engage the services of third parties who do not exploit them, including security guards, drivers, and receptionists. Sex workers should also understand that when PCEPA is properly interpreted, they can seek police assistance without fear that they will be charged for selling their sexual services, receiving a material benefit from the own sexual services, communicating with customers in relation to their own sexual services, or advertising in relation to their own sexual services. Sex workers should also understand that they cannot be prosecuted for communicating with customers in public, except where they do it under certain specific geographical circumstances, such as near a place where children are regularly found, or by stopping traffic on public roads.
- Fourth, many people who work with sex workers filed affidavits on behalf of both the Applicants and the Respondent. They are employed by or volunteer with community organizations that provide valuable services. They work with some of the most disadvantaged populations in this country. They labour, often for years, on behalf of marginalized people. As I will point out at other places in these reasons, they receive little in the way of recognition or respect from our society. They deserve plenty of both. One of the functions of a court's reasons is to educate the public. I hope that these reasons will convey this court's respect for and recognition of the work they do.

[12] What follows are my reasons for dismissing the application.

II. Background

A. Language and Definitions

[13] The language around this issue reflects the issue itself: it is charged and contentious. I will try to use neutral terms wherever possible.

[14] ***Sex work and sex worker***: For the purposes of simplicity and neutrality I will refer to the commercial sale of sex as "sex work" and those engaged in it as "sex workers". The terms "prostitute" or prostitution" should generally be avoided in sexual assault cases, as the terms feed

into the "twin myths" prohibited by s. 276 of the *Criminal Code*.[6] This is obviously not a sexual assault case, but the language of "sex work" and "sex worker" is more neutral. Let me be very clear that by using this language, I do not mean to convey that I agree with the Applicants (and some of the intervenors) that sex work is no different from any other type of work. I will only use the term "prostitution" or "prostitute" where I am quoting evidence or cases, or as the context specifically requires.

[15] In this case, I define sex work to mean providing sexual services for consideration. I do not mean sex work to include other forms of adult entertainment such as stripping and massages except where strip clubs or massage parlours or other adult entertainment establishments provide sexual services for consideration. I also do not include the production or sale of pornography.

[16] ***Pimp and pimping:*** Some of the Applicants' experts have criticized the use of the term "pimp". For example, in her expert report Professor Roots states:

> Those who profit from the sexual labour of others are typically misconstrued as parasitic, exploitative, and misogynistic. The construction taps into a deeply rooted stereotype of the third party manager as 'the pimp' – an often racialized image of a predatory male who exploits women in the sex trade.[7]

[17] I accept that there are non-exploitive third-party relationships in the sex trade. As will become clear in these reasons, however, there is a large amount of evidence that there are many involved in the sex trade – mostly men – who exploit and profit from the sexual labour of others – mostly women. That exploitation is not only parasitic and misogynistic; it is also frequently violent and manipulative. "Pimp" and "pimping" are ugly words that describe ugly behaviour – and with all due respect to Professor Roots, the evidence demonstrates (as will also be seen in these reasons) that pimps and pimping are common in the sex industry. "Pimp" is a term that is used by people in the sex trade themselves, often including the pimps.[8] It is also a term used in the government's Technical Paper. However, I agree with Professor Roots that there is a danger of racial stereotyping. I further agree that racial stereotyping can feed into a "pimp" narrative that includes significant tropes and elements of anti-Black racism.[9] I will use the word "exploiter" instead to avoid the danger of racial stereotyping. By "exploiter" I mean those who engage in exploitive behaviour to profit from the sexual labour of others. I use the term primarily to differentiate between those third parties who engage in violence, manipulation, and

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[6] *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at paras. 229-230.
[7] Expert Report of Katrin Roots, dated January 25, 2022, p. 2 (JAR Tab 39)("**Roots Report**").
[8] Affidavit of Colin Organ, sworn December 20, 2021, para. 24 (JAR Tab 75)("**Organ Affidavit**").
[9] Affidavit of Ellie Ade-Kur, affirmed July 12, 2021, para. 36 (JAR Tab 29)("**Ade-Kur Affidavit**"); Roots Report, p. 2.

exploitation, and those who do not. I will continue to use the term "pimp" when it appears in a quote, or where the context requires.

[18] ***Trafficker***: I also use the term "trafficker". I often use it in the same sentence as the term "exploiter". A trafficker is one who commits an offence under s. 279.01(1) of the *Criminal Code* or one of the related sections. Section 279.01(1) of the *Criminal Code* states:

> 279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence…
>
> (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.[10]

[19] Although trafficking and procuring or receiving a material benefit are different criminal offences, a trafficker and an exploiter can be, and often are, the same person. Hence I frequently use the terms exploiter and trafficker together.

[20] ***Criminalization, prohibition, and asymmetric prohibition***: There has been frequent use of the term "criminalization" in this Application. The government's Technical Paper employs the term. The Honourable Peter McKay, the Minister of Justice, used the term when he introduced Bill C-36 in the House of Commons. The Applicants in their affidavits (including their experts) frequently employ the term "criminalization". It appears to mean different things to different experts and different lay witnesses at different times. The term appears to encompass a very broad range of governmental action. As a result, I have avoided the term. Instead, I try to speak of specific prohibitions and sanctions to be more precise. When I do use the term "criminalization", it is usually in the context of a quote or a reference to material in an affidavit or study or factum that uses the term. I also make frequent use of the term "asymmetric prohibition". I use this term to describe the offence in s. 286.1(1) of the *Criminal Code*. The offence is asymmetric because criminal liability attaches to the purchaser of sexual services, but not the seller.

[21] ***Safety measures***: I have also used the term "safety measures" in these reasons. The term "safety support" is sometimes used in the materials, but the term "safety measure" was used by both Justice Himel and the Supreme Court in *Bedford*. By "safety measures" I mean a good,

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[10] Several cases from this court have found the mandatory minimums to be unconstitutional: See e.g. *R. v. Reginald Louis Jean*, 2020 ONSC 624, *R. v. McEwan*, 2023 ONSC 1608. The constitutionality of the mandatory minimums for human trafficking is not at issue in this Application.

service, or individual that is engaged in preventing violence by customers. This could be, for example, an alarm system, security cameras, a security guard, or a driver.

[22] ***Outdoor sex workers and indoor sex workers:*** Sex workers may work from both indoor and outdoor locations. Outdoor sex workers are sometimes referred to as working on the street. They are distinguished from indoor sex workers. Outdoor sex workers usually do not have a fixed location and may have sex in cars, or parks, or other outdoor places. Indoor and outdoor sex work are not watertight compartments. There may be overlap. Some sex workers work both indoors and outdoors.

B. A Brief History of Canada's Prostitution Laws

[23] Prior to PCEPA, the sale and purchase of sex for consideration by adults was not a crime in Canada. As Himel J. pointed out in *Bedford (SCJ),* "prostitution laws... have developed in a rather *ad hoc* manner, reflecting differing concerns of legislators over the years."[11] Justice Himel quoted the *Fraser Report*, briefly summarizing the history of prostitution-related laws in Canada:

> The earliest provisions in Canadian criminal law relating specifically to prostitution dealt with bawdy-houses and street walking. The bawdy-house provisions which were 'received' from England made it an offence to 'keep' a bawdy-house (typically a brothel). However, unlike the parallel English law, they also embraced both being an inmate of or one 'found in' (a customer in) a bawdy-house. The law on streetwalkers which developed from more general provisions on vagrancy made it an offence to be a prostitute or streetwalker 'not giving a satisfactory account of [herself]'.
>
> In the 1860s, in the wake of concern in official circles in Britain about the supposed connection between prostitutes, venereal disease and demoralization in the armed forces, Canada, following the British lead, introduced a regulatory regime which made it possible for prostitutes to be subjected to medical inspection and, if found to be diseased, detained for compulsory treatment in a certified hospital. However, in Canada the legislation was rarely enforced and was soon allowed to lapse.

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[11] *Bedford (SCJ)*, at para. 227.

In all of this early legislation, with the partial exception of the bawdy-house provisions, the emphasis of the law was on penalizing the prostitute. The philosophy seems to have been that the male population was entitled, without sanction, to seek the services of prostitutes, but insofar as the morality or health of the community might be compromised by such activity, the target of the law was properly the purveyors and not the customers of the business.

In the late 19th and early 20th century, the emergence of a more paternalistic concern on the part of the legislators with the protection of girls and young women from the ravages of vice, often associated with the alleged scourge of 'white slavery', led to the addition of a series of provisions which had the protection of 'virtuous womanhood' as their objective. These included a litany of offences proscribing procuring, and 'living on the avails' of prostitutes. Together with the earlier streetwalker and bawdy-house offences, they were included in the Canadian *Criminal Code*.

Largely as a result of the efforts of women involved in the so-called 'social purity movement', legislation designed both to rehabilitate prostitutes and to prevent children opting for that way of life was also enacted across the country at the provincial level. These regimes, which allowed for special detention orders for prostitutes and the removal of female adolescents from their own homes, were often as repressive in application as the streetwalking provisions.

The dual elements in the thinking of lawmakers of the prostitute as both moral and legal outcast, and the need to protect respectable women from the wiles of perverse males, has continued to influence the law and its enforcement through the 20th century. The bawdy-house provisions, with their uniquely Canadian focus on keeper, prostitute and customer, remain in the *Criminal Code* in sections 193 and 194. The purely status offence of streetwalking was retained in the *Code* until 1972 when it was replaced by the present soliciting provision, section 195.1.

The list of procuring offences continues to exist in section 195(1) of the *Code*, subject to recent changes which extend their

> application to both males and females. Although the special regulatory regimes designed to deal with the public health or morals problems caused by prostitution are now historic memories, more general legislation on public health and child welfare exists which provides the possibility of regulatory control over prostitution and its side effects.[12]

[24] In the early 2000s, the applicants in *Bedford* (Terry Jean Bedford, Amy Lebovitch, and Valerie Scott) brought a constitutional challenge to three of the main prostitution-related offences in the *Criminal Code*: s. 210, the bawdy house provisions; s. 212(1)(j), living on the avails of prostitution; and s. 213(1)(c), communicating for the purpose of prostitution.[13] All three applicants were current or former sex workers. Justice Himel considered the history, objectives, and judicial interpretations of these sections. Justice Himel found that all three provisions of the *Criminal Code* violated s. 7 of the *Charter* and could not be saved by s. 1. She found that each of the three provisions of the *Criminal Code* deprived the applicants of liberty and security of the person. The deprivation was not in accordance with the principles of fundamental justice. The three provisions increased the risk of imprisonment or violence by preventing sex workers from taking steps to reduce the risk of violence while carrying on a legal activity.

[25] The Court of Appeal for Ontario agreed with Himel J. that the bawdy house and living on the avails provisions of the *Criminal Code* were unconstitutional. The majority overruled Himel J. on the communicating provision. The majority found that it was constitutional. Justice MacPherson, in dissent, agreed with Himel J. on the communicating provision. He would have struck it down as unconstitutional.[14]

C. The Supreme Court Strikes Down Prostitution-Related Legislation in *Bedford*

[26] Justice Himel's decision was upheld by the Supreme Court of Canada in 2013: *Bedford (SCC)*. The Court struck down all three provisions and suspended the declaration of invalidity for one year. The Supreme Court disagreed with the majority of the Court of Appeal that the communicating provision was constitutional.

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[12] *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985), online (pdf): <publications.gc.ca/site/eng/9.840147/publication.html> ("***Fraser Report***"); *Bedford (SCJ)*, at para. 227.

[13] Ms. Bedford and Ms. Leibovitch did not take part in this application. Ms. Scott is a party and has filed an affidavit.

[14] Bedford v. Canada (Attorney General), 2012 ONCA 186, 128 O.R. (3d) 385 ("**Bedford OCA**").

[27] Chief Justice McLachlin, writing for a unanimous Supreme Court, started her decision by succinctly summarizing the issue:

> It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.[15]

[28] The Chief Justice agreed with Himel J. and the Court of Appeal that the security of the person of the applicants was engaged. As she put it at paras. 60 and 87:

> The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.
>
> […]
>
> The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

[29] McLachlin C.J.C. adopted Himel J.'s finding that the practical effect of bawdy house sections was to confine lawful prostitution to street work and out-calls. Street work and out-calls are activities that are more dangerous to sex workers. The Chief Justice also adopted Himel J.'s finding that the living on the avails sections prevented sex workers from taking some basic security measures. Those basic measures included hiring bodyguards, receptionists, and drivers. She further adopted Himel J.'s finding that face-to-face communication by street sex workers is an essential safety tool. Communication permits sex workers to screen clients for violence or intoxication. The communication law displaced sex workers to more isolated areas. This measure made a legal activity more dangerous. There was a causal connection between the laws and the risks faced by sex workers.[16]

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[15] *Bedford (SCC)*, at paras. 1-2.
[16] *Bedford (SCC)*, at paras. 62-63 and 69-73.

[30] McLachlin C.J.C. then analyzed the provisions in terms of arbitrariness, gross disproportionality, and overbreadth. She agreed with Himel J. and the Court of Appeal that the negative effect of the bawdy house provisions on the security of the person was grossly disproportionate to the objective. The objective of the provision was the deterrence of community nuisance and disruption.[17] The harm, however, was the displacement of sex workers to street and outcall sex work. Complaints about nuisance, in contrast, were rare.[18]

[31] The objective of the living on the avails provisions was to target exploiters and parasitic behaviour.[19] McLachlin C.J.C. agreed with Himel J. and the Court of Appeal that the provisions were overbroad. The law criminalized all behaviour without distinguishing between those who could increase the safety of sex workers, such as bodyguards, and those who exploit sex workers, such as abusive exploiters. Because the law made no distinction, it was overbroad.[20]

[32] The communicating provision was directed at the social nuisance of solicitation in a public place. The purpose, as described by Dickson C.J.C. in the *Prostitution Reference*, was to take "prostitution off the streets and out of public view."[21] Communication between a sex worker and a potential client – an essential screening tool – was prohibited. Inability to screen increased the danger of harm to a sex worker. That danger deprived outdoor sex workers of security of the person. When measured against the objective, the harm engendered by the provision was grossly disproportionate.[22]

[33] The Supreme Court suspended the declaration of invalidity for one year. Parliament considered and debated its response.

D. <u>The Government Responds To *Bedford*</u>

[34] On June 4, 2014, the Honourable Peter McKay, the Minister of Justice, introduced Bill C-36 – the bill that eventually became PCEPA – in the House of Commons for first reading. The Department of Justice released a Technical Paper detailing the government's response to *Bedford (SCC)* and the data upon which it relied in choosing what had come to be known as "the Nordic Model". The Nordic Model is so named because it was first introduced in Sweden in 1999, followed by Norway and Iceland in 2009.[23]

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[17] *R. v. Rockert*, [1978] 2 S.C.R. 704 at p. 712.
[18] *Bedford (SCC)*, at paras. 20, 61-63, 130 and 136.
[19] *R. v. Downey*, [1992] 2 S.C.R. 10 at p. 32.
[20] *Bedford (SCC)*, at paras. 137-145.
[21] Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123, at p. 1135 ("**Prostitution Reference**").
[22] *Bedford (SCC)*, at paras. 146-159.
[23] Department of Justice Canada, Technical Paper: Bill C-36, 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

[35] The key feature of the Nordic Model is that it prohibits the purchase of sex but does not penalize the seller. The theory of the model is that prostitution is a harmful activity. It is highly gendered. Male customers of generally higher wealth, status, and power exploit (mostly) female sellers of lower status, wealth, and power. The intent of the Nordic Model is to reduce the demand for sex work. Bill C-36 as introduced (and ultimately passed) prohibits the purchase of sex but immunizes those who sell their own sexual services. Non-exploitive third parties also do not attract criminal liability. The government stated through the Technical Paper:

> The majority of those who sell their own sexual services are women and girls. Marginalized groups, such as Aboriginal women and girls, are disproportionately represented.
>
> Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. In this regard, prostitution harms everyone in society by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.[24]

[36] The government also stated, through the Technical Paper, that "… Prostitution is an extremely dangerous activity that poses a risk of violence and psychological harm to those subjected to it, regardless of the venue or legal framework in which it takes place, both from purchasers of sexual services and from third parties."[25] These comments were echoed by Justice Minister McKay when he introduced PCEPA in the House of Commons.[26]

[37] The House of Commons Standing Committee on Justice and Human Rights heard submissions and evidence for and against PCEPA. So did the Senate Standing Committee on Legal and Constitutional Affairs.

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consequential amendments to other Acts, (Ottawa: Department of Justice Canada, 2014) (JAR Tab 110)("***Technical Paper***").

[24] *Technical Paper*, at pp. 3-4 (citations omitted).

[25] *Technical Paper*, at p. 4 (citations omitted).

[26] *House of Commons Debates*, 41-2, No. 101 (11 June 2014) at 6653 (JAR Tab 107, p. 11100) ("***Sponsor's Speech***").

E. This Application Mirrors The Policy Debate

[38] Many of the same arguments made before the Parliamentary committees considering Bill C-36 were also made before Himel J. during the original *Bedford* application. Many of those arguments were repeated on this Application, modified to deal with the legislative changes and the new evidence. Some of the evidence before the Parliamentary committees was also filed in this Court. Some of the Interveners in this Application also made presentations to the House and Senate committees examining Bill C-36. Current and former sex workers spoke against PCEPA; former sex workers spoke for it. Representatives of social services agencies (some of which intervened in this Application) spoke for and against PCEPA. Many of the people who testified before these committees also played a role in this Application. For example, the Applicant Valerie Scott testified before the House of Commons committee. She also filed an affidavit in this proceeding. Janine Benedet and Gwendoline Allison, who represented Interveners in this Application, also testified before the House of Commons Committee. Professor Bruckert and Professor Atchison, who submitted expert reports on behalf of the Applicants, testified. Diane Redsky, who filed an affidavit on behalf of the Attorney General of Canada also testified. The evidence and submissions on this Application mirrored the debates around Bill C-36.

[39] Another feature of the advocacy before Parliament and this court is that organizations purporting to represent the same groups frequently took diametrically opposed positions. For example, representatives of Indigenous groups were divided, a division that is also mirrored in this Application. Michèle Audette of the Native Women's Association of Canada advocated for the Nordic Model before the House of Commons committee.[27] Christa Big Canoe of Toronto Aboriginal Legal Services took the opposite position before the same committee.[28] Aboriginal Legal Services intervened before this court to support the Applicants. Representatives of social services agencies that assist Indigenous sex workers filed affidavits in support of the Respondent.

F. Whether Sex Work Is Inherently Exploitive Is Not Relevant To The Analysis

[40] Much time and effort in this Application has been spent litigating the question of whether sex work itself is inherently exploitive, stigmatizing, or violent. Violence and stigma have some relevance in one sense: the Applicants argue that PCEPA stigmatizes sex workers, which leads to violence, a proposition I reject for lack of empirical evidence. The question of inherent exploitation is not, however, something that this court can decide. It is simply not a legal or factual question. One's view of the question of inherent exploitation appears to be dictated by one's normative perspective. Parliament has chosen a particular normative perspective and it is not for this court to second-guess Parliament in that regard. In other words, it is not this court's

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[27] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 36 (8 July 2014) at 13:20 (Michèle Audette) (JAR Tab 120, p. 11278).
[28] House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 41 (10 July 2014) at 10:05 (Christa Big Canoe) (JAR Tab 130, p. 11392-93).

duty to assess whether Parliament was correct to proclaim that sex work is inherently exploitive and then legislate on that basis, except, perhaps, where it may be relevant under s. 1 of the *Charter*. Rather, this court's duty is to determine whether resulting legislative scheme is *Charter*-compliant.[29] In any event, much of the interpretive work around this question has been done by the Court of Appeal in *N.S.*, as I turn to next.

G. The *N.S.* Decision

[41] *N.S.* is critical to this Application. In *N.S.* the Court of Appeal for Ontario dealt with three of the challenged offences that are at issue in this Application. The Court found them to be constitutional. The Applicants say that I can re-visit the constitutionality of the three sections. I disagree. I will first summarize *N.S.* and then deal with the question of whether I can revisit the constitutionality of the three sections.

i. Summary of N.S.

[42] N.S. was charged with offences contrary to, among other things, s. 286.1 (the purchasing offence), s. 286.2 (the material benefit offence), s. 286.3 (the procuring offence), and 286.4 (the advertising offence) of the *Criminal Code*. N.S. challenged the constitutionality of the material benefit offence, the procuring offence, and the advertising offence. He argued that those sections violated s. 2(b), s. 2(d), and s. 7 of the *Charter*. He did not challenge the constitutionality of the purchasing offence. He did not argue that his *Charter* rights were violated on the facts of his case. Rather, he challenged those sections based on four "reasonable hypotheticals". The application judge found that two of the hypotheticals engaged the challenged offences in a manner that infringed s. 7.

[43] The first reasonable hypothetical involved two or more female students deciding to become sex workers to pay university tuition and living expenses. They obtain advice from an experienced sex worker. They rent premises. They hire professionals such as web designers, security guards, and photographers. The second reasonable hypothetical involved a male student. He leases a room in the same premises as the students in the first hypothetical.[30]

[44] The application judge found, based on these reasonable hypotheticals, that all three sections violated s. 7 of the *Charter* and could not be saved under s. 1.[31] He found that the students would be caught by the material benefit and procuring offences, thus engaging their s. 7 liberty interests. The cooperative arrangement, he found, was a commercial enterprise. The students, therefore, could not avail themselves of the immunity provisions in the material benefit

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[29] Tanudjaja v. Canada (Attorney General), 2014 ONCA 852 at paras. 20-25 ("**Tanudjaja**"); Chaouli v. Quebec (Attorney General), [2005] 1 S.C.R. 791 at para. 107.
[30] *R. v. N.S.*, 2021 ONSC 1628 at para. 32.
[31] *R. v. N.S.*, 2021 ONSC 1628.

offence. The hiring of security guards or taking of other safety measures would engage the material benefit offence, thus also engaging their security of the person interests. The experienced sex worker would be caught by the procuring offence. The trial judge also found that although the students themselves would be immune from prosecution under the advertising offence, their security of the person interest would be engaged because they could not communicate frankly with customers.[32]

[45] The Crown appealed. The Court of Appeal allowed the appeal. Justice Hoy, for the Court, found that the three sections did not violate ss. 2(d) and 7 of the *Charter*. The infringement of s. 2(b) was saved by s. 1. The Supreme Court of Canada dismissed an application for leave to appeal.

[46] Justice Hoy reviewed the history accompanying the enactment of PCEPA; the decision of the Supreme Court of Canada in *Bedford (SCC)*; Parliament's adoption of the "Nordic Model"; as well as the purpose of PCEPA and the proper interpretation of its provisions. She noted that "the overall objective of the PCEPA is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible".[33]

[47] Justice Hoy further noted:

> The PCEPA, however, was an explicit response to *Bedford*. While Parliament addressed the specific safety issues which were the focus in *Bedford* — working from a fixed indoor location, hiring persons who may enhance safety, and the ability to negotiate conditions for the sale of sexual services in a public place — it also chose to criminalize prostitution by prohibiting the demand and reinforcing the prohibition on the exploitation of others by third parties. As noted above, Minister MacKay was clear that Parliament sought to "create the climate in which prostitutes can take certain specific measures, steps to further protect themselves or insulate themselves from violence." He was also clear, however, that the best way to protect them was to reduce prostitution itself. This is reflected in the scheme of the PCEPA as a whole.[34]

[48] Justice Hoy disagreed that the arrangements in the two hypotheticals constituted a commercial enterprise. The purpose of PCEPA was to prohibit the exploitation of sex workers by others. The student sex workers in the hypotheticals were not profiting from the sex work of

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[32] *R. v. N.S.*, 2022 ONCA 160 at paras. 32-41 ("***N.S.***").
[33] *N.S.*, para. 57.
[34] *N.S.*, at para. 62.

others. They were not exploiting each other. They were pooling resources. The student sex workers could, therefore, avail themselves of the immunity provisions in the material benefit offence. She found that on the hypotheticals, the material benefit provision did not engage the security of the person.[35]

[49] Justice Hoy also considered the procuring provision. She found that the two student hypotheticals did not engage s. 7 in relation to the procuring offence either: they were not concealing or harbouring each other, or exercising control, direction, or influence on each other. As well, the experienced sex worker did not exercise control or influence over the students or facilitate the obtaining of sexual services from the students. This advisory behaviour was, therefore, not caught by the procuring offence.[36]

[50] Justice Hoy then considered the procuring provision on the reasonable hypothetical advanced by the intervener, Deshon Boodhoo. Mr. Boodhoo had been convicted of the material benefit and procuring offences. Mr. Boodhoo's counsel proposed a reasonable hypothetical involving a person already engaged in sex work. On the hypothetical, the sex worker reaches out to a young, homeless, impecunious friend. The sex worker proposes that they share expenses and an apartment and work together in providing sex work. Justice Hoy did find that on Mr. Boodhoo's hypothetical, the sex worker who recruited her friend could be found guilty of procuring and thus liable to imprisonment, engaging the liberty interest under s. 7. Justice Hoy found, however, that when the scope of s. 286.3 is properly delineated, the deprivation of the sex worker's liberty interest was not arbitrary, overbroad, or grossly disproportionate given the objective of the procuring offence to denounce and prohibit the prostitution of others.[37]

[51] Justice Hoy then considered the advertising offence. The application judge had found that sex workers were more likely to advertise online and communicate with customers prior to meeting. Since advertising was now prohibited, sex workers had to advertise surreptitiously and use coded language. The application judge found that the advertising offence made sex work more dangerous, thus engaging the security of the person interest.[38] Hoy J.A. reviewed the evidence before the application judge (the evidence of Chris Atchison, who also filed an expert report in this Application). Justice Hoy found that the evidence was not that sex workers were forced to engage in riskier kinds of sex work, such as outdoor sex work. Rather, sex workers could continue to advertise but had to employ vaguer language. The impairment on security of the person from having to use vaguer language was trivial and did not amount to a deprivation of that interest. Nevertheless, Hoy J.A. found that if the advertising offence did deprive the

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[35] *N.S.*, at paras. 68-85.
[36] *N.S.*, at para. 91.
[37] *N.S.*, at paras. 89-90, 92-131.
[38] *N.S.*, at paras. 132-135.

hypothetical sex worker of her security of the person, the deprivation was not overbroad or grossly disproportionate.[39]

[52] Justice Hoy did find – and the Attorney General conceded, as it does in this case – that the advertising offence violated s. 2(b) of the *Charter*. She found, however, that it was saved by s. 1. Justice Hoy rejected an argument that the material benefit, procuring, and advertising offences violate the right to freedom of association under s. 2(d) of the *Charter*.[40]

ii. N.S. is binding on this court

[53] The Applicants argue that they have presented evidence in this Application that fundamentally shifts the parameters of the debate such that this court can revisit the constitutionality of the three challenged offences that were upheld in *N.S.* They argue that the Court of Appeal deliberately constrained its decision in *N.S.* to avoid foreclosing this relief. The Applicants further argue that *N.S.* was "an incomplete and artificial exercise that arose in the particular circumstances of a criminal prosecution, it does not reflect the true impact of the impugned provisions at issue in this application, and it is readily distinguishable." The record in that case was thin, consisting of hypothetical scenarios only. They also point out that the Court of Appeal did not consider the constitutionality of the purchasing offence, which is a fundamental part of the legislative scheme. Indeed, the Applicants argue that the Court of Appeal's analysis did not consider the "true impact" of the challenged offences. The Applicants argue that *N.S.* did not consider the entire legislative scheme, the other challenged offences, or the realities of the impact of the challenged offences on the lives of sex workers. That evidence is in the record before this court but was not before the Court of Appeal.[41]

[54] With respect, I disagree with the Applicants.

[55] The principle of vertical *stare decisis* means that a lower court must apply the decision of a higher court to the facts before it.[42] There are narrow exceptions to the rule of vertical *stare decisis*. A trial judge can hear and decide *Charter* arguments that were not raised in an earlier case, constituting a new legal issue. A trial judge can also revisit an issue if there are "significant developments in the law, or a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."[43] This threshold is not an easy one to reach. It is not an invitation to reconsider binding authority simply because there is new evidence. The exception can be

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[39] *N.S.*, at paras. 137-154.
[40] *N.S.*, at paras. 155-169.
[41] Factum of the Applicants, at paras. 72-76.
[42] *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 26 ("***Comeau***").
[43] *Comeau*, at para. 29; *Bedford (SCC)*, at para. 42.

engaged when the underlying social context of the earlier decision is profoundly altered.[44] The Supreme Court of Canada summed up the second exception this way:

> To reiterate: departing from vertical *stare decisis* on the basis of new evidence is not a question of disagreement or interpretation. For a binding precedent from a higher court to be cast aside on the basis of new evidence, the new evidence must "fundamentally shif[t]" how jurists understand the legal question at issue. It is not enough to find that an alternate perspective on existing evidence might change how jurists would answer the same legal question.[45]

[56] The narrow exceptions to vertical *stare decisis* do not apply here for several reasons. *N.S.* was decided in the circumstances of a criminal prosecution. That is the usual way that constitutional challenges to criminal law are dealt with. It is civil applications such as this, and the original application in *Bedford*, that are unusual.

[57] As well, the evidentiary exception cannot be engaged simply by filing a fuller record. Much of the decision in *N.S.* is based on statutory interpretation. Virtually all the Applicants' material was filed prior to the decision in *N.S.* Many of the factual assertions made in the Applicants' material were based on interpretations of law that fundamentally differ from the interpretation of the Court of Appeal in *N.S.* The record in *N.S.* included one of the Applicants' own experts. The Applicant CASWLR was granted standing. I appreciate that CASWLR was precluded from filing an evidentiary record before the Court of Appeal, but it was represented at the hearing, and counsel for the Alliance made submissions consistent with their position in this court.

[58] I also respectfully disagree with the Applicants that the Court of Appeal did not consider the legislative scheme as a whole. Justice Hoy very clearly did so. *N.S.* therefore informs the analysis of ss. 7, 2(b), and 2(d) in relation to the sections that were not challenged in that case. Although s. 15 of the Charter was not in issue in *N.S.*, Hoy J.A.'s interpretation of the objectives of PCEPA is obviously both binding and informative in relation to that issue.

[59] I note that *N.S.* was released on February 24, 2022. This Application was heard during the first week of October 2022, a little more than six months later. There was obviously no change in the social context of sex work in those six months. The exception cannot be engaged on that basis.

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[44] *Comeau*, at paras. 30-31.
[45] *Comeau*, at para. 34.

[60] Even if I am wrong in deciding the evidentiary exception is not made out, as the trier of fact, I find the evidentiary record, quite simply, does not demonstrate a basis for finding that PCEPA repeats the harms described in *Bedford*.

[61] Finally, I have reviewed *N.S.* in detail, over a lengthy period of time, as I have prepared these reasons. It is, of course, awkward for a superior court judge to pronounce judgment on the Court of Appeal, but in a very real sense that is what the Applicants have asked me to do. I say very respectfully that I agree with *N.S.* I think it correctly interprets PCEPA. I also think it correctly upholds the constitutionality of the material benefit, procuring, and advertising offences. Even if the exception to vertical *stare decisis* applied and I could revisit *N.S.* I would not.

III. The Scheme Of PCEPA

[62] The challenged offences are contained in two Parts of the *Criminal Code*. The stopping traffic offence and the communication offence are both contained in Part VII: Disorderly Houses, Gaming and Betting. The other provisions are contained in Part VIII: Offences Against The Person And Reputation. I will first summarize the objectives of the legislation; then summarize those sections that fall under Part VIII; and then those that fall under Part VII.

A. The Objectives Of PCEPA

[63] Bill C-36 was specifically designed as a response to Bedford (SCC). The formal title of the legislation is *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*.[46] When Justice Minister McKay introduced Bill C-36 he noted that the new law signalled "a significant shift" in Parliament's approach to sex work. The bill shifted criminal law policy from "treatment of prostitution as a nuisance toward treatment of prostitution for what it is: a form of exploitation." The Minister went on to note that "the impact of the new prohibitions would be borne predominantly by those who purchase sex and persons who exploit others through prostitution. The bill is intended to reduce the demands for prostitution". The Minister also noted that "an additional objective is to reduce the likelihood of third parties facilitating exploitation through prostitution for their gain, and the key and operative word here is 'exploitation'".[47]

[64] The objectives of PCEPA are set out in the preamble:

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[46] S.C. 2014, c. 25.
[47] *Sponsor's Speech*, at 6653 (JAR Tab 107, p. 111100).

> 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;

[65] The government's Technical Paper stated that the victims of sex work include individuals who are exploited, and communities, including children, who are exposed to it. The legislation recognizes that "those who capitalize on that demand, i.e., third parties who economically benefit from the sale of those services, both cause and perpetuate prostitution's harms."[48]

[66] As Hoy J.A. noted in *N.S.* the overall objective of the PCEPA is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it to the greatest extent possible. She stated that PCEPA has three purposes:

> First, to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible, in order to

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[48] *Technical Paper*, at pp. 3-4.

> protect communities, human dignity and equality; second, to prohibit the promotion of the prostitution of others, the development of economic interests in the exploitation of the prostitution of others, and the institutionalization of prostitution through commercial enterprises in order to protect communities, human dignity and equality; and, third, to mitigate some of the dangers associated with the continued, unlawful provision of sexual services for consideration.[49]

[67] Hoy J.A. noted that the third object is to ensure that, as much as possible, sex workers can avail themselves of safety measures and report incidents of violence without fear of prosecution. She noted that the Crown had argued that PCEPA permitted some measures to protect sex workers as an ancillary measure. She also noted that the application judge had described one of the purposes of PCEAP as "to protect sex workers from violence, abuse, and exploitation and protect the health and safety of sex workers." Hoy J.A. disagreed with that characterization. Rather, Hoy J.A. found that the safety-related purposes of PCEPA was "limited to ensuring that persons who continue to provide their sexual services for consideration, contrary to law, can avail themselves of the safety-enhancing measures identified in Bedford and report incidents of violence."[50]

[68] These reasons will refer to the three objectives of PCEPA as interpreted by Hoy J.A. many times. As a matter of shorthand, I will on occasion simply refer to them as:

- The demand reduction objective;
- The exploitation of others objective; and,
- The safety-enhancing objective.

B. The Purchasing Offence

[69] Section 286.1(1) of the *Criminal Code* states:

> 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…; or,
>
> (b) an offence punishable on summary conviction…

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[49] *N.S.*, para. 57, 59.
[50] *N.S.*, paras. 60-63.

[70] Section 286.1(1) is the key section of PCEPA. It represents the most important change from the pre-*Bedford* regime. The section prohibits the purchase of sex. It also prohibits communications for the purpose of purchasing sex. In other words, a person buying sex – I will call him the customer – can be found criminally liable for buying sex. The customer can also be found criminally liable by communicating with anyone for the purpose of buying sex.

[71] The purpose of the purchasing offence is to reduce the demand for commercial sex with a view to ultimately abolishing sex work, in keeping with the overall objective of PCEPA.[51] The sale of one's own sexual services does not attract criminal sanction.[52] Neither is communicating for the purpose of selling one's own sexual services. The immunity provisions mean that no person can be prosecuted for selling their own sexual services. The immunity provisions also mean that no person can be prosecuted as a party to the offence of purchasing sexual services.[53] Section 286.5(1) of the *Criminal Code* states:

> 286.5 (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.

[72] The purchasing offence is a hybrid offence. The maximum punishment when prosecuted by indictment is five years imprisonment.

C. <u>The Material Benefit Offence</u>

[73] Section 286.2(1) of the *Criminal Code* states:

> 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…; or
>
> (b) an offence punishable on summary conviction.

[74] This section modernizes the unconstitutional "living on the avails" section struck down in *Bedford (SCC)*. The purpose of the section is to denounce and prohibit the development of an

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[51] Technical Paper, p. 4-5.
[52] *N.S.*, at para. 22.
[53] *N.S.*, at para. 22.

economic interest in the sex work of others. The section is also designed to inhibit the institutionalization and commercialization of sex work.[54]

[75] Parliament immunized from prosecution those who benefit from their own sexual services: s. 286.5(1)(a) of the *Criminal Code*. Parliament created other exceptions to the material benefit offence. Section 286.2(4) states:

> 286.2 (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.

[76] The purpose of these exceptions is to ensure that there is no criminal liability unless there is an exploitive relationship.[55] In other words, no person can be convicted under the material benefit offence if they are in a legitimate family or business relationship with the person providing sexual services. The Technical Paper goes on to explain that that the exceptions apply in the following situations:

- in the context of a legitimate living arrangement, for example by a spouse, child or roommate of the person who provides the benefit;
- as a result of a legal or moral obligation, for example by a dependent parent of the person who provides the benefit or where a gift is purchased with the earnings of sex work;

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[54] *Technical Paper*, p. 5-7; See also: *N.S.* at para. 24.
[55] *N.S.* at para. 77.

- in consideration for goods or services offered on the same terms and conditions to the public, such as by an accountant, landlord, pharmacist or security company; and,
- in consideration for a good or service that is offered informally, for example by a person who provides protective or administrative services, provided that the benefit received is proportionate to the value of the good or service provided and the person who provided the service did not encourage, counsel or incite the provision of sexual services.[56]

[77] There are, however, exceptions to the exceptions set out in s. 286.2(4). Section 286.2(5) of the *Criminal Code* states:

> 286.2 (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.

[78] Thus, the immunity afforded to non-exploitive business and familial relationships will not apply if the person receiving the benefit uses violence, abuses a position of trust, provides drugs or alcohol, or procures the sex worker. The immunity also does not apply in the context of a commercial enterprise offering the sale of sexual services, such as a strip club, massage parlour,

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[56] Technical Paper, p. 3-4.

or escort agency where sex work takes place.[57] As will be seen later in these reasons, the Court of Appeal interpreted the phrase "commercial enterprise" to involve the exploitation of another's sexual labour for profit. The Court distinguished between cooperative arrangements where costs are shared between sex workers and commercial enterprises where third parties profit.[58]

[79] In other words, PCEPA prohibits exploitive relationships relating to the purchase of sex. The exceptions and the exceptions to the exceptions in PCEPA are structured to exempt non-exploitive personal and business relationships from criminal liability. They are also structured to prohibit commercial enterprises from receiving a material benefit from the sexual services of sex workers.

[80] The material benefit offence is a hybrid offence. The maximum punishment when prosecuted by indictment is ten years imprisonment.

D. The Procuring Offence

[81] Section 286.3(1) of the *Criminal Code* states:

> 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.

[82] This section prohibits the procurement or recruitment of persons for sex work. Specifically, the offence is committed in two different ways. A person can procure another by causing, inducing, or persuading another person to engage in sex work. A person can also recruit, hold, conceal, or harbour a person for the purposes of sex work. A person can exercise control, direction, or influence over the movements of a sex worker. The objective of this section is to denounce and prohibit the procurement of others as part of the overall objective to reduce the demand for sex work.[59]

[83] The government's Technical Paper described the difference between the material benefit offence and the procuring offence. The difference hinges on the level of involvement in the sex work of others. Active involvement in the provision of another's sex work is likely to be caught by both the procuring and the material benefit offence; more passive involvement is likely to be

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[57] Technical Paper, p. 6-7.
[58] *N.S.*, at para. 76.
[59] Technical Paper, p. 7-8.

caught only by the material benefit offence. The Technical Paper illustrated the difference by describing a "classic pimp" and a bouncer at a strip club where sexual services are provided. The "classic pimp" generally induces or causes others to offer or provide sexual services. The "classic pimp" also benefits from the sex worker's sale of sex. The bouncer knows about the sex work and derives a benefit from it but does not actively incite the provision of sexual services. Thus, the bouncer is likely to be caught only by the material benefit offence and not the procuring offence (although the bouncer may benefit from the immunity provisions in the material benefit offence).[60]

[84] In *N.S.*, Hoy J.A. described the purpose of the procurement section as the denunciation and prohibition of the promotion of the sex work of others to protect communities, human dignity, and equality. The aim is to deter encouraging entry into sex work by criminalizing those who do the encouraging.[61]

[85] Both the conduct component and the *mens rea* requirement for the two ways of committing this offence are narrow. The Crown must prove that the accused specifically intended to procure a person to provide sexual services for consideration; or specifically intended to recruit, conceal, or harbour a sex worker or exercise control, direction, or influence over the movements of that sex worker. In other words, there are two ways to commit the offence. Procuring can encompass recruiting or luring a person into sex work. Procuring can also encompass controlling a sex worker. The Crown can prove one method, but need not prove both. A shared cooperative arrangement is not caught by the procuring provision because of the purpose requirement. It is only an offence if the accused intended to exercise influence over the sex worker, as Justice Hoy explained:

> The offence in s. 286.1 is *obtaining* for consideration or communicating with anyone for the purpose of obtaining for consideration the sexual services of a person. The offence is not *providing* sexual services for consideration. The purpose requirement in s. 286.3 is therefore tied directly to the asymmetrical scheme of the PCEPA. The Crown must prove that the accused intended to assist the principal in the commission of the offence in s. 286.1.[62]

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[60] Technical Paper, p. 7.
[61] *N.S.*, at paras. 121-122.
[62] *N.S.*, at paras. 107-108.

[86] Justice Hoy also explained that merely giving advice would not be caught be the section due to the high *mens rea* requirement. It is simply not conduct that is captured by the procuring provision when considering the asymmetrical scheme of the purchasing offence.[63]

[87] The procuring offence only involves the sexual exploitation of others. There are obviously no immunity provisions. It is clearly the most serious of all the challenged offences in PCEPA. That seriousness is reflected in both the narrow *mens rea* requirement, as well as the fact that it is a straight indictable offence punishable by up to 14 years imprisonment.

E. The Advertising Offence

[88] Section 286.4 of the *Criminal Code* states:

> 286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of
>
> (a) an indictable offence…; or
>
> (b) an offence punishable on summary conviction.

[89] This section prohibits advertising the sale of sexual services. Like the material benefit offence, however, Parliament immunized against prosecution those who advertise their own sexual services: *Criminal Code* s. 286.5 (1).

[90] The reach of this section is broad. It catches, potentially, publishers and website administrators.[64] The purpose of the section is to reduce the demand for sex work by targeting the promotion of sexual services through advertising.[65]

[91] The Court of Appeal found in *N.S.* that the advertising offence violated s. 2(b) of the *Charter* but found that it was saved by s. 1. The Court therefore upheld the constitutionality of the advertising offence.

[92] The advertising offence is a hybrid offence. The maximum penalty when prosecuted by indictment is five years imprisonment.

F. The Stopping Traffic Offence

[93] Section 213(1) of the *Criminal Code* states:

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[63] *N.S.* at paras. 108 and 110-113.
[64] Technical Paper, p. 5.
[65] *N.S.*, at para. 152.

> 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.

[94] The purpose of this section is to modernize the existing legislation and protect residents of communities from harassment by those who purchase and sell sexual services as set out in the Preamble to PCEPA. The government's Technical Paper noted that sex work can negatively affect communities through a variety of nuisances: drug-related crime, and dangerous or unsanitary refuse such as used condoms or drug paraphernalia. The predecessor provisions were not at issue in *Bedford.* [66]

[95] The stopping traffic offence was upheld in the *Prostitution Reference* and not challenged in *Bedford (SCC)* or *N.S.* The stopping traffic offence is a straight summary conviction offence with a maximum penalty of 6 months imprisonment.

G. The Communication Offence

[96] Section 213(1.1) of the *Criminal Code* states:

> 213 (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.

[97] Public place is defined as:

> 213 (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.

[98] The Technical Paper also noted the problem of the exposure of children to the sale of sex as a commodity and the danger of being drawn into a life of exploitation. The protection of

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[66] Technical Paper, p. 9-10.

children from these harms, as well as the prevention of luring children for the purpose of sexual exploitation, are also objectives of PCEPA. Thus, the objective of s. 213(1.1) is to protect children from exposure to prostitution, and from harms associated with prostitution, such as drug-related activities or used condoms. As the Technical Paper notes:

> Bill C-36 also achieves its goal of protecting communities by criminalizing communicating for the purposes of selling sexual services in specific locations that are designed for use by children… The main objective of the offence, as enacted, remains the same – to protect children from exposure to prostitution, which is viewed as a harm in and of itself, because such exposure risks normalizing a gendered and exploitative practice in the eyes of impressionable youth and could result in vulnerable children being drawn into a life of exploitation. The offence also protects children from additional harms associated with prostitution, including from being exposed to drug-related activities or to used condoms and dangerous paraphernalia. In not criminalizing public communications for the purposes of selling sexual services, except in these narrow circumstances, Bill C-36 recognizes the different interests at play, which include the need to protect from violence those who sell their own sexual services, as well as the need to protect vulnerable children from prostitution's harms.[67]

[99] The communications offence is a straight summary conviction offence with a maximum of 6 months imprisonment.

IV. Facts

A. My Approach To The Evidence As Trier Of Fact

i. Expert evidence

[100] Expert evidence may be admitted where it meets the following criteria:

- Relevance;
- Necessity in assisting the trier of fact;
- Lack of an exclusionary rule; and,
- A properly qualified expert.[68]

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[67] *Technical Paper*, at pp. 9-10.
[68] *R. v. Mohan*, [1994] 2 S.C.R. 9, at paras. 16-21 ("***Mohan***").

[101] In *R. v. Abbey*, Doherty J.A. suggested a two-step approach to the admissibility of expert evidence. At the first step, the judge determines whether the proposed expert evidence meets the *Mohan* criteria. At the second step, the judge performs a gate-keeping function. The judge determines whether the benefits of the proposed evidence outweigh the potential harm to the trial process. The benefit side of the process evaluates the probative value of the proposed expert evidence. The probative value includes the methodology used by the expert, the expert's expertise, and the extent to which the expert is objective and impartial. The costs include the possibility that the jury will abandon its fact-finding role to the expert; the potential for complication as well as distraction from the real issues; and the use of valuable jury time where the evidence does not sufficiently merit it.[69]

[102] An expert witness has a broad duty to the court. The expert is required to provide independent assistance by way of an objective, unbiased opinion and should never assume the role of an advocate when giving their opinion. There is a threshold admissibility requirement in relation to independence and impartiality. Once that threshold is met, any concerns about the expert's compliance with their duty to the court should be part of the gatekeeping function. The judge must determine whether the lack of independence renders the expert incapable of giving an impartial opinion. The expert must be aware that their duty to the court overrides their obligation to the party calling them.[70]

[103] The only reference to expert evidence on an application in the *Rules of Civil Procedure* is set out in Rules 39.01(7) and 53.03(2.1). Sub-rule 39.01(7) of the *Rules of Civil Procedure* sets out that expert evidence must include the information set out in sub-rule 53.03(2.1). In addition to tombstone information, that sub-section requires that the expert set out their qualifications, employment, and education, the instructions provided to the expert, and an acknowledgment of the expert's duty of impartiality. Additionally, the expert must set out:

> 53.03(2.1) 4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
>
> 5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
>
> 6. The expert's reasons for his or her opinion, including,

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[69] *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 ("***Abbey***") at paras. 76, 87, 90-91; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 22 ("***White Burgess***").

[70] *White Burgess*, at paras. 26-27, 33-34, 36, 46.

> i. a description of the factual assumptions on which the opinion is based,
>
> ii. a description of any research conducted by the expert that led him or her to form the opinion, and
> iii. a list of every document, if any, relied on by the expert in forming the opinion.

[104] As in *Bedford (SCJ)*, the parties in this case filed large amounts of expert evidence. The Applicants relied on seven expert witnesses. The Respondents relied on five expert witnesses (four engaged by the Attorney General of Canada, and one by the Attorney General of Ontario). The expert opinions also included very large amounts of source material. All the experts filed reports; some filed additional reply reports. All were cross-examined, generating thousands of pages of transcripts. Numerous exhibits were appended to the cross-examinations.

[105] As Himel J. observed in *Bedford (SCJ)*, the *Mohan/Abbey* approach is well suited to trials but not well suited to civil applications. She observed that parties may be more concerned with placing every potentially important piece of evidence in the record than with conducting an admissibility analysis. And yet, the application judge cannot abandon the gatekeeper role.[71]

[106] In a jury trial the trial judge conducts a *voir dire* to determine threshold admissibility. The jury has the benefit of seeing and hearing the proposed expert. A trial is also self-regulating in the sense that 11 expert witnesses would be an unusually large number in either a civil or criminal trial. A trial is also self-regulating in that counsel are much more likely to take a more focussed approach during cross-examination before a jury than they might during cross-examination on an affidavit.

[107] Bearing those observations in mind, I adopt the approach taken by Himel J. in *Bedford (SCJ)*, and for the same reasons:

> In the case before me, it is not practicable to engage in an admissibility analysis for each piece of evidence contained in the record. Furthermore, the parties did not object to the opinion evidence tendered by the opposing side. I am aware that in *Charter* cases, judges are also the triers of fact. Judges are expected to disabuse themselves of irrelevant and inflammatory evidence: see *Masters' Assn. of Ontario v. Ontario (Attorney General)*, [2001] O.J. No. 1444 (Ont. Div. Ct.). While the evidence may be received at the hearing, it may not meet the strict rules of admissibility outlined in the *Mohan* and *Abbey* cases. Rather than engage in a

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[71] *Bedford (SCJ)* at para. 104.

> time-consuming analysis of each piece of evidence, I have chosen to exercise the gatekeeper function by assigning little or no weight to evidence which does not meet the *Mohan* and *Abbey* requirements. This is the most practical method to address the concerns raised about the legal relevance and reliability of certain expert opinions in the circumstances of this case.[72]

[108] The Court of Appeal found that Himel J. was well aware of the admissibility principles and risks governing expert evidence.[73] Neither that Court nor the Supreme Court of Canada disapproved of her approach. I am aware that *White Burgess* post-dates *Bedford (SCC)*. Nonetheless, there is no reason to doubt that the approach set out by Himel J. remains valid. If it were otherwise, on a large application the trial judge would spend as much time and energy on admissibility as on all other issues.

ii. Are the experts in this case biased?

[109] Several of the Applicants' expert witnesses have been heavily involved in advocacy for the rights of sex workers. Several of them have taken very public positions in favour of the decriminalization and regulation of sex work. Professors Bruckert and Atchison testified before both the House and Senate Committees in opposition to PCEPA.

[110] An expert can be an advocate.[74] It would be unrealistic, and unfair, to expect that persons who have expertise in a controversial field would simply keep their expertise to themselves. It is in no way inappropriate for a party to call an expert where that expert has also engaged in advocacy in their field. The expert must, however, abandon advocacy when giving their opinion. The question of advocacy is generally one of weight for the jury. An expert can become so identified with a particular position that they become partial, and their evidence inadmissible.

[111] There are times when some of the Applicants' experts veered into advocacy. Regrettably, some of the research appears to conform with the policy positions, normative views, and pre-conceived notions of the researcher. Virtually all the Applicants' experts (and the Applicants themselves) adamantly take the normative position that sex work is work, that sex work is not inherently exploitive or dangerous, and that sex workers have agency. As a result, the Applicants' experts simply reject Parliament's position, as reflected in the Preamble to PCEPA, that sex work is inherently harmful and exploitive. With respect – and I appreciate that all the experts filed their initial reports prior to the Court of Appeal's decision in *N.S.* – the question of inherent exploitation has been answered, at least from the point of view of

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[72] *Bedford (SCJ)*, at para. 113.
[73] *Bedford (OCA)*, at para. 136.
[74] See e.g. *R. v. Sadiqi*, 2013 ONCA 250 at paras. 10-16; *R. v. Shafia*, 2016 ONCA 812, 341 C.C.C. (3d) 354, at para. 253.

constitutional analysis, and, as I have mentioned, is largely irrelevant to the task this court must perform. Parliament's view is that sex work is inherently exploitive even if an individual sex worker has made a conscious choice to sell sexual services.[75]

[112] Moreover, some of the experts in their academic papers are somewhat less adamant about agency than they are in the reports themselves. For example, even in an article calling for the recognition of sex work as valuable work for Canadian sex workers (given their personal circumstances), Professor Benoit and her fellow authors state:

> Recent research on sex workers' working conditions is mixed. Some studies have found sex work to be satisfying for workers due to its flexibility, significant earnings and wide control over client relations, especially for those whose work is organized through digital technologies that aid in increasing workers' decision-making power (Abel, 2011; Sanders et al., 2016). Other studies have found unpredictable income and substandard working conditions (Orchiston, 2016; Phrasisombath et al., 2012)…[76]

[113] I also found that there was some denigration of opposing views. For example, Professor Krusi stated:

> Overwhelmingly, scholars who have made categorical claims that all sex work is coercive and exploitative have been criticized and discredited for the methodological shortcomings of their research that impair validity of analyses and research results.[77]

[114] Ironically, this is the mirror image of the Respondents' experts in *Bedford (SCJ)* (although in fairness to Professor Krusi, I found in reading the cross-examination on her affidavit that she answered questions forthrightly). In the case before Himel J., the Respondents' experts largely maintained that sex work is inherently harmful and a form of violence against women. Justice Himel found that evidence to be problematic, as some of the experts had veered into advocacy and used inflammatory language that detracted from their conclusions.

[115] As a result, Himel J. assigned less weight to the evidence of some of the Respondents' experts in *Bedford*.[78] The Applicants have tried to bootstrap Himel J.'s position into a finding

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[75] *N.S.*, at paras. 129-131.
[76] *The Relative Quality of Sex Work*, Work, Employment, And Society (Benoit, Smith, Jansson, Healey, Magnusson, 2021), p. 249-51, Exhibit 12 to the Cross-Examination of Cecilia Benoit ("**Benoit Cross-Examination**")("***The Relative Quality of Sex Work***") (JAR Tab 44, p. 3516).
[77] Expert Report of Andrea Krusi, July 13, 2021 at pp. 8-9 (JAR Tab 54, p. 4778-4779)((**Krusi Report**").
[78] *Bedford (SCJ)*, at paras. 344, 352-357.

that this Court ought to reject Parliament's policy choice as explained by the government's Technical Paper. The Applicants have criticized the government's Technical Paper as essentially recycling the evidence of experts rejected by Himel J. in *Bedford (SCJ)*. The Applicants stated in their Reply Factum:

> … both Canada and Ontario suggest that it is outside of the Court's proper role to question Parliament's conclusion that sex work *is* inherently exploitative. However, this is a shell game. The Technical Paper merely repeats the views of prohibitionist activists that were considered and rejected in *Bedford*. Canada and Ontario embrace the Technical Paper without acknowledging that it is the government of Prime Minister Stephen Harper's effort to rewrite the facts that this Court found in *Bedford*. Considered in this light, it is clear that the claims of inherent exploitation are rotten at their core.

[116] With respect, the Applicants significantly overstate what Justice Himel said in *Bedford (SCJ)*. Justice Himel not expressly reject empirical evidence that the Technical Paper embraced. Justice Himel also did not specifically reject the proposition that sex work is "inherently exploitive". She did something different: she assigned less weight to those experts who took a dogmatic view of the question because it coloured the rest of their evidence.[79]

[117] In contrast, I found that advocacy was less of an issue with the Respondent's experts, although some of those experts have also been advocates. It is also obviously true that some of the Respondent's experts take a normative position that is opposed to that of the Applicants. For example, Professor Haak, who conducted a literature review for the Attorney General of Canada, takes a position that is opposed to the normalization and decriminalization of sex work.[80] She has written at least one op-ed in The Globe And Mail criticizing Amnesty International for supporting decriminalization and regulation.[81] I take her position into account, as I do with the Respondent's experts.

[118] After my review of the expert reports in this case, and careful review of *Bedford (SCJ)*, I find that what separates the researchers are less disagreements about research methods, or disagreements about the validity of results, or even about the results themselves. What really separates them are their normative judgments about the nature of sex work.

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[79] *Bedford (SCJ)*, at paras. 131-132, 344-345 and 353-356.
[80] Cross-Examination of Deborah Haak, April 11, 2022, q. 113, 222 (JAR Tab 94)("**Haak Cross-Examination**").
[81] Haak Cross-Examination, qq. 123-127.

[119] One caution: there are many opinions and assertions of fact set out by the experts in this case. Because of the volume, I obviously cannot comment on all of them. I have tried to limit my comments to those opinions and facts that are most pertinent to the analysis. If I have not responded to a particular opinion or assertion of fact it should not be taken as agreement.

iii. Fact witnesses

[120] Some of the non-expert witnesses in this case also have their preconceived notions. Non-expert witnesses do not have the same duty to the court as expert witnesses. Several of the Applicants' witnesses expressed strongly negative views about PCEPA and believe that the decriminalization (and possibly regulation) of sex work will make their lives better. I do not doubt that these are sincerely held beliefs. I also do not doubt the empirical observations they have made with their own eyes or what they have been told by sex workers or former sex workers. I find, however, that their point of view has coloured their evidence.

[121] I note that eight individuals affiliated with social services agencies or non-profit organizations filed affidavits on behalf of the Applicants. All but one of these agencies or non-profit organizations is part of the Canadian Alliance For Sex Work Law Reform (which I will refer to as "CASWLR"). CASWLR is, obviously, an Applicant in this proceeding. CASWLR is an umbrella organization. No group can become a member unless it supports the full decriminalization of sex work. These affiants were the following people:

- Jenn Clamen is the national coordinator of CASWLR.
- Sandra Wesley is the Executive Director of Stella, a non-profit organization in Montreal run by and for sex workers. Stella is a member of CASWLR.
- Nora Butler-Burke engages in sex worker support for Action Santé Travesti(e)s et Transsexuel(le)s du Québec ("ASTT(e)Q"), a non-profit organization in Montreal that serves low-income trans people. ASTT(e)Q is a member of CASWLR.
- Elene Lam is the Executive Director and founder of Butterfly, an Asian and Migrant Sex Workers Support Group. Butterfly is a member of CASWLR.
- Ellie Ade-Kur is Vice Chair of Maggie's Toronto Sex Workers Action Project. Maggie's is a member of CASWLR.
- Danielle Cooley is a co-facilitator of SACRED, a program for Indigenous sex workers at Peers Victoria Resource Centre. Peers is a member of CASWLR.
- Jessica Quijano is coordinator of Iskweu Project, a project of the Native Women's Shelter of Montreal. Prior to that she was a street outreach worker for REZO, a social services agency for male and trans sex workers. REZO is a member of CASWLR.
- Laurel Cassels is the Community Programs Coordinator at Daniel McIntyre/St. Matthews Community Association (DMSMCA). DMSMCA is not a member of CASWLR.

[122] As an example, Ms. Clamen herself has been an advocate for decriminalization since 2002.[82] She testified before the Parliamentary committee opposing the enactment of PCEPA. Obviously Ms. Clamen and the other affiants have honestly held beliefs. They have every right to advocate for this or any other cause. Let me be very clear that I make no suggestion of impropriety or bad faith whatsoever on their part. As well, I do not single them out to be condemned, but rather to applaud their commitment and dedication, even where I find myself in respectful disagreement. As well, the affiants are not under the same obligations and duties as the experts. None of this makes their evidence disqualifying. Indeed, much of it is valuable, but these affiants have a point of view and as a trier of fact I must bear that in mind.

[123] The other affiants, such as the Applicants' social services agency workers, tended to blame at least some of the ills associated with sex work (and in some cases all of the ills) on the asymmetrical prohibition scheme of PCEPA. As I will explain later in these reasons, at least part of that blame is based on fundamentally mistaken interpretations of PCEPA. These social services agency workers – not only those who filed affidavits for the Applicants but also those who filed evidence for the Respondents – are people who work with some of the most marginalized and vulnerable, and unfortunate populations in our country. They deserve praise, respect, and recognition from society. Unfortunately, they receive very little. Again, I applaud them even where I find myself in respectful disagreement. I do not doubt their honesty and commitment but their approach – to disproportionately blame asymmetric prohibition – minimizes the complexity of the issues and only targets one factor. That also causes me to approach their evidence with some caution.

[124] The individual Applicants filed affidavits outlining their experiences and setting out what they believe are the harms that are caused by or perpetuated by PCEPA. They all have a point of view, and they are entitled to it. Again, I applaud their bravery and commitment in coming forward – it takes real courage to come forward as they have. That point of view has caused them to over-reach or over-state the case. For example, in her affidavit Alessa Mason states:

> Our lives are shaped by the *PCEPA*. It determines everything we do – the way that we conduct our work, how we interact with clients, and the social stigma and its consequences that we are subjected to everyday. The *PCEPA* has institutionally and systemically victimized sex workers through creating the conditions that put our lives, well-being, and prosperity at risk.[83]

[125] I do not doubt Ms. Mason's sincerity and dedication, but as will become clear in these reasons, there is little evidence to support this very adamant statement. Most of the other

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[82] Cross-examination of Jenn Clamen dated March 22, 2022, qq. 33, 43 (JAR TAB 11)("**Clamen Cross-Examination**").
[83] Affidavit of Alessa Mason, affirmed July 13, 2021, paras. 46 (JAR Tab 19)("**Mason Affidavit**").

Applicants made similar statements. No doubt Ms. Mason and the other Applicants very sincerely holds these firm views, their evidence also appears to be coloured as a result.

[126] The affidavits of the individual Applicants (like the reports of the expert witnesses) also betrayed a misunderstanding of the interpretation and reach of the challenged offences, as I will explain.

[127] What about the Respondents' witnesses? There is no doubt that many of these witnesses also hold strong views of the issues. Some of them have also been involved in advocacy. Diane Redsky is the Executive Director of Ma Mawi We Chi Itata Centre Inc. Ma Mawi is an Indigenous-led social services agency in Winnipeg. Ms. Redsky testified in favour of Bill C-36 in the House Standing Committee. Megan Walker is the former Executive Director of the London Abused Woman's Centre. Ms. Walker also testified in favour of Bill C-36 in the House Standing Committee. As with the Applicants' affidavits, I applaud their commitment and dedication in dealing with some of this country's most vulnerable and marginalized people. And, as with the Applicants' affiants, none of this makes the evidence disqualifying – again, much of their evidence is valuable – but as a trier of fact I must bear in mind the fact that these witnesses have also been advocates.

[128] Although none of the police officers who filed affidavits testified before either the House or Senate committees, the president of the Canadian Police Association (an organization representing front-line police officers) testified and endorsed Bill C-36, as it then was. Rick Hanson, the Chief of the Calgary Police Service, and Eric Jolliffe, the Chief of the York Regional Police Service, also testified before the House committee and endorsed Bill C-36.[84] There is no doubt that law enforcement generally was in favour of legislation that increased their ability to police the sex trade. There is a genuine debate about the appropriateness of that policy, but there is no doubt that the police officers who provided affidavits saw it as a good thing. They may well be right, but as trier of fact, I must also keep it in mind that they also have a point of view.

iv. Conclusions regarding the weight to be given the factual witnesses

[129] As I keep noting, an important theme in this judgment is the argument over whether sex work is simply a form of work or is a highly gendered form of exploitation. Obviously PCEPA takes the latter view. The evidence of the witnesses for each side reflects this argument.

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[84] *House of Commons*, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 43 (10 July 2014) at 16:10 to 16:25 (Tom Stmatakis, President of the Canadian Police Association) (JAR Tab 134, p. 11439-11441); *House of Commons*, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 35 (8 July 2014) at 9:50 to 10:05 (Rick Hanson, Chief of the Calgary Police Service) (JAR Tab 118, p. 11256-11258); *House of Commons*, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 38 (9 July 2014) at 10:05 to 10:15 (Eric Jolliffe, Chief of York Regional Police) (JAR Tab 124, 11323-11324).

Overall, I found that expert and lay affiants submitted by the Applicants were often (although not universally) unwilling to acknowledge the reality that exploitation and trafficking play a significant, and not just a marginal role, in the sex industry. They consistently downplayed the phenomenon of exploitation, and consistently extrapolated from qualitative studies with limited numbers of selected sex workers. They continued to filter their experiences and their conclusions through the normative lens of sex-work as regular work. These problems detract from the weight that I can give to their evidence.

[130] The social services workers and police officers who filed affidavits for the Respondents tended to view the sex trade through the opposite end of the normative lens. In contrast to the Applicants, however, I found that many of these individual affiants were more willing to acknowledge that there might have been perspectives other than their own. For example, even though social services agency workers and police officers largely worked with victims of trafficking and exploitation, they tended to acknowledge that there were sex workers who worked independently as a matter of choice. For example, Cora-Lee McGuire, executive director of the Ontario Native Women's Association stated:

> ONWA recognizes and appreciates that some women freely choose to partake in the sex trade as consenting adults, however, this is not the reality of many Indigenous women.[85]

[131] As another example, Andrea Rittenhouse stated:

> I do not doubt that there are individuals who have voluntarily chosen to become involved in the sex industry, and who work independently or with other individuals who identify as sex workers.[86]

[132] Detective Brian McGuigan of the Edmonton Police stated that most sex workers will initially claim to have entered the sex trade voluntarily and be working independently, but most will eventually admit that they work under the control of an exploiter. Detective McGuigan has, however, encountered sex workers who were involved in the sex industry of their own free will. He has also encountered sex workers who worked collaboratively. He noted that such sex

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[85] Affidavit of Cora-Lee McGuire, affirmed December 17, 2021 at para. 23, (JAR Tab 64)("**McGuire Affidavit**").
[86] Affidavit of Andrea Rittenhouse, affirmed December 15, 2021, at para. 25 (JAR Tab 69)("**Rittenhouse Affidavit**").

workers usually had control over advertisements, services offered, movements and money.[87] Staff Sgt. Colin Organ of the York Regional Police deposed to much the same thing.[88]

[133] Thus, the social services workers and police officers appeared more willing to acknowledge a perspective that left room for another point of view. This willingness adds to the weight that I can give this evidence.

B. The Sex Industry In Canada

i. The different views of the parties and the intervenors

[134] Studying the commercial sex industry is difficult and complicated. The sex industry is also difficult to characterize – as noted by the ways in which the parties part issue. Is sex work a form of labour like any other? Or is it highly gendered and exploitive? Do people choose sex work or are they trafficked into it? Do they choose sex work and then encounter traffickers and exploiters and are then intimidated or coerced into working for someone else? Or does the opposite happen – are they trafficked into sex work and then eventually make a free and voluntary decision to choose to continue? Or is there a spectrum of experience?

[135] The Applicants, and some of the intervenors who support them, take the position that sex workers exercise agency and decision-making even where their options are constrained. The Respondents agree that there are sex workers who enter the sex industry voluntarily and exercise agency. The Respondents also take the position that large numbers of sex workers – frequently the most marginalized and vulnerable – are coerced, lured, or trafficked into the sex industry.

[136] As the Applicants put it in their factum, the Application "does not challenge the criminalization of forcing sex without consent."[89] That is well and good that the Applicants do not challenge the constitutionality of laws prohibiting sexual assault and human trafficking, but the coercive aspects of sex work cannot simply be assumed away for the purposes of *Charter* analysis.

[137] At least one intervenor, the Sexual Health Coalition, took the position that the fundamental question is one of personal autonomy, rather than agency or choice of occupation:

> 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

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[87] Affidavit of Brian McGuigan, affirmed December 15, 2021, at paras. 27-28 (JAR Tab 81)("**McGuigan Affidavit**").
[88] Organ Affidavit, at paras. 7, 14, 56-58.
[89] Factum of the Applicants, at para. 44.

> Respondent's assertion, the personal choice at issue is not the choice of occupation. Neither is the dispute about an affirmative right to engage in commercial sexual transactions, as the Attorney General of Ontario asserts. At issue is the fundamental personal choice of who to have sex with and under what conditions.[90]

[138] In passing PCEPA, Parliament took a starkly different view, as expressed in the preamble. Some intervenors agree with the assertions in the preamble. For example, the Women's Equality Coalition puts it quite directly in its factum:

> The prostitution industry, in Canada and around the world, is sexist, racist, classist and colonialist. It legitimizes male violence against women and other forms of inequality in the pursuit of economic profit.
>
> The *Charter* does not compel the Government to accept the Applicants' promotion of prostitution as a solution to the economic difficulties faced by poor women...
>
> Section 7 of the *Canadian Charter of Rights and Freedoms* does not protect the right of men to buy sex or to have their sexual demands satisfied. It does not protect a right to pimp, procure or profit from the prostitution of another person. Yet the Applicants seek to create such rights through the smokescreen of the asserted liberty and security interests of women almost entirely immunized from prosecution by the impugned scheme. If the Applicants' arguments are accepted, the Charter will prevent Parliament from ever criminalizing sex purchase. This amounts to a constitutional right to buy sex, however it is packaged...[91]

[139] The factum of the intervenor Asian Women for Equality Coalition also states in its factum:

> The Applicants' assertion that prostitution should be considered an "occupation" has no merit and does not assist the Court in deciding this Application. First, the dangers of violence, sexual assault and even murder at the hands of men who pay for sexual access to women clearly distinguish prostitution from any other occupation. Second, there is no

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[90] Factum of the Sexual Health Coalition, at para. 9. See also Factum of the Women's Legal Action and Education Fund, at paras. 11-13 regarding the s. 15 analysis.
[91] Factum of the Women's Equality Coalition, paras. 1-3.

> way to reconcile the Applicants' position with laws against sexual harassment that protect women from enduring sexual propositions or being fired from their jobs for refusing sex.[92]

[140] Whether sex work is simply a form of labour where workers exercise agency or is inherently exploitive and a source of social harm is not a legal question. Parliament, in enacting PCEPA, explicitly chose the latter interpretation. This court is bound to defer to the *Charter*-compliant decisions of Parliament.

[141] It is more productive to describe the sex industry in Canada. I will start with the problems associated with researching the sex industry.

ii. What are the problems research sex workers and sex work?

[142] Almost the only thing the Applicants and Respondents agree on is that sex workers are a very difficult group to study.[93] Sex work is a large and diverse phenomenon, and individual research cannot present a complete picture.[94] There are many methodological challenges. The two key problems are accessing the population of sex workers and drawing a representative sample of sex workers. These challenges were also identified by Justice Himel in *Bedford (SCJ)*. As Professor Atchison, who provided an expert report for the Applicants, stated:

> The principal methodological challenge that researchers studying the industry face is accessing the people, places and things that will provide the information necessary to find the best answers to our various research problems and questions. Because the sex industry is so multifaceted and complex, it is impossible to accurately determine its exact size or to derive a comprehensive list of all of the people and things involved in the various aspects of its operation. This inability to estimate the parameters of the population makes it impossible to draw a single sample that is statistically representative of the wider population of people or things that make up the industry. As a result, researchers must rely on various scientific techniques to select samples that 'best represent' the particular individuals, groups or are looking at.[95]

[143] In her cross-examination on her affidavit, Professor Skilbrei had the following exchange:

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[92] Factum of Asian Women for Equality, at para. 6.
[93] Expert Report of Deborah Haak, December 15, 2021, paras. 46 (JAR Tab 92)("**Haak Report**").
[94] Expert Report of May-Len Skilbrei, December 20, 2021, para. 6 (JAR Tab 88)("**Skilbrei Report**").
[95] Expert Report of Chris Atchison, dated June 13, 2021, p. 9 (JAR Tab 48)("**Atchison Report**").

> Q. Right. So, you would agree that sex workers are generally a hard to reach research population, right?
>
> A. Yes. That's why they are difficult to count.
>
> Q. And we have already discussed that one variable that affects the ability to draw conclusions between a law and its effects, is the stigmatization of sex work, right? Because that can be independent of the law, right?
>
> A. It can be independent of the law, and makes it difficult to contact the population.
>
> Q. Right, so stigma makes it hard to access research participants is what you just said, right ?
>
> A. And it also can affect what people say, of course.
>
> Q. Because a sex worker might not be willing to speak to a researcher they don't know, right?
>
> A. Yes.
>
> Q. Or they might be willing to speak to you, but they might not be totally open, right?
>
> A. Definitely.[96]

[144] Professor Krusi stated that it is impossible to obtain a random sample of sex workers. As well, it can be difficult to gain access to and cooperation from sex workers. As a result, she agreed that researchers must be careful about drawing general conclusions applying beyond the specific participants of the study.[97] Professor Benoit noted that it is difficult or impossible to obtain a representative sample due to several factors, including acknowledgment that being a sex worker could make one an object of hate or scorn; sex workers distrust non-members, may refuse to cooperate with outsiders, avoid revealing their identities, and may give unreliable answers to questions about themselves and their networks.[98]

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[96] Cross-Examination of May-Len Skilbrei, April 27, 2022, q. 205-209 (JAR Tab 90)("**Skilbrei Cross-examination**").
[97] Cross-Examination of Andrea Krusi, April 19, 2022, q. 44-50 (JAR Tab 56)("**Krusi Cross-examination**").
[98] Benoit Cross-Examination q. 125-130 (JAR Tab 44).

[145] Because of the difficulties studying the population of sex workers, most of the research is qualitative, rather than quantitative. While such research can be valuable, it must also be approached with some caution.[99] The following comment made by Himel J. in *Bedford (SCJ)* equally applies here:

> Due to the relatively hard-to-reach and fluid nature of prostitution, research on the subject has some limitations. This was acknowledged by both parties. Much of the research presented by the parties' experts has been designed as qualitative, as opposed to quantitative research. In *Research Decisions: Quantitative and Qualitative Perspectives*, 3 rd ed. (Scarborough: Thomson, 2003) at p. 313, Professor Ted Palys describes qualitative research as follows:
>
> > ...typically inductive..., places a high value on preliminary exploration..., extols the virtues of target or purposive sampling..., and emphasizes that one should maintain flexibility and reap the advantages of more open-ended research instruments.
>
> The method and degree to which qualitative researchers can make causal inferences was debated amongst the experts in this case. Random sampling methods, which minimize sampling error, are generally not possible in prostitution research because the overall population size (or "sampling frame") is typically not known. It is, therefore, important for researchers to limit their conclusions to the discrete sample studied and avoid making generalizations.[100]

[146] In this application several experts agreed that qualitative research cannot be used to show causation or is not intended to show causation.[101] In his expert report, Professor Atchison stated the following about quantitative and qualitative research:

> Quantitative approaches are often associated with the view that there is a reality about any given phenomenon that exists – independent of the researcher – that can be understood and awaits our discovery. Accordingly, this approach rests on the belief that

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[99] *R. v. McIntosh* (1997) 117 C.C.C. (3d) 385, 25 O.R. (3d) 97 (Ont.C.A.) at para. 14.
[100] *Bedford (SCJ)*, at paras. 97-98.
[101] Cross-Examination of Kathy AuCoin, December 15, 2021, q. 50-51 (JAR Tab 86)("**AuCoin Cross-Examination**"); Krusi Cross-Examination, q. 362-367; Cross-Examination of Professor Atchison, March 4, 2022, q. 88-90 (JAR Tab 50)("**Atchison Cross-Examination**").

> the world is made up of causes (or predictors) and effects (or outcomes) and the object or goal of science is to find causal explanations (theories) for the phenomenon or phenomena we study…
>
> Qualitative approaches, on the other hand, follow a different set of logic. They often start from the belief that in order to study human behaviour we have to take into account that humans are thinking beings who actively perceive and make sense of the world around us, we have the capacity to abstract from our experience, ascribe meaning to our behavior and the world around us and are affected by those meanings. Consequently, qualitative approaches focus on employing methods that allow for the acquisition of deeper understandings of the human-centred processes underlying the phenomena we study…[102]

[147] Most of the studies referenced by the Applicants' experts used respondent-driven sampling. That is a method used by the AESHA project.[103] The AESHA project is one that recurs often in the record. Professor Krusi stated that to her knowledge the study "is the largest, and longest standing, ongoing, longitudinal study focused on sex workers health safety and working conditions in North America."[104]

[148] In this context, respondent-driven sampling means that a sex worker responds to a contact. For example, the researcher sees a sex worker's advertisement online, posts an invitation, and the sex worker responds by contacting the researcher. The sex worker then comes in for an interview.[105] Random sampling would be preferable and would obtain a more representative group, but it is almost impossible to conduct random sampling, as noted by Dr. Benoit.[106] Researchers who use respondent-driven sampling also conduct studies by partnering with community organizations that assist sex workers to obtain access to them. It is understandable that researchers would use this method, but it can obviously lead to skewed results. Very often those community organizations are in favour of the decriminalization and/or regulation of sex work. While there may be valuable information in these studies, a trier of fact must be aware that these studies have limits and may well reflect a bias.[107] Indeed, there is almost certainly a problem with confirmation bias: virtually all the experts using the respondent-survey method had results that conformed to their view of sex work.

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[102] Atchison Report, p. 4-5.
[103] AESHA stands for An Evaluation Of Sex Workers' Health Access.
[104] Krusi Report, p. 6, 30-31.
[105] Benoit Cross-Examination, q. 132-133.
[106] Benoit Cross-Examination, q. 140-151.
[107] Skilbrei Report, para. 47.

[149] After my review of the evidence, I agree with this statement by May-Len Skilbrei:

> Which picture the research presents depends on the sample strategy applied when recruiting participants. If recruitment is solely among the most marginalized of sex workers, it should come as no surprise that their marginalization is linked to vulnerabilities already present before they took up sex work…
>
> And, similarly, if one only recruits research participants among organized and privileged sex workers, one will often find that sex work for them does not stem from marginalization, trauma and poverty.[108]

[150] Deborah Haak conducted a review of the literature for the Attorney General of Canada. She noted that that much research is conducted through the normative lens that sex work is a type of labour. Professor Haak further noted:

> All or almost all of the scholars conducting empirical research about the exchange of sexual services for consideration in Canada since PCEPA came into force appear to conduct their research through a shared normative lens reflecting a value judgment that sex work is, and should be treated as, an occupation and that sex work is, and should be treated as, different and distinct from human trafficking.
>
> […]
>
> … all or almost all of the authors approach their research through a normative lens that views the commercial exchange of sexual services for consideration as a job or occupation.[109]

[151] Professor Haak noted that none of the researchers she examined had identified an important limitation: the research appeared to exclude the experiences of people trafficked or coerced. Some of the articles she examined made specific reference to only including sex workers who provide their services consensually. As well, there appears to be no scholarly empirical consideration of the experiences of people supporting those exiting sex work or surviving trafficking – and in some cases those people have been excluded from study.[110]

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[108] Skilbrei Report, at para. 18 (citations omitted).
[109] Haak Report, at paras. 22, 32.
[110] Haak Report, at paras. 22, 42, 47.

[152] Professor Abel in New Zealand conducted a qualitative study very similar in method to those conducted by the Applicants' Canadian experts. The study purported to show that sex workers were better off after decriminalization and regulation. The methodology of that study was criticized by Professor Pratt, a criminologist and expert in research methods, for reasons similar to those cited by Professor Haak.[111]

[153] Professor Haak's comments were the subject of criticism from the experts put forward the by the Applicants.[112] Having reviewed her evidence, and reviewed those critical reports, I agree with two of Professor Haak's findings:

- First, it is abundantly clear that virtually all the Applicants' experts, including Professor Abel, view sex work through the normative lens that sex work is labour and not exploitation. As a result, they take the position that many sex workers have agency and choice. Many of the researchers are also strong advocates for decriminalization and/or regulation.
- Second, and more importantly, I find that Professor Haak's observation that the research lacks participation by sex workers who have been trafficked or coerced is valid. Most of the Applicants' experts acknowledged that exploitation, coercion and trafficking exist, but also downplayed it. There is little mention in the Applicants' expert reports of sex workers who have been trafficked or coerced into sex work, or who have entered sex work voluntarily but become subject to coercion and trafficking later. There was an effort by the Applicants and their witnesses to separate sex work from coercion and human trafficking. Many of the Applicant's experts criticized the Respondents for conflating sex work and human trafficking. I find that the attempt by the Applicants to separate sex work and human trafficking is artificial and unrealistic considering the strong evidence to support Parliament's view that they often go together, as I will explain.

[154] The Applicants' experts have applied research methods that are standard and approved in their field. At the end of the day, however, qualitative studies are essentially structured interviews of sex workers who are identified through partner agencies and willing to be interviewed. I am not criticizing that methodology or denigrating that work, but it has two obvious limitations. The chief limitation is that it cannot be used to extrapolate to the entire population of sex workers; another limitation is the opportunity for confirmation bias.

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[111] Expert Report of Gillian Abel, July 11, 2021 (TAR Tab 57)("**Abel Report**"); Affidavit of John Pratt, affirmed December 20, 2021 (JAR Tab 95)("**Pratt Affidavit**").
[112] See: Reply Report of Cecilia Benoit, January 27, 2022 (JAR Tab 43).

[155] Much of the evidence filed by the Respondents also has limitations. Many of the affidavits relied on are from social services agency workers and police officers. These witnesses report based on their experiences and their interactions with sex workers. The social services agencies deal with sex workers who are suffering abuse or exploitation or looking for a way to exit the sex industry. That may skew the experiences of social services workers and police officers in a way that is opposite to the Applicants' experts: they may have little or no contact with sex workers who enter the sex trade willingly, do not encounter exploitation, and exit when they choose. Those sex workers are less likely to require such services.

[156] For example, Andrea Rittenhouse, an intervention support worker at the Crime Victims Assistance Centre in Montreal ("CAVAC"), indicated that CAVAC only works with victims of crime. The clients have all been victimized by a procurer, a customer, or an employer. She stated in her affidavit that there were individuals who chose to work in the sex industry and worked independently, but she had no experience working with them.[113]

[157] Police officers use various methods to investigate the sex industry. Some of these methods may include undercover work – pretending to be a customer in order to access a sex worker and investigate if she is being exploited. While no doubt for some sex workers such contact comes as a relief, for others it can be frightening – and this may also skew the perspectives of police officers. Police officers may also have an incomplete view of the sex industry because it is their job to find and investigate exploiters and traffickers. Because exploiters and traffickers exist, the police will always be able to find some.

[158] While I do not doubt that the experiences relayed to social services agency workers and police officers by sex workers are accurate, and that they are faithfully reported, as with the Applicants it is impossible to gauge numbers.

[159] To conclude, I find that much sex work is conducted by populations that are transient or marginalized (or both). This hard-to-reach population cannot or chooses not to engage with researchers. That makes it difficult for researchers to find and engage with sex workers. Thus, key parts of the population, such as those who are the subject of trafficking or coercion, are often left out of qualitative studies of the sex trade.

[160] I also find that the evidence from social services agency workers and police officers who regularly interact with sex workers is important and valuable. I recognize that the affidavits from these groups have been criticized by the Applicants' experts. I find, however, that these are generally reliable and useful. They are based on sex wokers' personal experiences as conveyed to these service providers and police officers. These are social services workers and police officers who have vast experience of dealing with sex workers over many years. They reflect the

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[113] Rittenhouse Affidavit, para. 25.

experiences of marginalized or hard-to-reach groups that qualitative researchers may miss. I find that their evidence is no less valid or valuable than the results from respondent-driven surveys and qualitative studies generally.

iii. Is there agreement about the nature of the sex industry in Canada?

[161] The Applicants and Attorneys General agree on some basic points:

- Sex workers are diverse population in terms of racial, gender, and cultural identity,
- Sex workers are also diverse in terms of socio-economic background, education, and employment background;
- Sex workers provide services in a variety of venues and ways of working;
- Women are the majority of sex workers;
- Women from marginalized populations, and especially Indigenous women, are over-represented in the sex industry.
- Indigenous women are especially over-represented in the street-based commercial sex industry.
- Trans and non-Indigenous racialized populations are also over-represented in the sex industry.
- Sex workers provide sexual services for multiple reasons, including the opportunity to generate income.

[162] There is also agreement that sex workers work in a large variety of locations and circumstances – both indoor and outdoor, and through different means of contact. These include street-based sex workers who may provide services in vehicles or other outdoor locations. These also include sex workers who work out of in-call locations such as hotels, homes, or Airbnbs. There is often overlap between and among these groups. Sex workers may work through escort agencies, strip clubs, or massage parlours.

[163] There is evidence that sex work is highly gendered – the overwhelming majority of sex workers are female, and the overwhelming majority of customers are male.[114] There is also evidence that racialized groups – particularly Indigenous girls and women – are over-represented in the sex industry.[115] There is disagreement about the average age of sex workers, and the average age at which women and girls enter the sex industry. I turn to some specific topics.

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[114] Cross-Examination of Professor Chris Bruckert, April 14, 2022, q. 546 (JAR Tab 47)("**Bruckert Cross-Examination**"); McGuigan Affidavit, para. 9.
[115] Affidavit of Diane Redsky, sworn December 15, 2021 at para. 26; (JAR Tab 67)("**Redsky Affidavit**"); McGuire Affidavit at para. 25.

iv. Do sex workers enter the industry by choice?

[164] The Applicants argue that sex work is a choice (even if, in some cases, a constrained choice), that sex workers have agency, and that sex work is simply a form of labour.[116] Professor Benoit notes that people engage in sex work for the same reasons that other people engage in other kinds of work: financial need combined with less favourable employment options. Sex work is a livelihood strategy, and sex workers exercise agency, even if that agency is constrained by economic factors. Professor Benoit states that sex workers mention four favourable themes when discussing sex work – job satisfaction, money, and control/independence; sex workers only mention one unfavourable theme: stigma, reproduced by criminalization.[117]

[165] Professor Krusi in her report states that most of the empirical research suggests that most sex workers engage in sex work as a form of employment, rather than due to coercion and exploitation.[118] The Applicants who have engaged in sex work, such as Llana Moon Perrin, state that they did so to earn money. They engaged in sex work so that they could have food to eat and money to pay the rent. They say that they made a choice to engage in sex work.[119] Some of the intervenors support this position.[120]

[166] The question of exploitation, coercion, manipulation, and human trafficking versus choice and agency is potentially important on a s. 7 and s. 1 *Charter* analysis. Unlike the question of the inherent nature of sex work, empirical evidence may shed light on this issue. Recall that in *N.S.* Hoy J.A. stated that PCEPA has three purposes:

> first, to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible, in order to protect communities, human dignity and equality; second, to prohibit the promotion of the prostitution of others, the development of economic interests in the exploitation of the prostitution of others, and the institutionalization of prostitution through commercial enterprises in order to protect communities, human dignity and equality; and third, to mitigate some of the

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[116] Factum of the Applicants, para. 42.
[117] Expert Report of Cecilia Benoit, dated July 13, 2021, p. 8 (JAR Tab 42)("**Benoit Report**").
[118] Krusi Report, p. 8-9.
[119] Affidavit of Llana Moon Perrin, affirmed April 25, 2022, paras. 2, 3, 7, 9 (JAR Tab 37)("**Perrin Affidavit**"); Reply Affidavit of Sandra Wesley, affirmed July 12, 2021 at para. 7 (JAR Tab 23).
[120] For example: Factum of the British Columbia Civil Liberties Association, paras. 4-7; Factum of the Black Legal Action Centre, paras. 2-4; Factum of Egale Canada and the Enchante Network, paras. 4-10.

> dangers associated with the continued, unlawful provision of sexual services for consideration.[121]

[167] The question of exploitation, coercion, manipulation, and human trafficking versus choice and agency is relevant to all three purposes.

[168] Respectfully, I do not accept the factual claim that the majority of sex workers do not engage in sex work through coercion or trafficking. What I do accept is that the majority of respondents to surveys conducted by the Applicants' experts state that they do not engage in sex work through coercion and trafficking. That is not the same thing as a majority of sex workers. There is evidence, which I accept, that sex workers are frequently counselled by their exploiter or trafficker to claim to the police to be independent when they are not.[122] It is obviously impossible to say how many sex workers counselled by an exploiter or trafficker – if any – are also respondents to surveys.

[169] Several social services agency workers and police officers submitted affidavits on behalf of the Attorney General of Canada. They found, based on their experiences, and based on the reporting of sex workers that they have contact with, that many have been coerced, trafficked, or manipulated into sex work. Inspector Ramkissoon of the Winnipeg Police, for example, estimates that of the women he has personally encountered, 20% worked in the sex trade willingly, 40% were involved in survival sex, and 40% had been coerced into entering and remaining in the sex trade.[123] Paul Rubner, formerly of the Calgary Police and now a social services agency coordinator, noted that "the demographic of women at RESET does not include any sex trade workers who were engaged in the sex trade independently."[124] Some social services workers have affirmed that they have never met a sex worker who entered the commercial sex industry willingly or have met very few.[125] Obviously Mr. Rubner, Inspector Ramkisson, and some of the social services agency workers were relying on personal experience rather than a scientific sampling. That does not, however, mean that their experience is invalid. I find that the evidence of police officers and social services agency workers on this point is useful, and I accept their evidence. I also find that, like the evidence in the Applicants' expert reports, their observations must be confined to the population that they are personally acquainted with. Their numbers cannot be extrapolated any more than the Applicants' numbers, although, after reviewing all the evidence. That said, I think that it is likely that police officers and especially social services workers are probably familiar with larger numbers than the Applicants'

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[121] *N.S.* at para. 59.
[122] Organ Affidavit, paras. 55-56; Affidavit of Andrew W. Taylor, sworn January 11, 2022, para. 9 (JAR Tab 99)("**Taylor Affidavit**").
[123] Affidavit of Darryl Ramkissoon, sworn December 15, 2021, para. 41 (JAR Tab 79)("**Ramkissoon Affidavit**").
[124] Affidavit of Paul Rubner, affirmed December 15, 2021, para. 29 (JAR Tab 83)("**Rubner Affidavit**").
[125] For example: McGuire Affidavit, at para. 20.

experts (although likely not larger than the numbers dealt with by the Applicants' social services workers).

[170] I think it is important to point out that the Applicants also provided affidavits from social services workers. Most of these affidavits are largely silent on the question of choice versus coercion. For example, according to Sandra Wesley, the executive director of Stella in Montreal, Stella has a representative view of sex worker demographics in Montreal. Stella has contacts of between 5000 and 8000 sex workers every year. Her affidavit does not mention this issue.[126] Neither does Nora Butler-Burke, the director of ASTT(e)Q.[127] Ellie Ade-Kur, the vice-chair of Maggie's, indicated that outreach workers logged contacts with sex workers of between 25 and 60 sex workers per week. That number has been increasing, and by 2021, Maggie's outreach workers logged contacts of about 50-100 sex workers per week. She is particularly engaged with Black sex workers in her role at Maggie's. Ms. Ade-Kur stated that sex workers reported reasons for engaging in sex work ranging from financial to job satisfaction. Her affidavit is silent on the question of how many sex workers are coerced or manipulated into sex work versus the number who enter as a matter of choice.[128]

[171] Two affidavits submitted by social services agency workers on behalf of the Applicants did deal with the issue. Elaine Lam of Butterfly (an organization representing Asian migrant sex workers) and Diane Cooley of SACRED (a program supporting indigenous Sex workers in Victoria) filed affidavits and were cross-examined. In her affidavit Ms. Lam asserted that none of the sex workers who were members of her organization were trafficked or exploited.[129] I carefully reviewed the transcript of Ms. Lam's cross-examination. It was impossible to understand her shifting explanations for the many contradictions in her testimony.[130] Ms. Lam also indicated that, in essence, she discourages Butterfly participants from reporting crimes to the police as the police may report them to the immigration authorities. It was clear from her cross-examination that she gives that advice because of something she was told by a single police officer in a single situation.[131] I find that this was improper. It was also contrary to the evidence before this court. Staff Sgt Correa of the Toronto Police Human Trafficking Enforcement Team was the only police officer to address this issue in his affidavit. His team does not notify immigration authorities when they come across those without status.[132] Staff Sgt Organ of the York Regional Police indicated during his cross-examination that immigration status is not a

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[126] Affidavit of Sandra Wesley, affirmed July 12, 2021, para. 27 (JAR Tab 22)("**Wesley Affidavit**"); Cross-examination of Sandra Wesley, February 28, 2022, p. 12 (JAR Tab 24).
[127] Affidavit of Nora Butler-Burke, affirmed July 13, 2021 (JAR Tab 25)("**Butler-Burke Affidavit**").
[128] Ade-Kur Affidavit, paras. 9, 25.
[129] Affidavit of Elene Lam, affirmed July 12, 2021, para. 15 (JAR Tab 27)("**Lam Affididavit**").
[130] Lam Affidavit, para. 28; Cross-examination of Elene Lam, July 12, 2021, p. 48-59 (JAR Tab 28)("**Lam Cross-Examination**").
[131] Lam Affidavit, para. 45; Lam Cross-examination, p. 111-112.
[132] Affidavit of David Correa. Sworn January 13, 2022, para. 53 (JAR Tab 97)("**Correa Affidavit**").

factor in his human trafficking investigations.[133] Ms. Lam's statements undermine her credibility. I give her evidence no weight.

[172] In contrast, I give weight to Ms. Cooley's evidence. Ms. Cooley indicated that many Indigenous sex workers have told her that it is a job that they decided to do. Many of them indicated that they have good and bad days at their work. She further stated that categorizing Indigenous sex workers as victims "is not reflective of the experiences that Indigenous sex workers share with us."[134] In contrast to Ms. Lam, Ms. Cooley did not overstate her case and was careful to limit her observations to what she was told.

[173] Professor Krusi, drawing on the AESHA study, found that of the migrants among the participants in the study (primarily Asian migrants) none had entered sex work due to trafficking or other forms of coercion. All said that they had entered for financial reasons. Again, I accept that the study participants told the interviewers that. The study, however, was structured in such a way as to limit the participants to certain types of sex workers – primarily those working in massage parlours or micro-brothels. The participants were visited at their work sites by outreach workers. Some participants identified as sex workers, over half as owner/managers, and several worked in both roles. In her cross-examination on her affidavit, however, Professor Krusi was careful to point out the limitations to her research in this area. She agreed that there are challenges involved in reaching hidden populations, such as populations of migrants:

> Q. And they also state that:
>
> "Despite our best efforts, our study does not reflect the full diversity of more marginalized im/migrants who do sex work, such as undocumented individuals." Correct? Would you agree with that statement?...
>
> . . .
>
> A. Yes. So this study as you say for the qualitative component no one reported to be trafficked and therefore speaks to people who have not experienced trafficking.
>
> Q. Understood. But would it be accurate to say that the study cannot be taken as an accurate representative sample of all marginalized immigrants who do sex work such as undocumented individuals in Vancouver, can it?

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[133] Organ Affidavit, p. 75-78.
[134] Affidavit of Danielle Cooley, affirmed July 9, 2021, para. 13 (JAR Tab 31)("**Cooley Affidavit**").

> A. I think the qualitative component can't. For the quantitative component I would like to add that within the AESHA cohort, yes, we do focus on sex work. There is a very small percentage of people who say that they have experienced trafficking. But again, I would say the fact that we have 900 sex workers who work in Meto Vancouver and very few report that they have experienced trafficking, that does tell us something about the phenomenon of trafficking and how frequent it is, but it also does say something about who we're able to reach.[135]

[174] The outreach workers visited sex workers in their places of work. There may have been managers or other supervisors present (or, perhaps, more exploitive third parties). These studies do not seem to consider whether some sex workers may well feel constrained about what they can and cannot say under those circumstances.

[175] There is also evidence that some sex workers are pressured or counselled not to cooperate with the police or identify as victims. Staff Sgt Organ stated in his affidavit that in human trafficking investigations many sex workers do not wish to cooperate or identify as victims, although several do. Many sex workers later come forward and indicate that they are or were under the control of an exploiter. According to Staff Sgt Organ these sex workers state that:

> … it is a common pimp tactic to prepare a sex trade worker for what to say during a police interaction. This includes reinforcing the mistrust of police by stating "they cannot be trusted", "they will arrest you", or "they will not take you seriously, as you are involved in the sex trade". The sex trade workers are also told to claim they are independent and that they work alone and are not associated with anyone.[136]

[176] It is very difficult to give a reasonable estimate of the number of sex workers entering the industry through choice. I find, however, that it is likely exaggerated in the Applicants' expert reports. I make that finding for four reasons:

- The qualitative studies are largely based on responses from respondents who are identified by organizations committed to the decriminalization and regulation of the sex trade. I do not question the good faith of these organizations, but that cannot help but limit the sample group;

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[135] Krusi Cross-Examination, p. 41-42.
[136] Organ Affidavit, paras. 55-56.

- As mentioned, the qualitative studies appear to exclude those who have experienced trafficking or coercion;
- It is likely that the sex workers reached by the qualitative studies are less likely to be highly marginalized and vulnerable;
- The Applicants' experts largely favour the decriminalization and regulation of prostitution – which may be a valid goal from a policy perspective – and take the normative view that sex work is work, just like any other occupation. Again, I do not question the good faith of the experts, but there is obviously a significant potential for confirmation bias.

[177] There is evidence that some sex workers enter the sex trade by choice – sometimes constrained choice – but later become subject to the control or exploitation of exploiters or traffickers.[137] It appears that many of the sex workers who enter by choice and are later exploited are also left out of the qualitative studies. I turn next to the question of human trafficking.

v. Is there a link between sex work, exploitation, and human trafficking?

[178] In contrast, are there sex workers who enter the sex industry through trafficking, manipulation, or exploitation? The Applicants argue that the Attorneys General have wrongly conflated sex work with human trafficking or exploitation. Sex work and human trafficking are two different phenomena. There are other sections of the *Criminal Code* that prohibit human trafficking. The Applicants do not challenge those sections. The Applicants argue that there is no evidence that sex work transitions to human trafficking, or that sex workers are subject to an inherent risk of human trafficking.

[179] With respect, I cannot agree. I find that there is a clear link between sex work and human trafficking. In fact, there is a considerable body of evidence that many sex workers are manipulated or coerced into sex work or trafficked while in it.[138]

[180] Individuals working in social services agencies provided evidence in that regard. Andrea Rittenhouse of the Montreal Crime Victims Assistance Centre has experience working with young women and girls in the sex industry. She stated in her affidavit that there is a high level of manipulation, coercion and control exercised over young women and girls in the sex industry - psychologically, physically, financially, and sexually.[139] Ms. Rittenhouse described the recruitment process:

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[137] Walker Affidavit, para. 5.
[138] Skibrei Affidavit, para. 42; Correa Affidavit, para. 51.
[139] Rittenhouse Affidavit, para. 35.

> While individual circumstances vary, the young women and girls who I have worked with report several common experiences in the recruitment process. In general, the methods they have described fall into the following categories: Young women and girls have been seduced into the sex industry by their partner ("boyfriending in"); Young women and girls have been lured into the sex industry under the pretext that they will be able to make a lot of money, with promises from a procurer of fast, easy cash; Young women and girls working in the sex industry have been forced to work for a procurer under threats of violence; Young women and girls seeking adventure and autonomy have fallen victim to procurers.

[181] Several of the police officers and social services workers also described how recruitment and coercion often takes place. As well as Andrea Rittenhouse, Diane Redsky, Megan Walker, Cora-Lee McGuire, Inspector Ramkissoon, Detective McGuigan, and Inspector Dominic Monchamp of the Montreal Police also described "the boyfriend method" or manipulation by a "Romeo pimp" - a person that the woman or girl thought cared about them but was in fact only interested in exploitation – or procurement by organized crime or gangs.[140] That is a method commonly used to recruit young and vulnerable women and girls into the sex industry through romance and intimacy, eventually leading to control, isolation, and violence. It is also sometimes used to lure women and girls who are already working in strip clubs or massage parlours. Police officers and social services workers described other methods as well, usually involving violence by unscrupulous exploiters and other third parties. Exploiters may manipulate a young and vulnerable person into believing that she is entering the sex trade by choice.[141]

[182] There is also evidence that exploiters and traffickers target young people. Staff Sgt Organ has investigated offences related to the sex trade, including human trafficking. In his experience (and the experience of other police officers and social services workers) there is a high prevalence of sex trade workers who have been involved with the Children's Aid Society. Many sex workers entered the sex trade when they were younger than age 18. In one project he was involved with, 31 female sex workers were interviewed. Their average age of entry into the sex industry was 14.8 years old.[142] According to the observations of Sergeant Maria Koniuk of the Winnipeg Police, 80% of sex workers on the street in Winnipeg are Indigenous and range in

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[140] Rittenhouse Affidavit, paras. 35-38; Redsky Affidavit, paras. 50-53, 58-62; Affidavit of Megan Walker, affirmed December 15, 2021, paras. 38-40, 42 (JAR Tab 72)("**Walker Affidavit**"); McGuire Affidavit at para. 37; Ramkissoon Affidavit, para. 16; McGuigan Affidavit at para. 25; Affidavit of Dominic Monchamp, sworn December 15, 2021, at paras. 33-37 (English translation at JAR Tab 73.1)("**Monchamp Affidavit**").

[141] Redsky Affidavit, para. 53.

[142] Organ Affidavit, para. 32.

age from 14-65.[143] Inspector Monchamp filed evidence from a Quebec provincial survey of victims of procuring in Quebec. The survey found that of 292 cases analyzed in 2018 and 2019 43.5% of victims were minors.[144]

[183] There is also evidence that exploiters and traffickers target those with pre-existing vulnerabilities. These vulnerabilities include addiction issues; poverty; cognitive ability; mental health issues; immigration issues; and medical conditions. There is also evidence that exploiters and traffickers specifically target youth in foster care, group homes, and youth correctional facilities. Often these are young women and girls who have been in the child protection system or run away from home. Indigenous girls and women are especially vulnerable.[145] According to Diane Redsky of Ma Mawi We Chi Itata Centre Inc., an Indigenous-led social services agency in Winnipeg, the average age of recruitment has become younger and younger.[146]

[184] The Applicants have filed evidence from three studies stating that the average age of entry into the sex trade in Canada is between 18 and 24.[147] Even if that number is correct it obviously still means that many girls under 18 enter the sex trade.

[185] Cora-Lee McGuire of the Ontario Native Women's Association acknowledged in her affidavit that there are women who enter the sex trade voluntarily, but noted that none of the women involved with the ONWA program self-identified as participating in sex work by choice. She noted that the vulnerability of Indigenous women may lead to them being targeted for exploitation and human trafficking.[148]

[186] Staff Sgt Organ indicated that there are signs a sex worker is in an exploitive relationship such as bruising, burns, or other injuries; lack of awareness of advertisements; lack of awareness of her location; lack of communications with the customers; frequent moving of location; and lack of access to money. Staff Sgt Organ also noted that violence from an exploiter can make a sex worker more fearful of going to the police. In contrast, an independent sex worker usually has control over her advertisements, communications, and earnings.[149] Other police officers have made similar observations.

[187] Mr. Rubner of RESET, the Calgary social services agency, was heavily involved in the investigation of offences relating to the sex trade as a police officer, including human trafficking.

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[143] Affidavit of Maria Koniuk, sworn December 20, 2021, at para. 38 (JAR Tab 77)("**Koniuk Affidavit**").
[144] Monchamp Affidavit, para. 19.
[145] Taylor Affidavit, para. 15; Rittenhouse Affidavit, paras. 43-44; McGuire Affidavit at paras. 13, 14; Koniuk Affidavit, para. 14.
[146] Redsky Affidavit, paras. 45-47.
[147] Roots Report, p. 8.
[148] McGuire Affidavit at paras. 19, 20, 23.
[149] Organ Affidavit, paras. 57, 70.

He observed that most of the sex workers he dealt with would not at first acknowledge that coercion or pressure led them into or kept them in the sex industry.

[188] He observed that even where there were obvious indications to the contrary – bruising, lack of access to bank accounts, no control over advertisements – no current sex workers admitted to coercion. Sex workers usually acknowledged coercion or pressure later, or after they have left the sex industry. He also stated:

> Conversely, in speaking with the hundreds of women who have exited the sex trade, not a single one has stated that they enjoyed that lifestyle, stayed in it voluntarily, or would want a friend or loved one to experience it.[150]

[189] Megan Walker of the London Abused Women's Centre indicated that the Centre has kept a database of women and girls it supports. Between December 6, 2014 (one month after PCEPA received Royal Assent) and the swearing of her affidavit, her agency recorded provided services to 2,888 women and girls involved in the sex industry. Of these 68 girls reported being underage, with 15 under the age of 15. Only six women and girls reported entering the sex industry by choice. Some reported being lured from streets or youth centres; lured online; lured from schools, universities, and workplaces; or lured from strip clubs or body rub parlours. Many entered through a constrained financial choice; others were coerced by organized crime or gangs. Several reported being lured into the sex trade by a "Romeo" pimp.[151] She also observed that in her experience sex work and trafficking are difficult to separate. She agreed that women and girls enter the sex trade for a variety of reasons, but noted:

> Even if a woman or girl starts out independently, she can quickly be picked up by a trafficker or procurer. During my years working at LAWC, women and girls consistently reported that they experienced a lack of choice when they entered the sex industry and when they were under the control of a trafficker or procurer.[152]

[190] Even one of the Applicants described being trafficked herself. The Applicant Lana Moon Perrin described the experience:

> I have felt some elements of control while working in the sex industry. When I was sixteen and working in Sudbury, a man had promised me a better life working in Toronto. I thought he had my best interests in mind. I had never been to Toronto before. So I

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[150] Organ Affidavit, para. 51.
[151] Walker Affidavit, paras. 34, 35, 37-40, 42.
[152] Walker Affidavit, para. 5.

> willingly took this opportunity. But when I got there, I was being controlled by others. I was locked into a rundown room, where men were brought to me and I was told what to do with them. I was told when to work. And my movement was restricted. I received no money in return. I was being controlled and made to fear touching the doorknob. I remember being so scared. After a few days, I was able to escape. This experience was exploitation. I believe that I was being trafficked.[153]

[191] I make the following findings of fact in relation to the issues of choice, coercion, and human trafficking:

- To put it at its most basic, where a customer purchases sex, there is a significant possibility that the sex worker has been trafficked, manipulated, lured, forced, and/or coerced into providing sexual services, and in continuing to provide sexual services.
- Where a customer purchases sex, there is also a significant possibility that an exploiter or trafficker has used manipulation and/or violence to control that sex worker, take her earnings, and impose a "price" on her to leave the sex trade.
- Even where a sex worker has entered the sex trade by choice, there is a significant possibility that she has become subject to the control of an exploiter or a trafficker.[154]
- There are some sex workers who freely choose to become involved in the sex industry, even where that choice is constrained as a result of economic factors or barriers to other occupations. Some of those sex workers remain independent. Some of those sex workers fall prey to traffickers and/or exploiters and become exploited.
- There are likely some sex workers who fall somewhere on the spectrum between coercion and free choice.
- A significant number of women and girls lured or coerced into sex work are Indigenous or from other vulnerable racialized or sexual minorities.
- A significant number of women and girls lured or coerced into sex work have pre-existing vulnerabilities, including contact with the child protection and foster care

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[153] Perrin Affidavit, para. 8.

[154] I am using exploiter and trafficker interchangeably here, acknowledging that receiving a material benefit, procuring, and human trafficking are different offences. It is obvious, however, that an exploiter and a human trafficker may well be one and the same person – and that to a sex worker under their control, it is a distinction without a difference.

system; mental health or cognitive challenges; substance abuse challenges; or a combination of all of these things.

- It is not possible to quantify the numbers or percentages of those who engage in sex work voluntarily, involuntarily, or somewhere in between.
- Studies by the Applicants' experts showing a majority of sex workers enter the sex trade by choice have significant limitations. The evidence fails to establish that the majority of sex workers enter the trade by choice, even constrained choice. I reject that contention.

vi. What is the role of third parties in the sex industry?

[192] Given that the Court of Appeal found the material benefit and procuring offences to be constitutional in *N.S.*, this question is arguably moot. The parties, however, devoted much evidence this issue – evidence that was generated prior to *N.S.* The Applicants have argued that I can come to a different conclusion based on the fuller record filed in this matter. As noted, I disagree. Even if I were able to come to a different conclusion than the Court of Appeal I would not. I do not agree that the evidence supports the position of the Applicants.

[193] Both the Applicants and the Respondents agree that third parties play an important role in the sex industry. They take very different views of that role. Since a third party can be a trafficker or exploiter, there is overlap between this question and the previous questions.

[194] The Applicants have filed evidence outlining the range of services that third parties provide to sex workers. The key expert evidence comes from Professor Bruckert. Professor Bruckert drew on the Management Project, "an academic-driven project that endeavored to fill a knowledge gap – the lack of rigorous empirical research about individuals who are involved in the sex work exchange who are neither clients nor sex workers (e.g., individuals who perform tasks and labour in the sex industry)." The Management Project drew on surveys of 75 people in Quebec in the sex industry who perform third party tasks and focus groups with 47 sex workers who had worked for or with third parties. Thirty-two third parties had also been sex workers at the same time as they performed third-party tasks. Over 60% of the third parties were women, including two who identified as trans women. The Management Project found that the boundaries between being a sex worker and a third party were porous – people moved back and forth in the roles. The Management Project identified three different roles for third parties: manager, where a sex worker works for an individual or agency; associate, where a sex worker or sex workers collaborate with a third party; contractor, where a sex worker or sex workers contract with a third party to provide services. Professor Bruckert described these different roles

in some detail in her report. A key finding is that these relationships are diverse and complex, but do not involve the kind of abuse that is stereotypically associated with exploiters.[155]

[195] According to Professor Bruckert, agencies typically impose restrictions on their employees, like any employer. She stated, however:

> In sharp contrast to the stereotypes, sex workers and third parties told us there is one very significant area that agencies do not impose expectations – the type of sexual services that are provided. Although agencies are, generally, respectful of sex worker's boundaries regarding the specific sexual services they will (and will not) provide sex workers who will not provide the services offered by the agency will not be able to work for that agency. Agencies also typically insist on safety protocols and mandatory condom use for certain activities.[156]

[196] Professor Bruckert did note that many managers are interested in their "bottom line" and motivated to generate a profit. Professor Bruckert rejected the stereotype of the archetypical "pimp". She went on:

> Third parties (like any businessperson) have a vested interest in their business. The demonization of that vested interest hinges on the belief that sex work is inherently bad and therefore anyone who profits from it must be immoral (see Question #4 below). The truth is more complex. Third parties are individuals – some considerate, some apathetic, others unpleasant - some third parties are very good at what they do, some do an acceptable job, and some are incompetent.[157]

[197] There are four obvious problems with the Management Project. The first is that it involved 75 people who agreed to be interviewed in an underground industry involving thousands. As a qualitative survey rather than a quantitative survey, the results simply cannot be extrapolated. The second obvious problem is that it does not include exploiters and traffickers who are also third parties in the sex industry. It is difficult to imagine many exploiters or traffickers sitting down with an academic or outreach worker to answer questions. It is even more difficult to imagine exploiters and traffickers answering the questions honestly. Professor Bruckert did acknowledge that Management Project workers spoke with some street-based sex workers and third parties who described managers who used violence and threats. She stated that

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[155] Expert Report of Chris Bruckert, dated July 13, 2021, at p. 9 (JAR Tab 45)("**Bruckert Report**").
[156] Bruckert Report, p. 15.
[157] Bruckert Report, p. 17.

this is less common than generally assumed. The basis upon which Professor Bruckert makes this claim is unclear, as it is unfootnoted and unanalyzed.[158] The bottom line is that there is a large and significant group of third parties – exploiters and traffickers – who are simply left out of these academic surveys. The third problem is related to the second: the Management Project appears to have simply assumed away or denied the presence of exploiters and traffickers, as their existence is simply not acknowledged. The fourth problem, as I have already pointed out, is the normative lens through which sex work is seen. Again, that normative lens appears to have influenced the conclusions of the study. It is not clear to me what steps the researchers took to deal with the normative problem or the problem of confirmation bias.

[198] That said, I accept from the evidence of Professor Bruckert – as well as the evidence of some of the Applicants themselves – that there are sex workers who hire third parties or work for third parties and that those relationships are akin to professional business relationships. I also accept that there are third-party relationships do not have the hallmarks associated with exploitation. I accept the individual statements set out in the expert report of Professor Krusi on that point.[159]

[199] I do not, however, accept that these relationships are a majority of sex worker/third party relationships. As with the AESHA project, it is not a majority of sex workers and third parties who have non-exploitive relationships with each other. It is a majority of sex workers and third parties responding to the survey. The numbers cannot be extrapolated to a general proposition about all sex workers and third parties. All that can be said is that these non-exploitive relationships exist, that there are a variety of these relationships, and that the relationships can be complex.

[200] There is also compelling evidence that many sex workers experience exploitation, manipulation, control, and/or trafficking at the hands of third parties. These third parties are classic exploiters and/or traffickers. The experiences of sex workers at the hands of exploiters are set out in the affidavits of police officers and social services workers.

[201] For example, there is evidence that some exploiters employ extreme levels of control. Some even brand or tattoo sex workers.[160] Exploiters have kept sex workers isolated and dependent, moved them regularly, threatened them with blackmail by using photographs, threatened to use violence on family members, controlled them through drug use, or have forced them to become involved in illegal activity. Some have used extreme violence. Sex workers

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[158] Bruckert Report, P. 17.
[159] Krusi Report,
[160] Walker Affidavit, para. 63; Redsky Affidavit, para. 62; Correa Affidavit, para. 57.

also report that exploiters have forced them to take out loans and credit cards and their own names and then kept the money.[161]

[202] Exploiters have also controlled sex workers by forcing them to ask permission to eat or use the bathroom, or dictate what to say and wear. Many sex workers reported that they had no control over the content of their advertisements. Many exploiters require sex workers to meet a daily quota. Many report that they have no control over what sexual services to provide.[162] These can include include unprotected vaginal or anal sex, violence, choking, and fetishes such as "golden showers". Many sex workers reported contracting sexually transmitted infections as a result.[163]

[203] Exploiters have also controlled sex workers by isolating and displacing them, using substance dependency, threats of violence against the sex worker or their families, and actual violence. Some third parties have threatened to pull a younger sister or child into the sex trade. Sex workers reported that fear of third parties made them compliant. They would not tell the police, their families, or others the truth about their situation, often claiming to be in the sex trade by choice. Some third parties are "debt-bonded" to exploiters. A debt-bond means that sex workers must meet a daily quota of money to hand over.[164] It may also mean that they cannot leave the sex trade without paying a fee to their exploiter. There is evidence that in Manitoba sex workers under age 25 cannot operate independently (customers will pay more for an underage girl) because third parties target them, demanding payment or benefit. The targeting can include threats, violence, and manipulation.[165] Staff Sgt Correa stated that he has encountered situations where third parties have threatened to kill the family members of sex workers.[166] Indigenous women and girls are particularly vulnerable to exploiters.[167]

[204] Overall, I find as follows regarding the role of third parties:

- Third parties are a diverse group and can include sex workers who move back and forth between roles;
- Some third parties can provide a legitimate range of services, including security, reception and booking, advertisements, and transportation;
- There is a spectrum: some third parties can work at arms-length in a non-exploitive fashion, or in a non-arms-length, non-exploitive fashion, or somewhere in between;

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[161] Redsky Affiavit, paras. 61-62; Rittenhouse Affidavit, para. 38, 52, 56, 57, 58, 59.
[162] Walker Affidavit, paras. 62-63; Redsky Affidavit, paras. 42-44.
[163] Walker Affidavit, para. 53, 55.
[164] Walker Affidavit, paras. 64-65, 67; Correa Affidavit, para. 57; Redsky Affidavit, para. 44; Rittenhouse Affidavit, paras. 52, 54-59; McGuire Affidavit, para. 12.
[165] Redsky Affidavit, para. 42; Walker Affidavit, paras. 60.
[166] Correa Affidavit, para. 58.
[167] McGuire Affidavit, para. 38; Redsky Affidavit, paras. 26, 31-35.

- Some third parties, are exploiters and/or traffickers;
- Some third parties who are exploiters and/or traffickers use violence, manipulation, drugs, or intimidation (or a combination), to control sex workers;
- Some third parties who are exploiters force sex workers to engage in sexual activities against their will;
- Some third parties who are exploiters take control of the advertising, finances, housing, clothing, and other aspects of sex work;
- Some third parties "debt bond" sex workers; and,
- Some third parties who are exploiters deprive sex workers of their earnings.

vii. What is the role of violence in the sex industry?

[205] The Applicants argued that prostitution itself is not inherently violent or dangerous. As the Applicants put it in their factum:

> Clients of the sex industry are typically "average" people who are not predatory nor violent. Expert witnesses confirmed that the "majority of sex workers' client interactions [are] positive" and "peaceful." As with any other service industry, sex workers do encounter bad clients, though such encounters are the exception.[168]

[206] Sandra Wesley stated in her affidavit that sex workers are sometimes subject to violence from neighbours in public spaces. Ms. Wesley reported that neighbourhood residents are sometimes very aggressive and assert the right to have their neighbourhoods free from sex work.[169] Ms. Forrester, Ms. Mason, and Ms. Scott all described violence at the hands of customers or other sex workers in their affidavits. Ms. Clamen reported that the sex workers with whom she works are also subject to violence. All said that it is rare, but that it happens.

[207] Ms. Clamen, like many of the Applicants, asserted that PCEPA was the cause of unsafe working conditions.[170] Diane Cooley, for example, stated that:

> Members of Peers and SACRED tell me that the criminalization of sex work is the main reason Indigenous and other sex workers experience violence, as it drives sex work into isolated and hidden

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[168] Factum of the Applicants, para. 80.
[169] Wesley Affidavit, para. 36.
[170] Affidavit of Monica Forrester, affirmed July 13, 2021, paras. 10-11 (JAR Tab 12)("**Forrester Affidavit**"); Mason Affidavit 5-6 (JAR Tab 19); Affidavit of Valerie Scott, affirmed July 10, 2021, paras. 7-8 (JAR Tab 15); Affidavit of Jenn Clamen, affirmed September 25, 2022, paras. 49, 50, 68 (JAR Tab 10)("**Clamen Affidavit**").

> locations, and forces sex workers to work in ways that compromise their safety. The criminalization of sex work makes sex workers ashamed of what they are doing. Sex workers are scared to tell their loved ones that they are doing sex work, and potentially violent people know this and target sex workers because they are aware that sex workers are much less likely to report violence against them in sex work. Predators target sex workers for physical or sexualized violence. Violent people know that Indigenous sex workers are even less likely to interact with police, so they are more likely to get away with violent behaviour and assaults. The criminalization of sex work contributes to this violence against Indigenous sex workers.[171]

[208] That assertion is common throughout the Applicant's materials. Although I accept that many truly believe it, I find, with respect, that it is at best an exaggeration and at worse unture. Violence in the sex trade is obviously not monocausal. Indeed, the causes of violence in the sex trade are multiple and complex. Justice Himel's summary of the expert evidence in *Bedford (SCJ)* is apt:

> The experts generally agree on the following statements:
> a) Street prostitution is a dangerous activity;
> b) All prostitution, regardless of venue, carries a risk of violence;
> c) Prostitution conducted in indoor venues can be dangerous;
> d) There is significant social stigma attached to prostitution; and
> e) There are multiple factors responsible for the violence faced by prostitutes.[172]

[209] There is a significant amount of evidence that sex workers are subject to violence at the hands of third parties, especially exploiters and traffickers. Sex workers are also sometimes subject to violence from customers, although there is evidence that much goes unreported.[173] Some of the social services workers described horrific acts of violence against sex workers.[174] So did police officers. The violence employed by exploiters can include aggressive grabbing, open or closed hand strikes, kicks, choking, or burning victims using cigarettes or curling irons. Violence can lead to significant visible injuries. It can also lead to death. Staff Sgt Organ also noted that "violence from a pimp towards a sex trade worker can make them fearful of coming forward to police with a complaint, and it can also serve as a barrier to them trying to exit the sex

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[171] Cooley Affidavit, para. 25.
[172] *Bedford (SCJ)* at para. 116.
[173] Organ Affidavit, para. 69; Rittenhouse Affidavit, paras. 35-38; Redsky Affidavit, paras. 34, 62; McGuire Affidavit at para. 12, 16, 25.
[174] Walker Affidavit, paras. 30, 40, 57.

trade." In addition to exploiters, violence can come from the owners of escort agencies or body rub parlours. Customers sometimes refuse to respect the decision of sex workers to withdraw consent to sexual activity.[175] Some women and girls report being victims of torture, gang rape, mutilation, whipping, and waterboarding at the hands of both purchasers and exploiters. One sex worker shared a video with Meghan Walker.[176]

[210] Professor Roots stated that "research shows that sex workers' biggest safety concern is the police, not their clients or third-party managers."[177] One of her sources for this assertion is Ms. Lam of Butterfly. For reasons I have already mentioned, Ms. Lam is not credible. The other source cited is a study by Professor Bruckert and Frederick Chabot from 2018 entitled "*To Serve And Protect?*". While the study does not appear to be in the Joint Application Record, another publication with much the same conclusions that is appended to the cross-examination of Professor Bruckert is called "*Challenges: Ottawa Area Sex Workers Speak Out*". This publication appears to come to much the same conclusion as "*To Serve And Protect*?" The publication was written in collaboration with POWER (Prostitutes of Ottawa/Gatineau Work, Educate, and Resist). Power is an organization that advocates for the decriminalization and regulation of sex work. The publication includes sex worker stories of negative interactions with the police in Ottawa. The methodology was to use the type of qualitative research that I have already discussed. As such (and as acknowledged in the publication itself) it is subject to the same limitations as other qualitative research.[178] When I review *Challenges* I accept that there are sex workers who have had negative reactions with the police and are genuinely concerned about encounters with the police, but, with respect, I think Professor Roots overstates the conclusions reached in that study. Moreover, the study generally dealt with outdoor sex workers, who were more likely to encounter police. I also note that *Challenges* was published in 2014, and the research was conducted prior to the enactment of PCEPA, although "*To Serve And Protect?*" was published in 2018.

[211] I accept that some sex workers are more concerned about police than clients or third-party managers, but it is unclear from the material that I have reviewed whether there was a distinction made between exploitive and non-exploitive third-parties; or whether the fear of police arose because of other criminal activity or outstanding charges; or because exploiters and traffickers encourage this belief – for which there is evidence; or because of the significant number of sex workers who have drug addictions or mental health problems and have encountered police through that avenue; or because they come from a community with a long-standing distrust of police, such as Indigenous or Black Canadians; or because of immigration concerns. As Professor Bruckert points out, there is a long history of perceived police neglect

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[175] Organ Affidavit, paras. 70-72.
[176] Walker Affidavit, paras. 57-60.
[177] Roots Report, p. 7-8.
[178] *Challenges: Ottawa Area Sex Workers Speak Out*, attachment to the Cross-Examination of Chris Bruckert, April 15, 2022 (JAR Tab 47, p. 3954 and following)

and harassment by some groups.[179] It may also be that some sex workers are concerned about the police because exploiters and traffickers have involved them in other criminal activity – a phenomenon commented upon by most of the police officers in their affidavits.

[212] After reviewing the evidence in detail, I am very skeptical that the majority of sex workers are more concerned about the police than they are about human traffickers or exploiters or customers. Some sex workers may be more concerned about the police, of course. There can be no doubt that many sex workers are concerned because they fear that any contact with police will bring violent consequences from exploiters – a very realistic fear. There is also evidence that many sex workers do not understand that they are immune from prosecution for selling their own sexual services and fear arrest for something that they cannot be arrested for – as I have already noted, there is a evidence that this belief is encouraged by exploiters and traffickers. Exploiters and traffickers themselves may be ignorant of the immunity provisions, or they may simply be cynical. There is a great deal of evidence filed by all parties that sex workers are often not aware of the laws around sex work and often unaware that they are immune from prosecution for their own sexual services.

[213] Thus, I reject the assertion that a majority of sex workers are more concerned about the police than about human traffickers or exploiters. After reviewing all of the evidence, I find that some sex workers are more afraid of the police than they are of exploiters, traffickers, and/or customers; but I also find that many sex workers are more likely to be afraid of exploiters, traffickers, and/or customers than they are of the police. I also find that many sex workers are likely to be more afraid of the consequences from exploiters and traffickers if they do go to the police than of the police themselves. Based on my review of the evidence, I also find that there is variation in the relationships between sex workers and police services. Some police services have simply done a better job of dealing with sex workers (and with the marginalized communities from which they often come) than other police services.

[214] As noted, many of the Applicants and their experts asserted that there is a causal relationship between the enactment of PCEPA and violence against sex workers. I find that that the evidence simply does not support this blanket assertion, as I will examine in more detail later in these reasons.

[215] Many of the affiants described violent encounters with customers under the pre-*Bedford* regime and prior to the enactment of PCEPA. Moreover, statements suggesting that PCEPA is responsible for violence are contradicted by some of the Applicants' own expert evidence. For example, Professor Krusi, one of the Applicants' experts, provided statistics from the AESHA longitudinal study. The study was designed to look at reported rates of violence before and after

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[179] Reply Report of Chris Bruckert, January 20, 2022 (JAR Tab 46, p. 3738-3739)("**Bruckert Reply Report"**).

the implementation of PCEPA. The study found almost no difference in the rates. I set out excerpts:

> … in the 8-month period post-policy implementation, 24.6% (58/236) of sex workers experienced work-related physical and sexual violence (as compared to 23.7% (65/275) interviewed in the 8 months pre-policy in 2012), of whom 22.0% reported physical abuse and 14.0% had been raped post-policy implementation (compared with 19.3% and 15.6% pre-policy, respectively).[180]

[216] It may be that most customers are not violent, and that encounters rarely lead to violence. But violence is a feature, not a bug of sex work. It comes in various guises and forms and is perpetrated by customers, exploiters, traffickers, and occasionally by other sex workers. Regrettably, sometimes it may also be perpetrated by police officers. Sex workers take measures to prevent or report violence. The change from the pre-*Bedford* regime to the PCEPA regime did not alter any of that.

[217] Perhaps more importantly, the Applicants have not been able to point to any statistical evidence showing an increase in violence against sex workers since the enactment of PCEPA. I understand that the Applicants' response that much violence goes unreported, and I accept that may be the case, but there is no evidence that sex workers were less likely to report violence prior to the enactment of PCEPA than they have been post-enactment.

[218] On the other hand, according to the Homicide Survey of Statistics Canada (as reported in the Juristat, the number of homicides pre- and post-PCEPA has declined – although the statistical significance is not large, given the small numbers. In the five years between 2010 and 2014, when PCEPA was enacted, 54 sex workers were victims of homicides; 20 of the 54 victims were identified of as Indigenous. In the five years after the enactment of PCEPA, from 2015 to 2019, 35 sex workers were victims of homicides; 7 of the 35 victims were identified as Indigenous. The Homicide Survey also noted that this decline took place when the number of homicides in Canada increased during the five-year periods from 2745 to 3229. According to the same Juristat, the number of injuries reported by sex workers also declined in the five-year period after the enactment of PCEPA.[181] It is unclear exactly how to interpret these numbers, but they do not provide evidence of a general increase in violence towards sex workers since PCEPA was enacted.

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[180] Krusi Report, p. 4796-4797; Sex Workers Experiences And Occupational Conditions Post-Implementation of End-Demand Criminalization in Metro Vancouver, Canada, Canadian Journal of Public Health, 2019, Exhibit 18 to the Cross-examination of Cecilia Benoit (JAR Tab 44, p. 3591).

[181] Affiadvit of Kathy AuCoin, sworn December 15, 2021, para. 11 (JAR Tab 85)("**Aucoin Affidavit**"); Juristat: Crimes Related To The Sex Trade Before And After Legislative Changes In Canada, p. 3 ("***Juristat***"), Exhibit "A" to AuCoin Affidavit, at p. 12-14 (JAR Tab 85, p. 8283-8285).

[219] Overall, I find that violence plays an important role in the sex industry but that there is no evidence that the enactment of PCEPA has led to an upsurge in violence.

viii. Conclusions regarding the sex industry

- The sex trade is challenging to study.
- There are male and trans sex workers, but sex workers are overwhelming female. Customers are overwhelmingly male. For the most part, female sex workers have less education, less economic power, and lower socio-economic status than their male customers.
- Significant numbers of sex workers come from marginalized and racialized groups. Indigenous women and girls make up a disproportionate number of those involved in the sex trade.
- While there are sex workers who have agency and freely choose to enter the sex trade, large numbers of sex workers are coerced or trafficked into the sex trade. Many, if not the majority, of those who are coerced and trafficked are themselves women and girls from marginalized groups.
- I do not agree that the Respondents have conflated sex work and human trafficking. What the evidence shows is that there is a very strong link between sex work and human trafficking.
- Many third parties provide services and safety measures to sex workers without exploitation, but many are simply exploiters and/or traffickers who control sex workers through violence and manipulation and take most, if not all of their earnings.
- It is unknown how often sex workers encounter violence from customers, but violence and the threat of violence are present in the everyday lives of sex workers.
- There is no evidence that PCEPA has led to an upsurge in the levels of violence associated with sex work.

V. Does PCEPA Violate Section 7 Of The Charter?

A. The S. 7 Framework

[220] Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[221] In *R. v. J.J.* Wagner C.J.C. and Moldaver J. set out the framework for analyzing breaches of s. 7 of the *Charter*:

> A claimant must follow two analytical steps to establish that a law breaches s. 7 of the Charter: they must demonstrate that (1) the impugned provisions result in the deprivation of life, liberty or security of the person; and that (2) the deprivation violates principles of fundamental justice.[182]

[222] The first step requires determining whether there has been a deprivation of life, liberty, or security of the person. The deprivation must cause a limitation or a negative impact on, an infringement of, or an interference with life, liberty, or security of the person.[183] To demonstrate a deprivation, an applicant must show that there is a sufficient causal connection between the alleged harm and the legislative provision at issue.[184] The sufficient causal connection test does not require that the state action be the only or dominant cause of prejudice to the person claiming the right.[185]

[223] The second step is to determine wither the deprivation is in accordance with the principles of fundamental justice. To demonstrate that the deprivation violates principles of fundamental justice, an applicant must show that the legislative provision is arbitrary, overbroad, or grossly disproportionate.[186] In other words, laws that impinge on life, liberty, or security of the person must not be arbitrary, overbroad, or have consequences grossly disproportionate to their objects.[187] The two steps must not be conflated.[188]

[224] The three principles of arbitrariness, overbreadth, and gross disproportionality compare the infringement caused by the law with the objective of the provision at issue. The three principles are not concerned with effectiveness. It is a qualitative, not a quantitative analysis.[189]

[225] A court analyzing a *Charter* challenge to a section of an integrated scheme must consider related provisions as well, including those that may prevent or cure possible defects. Curative provisions can act as a kind of legislative safety valve that prevents the general rule from applying where the application would be arbitrary, overbroad, or grossly disproportionate in its

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[182] *R. v. J.J.*, 2022 SCC 28 at para 116 ("***J.J.***"). See also: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 55 ("***Carter***"); *Bedford (SCC)* at para. 57.
[183] *Canadian Council of Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at para. 56 ("***Canadian Council of Refugees***"). The Supreme Court of Canada released *Canadian Council of Refugees* after the argument in this case but before I was planning on releasing this decision. In my view the case provides some clarity the principles articulated in *Bedford (SCC)* but does not fundamentally alter the analysis.
[184] *Bedford (SCC)* at paras. 75-76; Canadian Council of Refugees at para. 60
[185] Canadian Council of Refugees at para. 60.
[186] *Bedford (SCC)* at paras. 96-97.
[187] *Carter* at para. 72.
[188] Canadian Council of Refugees at para. 73.
[189] *Bedford (SCC)* at para. 123.

effects. Curative provisions are generally available after a determination that the general rule applies. If the legislative scheme cures potential *Charter* breaches by providing exemptions targeting specific deprivations, that can render the scheme compliant with the *Charter*. In *PHS* the ability of the Minister to grant exemptions to the *Controlled Drugs And Substances Act* cured the constitutional defects.[190]

[226] The courts must presume that Parliament intended to enact constitutional, *Charter*-compliant legislation. Courts must strive, wherever possible, to give effect to this presumption.[191] I will approach the s. 7 analysis by asking the following questions:

- Do the challenged offences result in the deprivation of life, liberty, or security of the person?
- Do the deprivations violate the principles of fundamental justice by being arbitrary, overbroad, or grossly disproportionate?

[227] Before I answer those questions, however, a predicate question arises: what is the effect of prohibiting the purchase of sex?

B. Is Sex Work Now Legal?

[228] According to the Applicants, the sale of one's own sexual services remains a permitted activity due to the immunity provisions. They argue that even if the sale of sex is now illegal (which they dispute) s. 7 still applies where the activities of the individuals are criminalized.[192]

[229] I disagree that the sale of sex is a permitted activity. It is not. The purchase of sex is a criminal offence. On basic principles of criminal law sellers of sex could still be convicted in relation to a commercial transaction for sex in different ways, absent the immunity provisions. As Hoy J.A. pointed out in *N.S.*, the sale is still contrary to law.[193] There are several ways that a sex worker could be liable. The first is as a party. Section 21(1) of the *Criminal Code* states:

> 21 (1) Every one is a party to an offence who
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> (a) actually commits it;
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> (b) does or omits to do anything for the purpose of aiding any person to commit it; or

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[190] *Canadian Council of Refugees* at paras. 62-66, 71, 76; *PHS* at para. 39.
[191] *J.J.* at para. 18.
[192] Canada (Attorney General) v. PHS Community Services Society, 2011 SCC 44 at paras 91-93 ("**PHS**").
[193] *N.S.*, para. 63.

(c) abets any person in committing it.

[230] Obviously a seller of sex does not commit the crime of purchasing. A sex worker could, however, be found guilty as a person who is party to someone else's criminal purchase of sex.[194]

[231] On any interpretation of s. 21(b) or s. 21(c) a person who sells sex is facilitating, or encouraging at the very least, the purchase of sex. That would satisfy the requirements of aiding and/or abetting. In *R. v. Greyeyes*, the Supreme Court of Canada noted that an agent for the purchaser of drugs could not be found guilty of aiding or abetting the trafficker. The agent could, however, be found guilty of aiding and abetting the criminal offence of possession of drugs. A seller of sex is not like an agent for the purchaser of drugs who cannot be found guilty of aiding or abetting the trafficking of drugs. In the *Greyeyes* scenario the sex worker is, in fact, the trafficker. Since it is the purchase, rather than the sale of sex that is prohibited, the trafficker can not be prosecuted in the *Greyeyes* scenario for that sale. Rather, a seller of sex is like the agent for the purchaser who can still be found guilty of aiding and abetting the crime of possession of drugs.[195]

[232] Arguably, a seller of sex might also be caught by s. 22(1) of the *Criminal Code*. That section, the counselling provision, states:

> 22 (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, *counsel* includes procure, solicit or incite.

[233] The reason a seller of sex cannot be prosecuted is not because it is legal to sell sex. A seller cannot be prosecuted because of the immunity provisions in relation to the sale of one's own sexual services. Third parties who are in non-exploitive personal or business relationships are not immunized in the way those who sell their own sexual services are immunized. Rather,

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[194] *R. v. Dooley*, 2009 ONCA 910 at para. 123
[195] *R. v. Greyeyes*, [1997] 2 S.C.R. 825 at para. 9; *N.S.*, at para. 114.

Parliament has chosen not to prohibit those relationships. Parliament has only prohibited the exploitive relationships. That does not mean that the sale of sex is a lawful, permitted activity. As the Ontario Court of Appeal noted in *Gallone* in respect of the advertising offence, the immunity provisions do not "legalize" advertising one's own sexual services – it just exempts the sex worker from prosecution.[196] That logic applies equally to all the challenged offences.

[234] Moreover, a plain reading of the immunity provisions fortifies this conclusion. Pursuant to s. 286.5(1)(a) and (b) of the *Criminal Code* no person can be prosecuted for an offence under the material benefit or advertising offences if it is in relation to their own sexual services. Section 286.5(2) of the *Criminal Code* provides that no person can be prosecuted for aiding, abetting, conspiring, attempting to conspire, being an accessory after the fact, or counselling a person to be a party to the purchasing, material benefit, procuring, or advertising offences. Parliament included these provisions to immunize sex workers from party liability (or other forms of non-principal liability) for these challenged offences. If sex work were now legal, the immunity provisions would not be required.

[235] In *R. v. Malmo-Levine*, the appellants contended that the criminalization of simple possession of marijuana for personal use – a so-called "victimless crime" – violated s. 7 of the *Charter*.[197] The majority of the Supreme Court disagreed, finding that the prohibition against possession of marijuana was a valid exercise of Parliament's criminal law power. In *Canada (Attorney General) v. PHS Community Services* the Supreme Court later rejected another claim that the simple possession of drugs violated s. 7 of the *Charter*. Although the provision engaged s. 7, the deprivation was in accordance with the principles of fundamental justice. That was because the Minister had the discretion to grant an exemption from the CDSA for medical or scientific purposes, or otherwise in the public interest. That exemption was a safety valve preventing the CDSA from applying where it would be arbitrary, overbroad, or grossly disproportionate.[198]

[236] As a result, I agree with both Attorneys General that asymmetric prohibition changes the context of the s. 7 argument. Previously, the purchase (and sale) of sex, had not been illegal. The focus of *Bedford* was on prohibitions that made a legal activity riskier. The fundamental activity is now illegal. Sex workers had the right to sell their own sexual services in the pre-*Bedford* regime. They do not have that right under PCEPA.

[237] Before moving on to the first stage of the s. 7 analysis, I wish to make two observations. The first is that many of the harms alleged by the Applicants are simply the collateral consequence of the asymmetric prohibition on the purchase of sex. The second is that the

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[196] *R. v. Gallone*, 2019 ONCA 663 at para. 94; *N.S.* at para. 128.
[197] R. v. Malmo-Levine, 2003 SCC 74 ("**Malmo-Levine**").
[198] *PHS* at para. 113.

Applicants have fundamentally misinterpreted the challenged offences. I turn first to the collateral consequences.

C. Most Of The Harms Complained Of Are The Collateral Consequences Of Prohibition

[238] The Applicants make the very broad claim that targeting clients' harms sex workers. Targeting clients deprives sex workers of liberty, and in extreme cases, life. The Applicants then go on to provide specific illustrations. I will analyze the specific harms below, where I ask whether PCEPA results in a deprivation of life, liberty, or security of the person. In my view, however, many of the harms complained of are simply the collateral consequence of prohibiting the purchase of sex by customers, or the collateral consequences of the other challenged offences.

[239] In *R. v. Malmo-Levine* the appellants challenged sections of the *Narcotic Control Act* prohibiting the simple possession of marijuana.[199] They pointed to numerous ills created and perpetuated by prohibition, such as infringements of personal liberty and the acquisition of a criminal record for something that is essentially harmless to others. The majority of the Supreme Court found that there was no free-standing right to cannabis for personal use based on liberty interests. The Court found that the "Constitution cannot be stretched to afford protection to whatever activity one chooses to define as central to his or her lifestyle". To extend such constitutional protection would make society ungovernable. [200]

[240] More seriously, the Court also examined the fact that a conviction under the possession provision carried a risk of jail. Such a risk engaged liberty interests. The collateral consequences, however, were simply part of the costs of having a criminal justice system when the exercise of the criminal power is for a valid state purpose. As the Supreme Court stated:

> … if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power,

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[199] The Narcotic Control Act was replaced by the Controlled Drugs and Substances Act in 1997.
[200] *Malmo-Levine,* at para. 86.

> such costs will arise. To suggest that such "inherent" costs are fatal to the exercise of the power is to overshoot the function of s. 7.[201]

[241] Parliament has a very broad and plenary criminal law power. It is a valid exercise of that power to prohibit conduct that harms people – even when those people argue that they don't need the help.[202] The state has a valid interest in protecting vulnerable groups.[203] In enacting PCEPA, Parliament was concerned with the safety of those involved in the sex industry – even those who made a conscious choice to participate.[204] As Hoy J.A. stated in *N.S.*:

> … it is clear from the preamble to the PCEPA and Minister MacKay's description of prostitution as "inherently degrading" before the Senate Committee on Legal and Constitutional Affairs (at p. 12), that Parliament views prostitution as inherently exploitative, even where the person providing the sexual services for consideration made a conscious decision to do so.[205]

D. The Applicants Misinterpret The Challenged Offences

[242] Respectfully, the Applicants have based many of their claims on misinterpretations of the challenged offences. These misinterpretations permeate their materials. These misinterpretations are found in the expert opinions, as well as the affidavits of the individual Applicants. Professor Haak, in her review of the literature, noted the following:

> Based on my review of the 37 peer-reviewed articles I located that included data collected after PCEPA was implemented, authors express inconsistent understandings about the current legality of prostitution (or sex work), the aims of the Impugned Offences, and what activities would or would not be prohibited by the Impugned Offences. Incorrect or imprecise understandings of the Impugned Offences may impact research findings and related conclusions drawn about the impact of the Impugned Offences. They may impact what the data, findings, and conclusions do and do not, can and cannot, tell us about the exchange of sexual services for consideration in Canada since PCEPA came into force.

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[201] *Malmo-Levine* at para. 174.
[202] *Reference re: Genetic Non-Discrimination Act*, 2020 SCC 17 paras. 69, 78 ("Genetic Non-Discrimination").
[203] *Malmo-Levine* at paras. 133-134.
[204] *N.S.* at paras. 61, 131.
[205] *N.S.* at paras. 130-131.

> In discussing the current legal status of sex work, many of the authors point to the sale of sex being legal under the new legislative framework. Of particular note, in all five articles I located that set out research questions specific to the impact of PCEPA or "end-demand" laws, the authors identified sex work as legal following the coming into force of PCEPA. One refers to sex work as a "legal profession," while another describes Canadians as being legally permitted to sell sexual services and describes the de facto decriminalization of sex workers working without the assistance of third parties." Authors of some of the other located articles refer to prostitution or sex work as "effectively" criminalized or "de facto criminalized."[206]

[243] The Applicants consistently assert in their materials that, among other things, the material benefit offence prevents cooperative arrangements between sex workers to share security or pay guards; or that the procuring provision prevents sex workers from working collectively to improve their security; or that the advertising offence prevents sex workers from emailing, texting, or phoning with a client in response to an advertisement. In fact, every one of these assertions is incorrect as it is based on a fundamental misunderstanding of PCEPA. As Hoy J.A. pointed out in *N.S.*, one of the purposes of PCEPA is, in fact, to allow sex workers to "avail themselves of the safety-enhancing measures identified in *Bedford* and report incidences of violence."[207]

[244] I note that all of the affidavits in support of the application (and those opposing it) – except for the affidavit of Lana Moon Perrin – were sworn prior to the Court of Appeal's decision in *N.S.* Professor Bruckert proceeded from the assumption that the procuring offence and the material benefit offence restricted access to services provided by third parties. Professor Bruckert set out thirteen ways that sex workers can be negatively impacted by criminalization of third parties. I will set out just a few examples:

- Criminalization constrains access to security staff;
- Marginalized sex workers may not be able hire third parties because those sex workers do not have lawful immigration status, or they are concerned about coming to the attention of the police;
- Criminalization impedes the establishment of incall locations;
- Criminalization renders sex workers vulnerable to being charged;
- Criminalization prevents sex workers from forming collectives.[208]

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[206] Haak Report, paras. 49-50.
[207] *N.S.* at paras. 63, 72, 74, 77, 79-83, 107-112, 146-148.
[208] Bruckert Report, p. 30-35.

[245] In fact, all of these assertions are incorrect, as they are based on a faulty interpretation of the law or are the collateral consequences of the asymmetric prohibition scheme. They are also beyond Professor Bruckert's expertise, which is in sociology, not law. It is clear from *N.S.* that none of the challenged offences prevent the hiring of security staff or the forming of collectives in non-exploitive situations. Both the Applicants and the Respondents have filed evidence that the line between being a sex worker and a third party is porous. Sex workers may do both or blend the functions. If a sex worker is engaged in a non-exploitive business or cooperative relationship (and is not operating a commercial enterprise, such as a brothel where she is the employer), she will not be guilty under the material benefit or procuring provisions. It is also clear from *N.S.* that the challenged offences do not prevent the establishment of an in-call location where sex workers work in association. Professor Bruckert asserts that third parties will be reluctant to work there and might come to the attention of the police. Again, a non-exploitive third party will not be found guilty under the material benefit or procuring offences. The same point can be made about marginalized sex workers. If a non-exploitive third party is reluctant to work with a sex worker, it is not because that relationship is prohibited by law. It is because that non-exploitive third party does not understand the law, has been misinformed, simply doesn't want to do that type of work, or does not wish to risk arrest on the basis that the third-party relationship has been mis-interpreted.

[246] Monica Forrester stated in her affidavit that "the PCEPA prohibits indigenous sex workers from working together..."[209] That is an incorrect understanding of the law. Ms. Forrester had been arrested under the previous, pre-*Bedford* laws for communication for the purpose. She has not been arrested since PCEPA has been enacted.[210] Jane X stated in her affidavit that she "cannot work legally and meaningfully with others."[211] Again, that is also an incorrect understanding of the law. Alessa Mason noted in her affidavit that PCEPA "makes it illegal to work with other sex workers". She stated that it would make everyone safer, but "… such an arrangement is not possible under the PCEPA."[212] Again, with respect, that interpretation is also based on a flawed understanding of the challenged offences. Many of the cross-examinations on affidavits took place after the Ontario Court of Appeal's decision in *N.S.* Some of those cross-examinations show the same fundamental misunderstanding.[213] I do not fault individuals such as Ms. Forrester, Ms. Mason, and Jane X, for a flawed understanding of PCEPA. I also do not fault the Applicants' experts. They cannot be faulted for failing to anticipate the Court of Appeal's decision in *N.S.* and there were cases (including the Superior

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[209] Forrester Affidavit, para. 16.
[210] Cross-Examination of Monica Forrester, March 11, 2022, q. 278-283 (JAR Tab 14)("**Forrester Cross-Examination**").
[211] Affidavit of Jane X, affirmed July 10, 2021, paras. 17-18 (JAR Tab 17)("**Jane X Affidavit**").
[212] Mason Affidavit, paras. 32-33.
[213] For example, see the Forrester Cross-Examination, q. 151-155;.

Court decision in *N.S.*) that validated their understanding. They are not lawyers and, no doubt, base their assertions on advice that they have received as a result of lower court decisions. After *N.S.* that advice is incorrect.

[247] I now turn to the first stage of the s. 7 analysis.

E. Does PCEPA Result In A Deprivation Of Life, Liberty, Or Security Of The Person?

[248] The Applicants argue in general that PCEPA deprives the Applicants of their s. 7 rights to liberty and security of the person, and in some cases, life. The Applicants argue that the challenged offences impose dangerous conditions on sex workers. The challenged offences prevent sex workers from taking steps to protect themselves. As the Applicants put it in their factum, "if PCEPA does not provide for the access to safety supports set out in *Bedford*, it cannot survive constitutional challenge."

[249] The Applicants argue that PCEPA harms sex workers in several ways. Even though the challenged offences target purchasers, the effects harm sex workers. The Applicants make several assertions that, they say, illustrate how the challenged offences deprive them of security of the person, liberty, and in extreme cases, life. PCEPA, they argue, creates unsafe conditions for sex workers because the law prevents access to safety-enhancing measures. PCEPA thus infringes sex workers' right to security of the person. PCEPA can also, in extreme cases, infringe the right to life. The Applicants also argue that PCEPA infringes sex workers' right to liberty by criminalizing sex work. The argument that PCEPA infringes the right to liberty and in extreme cases the right to life is subsumed within their specific claims, which I set out here:

- The prohibition on commercial enterprises in s. 286.2(5)(e) of the *Criminal Code* prohibits sex workers from accessing safety measures or third-party services, working in association, or operating from fixed indoor locations, increasing the danger to sex workers.
- The purchasing offence, the stopping traffic offence, and the communications offences all work to impede the ability of sex workers to screen clients to prevent violence or exceed boundaries set by the sex worker; the prohibitions compromise the ability of sex workers to negotiate terms and conditions;
- The prohibition on advertising (exempting sex workers themselves) compromises the ability of sex workers to communicate with clients to establish boundaries and prevent violence;
- Sex workers are denied labour standards, occupational health and safety, and income-related government programs because sex work is criminalized;
- PCEPA generally stigmatizes sex workers, thereby increasing discrimination and violence;
- PCEPA generally discourages sex workers from reporting of violence to the police;

- PCEPA generally infringes the right to security of the person by compromising sex workers' ability right to personal and bodily autonomy.

[250] The Applicants claim that there is a sufficient causal connection between the challenged offences and the alleged harms. This causal connection deprives sex workers of security of the person, liberty in some situations, and life in others.

[251] Respectfully, I disagree. I find that the evidence does not establish a sufficient causal connection between the challenged offences and the alleged harms, with the following exceptions:

- The security of the person rights of outdoor sex workers are engaged in relation to the purchasing offence regarding the screening of customers;
- The security of the person rights of sex workers are engaged in relation to the purchasing offence due to the interference with bodily and sexual autonomy.

[252] Chief Justice McLachlin set out the standard for a causal connection at para. 76 of *Bedford (SCC)*:

> A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link… While I do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

[253] There must be a specific connection between the alleged harm and the challenged section or governmental action. It is a flexible standard, taking into account the specific circumstances of each case. The Applicants bear the burden of showing the sufficient causal connection on a balance of probabilities.

[254] It should be noted that as a result of the decision in *N.S.*, it is not open to this court to find that the material benefit, advertising, and procuring offences violate s. 7. The only sections at play for the purposes of the analysis are the purchasing offence, the stopping traffic offence, and the communication offence. That said, my analysis of the other sections will touch on the material benefit, advertising, and procuring offences.

[255] Before I turn to each assertion, I must observe that there is a problem at the heart of the Applicants' position. The Applicants view the Nordic Model, and the use of targeted criminal sanctions generally, as a vastly inferior policy response to the one they prefer: decriminalization and regulation. If that policy were adopted, it is very difficult to see how any future regulator would not re-enact the material benefit and procuring offences more or less as they exist now. These offences are designed to permit non-exploitive relationships between sex workers and third parties, and prohibit exploitive relationships – in other words, pimping and exploitation. In arguing that these offences are unconstitutional, the Applicants are essentially arguing that Parliament has no power to prohibit the most harmful kinds of behaviours associated with sex work. Respectfully, that simply cannot be correct.

[256] I will deal with each of the assertions made by the Applicants in the form of questions:

i. Does the prohibition on commercial enterprises under s. 286.2(5)(e) prevent sex workers from accessing safety measures or third party services, working in association, or operating from fixed indoor locations?

[257] The Applicants argue that the material benefit and procuring provisions, in combination with the purchasing offence, make conditions more dangerous for sex workers. They argue that these sections do so in four ways:

- ***Reducing access to safety measures in commercial enterprises***: The exceptions to the material benefit offence in s. 286.2(4) of the *Criminal Code* do not apply to commercial enterprises, as set out in s. 286.2(5)(e). This means that sex workers are unable to access safety measures in the context of an employer-employee relationship. The Applicants say that most sex workers who work for a third party in order to access safety measures can only do so through an escort agency, massage parlour, or other commercial enterprise. Ordinarily, the employer would be responsible for providing safety measures. The prohibition on commercial enterprises means that the employer cannot do so, thus increasing the danger to sex workers.
- ***Reducing access to third parties***: The Applicants say that the exceptions to the material benefit offences in s. 284.2(4) of the *Criminal Code*, while nominally applying to non-exploitive third parties, are largely illusory. Third parties are useful to sex workers since they can provide safety measures, screen clients, or assist with business functions. Since third parties are in the business of making a profit, they are captured by the material benefit and procuring provisions and excluded from the exceptions. Third parties, however, fear being charged with sex work or sex trafficking offences because of the asymmetric prohibition on the sale of sex in s. 286.1(1) of the *Criminal Code* as well as the material benefit offence. Sex workers are, therefore, left to negotiate terms and conditions by themselves or left to provide their own safety measures, thus creating dangerous conditions.

- ***Preventing working in association***: The prohibition on commercial enterprises in s. 286.2(5)(e) increases the isolation of sex workers by limiting their ability to work in association. The procuring offence in s. 286.3(1) also prevents sex workers from giving advice about health, safety, or business practices to other sex workers. By promoting isolation and prohibiting advice, the Applicants say that these prohibitions increase the danger to sex workers. Working in association can bring increased police detection, displacing sex workers to more isolated areas. There is evidence from sex workers that they do not wish to work alone and find it to be more dangerous.[214] This was also a finding made by Justice Himel.[215]
- ***Working from fixed indoor locations***: The prohibition on commercial enterprises in s. 286.2(5)(e) prevents sex workers from operating from fixed indoor locations. Outcall sex work is less dangerous than outdoor sex work, and indoor sex work from a fixed location is less dangerous than outcall sex work. Although sex workers themselves cannot be prosecuted for the sale of their own sexual services, landlords are free to evict sex workers and may refuse to rent to sex workers altogether.

[258] Respectfully, I do not accept any of these contentions. *N.S.* is a complete answer to much of this argument. I will, however, deal with the issues raised by the applicants in some detail because the constitutionality of s. 286.1(1) of the *Criminal Code* – the purchasing offence – was not considered in *N.S.* and is related to the questions raised by the prohibition on the purchase of sex in commercial establishments.

[259] I turn first to the question of what is a "commercial enterprise".

"Commercial enterprise that offers sexual services for consideration" is not defined in s. 286.2(5) of the *Criminal Code*. In *N.S.*, Hoy J.A. noted that the government's Technical Paper addressed the issue. The Technical Paper noted that "commercial enterprise" has been interpreted in drug trafficking cases. Based on that interpretation, the Technical Paper stated that in the context of PCEPA a commercial enterprise "necessarily involves third party profiteering." Justice Hoy went on to state that the words "profit from" has a pejorative meaning:

> The *Oxford Canadian Dictionary*, 2nd ed. (Toronto: Oxford University Press, 2006) defines profiteering as "make or seek to make excessive profits, esp. illegally or in black market conditions". In this context, the word correctly captures that a "commercial enterprise" in s. 286.2(5)(e) necessarily involves the

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[214] Forrester Affidavit, paras. 16, 43; Jane X Affidavit, para. 30.
[215] *Bedford (SCJ)*, at para. 41.

> making of a profit derived from third party exploitation of the sex worker. In other words, it involves the making of a profit from the commodification of sexual activity by a third party.[216]

[260] Justice Hoy also quoted the government's Technical Paper when she considered the meaning of the term "commercial establishment":

> The only type of enterprise that this phrase cannot capture is one involving individuals who sell their own sexual services, whether independently or cooperatively, from a particular location or from different locations. PCEPA does not allow for prosecution in these circumstances…[217]

[261] I turn to the evidence.

a. Is there a sufficient causal connection between the prohibition on commercial enterprises and the inability of sex workers to access safety measures?

[262] In my view, the answer is "no". The evidence does not establish that the "majority" of sex workers access safety measures through a commercial establishment. The evidence that commercial establishments provide safety measures and other services without exploitation is mixed, at best. There is evidence that sex workers can access safety measures in other ways. I find, therefore, that there is not a sufficient causal connection between the prohibition on commercial enterprises and any inability of sex workers to access safety measures.

[263] The Applicant, Tiffany Anwar, described the escort business that she operated with her husband in London and Mississauga. She described operating a regular business with well-paying work, paid vacation, and medical and dental insurance. She described the safety and security measures taken by the agency, including posting of information that sex workers could refuse to provide certain services, and a client list that included customers who were banned because of poor behaviour, violence, or bringing drugs to appointments. She and her husband were charged with offences contrary to s. 286.2, 286.3, and 286.4 of the *Criminal Code* (the material benefit, procuring, and advertising offences). In 2020 Justice McKay of the Ontario Court of Justice found that the sections were unconstitutional. The charges were dismissed.[218]

[264] Professor Krusi (along with others) authored a study that was part of the AESHA project. She drew on that study for her expert report. That study drew on 25 semi-structured interviews

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[216] *N.S.* at para. 76.
[217] *Technical Paper*, p. 7; *N.S.* at para. 75.
[218] Affidavit of Tiffany Anwar, sworn June 27, 2021 (JAR Tab 21)("**Anwar Affidavit**"), paras. 7, 8, 10.

with third parties (sex work venue owners, managers, security, receptionists) in places such as massage parlours, beauty parlours, and private apartments in Vancouver in 2017 and 2018:

> The findings of this study show that third parties provided client screening, assisted with security, and provided sexual health resources for workers; yet criminalization constrained third parties' supportive activities including working in association with other sex workers, restricted third parties abilities to support client screening, increased venues' vulnerability to robberies, and constrained access to police protections in case of violence or fraud, severely undermining sex workers' occupational health and safety. The findings of this study highlight that third party criminalization under end-demand legislation reproduced the unsafe working conditions under the previous *Criminal Code* provisions governing sex work.

[265] Several aspects of the study emphasized prohibitions that, the participants felt, decreased their security. This included, for example, a prohibition on collecting fees on behalf of sex workers. The study also emphasized the positive benefits of sex workers working out of indoor locations in cooperative arrangements (increased safety and security, policies promoting safe sex, etc.). Professor Krusi noted:

> While acknowledging the power imbalances between workers and managers which exist in the sex industry as in others, these findings show that third parties offer supportive services, and sex workers use third party services (and work collectively, as third parties to one another) towards creating the most optimal working conditions for themselves.[219]

[266] I do not doubt the validity of the findings of the study regarding the survey respondents. With respect, however, I find that this study has many of the limitations that I have described in relation to other qualitative studies, including the AESHA study. The sample size is very small. Given the difficulties studying sex workers generally, the results cannot be extrapolated to make general findings about the population of all sex workers working in commercial enterprises. As well the study did not appear to distinguish between commercial enterprises where the venue owners profited and establishments where sex workers simply worked in association – or establishments that had elements of both. I suspect, as well, that venue owners and managers engaged in exploitive relationships with sex workers are highly unlikely to respond to surveys

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[219] Krusi Report, p. 44-45.

and answer questions about them. And if they did, I rather doubt that they are willing to admit to exploitive behaviour, even in a survey.

[267] Moreover, as I have stated in several places in these reasons, the study's interpretation of the challenged offences is simply wrong in the context of sex workers working in association.

[268] The rather benign conditions described in the study are also contradicted by a significant amount of other evidence. Some of the social services workers and police officers who interact with sex workers described very different conditions in commercial enterprises.

[269] According to Diane Redsky, in Manitoba exploiters and traffickers are heavily involved in the commercial sex entertainment industry. This industry includes strip clubs, escort agencies, and massage parlours. Sex workers exchange sexual services for consideration at those locations.[220] According to Andrea Rittenhouse, the sex industry in Montreal includes dance clubs, massage parlours, and in-call escort services. Procurers use social media to lure girls and women by posting ads for work in massage parlours and promising fast cash. Women and girls doing sex work in dance clubs and massage parlours reported being forced to work every day without time off, including while menstruating.[221] Inspector Monchamp has met sex workers who were assaulted in strip clubs, hotels, or massage parlours, "venues that actually offer a certain amount of security through the presence of staff like receptionists, bouncers or other sex workers".[222]

[270] According to Detective McGuigan, many indoor establishments in Edmonton– such as massage parlours – offer sexual services. A survey of 42 women working in body rub parlours indicated that 24 of the respondents were victims of physical or sexual violence from customers, and another 10 said that they sought medical help for some harm that they had experienced. Some of the violence included hair pulling, robbery, and sexual violence from customers who demanded more services than sex workers consented to. Sixty-seven percent of respondents reported that owners forced them to provide services they did not wish to provide. Sex workers reported that owners failed to protect them from customers. Some reported no cameras, no security, and no panic buttons in their locations. Eighty-eight percent responded that they had been victims of choking, biting, slapping, or all three. Although the numbers are unclear, respondents were also asked whether they sought help: 11 said that they turned to the owner; 16 to a friend; 7 to the police; and 5 to "other". Three said that they received support to go through the police and court process; 16 said that they did not. It is unclear what "received support" in this context means. This survey was not an academic study. It has some obvious limitations. Like many of the qualitative studies, the numbers of respondents are small. The study's observations cannot be extrapolated beyond the respondents, like the qualitative studies. It does,

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[220] Redsky Affidavit, para. 36.
[221] Rittenhouse Affidavit, paras. 36, 42, 61,
[222] Monchamp Affidavit, para. 66.

however, say something about the conditions under which at least some sex workers in massage parlours in Edmonton operate.[223]

[271] Detective McGuigan also observed that some sex workers lived in massage parlours under poor conditions. As well, the sex workers were not local but stated that "they were from China and were only here to work for a short time before returning to Ontario or British Columbia."[224] Staff Sgt Organ also indicated that the sex trade also occurs in strip clubs and massage parlours in York Region. There is almost no street prostitution in York Region.[225]

[272] After reviewing the evidence, I find that there are third party owners and managers who make a reasonable profit, properly protect sex workers, and ensure that sex workers are reasonably paid. I also find that some sex workers are also owners or managers, and vice versa. The numbers, however, are impossible to extrapolate to the wider population of sex workers working out of escort agencies, massage parlours, and adult entertainment venues. As well, even responsible owner/managers are doing exactly what the material benefit and procuring provisions prohibit: profiting from the sexual commodification of others.

[273] I also find that there are other sex workers working in commercial enterprises such as massage parlours and adult entertainment establishments (and escort agencies) that do not provide any sort of safety measures. Some of these workplaces do not enforce rules regarding safety, hygiene or the sex workers' right to refuse to perform a particular service. Many owner/managers are also exploiters. Some may also be traffickers. Many sex workers working in commercial enterprises are subject to violence (including sexual violence), manipulation, and exploitation.

[274] The purpose of the material benefit and procuring offences is to prohibit the commodification of sexual activity, not to prevent sex workers from taking measures that would increase their safety. As set out in *N.S.* the prohibition on commercial establishments does not prevent access to safety measures. Even if the prohibition means that sex workers cannot access safety measures through employment in a commercial establishment, it does not mean that sex workers cannot access safety measures in other ways. Sex workers are not prohibited from working in association to increase their own access to safety measures. As well, the third-party exceptions provide a kind of safety valve or curative provision.[226]

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[223] CEASE (Center To End All Sexual Exploitation) Survey, Exhibit B to the McGuigan Affidavit.
[224] McGuigan Affidavit, para. 34.
[225] Organ Affdavit, para. 35. York Region is the area north of the City of Toronto.
[226] *Canadian Council of Refugees* at paras. 64-66; *PHS* at para. 113.

b. Is there a sufficient causal connection between the prohibition on third parties under the material benefit and procuring provisions, and the inability of sex workers to make use of third parties who would improve their safety and security?

[275] In my view, the answer to this question is also "no". The Applicants argue that as with the avails provision in *Bedford (SCC)*, the material benefit offence and procuring offence do not distinguish between exploitive third parties and non-exploitive third parties.

[276] Respectfully, that interpretation is simply incorrect, based on a plain reading of the exceptions (and the exceptions to the exceptions) to the material benefit offence. PCEPA very much distinguishes between exploitive and non-exploitive third parties. Properly interpreted, the material benefit and procuring provisions only prohibit exploitive third-party relationships. Again, *N.S.* is a complete answer to this assertion. As Hoy J.A. stated:

> The cooperative sharing of security in the hypothetical does not involve third party exploitation of the sex workers by the commodification of their sexual services. The sex worker controls the sale of her own sexual services. The third parties who receive a financial benefit from providing the security services do not exploit the sex workers… in the hypothetical, the sex workers do not exploit each other.
>
> … If the cooperative arrangement were a "commercial enterprise" (and in my view it is not), properly construed, s. 286.5(1) would provide immunity to the sex worker who receives security services through a cooperative arrangement. To receive the benefit — the shared security service — the sex worker must pay her share of the cost. Presumably, the funds to pay for the shared security service are derived from the provision of the sex worker's own sexual services. Thus, the benefit is derived from the provision of the sex worker's own sexual services.[227]

[277] Associations between sex workers and non-exploitive third parties do not violate the material benefit offence. Non-exploitive third parties are subject to the exemptions. I have also already noted that the procuring offence does not prevent a sex worker from providing advice.[228]

[278] Moreover, it is not PCEPA that prevents access to safety measures from third parties – if such access is indeed prevented. It is perceptions and attitudes in society, as well as a fundamental misunderstanding as to how the challenged offences operate. I have mentioned this

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[227] *N.S.*, at paras. 79, 82.
[228] *N.S.* at paras. 110-113.

fundamental misunderstanding several times. The role of perceptions and attitudes is noted in the evidence of the Applicants. In her report Professor Krusi writes:

> Individuals who earn income from sex workers' labour are criminalized due to assumptions that third party roles are inherently exploitative. Third parties who work in association with sex worker include venue owners, managers, security, receptionists, bookkeepers, advertisers, webhosts, drivers, and others and are often also sex workers themselves. Public discourse and media portrayals offer homogenous representations of third parties as coercive 'pimps' and 'traffickers', and this discourse also informs legal strategies including the PCEPA.[229]

[279] Professor Krusi then went on to describe three studies she was involved with in Vancouver – two were conducted prior to *Bedford (SCC)*, and one in 2017-18, after the enactment of PCEPA. All studies showed that sex workers working indoors, with third party assistance, enhanced their safety. She contended that criminalization, however, constrained third parties' activities such as working in association. That increased sex workers' vulnerability to robberies, and undermined health and safety generally.[230] As I have noted, however, the prohibitions set out in the purchasing, material benefit, and procuring offences do not constrain non-exploitive third parties.

[280] I therefore find that there is no significant causal connection between the purchasing offence, the procuring offence, the material benefit offence and the reluctance of third parties to provide services to sex workers. If third parties are reluctant, that may be based on a misperception about the reach of the section. Or it may simply be a decision not to become involved with sex work on moral or reputational grounds. The narrow *mens rea* requirement of the procuring offence as well as exemptions to the material benefit offence operate as a curative provision or safety valve.[231]

c. <u>Is there a sufficient causal connection between the prohibition on commercial enterprises and the inability of sex workers to work in association?</u>

[281] In my view, the answer is also "no" to this question, because PCPEPA does not prohibit sex workers from working in association.

[282] The Applicants rely on the Management Project that is described in Professor Bruckert's report. Some of the conclusions in the Management Project also apply here – as do some of the

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[229] Krusi Report, p. 33-34.
[230] Krusi Report, p. 40.
[231] *Canadian Council of Refugees* at paras. 64-66; PHS at para. 113.

problems with it that I have previously mentioned. Professor Krusi, in her report, drew on her study (with other authors) *Negotiating Safety and Sexual Risk Reduction with Clients in Unsanctioned Safer Indoor Sex Work Environments: A Qualitative Study*.[232] The authors studied low-barrier supportive housing programs in Vancouver for women that functioned as unsanctioned sex work environments. The women tended to be marginalized, chronically homeless, and often with substance abuse problems. The women worked supportively with others and were informally supported by the housing program. The survey consisted of 39 semi-structured interviews and 6 focus groups. Unsurprisingly, the women in the study preferred to work in such a setting, even though it was unsanctioned. There were rules in place, and safety measures available to deal with violent customers.

[283] The Applicants point to this study to show that this kind of arrangement is something that is prohibited notwithstanding that it increases the safety of marginalized sex workers. I disagree. When properly interpreted, PCEPA does not prohibit associations like the one Professor Krusi describes as it is not a commercial enterprise. There is no third party making a profit by commodifying someone else's sexual activity. If the association between sex workers is one where each sex worker provides sexual services on her own and pays for her share of the expenses it is not a commercial enterprise and the material benefit and procuring offences do not apply. The exceptions apply to third parties assisting the association where those third parties are non-exploitive. The exceptions cease to apply if the third party commodifies and commercializes someone else's sexual activities.[233] Again, the third-party exceptions provide a kind of safety valve or curative provision.[234]

d. Is there a sufficient causal connection between the prohibition on commercial enterprises and the inability of sex workers to operate from fixed indoor locations?

[284] As noted, there is evidence that indoor locations are generally safer than outdoor locations.[235] In my view, however, the answer to this question is "no" for two related reasons. First, *Bedford (SCC)* struck down the common bawdy house offence and Parliament made no attempt to re-enact it in a *Charter*-compliant form. Second, as I keep emphasizing, it is clear from *N.S.* that the prohibition on commercial establishments does not prevent sex workers from establishing fixed indoor working locations for in-call sex work when working in association.

[285] If landlords choose not to rent to sex workers or choose to evict them, that is a matter of private contract. There may be any number of reasons a landlord does not wish to rent a premises to be used as a fixed indoor location for sex work. Those reasons may include moral disapproval, not wishing to become involved in the sex industry, or the prevention of nuisance to

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[232] Krusi Report, p. 4805.
[233] *N.S.* at para. 74, 77, 79-80, 91, 93.
[234] *Canadian Council of Refugees* at paras. 64-66; PHP at para. 113.
[235] Bruckert Report, p. 9; Krusi Report, p. 38; *Bedford (SCJ)* at paras. 300, 421.

other tenants. None of those reasons have anything to do with the material benefit offence, or with the prohibition on commercial enterprises. If landlords evict sex workers for providing sexual services contrary to the terms of a lease, then, again, that is a matter of private contract. While it may be a very unfortunate consequence for individual sex workers, it does not mean that the prohibition on commercial establishments is a significant causal factor in preventing sex workers from working from a fixed indoor location. Indeed, even if sex work were lawful and regulated, landlords would still have the right to evict sex workers operating in contravention of the terms of a lease.

[286] That does not establish a sufficient causal connection because landlords who are non-exploitive third parties are not prohibited from renting to sex workers who operate in association.[236] Again, the third-party exceptions provide a kind of safety valve or curative provision.[237]

ii. Do the challenged offences impede the ability of sex workers to screen clients?

[287] The Applicants argue that the existence of the challenged offences impedes the ability of sex workers to screen customers. I accept, as did Himel J. and McLachlin C.J.C., that screening of potential customers is a safety measure for sex workers. The pre-*Bedford* communication offence effectively prevented sex workers from screening potential clients before engaging in a legal transaction. It made a legal activity riskier.[238]

[288] The Applicants further argue that the asymmetric prohibition of the purchase of sex, the stopping traffic offence, and the communication offence all contribute to making sex work dangerous. Customers fear police detection, which shapes their interactions with sex workers. Encounters are hurried and can be more aggressive. Sex workers need to screen customers to prevent violence or set boundaries or negotiate terms and conditions. When the screening process is abbreviated, sex workers have fewer opportunities to screen. That compromises their safety.

[289] In my review of the evidence, I found some statements from some of the Applicants that customers have told them that the challenged offences have made those customers more wary of encounters and more reluctant to provide information. Some of these customers directly blame the criminalization of the purchase of sex for the reluctance to provide information; others appear to simply want to avoid police detection.[239]

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[236] *N.S.*, at para. 83
[237] *Canadian Council of Refugees* at paras. 64-66; PHP at para. 113.
[238] *Bedford (SCJ)* at paras. 301, 409.
[239] Forrester Affidavit, para. 31; Mason Affidavit, para. 12; Jane X Affidavit, paras. 10-11; Ade-Kur Affidavit, para. 28.

[290] Some of the Applicants noted that clients are more aggressive with sex workers. Sex workers have also stated, through their own affidavits or through feedback to social services agencies, that the stopping traffic offence and the communication offence have also impeded their ability to screen customers.[240] Jane X stated in her affidavit that she noticed a major shift in the attitudes of clients after PCEPA came into force. She further stated:

> … the criminalization of purchasing and of communication for the purpose of purchasing sexual services has made clients highly reluctant to provide personal identifying information and many refuse to discuss the terms and conditions of the engagement in advance of the appointment.
>
> Under the PCEPA, clients are more reluctant to speak with me in advance of appointments, even regarding essential elements of the transaction, such as the nature of the services offered, price, and safer sex practices. Clients have informed me that they were afraid of having these discussions over text and phone, concerned about the potential for undercover police investigations and surveillance….[241]

[291] Jenn Clamen stated in her affidavit that the sex workers she works with report that customers are less willing to share information. Customers fear criminal charges. She says that this is something that has happened since PCEPA was enacted. Sex workers have reported that they must get into the cars of customers hastily to avoid police detection. That obviously limits their ability to screen customers. It also displaces sex workers into more remote and isolated locations. Sex workers have also reported that customers have shown a greater awareness of criminalization. This awareness also makes customers more reluctant to share details on the telephone.[242]

[292] Diane Cooley of SACRED in Victoria indicated that although the police will not arrest sex workers, the police do monitor sex workers on "the stroll". That makes customers – who are subject to arrest – nervous and unwilling to have proper conversations with sex workers. That makes it difficult for outdoor sex workers to conduct screening.[243] Professor Krusi and Professor Bruckert made essentially the same point, using sex worker's narratives.[244] These experiences apply both to indoor workers and outdoor, or street-based workers. The communication offence and the stopping traffic offence apply particularly to the latter group.

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[240] Wesley Affidavit, para. 34.
[241] Jane X Affidvavit, paras. 9, 11.
[242] Clamen Affidavit, paras. 62-63, 65, 69-72.
[243] Cooley Affidavit, paras. 18-19.
[244] Krusi Report, p. 26-29; Bruckert Report, p. 8-9.

[293] Professor Krusi drew on the AESHA study. The study indicated that most encounters with customers were positive, although there are clients who are rude, difficult, and physically aggressive. There are a wide variety of purchasers. Professor Krusi went on to say:

> However, sex workers also noted that client fear of being prosecuted or 'outed' by police enhanced feelings of shame, which they linked to clients feeling 'on edge' and increased aggression.[245]

[294] Alessa Mason asserted in her affidavit that she is unable to properly screen customers. In her cross-examination, she stated that most of her customers find her through her online advertisements, which include information about her, contact information (including a phone number), information about her services and her restrictions, and photographs. She stated that many customers are concerned about being arrested, but that there are other reasons customers are reluctant to provide information – including fear of outing and fear of being judged. In fact, Ms. Mason stated in her cross-examination that she still has phone conversations with clients, but the number has dropped and most of her conversations are now by text.[246]

[295] Professor Atchison is one of the few academics to have studied customers. He stated that there could be many reasons why a customer might not want to exchange information with a sex worker. Those could include perceptions of risk, a desire for privacy, or no pre-established relationship.[247] Professor Atchison was involved in a project called John's Voice. John's Voice was part of a larger project to understand the relative risk and exposure of both buyers and sellers of sex as part of an AIDS and HIV prevention initiative. The study was qualitative. The findings were released in 2010, meaning prior to the enactment of PCEPA – at a time when the purchase of sex was not illegal. About 18.5% of respondents indicated that they told others when they were going to purchase sex. Buyers stated that privacy, embarrassment, stigma, shame, and fear prevented them from informing people that they were going to purchase sex. That fear could include fear of arrest, fear of detection by a spouse, or simply fear of being "outed" as a purchaser of sex. According to Professor Atchison, there could be a multitude of factors why customers do not wish to share information.[248]

[296] I do not doubt that there are sex workers who genuinely perceive that the asymmetric prohibition on the purchase of sex has caused a change in customers. The sex worker narratives in Professor Krusi's and Professor Bruckert's reports do not add anything to that observation: they are simply more of the same, except set out in an expert report. I also accept that it may be the perception of Jane X and other sex workers that things have changed since PCEPA was

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[245] Krusi Report, p. 6, 30-31.
[246] Cross-Examination of Alessa Mason, March 7, 2022, q. 43, 46-47, 74, (JAR Tab 20)("**Mason Cross-Examination**").
[247] Atchison Cross-Examination, q. 202 (JAR Tab 50).
[248] Atchison Cross-Examination, q. 205, 209, 212, 214-15, (JAR Tab 50).

enacted. I also accept that many sex workers perceive that the purchasing offence has made it more challenging to screen customers. That perception is not, of course, evidence of causality. Professor Atchison's study further complicates that finding as it tends to show that individual purchasers may have more than one reason to avoid detection.

[297] As well, there is evidence that indoor sex workers have been able to screen clients since the enactment of the challenged offences. Professor Atchison stated that most commercial sex transactions are initiated through online advertisement. The advertisements always have a means for customers to contact the sex worker – email, text, or a telephone call. His research indicates that the average number of communications between a sex worker and customer prior to a physical encounter is in the range of 4.2. Professor Atchison further stated that the number of communications may depend on where and how the sex worker works – ranging from fewer communications with an escort service to more with an independent sex worker.[249] In other words, sex workers and purchasers are still having communications in a post-PCEPA world. This was essentially the same evidence that was before the Superior Court and the Court of Appeal in *N.S.* Hoy J.A. characterized any impairment of the rights of sex workers in relation to the advertising offence as "trivial".[250]

[298] Other research from the Applicants' experts also does not bear out PCEPA as reducing the ability of indoor sex workers to screen clients due to fear of police detection. In her expert report, Professor Krusi focussed on the two studies showing that PCEPA has not improved the working conditions for sex workers.[251] Obviously that was not a goal of PCEPA; moreover, the constitutionality of the challenged offences does not depend on showing that PCEPA has improved conditions for sex workers. The main study dealt with self-reported changes from 299 sex workers who had worked in the sex industry in the greater Vancouver area before and after the enactment of PCEPA. The study encompassed both indoor and outdoor sex workers. Most sex workers (72.2%) reported no change in working conditions and 26.4% reported negative changes, but the negative changes were correlated with being an immigrant or migrant and having experienced recent physical violence. A sub-analysis found that living in the suburbs of Burnaby or Richmond and physical workplace violence correlated with reduced screening capacity.[252] Professor Krusi agreed that the study did not establish that a police presence reduced the ability of sex workers to screen clients.[253]

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[249] Atchison Cross-Examination, q. 194, 197-98; see also *N.S.*, at paras. 141-142.
[250] *N.S.*, para. 150.
[251] Krusi Report, p. 46-48.
[252] *Sex Workers And Occupational Conditions Post-Implementation Of End-Demand Criminalization In Metro Vancouver*, Canadian Journal of Public Health (2019), Exhibit 13 to Krusi Cross-Examination; Krusi Report, p. 47-48 ("**Sex Workers And Occupational Conditions**")
[253] Krusi Cross-Examination, q. 320.

[299] I therefore find that there is not a sufficient causal connection between the purchasing offence, the communication offence, and the stopping traffic offence and the alleged harm to indoor sex workers.

[300] I make a different finding regarding outdoor sex workers. There is obviously a greater likelihood of police detection when customers meet with sex workers on the street rather than at an indoor location. There is a consensus that outdoor sex work is more dangerous. If customers are more reluctant to speak in public, there may well be a host of reasons; fear of arrest may be only one reason, but it is likely a significant one. I accept, therefore, that the purchasing offence may be a contributing factor to the reported inability to screen. Based on the evidence of the pre-PCEPA study, I do not think that this is a new phenomenon. I find, however, that in the case of the purchasing offence as it applies to outdoor sex workers, that there is a sufficient causal connection, although it is likely not the only connection. Shame, fear of "outing", and the myriad of other reasons also drive the responses of customers.

[301] In contrast, I find that the stopping traffic offence and the communication offence do not prevent sex workers from screening clients and do not result in displacing them to more isolated places. There is evidence that some sex workers perceive these sections as having driven them to more isolated urban areas and thus increased risk. In her affidavit, Jenn Clamen stated:

> The prohibition on public communication also severely restricts where sex workers can meet clients and where sex work can take place to areas where sex workers' health and safety is put at risk. Sex workers report how the prohibition on communicating to offer or provide sex work within the vicinity of a school, playground, or daycare makes it difficult to engage in sex work in public spaces that are not in isolated and desolate areas.[254]

[302] In her affidavit, Sandra Wesley stated:

> Sections 213(1) and 213(1.1) of the *Criminal Code* directly criminalize sex workers for impeding traffic and soliciting in public spaces, creating a context where sex workers are not able to negotiate and advertise with clients in an efficient manner. Sex workers are constantly avoiding detection of the police for fear of being charged with these offences, and as a result, are not able to take the time to collect necessary identifying information from potential clients, and to establish consent for services and fees. The prohibition against communication for the purpose of selling

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[254] Clamen Affidavit, para. 61.

> sexual services in public spaces that are near schools, daycare, and parks in effect creates a blanket prohibition against selling sex in public. In an urban city like Montréal, it is hard to find public space that is not close to one of these locations. The same applies to most adjacent suburban areas.[255]

[303] I do not accept the evidence of Ms. Clamen and Ms. Wesley on this point. Their evidence amounts to a blanket statement that areas near playgrounds and daycare centres encompass entire cities. That is an obvious exaggeration. Ms. Clamen and Ms. Wesley also appear to assert that sex workers should have a freestanding right to simply stop traffic or pedestrians – a right that has never existed either at common law or under the *Charter.* If it is a breach of a *Charter* right, it is a trivial one.

[304] In any event, those sections are directly responsive to *Bedford (SCC)*. The stopping traffic offence prohibits the stopping of motor vehicles for the purpose of offering, providing, or obtaining sexual services for consideration. It does not, for example, prevent a sex worker and a potential customer discussing terms and conditions in a parking lot or a parking space or even just on the sidewalk in a well-lit location (although the purchasing offence obviously does). The communication offence prohibits communication for the purpose of offering or providing sexual services in places that are next to a school ground, playground, or daycare centre. This section only prevents communications in places where children are to be found. Neither of these sections prohibits communications between a sex worker and a customer, as the pre-*Bedford* section did. They simply prohibit communications under specific circumstances in very specific locations.

[305] In short, if customers and sex workers have, in fact, been driven to more isolated locations it may be due to the purchasing offence, but it is not due to the communications and stopping traffic offences.

[306] As well, from an empirical point of view, the evidence suggests that there are many fewer charges involving outdoor sex work. The June 21, 2021 Juristat stated:

> After the PCEPA, fewer sex-trade-related offences occurred on the street or in an open area and proportionally more took place in a home or a commercial dwelling unit such as a hotel. This was driven by a considerable decline in offences that are public by definition (i.e., stopping or impeding traffic or communicating offences). The increase in incidents occurring in a home or a commercial dwelling unit is mostly explained by the large increase

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[255] Wesley Affidavit, para. 34.

> in incidents of procuring or receiving material benefit as well as the creation of the new offence related to obtaining sexual services from an adult.[256]

[307] I find that it is only the purchasing offence that engages s. 7 of the *Charter* and that it does so only in relation to screening by outdoor sex workers.

iii. Does the advertising offence jeopardize the health and safety of sex workers?

[308] The Applicants argue that advertising is a necessary tool for protecting the health and safety of sex workers. Advertising permits sex workers to provide detailed and specific information about their services and boundaries. Advertising manages customer expectations. Sex workers are not prohibited from advertising their own sexual services. The Applicants argue that this exemption is of little value because sex workers must use third party advertising services. Sex workers require the assistance of third parties to host websites, create accounts, design advertisements, and access a credit card. More marginalized sex workers do not have the resources to set up advertisements and require assistance. Advertisers and websites are more reluctant to take advertisements from sex workers.[257] Some sex workers in this proceeding have stated that the advertising offence has pushed them to more outdoor or street work.[258] There is also evidence that other sex workers continue to advertise but to have more guarded conversations or use dating apps where open conversations are more difficult.[259]

[309] I agree that communication is critical to the safety and security of sex workers.[260] I also agree that the immunity provisions only apply to sex workers themselves in respect of their own sexual services.[261] *N.S.*, however, provides a complete answer to this argument. During the pre-trial applications in the Superior Court, the accused called Professor Atchison as an expert witness. He is also an expert witness in these proceedings on behalf of the Applicants. The thrust of his testimony in *N.S.* was effectively the same as his evidence here:

> Mr. Atchison testified that advertisement was a fundamental initial way for sex workers and people who owned and operated commercial sex establishments to clearly relay the boundaries and the services offered to prospective clientele. It sets the stage for the initial interaction between sex workers and prospective clients. The more capacity there is to exchange information, the less likely

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[256] Juristat, p. 3.
[257] Bruckert Report, at pp. 36-39.
[258] Forrester Affidavit, para. 59; Perrin Affidavit, paras. 20-21.
[259] Forrester Affidavit, paras. 57-58; Mason Cross-Examination, q. 49-50.
[260] *Bedford (SCJ)* at para. 432; *Bedford (SCC)* at para. 71; *N.S.* at para. 144.
[261] *R. v. Gallone*, 2019 ONCA 663 at para. 99.

> sex workers or their clients were to report that there was any form of conflict in their actual physical exchanges…
>
> According to Mr. Atchison, following the passage of the PCEPA, advertisement migrated to off-shore locations. Advertisements on third-party sites began using vague language in order not to be flagged or trigger a complaint and be taken down by site administrators: e.g., talking about 2 or 3 roses for a certain kind of date, or saying "safe only" to mean that condoms must be used. He testified that there is empirical evidence that a lack of clarity between buyer and seller leads to physical conflict.
>
> Mr. Atchison also agreed that through the ads the sellers make it possible for the buyers to contact them, in some forum — text, email, or phone call. Mr. Atchison testified that the average number of communications before a physical encounter was 4 to 4.2. It is open to the seller to disengage if they are not happy with the communications or are not getting sufficient information.[262]

[310] Justice Hoy found that the evidence was not that persons who had previously advertised their sexual services were resorting to risker forms of communication, such as on the street. The evidence was that sex workers continue to advertise but use vaguer language.

[311] In *N.S.*, Hoy J.A. found that the advertising offence did not affect the ability of sex workers to have frank and detailed communications. This was due to the immunity clause. She also found that any vague language between sex workers and customers presumably arise because of the asymmetric prohibition of the purchase of sex under s. 286.1. She found that any impairment of the security of the person was a trivial one.

[312] *N.S.* is binding and dispositive. Even if I could somehow over-rule the Court of Appeal on this point, I would not because the evidence does not support a different conclusion.

iv. Does the prohibition against sex work result in the denial of labour standards, occupational health and safety standards, and income-related government programs to sex workers?

[313] The Applicants argue that by criminalizing and de-legitimizing sex work, PCEPA prevents sex workers from accessing labour protections and employment standards. Sex workers cannot access occupational health and safety resources for unsafe workplaces, workers compensation for workplace injuries, or the collective bargaining process to improve working

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[262] *N.S.*, at paras. 140-142.

conditions. Sex workers also cannot access income programs such as the Canada Pension Plan because they do not have taxes and other monetary contributions deducted at source.

[314] I accept for the purposes of argument that sex workers cannot access formal employment protections because they work outside the formal economy. What the Applicants are really saying, however, is that their *Charter* rights have been violated because Parliament has chosen not only not to decriminalize sex work, but also because it has also failed to formally regulate it.

[315] The inability of sex workers to access formal health and safety standards and income programs because they are not in formal work is a collateral effect of prohibiting the purchase of sexual services for consideration. There is no free-standing right to government programs. The failure to provide them does amount not a *Charter* violation.[263] I agree with the observation of the Attorney General of Ontario that the Applicants are engaged in the logical fallacy of arguing that because the law has not made something better, the law has made it worse. With great respect, and not to compare the morality of sex work to drug dealing, sex workers have no more claim to health and safety standards than drug dealers. Or, to use a different analogy that the Applicants themselves might prefer, sex workers have no more right to health and safety standards or income programs than sole proprietor home renovators who take cash and don't report it.

[316] In any event, the assertion that sex workers have no access to income support programs or other programs is not entirely correct. Sex workers are required to report their income from all sources – whether legal or illegal – just like any other worker.[264] It has long been the case that sex workers are also permitted to deduct business expenses such as rent, utilities, supplies, and equipment.[265] Section 241 of the *Income Tax Act* prohibits CRA from disclosing the sources of income to law enforcement except under certain specific conditions. Filing a tax return regularizes, to some extent, the ability of those working outside the formal working sector to access some programs. Self-employed individuals may access the Canada Pension Plan by paying employee and employer contributions. There appears to be no reason why sex workers who file T1 income tax returns and pay CPP contributions cannot access the Canada Pension Plan when they retire. Like all Canadians, Indigenous persons registered under the *Indian Act*, and permanent residents sex workers are eligible for publicly funded health care.[266]

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[263] *Malmo-Levine*, paras. 133-134; *Tanudjaja* at paras. 2025.
[264] *R. v. Brown*, 2012 TCC 251, 2012 CarswellNat 2481.
[265] Minister of National Revenue v. Eldridge, [1964] C.T.C. 545, 1964 CarswellNat 357 (Exch.Ct.); Expenses of Illegal Businesses, CED §246.
[266] *Health Insurance Act*, R.S.O. 1990, c. H.6, ss. 10, 11; https://www.ontario.ca/page/apply-ohip-and-get-health-card#section-2.

v. Does PCEPA increase discrimination and violence due to stigmatization?

[317] The Applicants argue that PCEPA stigmatizes sex workers. This stigma encourages a culture of violence and discrimination. Stigma is inherent in the language and goals of the legislation. The applicants take issue with Parliament's characterization of sex workers as exploited persons who require protection. They must balance the label of "criminals" with the label of "victim". Thus, PCEPA enables "interference, stigma, harassment, and discrimination towards sex workers."[267]

[318] The Applicants further argue that this stigma breeds violence by sending a message that sex workers should expect violence, including violence by predators and violence against Indigenous and other racialized women.[268] The Applicants' material is replete with assertions that PCEPA is a source, if not the dominant source of stigma leading to violence.

[319] The Applicants' argue that this stigma is the source of many of harms and dangers faced by sex workers – although, to be fair, the Applicants' experts are less categorical and more nuanced about PCEPA as the source of stigma than the individual Applicants themselves. That said, I note that Professor Benoit stated that "the main challenge of sex work compared to other work is occupational stigma."[269] She stated in her expert report that the preamble to PCEPA is "inherently stigmatizing" towards sex workers:

> … Bill C-36, Protection of Communities and Exploited Persons Act, and its Preamble include words and phrases that are inherently stigmatizing toward sex workers. Emotive phrases such as "exploited persons" and "victims" and "women's bodies as commodities" are trademarks popular in the media that portray negative views of all sex workers, reducing them to the caricature of helpless victim without complexity or agency.[270]

[320] In her expert report, Professor Bruckert states:

> The *PCEPA* frames sex work as inherently exploitative and violent for sex workers. It frames sex workers as incompetent social actors and victims, third parties as exploiters, clients as a part of "objectification of the human body" of sex workers and "the commodification of sexual activity." While using stereotypes this framing is inconsistent with empirical evidence. This

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[267] Benoit Report at p. 11.
[268] Atchison Report, p. 17-19.
[269] *The Relative Quality of Sex Work*, p. 249 (JAR Tab 44, p. 3525).
[270] Benoit Report, p. 17.

> criminalization hinges on stereotypes and reinforces/entrenches stigmatic assumptions about the sex industry, sex workers, clients, and third parties.[271]

[321] Regrettably, to say that the Preamble to an Act of Parliament is inherently stigmatizing is a value judgment. The preamble to PCEPA cannot be dismissed as some caricature; it is the considered language of Parliament and, as a matter of statutory interpretation cannot simply be rejected by this Court because a witness has a different view of the question. As value judgments, the comments of Professor Benoit and Professor Bruckert are outside the scope of their expertise. As well, after reviewing the record, I do not agree that these criticisms of PCEPA are grounded in the empirical evidence; rather, they are statements of advocacy.

[322] Moreover, there is no evidence that PCEPA has led to an upsurge in violence against sex workers. The Applicants have not pointed to a general statistical increase. Rather, their argument is that PCEPA has perpetuated the conditions that lead to violence. In the AESHA study, as I have already noted, most sex workers experienced no change in working conditions after PCEPA – except for a subset of migrant sex workers in certain indoor spaces.[272]

[323] There is no question, however, that stigma is a real thing. There is evidence that stigma is a social determinant of health and can lead to poor health outcomes.[273] Some aspects of stigma were described in the expert evidence. Some aspects were described in the affidavits of some of the Applicants.[274] For example, Ms. Perrin described how people react to her (negatively) and don't see her as a human being.[275] The real question, however, is not whether stigma exists. It obviously does. The real question is whether there is a sufficient causal connection between PCEPA, and stigma experienced by sex workers. The response, like so many responses in these reasons, is that it's complicated. Stigma is hard to study – it is not a phenomenon that is easily measured. It is also at least partially subjective.

[324] A definition of "stigma" is helpful. An article authored by Professor Benoit states that "Erving Goffman (1963) defined stigma as a social attribute or mark that separates those of us considered to be 'normal' from 'others', based on dominant cultural stereotypes."[276] The Oxford

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[271] Bruckert Report, p. 51.
[272] Sex Workers And Occupational Conditions, JAR p. 3594.
[273] *Occupational Stigma and Mental Health: Discrimination and Depression among Front-Line Service* Workers, Canadian Public Policy (Benoit, McCarthy, and Jansson, 2015), Ex. 4 to the Cross-Examination of Cecilia Benoit.
[274] See, for example: Perrin Affidavit, paras. 16-18; Mason Affidavit, para. 46.
[275] Perrin Affidavit, paras. 16-18.
[276] *Canadian Sex Workers Weigh The Costs And Benefits Of Disclosing Their Occupational Status to Health Providers*, Sexuality Research and Social Policy (Benoit, Sith, Jansson, Magnus, Maurice, Flagg, 2019), Exhibit 5 to Benoir Cross-Examination, p. 329.

English Dictionary defines stigma as "a mark of disgrace associated with a particular circumstance, quality, or person." The Merriam-Webster Online Dictionary defines stigma as "a set of negative and unfair beliefs that a society or group of people have about something."

[325] Stigma is based upon feelings and beliefs, usually ungrounded in facts. Stigma obviously has a significant subjective component. That makes it difficult to measure and grapple with as a driving concept.

[326] Despite the numerous assertions in the Applicants' expert reports and affiavits that PCEPA has been a source of stigma, if not the major source of stigma, there is much evidence to the contrary. That evidence includes evidence from the Applicants' own experts. Professor Benoit drew upon a study noting that stigma was more pronounced among sex workers than people in hairstyling or the food service industry. That is hardly surprising.

[327] As well, social attitudes towards sex work and sex workers obviously did not suddenly change from negative to positive after *Bedford* and to negative again with the advent of PCEPA. Professor Benoit admits as much when she states that "criminalization of sex work is a reflection of pervasive societal stigma inflicted on sex workers in Canada and elsewhere."[277]

[328] The experts were less definitive when cross-examined. Professor Benoit agreed that the phenomenon of stigma as it relates to sex work is highly complex. There are numerous sources of stigma, and not all of them relate to legal structures. Some relate to the media, other institutions such as health care, and the attitudes of both sex workers and the general public. Stigma is a widespread phenomenon and affects sex workers in all countries, not just Canada.[278]

[329] Professor Atchison agreed in cross-examination that stigma comes from a variety of complex interrelated factors. Stigma is both external and internalized. Structural factors exacerbate the impact of felt stigma. Those structural factors can include law, health, policy, or procedure. Stigma obviously pre-dated PCEPA. Professor Atchison stated:

> A. … PCEPA didn't really change the conditions surrounding the sex industry. If anything, it just highlighted and continued the ingrained stigma within the way that the sex industry is treated under the law.[279]

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[277] Benoit Report, p. 18.
[278] Benoit Cross-Examination, q. 574-581; *Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers*, The Journal Of Sex Research (Benoit, Jansson, Smith, and Flagg, 2017), Ex. 19 to the Cross-Examination of Cecilia Benoit.
[279] Atchison Cross-Examination, q. 257-258 (JAR Tab 50).

[330] In 2021 Professor Benoit (and co-authors) published a paper using interviews conducted with sex workers in 2012 and 2013, prior to the enactment of PCEPA. One of the unfavourable themes mentioned by most sex workers was stigma. Obviously those surveys were taken prior to the enactment of PCEPA. The authors stated that occupational stigma is worsened by "punitive" laws, such as those currently in place in Canada; although none of the sex workers mentioned the prohibition of sex work or activities around sex work as a source of stigma. Other sources, such as the media, were mentioned.[280]

[331] Moreover, it bears hi-lighting, again, that PCEPA is not punitive towards sex workers – sex workers are specifically exempt from punishment in relation to their own sexual services. In New Zealand, where sex work has been decriminalized, there is conflicting evidence about stigma. Some researchers have contended that decriminalization has lowered the level of stigma. Others, however, have noted in surveys of New Zealand sex workers that decriminalization has not removed the stigma attached to sex work.[281]

[332] In *The Relative Quality of Sex Work*, an article co-authored by Professor Benoit (and one where the New Zealand findings were mentioned), the authors stated:

> Sex work is "tainted' in multiple ways: it is associated with physical taint from the possibility of coming into contact with bodily fluids, social taint from being potentially associated with other stigmatized groups and moral taint from this work being perceived as 'somewhat sinful or of dubious virtue'… Stigma associated with the act of selling sexual services is so ingrained in public institutions and in public interactions that it often goes unrecognized by stigmatizers (Benoit et al., 2019a). Criminalization of sex work intensifies prostitution stigma because it fabricates 'commercial sex as immoral, illicit, and unlawful' (Vanwesenbeeck, 2017: 2).[282]

[333] In another article co-authored by Professor Benoit, dealing with the link between occupation and mental health, the authors stated:

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[280] Benoit Cross-Examination, q. 439-451; *The Relative Quality of Sex Work*, Work, p. 249-51 (JAR Tab 44, pp. 3525-3527.

[281] Krusi Cross-Examination, q. 532-533 p. 229-230 (JAR Tab 56, p. 4955); *Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work* (Bruckert and Hannem), Canadian Journal of Law and Society, 2013, Vol. 28 No. 1, P. 61 (JAR Tab 56, p. 5347), Ex. 19 to Krusi Cross-Examination; *Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers* (Benoit, Jansson, Smith, and Flagg), The Journal of Sex Research, Annual Review of Sex Research, 2017, p. 8, (JAR Tab 44, p. 3608), Ex 19 to Benoit Cross-Examination.

[282] *The Relative Quality of Sex Work*, p. 241-242 (JAR Tab 44, pp. 3517-3518).

> Along with other factors, such as race, gender, income, education, and culture, work and stigma have been found to be important determinants of population health… The "whore" stigma is powerful; yet it is mutable and varies across legal regimes and societies, and by social determinants, such as gender, race, or sexual orientation.[283]

[334] Since so many sex workers come from marginalized, racialized, and vulnerable communities, it is extremely challenging to separate out the stigma associated with sex work from other sources of stigma, such as gender, race, ethnicity, sexual orientation, sexual identity, trans-sexuality, and Indigeneity. Does an Indigenous sex worker suffer from the racism and stigma associated with Indigeneity, or from the stigma associated with poverty, or from the stigma associated with sex work? Or all these things?

[335] Nora Butler-Burke, the executive director of ASTT(e)Q, which supports trans sex workers in Montreal, had a nuanced point of view. She stated that the stigma trans sex workers face is "complex as they encounter many intersecting and compounding forms of oppression" including criminalization. She went on to state:

> I have observed that trans women face a great deal of stigma and discrimination, as they are often portrayed as sexually deviant and fundamentally immoral.
>
> In my work with ASTT(e)Q, I have also observed how harmful stereotypes and stigma against sex workers often plays out differently for trans women compared to cis women. For cis women sex workers, a dominant discourse is that they are exploited victims. However, that discourse is often not applied to trans sex workers, as they are not perceived to be adhering to societal gender norms.[284]

[336] In my view, the Applicants have not established that there is a sufficient causal connection between stigma and the challenged offences. Sex workers undoubtedly suffer from stigma, but the causes are complicated, many, and varied. Stigma associated with sex work itself may be completely unrelated to prohibition for some members of the public, highly related to prohibition for others, and fall somewhere in between for yet more people. Prohibition may be a of reason for stigma, but the evidence falls short of establishing a sufficient causal connection.

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[283] *Occupational Stigma and Metal Health: Discrimination and Depression among Front-Line Service Workers*, Canadian Public Policy (Benoit, McCarthy, and Jansson, 2015), Ex. 4 to the Benoit Cross-Examination, p. S61-S62.
[284] Butler-Burke Affidavit, paras. 49-50.

The evidence also falls short of establishing that it is even a significant source of stigma when compared with the perception of sex work in society generally, and other sources of stigma.

[337] What is required for the purposes of this Application is that PCEPA, or at least some of the challenged offences, is causally connected to that stigma, and that the resulting stigma generates or perpetuates violence. Respectfully, the Applicants cannot establish that.

vi. Does PCEPA discourage reporting of violence to the police by sex workers?

[338] The Applicants argue that sex workers do not seek assistance from the police when they are subject to violence. They argue that sex workers fear reporting because they are concerned that they or their colleagues might be charged with offences related to sex work. The Applicants argue that sex workers see the police as not being approachable, not treating sex workers fairly, and refusing to take their complaints seriously. They see the police as being part of a culture of impunity of violence towards sex workers. That fear has sex workers reluctant to report intimate partner violence. Trans, non-binary, and racialized sex workers are especially reluctant to reach out to police. They say that is because of a longstanding history of negative attitudes by police toward them but that it is also a direct consequence of criminalization. The Applicants quote Professor Bruckert's expert report in their factum:

> The reasons sex workers do not report violence and do not turn to the police are consistently related to criminalization. It's criminalization that creates this antagonistic relationship, that creates a situation where sex workers are blamed. Where they're scared of being put on police databanks, even if they're not charged. Where they're fearful of not being believed. It's in the context of criminalization that all of that occurs.[285]

[339] Professor Bruckert states that police are perceived not as allies but as threats to a sex worker's livelihood, liberty, personal relationships, and mental and physical well-being. She states that "criminalization creates an antagonistic relationship between law enforcement and sex workers and third parties."[286] Although Professor Bruckert (and the other experts) uses the term "criminalization" extensively throughout her expert report, she never defines the term. She uses it broadly, appearing to give it a wider meaning that the asymmetric prohibition on the sale of sex in s. 286.1(1).[287] As I have already pointed out, it is a mistaken interpretation of the challenged offences to assume that it means the criminalization of sex workers.

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[285] Bruckert Cross-Examination, April 14, 2022, q. 480 (JAR Tab 47); Factum of the Applicants, para. 148.
[286] Bruckert Report, p. 50.
[287] This use of the term "criminalization" is one of the reasons why I explained earlier in my reasons that I prefer to use the specific term "prohibition" except where the context requires.

[340] There is certainly evidence to support the argument that some sex workers have what I will refer to as a "fraught relationship" with the police.[288] Regrettably, there is evidence that some police officers have not taken claims of violence by sex workers seriously. There is also evidence that some police officers have acted in a dismissive and derisive way towards sex workers, especially trans, non-binary, racialized, and Indigenous sex workers.[289] That is behaviour that a good police officer – or a judge – recognizes as unprofessional and inappropriate, because it is unprofessional and inappropriate. There is a longstanding recognized distrust of police by Indigenous and Black, and by many sex workers.[290]

[341] According to Professor Bruckert, in one study 31% of sex workers reported that they were unable to call 911 in a safety emergency due to a fear of police detection. Professor Bruckert also referred to another a study where only 16.5% of sex workers reported a violent incident to the police.[291] I have some reservations about whether these numbers can be extrapolated to the sex worker population generally, for reasons that I have already canvassed relating to the way sex workers are surveyed. That said, I accept that at least some, and possibly many sex workers will not call the police for assistance during violent incidents. I also accept that at least some, and possibly many sex workers will not call the police to report violent incidents. I accept it because this evidence accords with the evidence of several other witnesses, including police witnesses themselves.

[342] Police officers acknowledge continuing issues of mistrust. Inspector Monchamp stated that very few Indigenous sex workers come forward to the police due to distrust, although individual sex workers may approach a police officer that they have a good relationship with. Inspector Ramkissoon acknowledged trust issues, especially between Indigenous communities and police. He stated that steps were required by the Winnipeg Police in terms of training and partnering with community groups to try to build trust. Detective Brian McGuigan also acknowledged trust issues between his police service – Edmonton Police – and Indigenous communities.[292]

[343] Is this fraught relationship the result of PCEPA? If so, does the relationship discourage the reporting of violence to the police? After reviewing the evidence in detail, I find that the Applicants have not established a sufficient causal connection between the alleged harm and the challenged offences.

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[288] For example, Jane X Affidavit, para. 31.
[289] See, for example: Forrester Affidavit, paras. 11, 15, 22.
[290] Cooley Affidavit, para. 26; Ade-Kur Affidavit, paras. 18 and 50.
[291] Bruckert Report, p. 50-51.
[292] Factum of the Attorney General of Canada, para. 61; Monchamp Affidavit, para. 45; Ramkissoon Affidavit, paras. 30-31; Cross-Examination of Brian McGuigan, March 28, 2022, q. 281-299 (JAR Tab 82)("**McGuigan Cross-Examination**").

a. Is the fraught relationship between police and some sex workers the result of PCEPA?

[344] I find that the answer is "no". There is evidence that at least some sex workers are reluctant to report violent incidents to the police. There is evidence that this reluctance has at least something to do with this fraught relationship. There is also evidence that perceptions of the pre-*Bedford* sections of the *Criminal Code* had something to do with that, and that it still does. As counsel for the Attorney General of Ontario points out, many sex workers and social services agency workers who support them often fundamentally misunderstand important parts of the challenged offences.[293] Staff Sgt Organ indicated in his affidavit that it is common for sex workers to be unfamiliar with laws associated with the sex trade.[294] Jessica Quijano of the Native Women's Shelter of Montreal stated:

> In most of the conversations I have had with Indigenous sex workers, although they are unaware of the specific laws around sex work, they feel the laws do not protect them and they are aware their work is criminalized.[295]

[345] There is also evidence that traffickers and exploiters encourage this misunderstanding – whether because they too misunderstand the immunity provisions of PCEPA or because they cynically use the threat of criminal liability to manipulate sex workers.[296]

[346] The first reason to doubt that PCEPA is the reason for the reluctance to report violent crimes is that sex workers enjoy immunity from prosecution for the sale of their own sexual services. Since PCEPA it is exceedingly rare for a sex worker to be charged. According to the 2021 Juristat, the number of sex workers charged for crimes relating to stopping traffic and communication has dropped by 97% since 2010. Most of the decline occurred prior to the enactment of PCEPA but the decline continued after. There was also a decline in the number of women tried in court for a stopping traffic or communication offence. In the five years prior to PCEPA, the majority of women who were tried in court for stopping traffic or communications were found guilty and many sentenced to custody. In the five years after PCEPA, only two women were found guilty of offences, and neither was sentenced to custody.[297]

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[293] For example: Cross-Examination of Valerie Scott, March 2, 2022, q. 97-118 (JAR Tab 16); Cross-Examination of Ellie Ade-Kur, March 1, 2022, q. 206-212 (JAR Tab 30)("**Ade-Kur Cross-Examination**"); Perrin Affidavit, para. 26; Cross-Examination of Lana Moon Perrin, May 3, 2022 paras. 76-77 (JAR Tab 38)("**Perrin Cross-Examination**"); Cross-Examination of Nora Butler-Burke, March 10, 2022, q. 60-67 (JAR Tab 26).
[294] Organ Affidavit, para. 59.
[295] Affidavit of Jessica Quijano, affirmed January 18, 2022, para. 10 (JAR Tab 33).
[296] Rubner Affidavit, para. 73.
[297] Aucoin Affidavit, para. 11; *Juristat*, p. 3.

[347] If sex workers are not calling police because they fear being charged, that is a fear that is not based on anything in the challenged offences. It is a fear based on misunderstanding or fear encouraged by exploiters and traffickers. It could also be based on inaccurate information provided to sex workers.

[348] The second reason to doubt that PCEPA is the reason for the reluctance to report violent crimes is that is that there is a long history of difficult relationships between the police and some communities, as illustrated in the affidavits of Ms. Forrester and Ms. Ade-Kur. Professor Bruckert notes that the mistrust "is the result of a long history of policing characterized by neglect, abuse, harassment, and violence as well as racial and social profiling. This is most especially the case for the most marginalized sex workers."[298] Several police officers acknowledged this history. It long pre-dates PCEPA, just like the stigma associated with sex work.

b. <u>If so, does the relationship discourage the reporting of violence to the police?</u>

[349] The lack of a sufficient causal connection between PCEPA and the fraught relationship with police leads me to answer "no" to this question.

vii. Does PCEPA infringe the right to security of the person by compromising sex worker's right to personal and bodily autonomy?

[350] The Applicants made this argument in *N.S.* Justice Hoy took the view that this argument was for another day. The Applicants say that this day is here.

[351] The Applicants argue that PCEPA, and especially the purchasing offence, interferes with the ability of sex workers to consent to sexual activity. It therefore interferes with personal and bodily autonomy. When and under what conditions a person will consent to sexual activity goes to the core of one's own personal autonomy. The Applicants argue in their factum: "The effects of the PCEPA undermine the longstanding sexual assault jurisprudence on the importance of ongoing and explicit consent."[299]

[352] The Applicants rely on cases dealing with bodily integrity in the medical context. In *R. v. Morgentaler*, s. 251 of the *Criminal Code* prohibited doctors from performing therapeutic abortions except under specific circumstances. The section interfered a woman's bodily integrity in both a physical and an emotional sense. As Dickson J. put it, "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own

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[298] Bruckert Reply Report, p. 3738-3739.
[299] Applicants' Factum, para. 203; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330.

priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."[300]

[353] In *Manitoba (Director of Child & Family Services v. C.(A.)*., the child protection authorities apprehended a 14 year old girl. She was a Jehova's Witness. She had given an advance directive not to be given a blood transfusion. Manitoba's child protection legislation provided that the Director could intervene and order medical care if it was in the child's best interests. The Director ordered a transfusion. The child (and her parents) argued that the provisions of the Manitoba child protection legislation were unconstitutional because they interfered with her security of the person. The court rejected that argument, based on her age. The ruling would not have applied to a consenting adult, confirming the right to be free from interference with bodily autonomy – in this case, the longstanding right of competent adults to refuse to receive medical treatment. Abella J. in dissent (but not on this point) adopted the following statement made by McLachlin J.A. in *R. v. Rodriguez* (which the Applicants reproduce in their factum):

> Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact ... that "s. 7 was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else."[301]

[354] In *R. v. Carter*, s. 241(b) of the *Criminal Code* prohibited assisted suicide. Section 14 provided that no person may consent to their own death. Ms. Taylor was dying of a degenerative disease. She did not wish to slowly waste away in a hospital bed. She wished to go to Switzerland where physician-assisted suicide was legal. Ms. Carter wished to help her. They challenged s. 14 and s. 241(b) of the *Criminal Code*. The trial judge found that she could revisit the Court's earlier finding in *Rodriguez*. She found that the prohibition on physician-assisted suicide imposed pain and psychological stress and interfered with fundamental, important, and personal decisions about medical procedures. That infringed her security of the person. The Supreme Court unanimously agreed, stating:

> An individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of

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[300] *R. v. Morgentaler*, [1998] 1 S.C.R. 30 at para. 24.
[301] Manitoba (Director of Child & Family Services v. C.(A.), 2009 SCC 30 at para. 100, quoting Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at p. 618.

> life-sustaining medical equipment, but denies them the right to request a physician's assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms. Taylor to endure intolerable suffering, it impinges on their security of the person.
>
> The law has long protected patient autonomy in medical decision-making.[302]

[355] PCEPA, the Applicants argue, interferes with the bodily integrity and autonomy of sex workers in the same way. It is state interference with a person's ability to impose conditions on sex in the same way that the state has interfered with a right to make decisions about having a therapeutic abortion, as in *Morgentaler*, or the right to terminate one's life, as in *Carter*.

[356] The Attorneys General argue that the decision to engage in commercial sexual activity is not comparable to the decision to terminate a pregnancy, terminate one's life, or refuse medical care. Violations of security of the person require that the Applicants show state interference with an "individual interest of fundamental importance."[303] In *Blencoe*, the appellant argued that the psychological stress from the delay in an administrative tribunal violated his security of the person. The Supreme Court of Canada rejected that argument. The Court stated at para. 83 that:

> It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. While these fundamental personal choices would include the right to make decisions concerning one's body free from state interference or the prospect of losing guardianship of one's children, they would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.[304]

[357] The Respondents argue that The Applicants are making an economic argument. They argue that the Applicants are not making an argument grounded in fundamentally private choices that go the core of what it means to enjoy individual dignity and independence.[305] They argue that PCEPA does not interfere with a person's right to have sex under the conditions of her own choosing. It is only an interference with a sex worker's ability to have sex for consideration.

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[302] *Carter* at paras. 66-67.
[303] Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44 at para. 82 ("**Blencoe**").
[304] *Blencoe* at para. 83.
[305] Association of Justice Counsel v. Canada (Attorney General), 2017 SCC 44 at paras. 48-51.

Interference with economic rights does not infringe security of the person.[306] There is no *Charter*-protected right to carry on a particular profession or occupation.[307]

[358] This point of disagreement between the Applicants and the Respondents is very challenging to resolve. There is a basic contradiction in the position of the Applicants. Sex work cannot be an ordinary type of job – no different, really, from any other gendered occupation such as nursing – and at the same time involve something so intimate that it interferes with a sex worker's bodily autonomy, privacy, and dignity. It is difficult for me to see how it can be both an ordinary job and a supremely intimate activity.[308] Yet at the same time, the Applicants are surely correct that the decision to have sex and under what conditions is a fundamental personal choice, even where that choice is driven by commercial considerations.

[359] At the same time, it is fundamental to PCEPA that sex work is not like other forms of work. One of the reasons for that is because sex work does involve the most intimate type of human activity, one that, in the view of Parliament, is harmful and therefore deserving of prohibition with a view to discouraging entry into it and reducing demand for it. Ultimately PCEPA does limit the circumstances under which sex workers can engage in this most intimate of activities.

[360] In my view, therefore, PCEPA, and especially the purchasing offence, does engage the s. 7 security of the person rights of sex workers.

viii. Does PCEPA engage the liberty interests of third parties?

[361] The Attorney General of Canada concedes that the material benefit, procuring, and advertising offences engage the s. 7 liberty interests of the applicant Tiffany Anwar. The Attorney General of Canada also concedes that the s. 7 liberty interests of other third parties who wish to become involved in providing services to or employing sex workers are engaged. The Attorney General does not concede that any deprivation violates the principles of fundamental justice.

[362] Ms. Anwar and her husband operated an escort service in London, Ontario. They were charged in 2015 with offences contrary to the procuring, material benefit, and advertising offences. Mr. Justice McKay of the Ontario Court of Justice acquitted them. He found that all three sections were unconstitutional. Ms. Anwar wishes to operate an escort service again. She has decided against it until the constitutionality of PCEPA is finally determined.[309]

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[306] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at p. 1003 ("**Irwin Toy**").
[307] Tanase v. College of Dental Hygienists of Ontario, 2021 ONCA 482 at paras. 35, 40.
[308] See, for example: Clamen Affidavit, para. 49.
[309] Anwar Affidavit, paras. 4-7, 13, 17-19, 24.

ix. Do the communications and stopping traffic offences engage the liberty interests of sex workers?

[363] The Attorney General of Canada also concedes that the communications and stopping traffic offences engage the liberty interests of sex workers. The Attorney General of Canada does not concede, however, that any deprivation violates the principles of fundamental justice.

x. Conclusions with respect to life, liberty, and security of the person

[364] I find that the Applicants have failed to establish there is a link between the challenged offences and the alleged deprivations, with the following exceptions:

- The purchasing offence engages the security of the person of outdoor sex workers;
- The purchasing offence engages the security of the person as it relates to the privacy and autonomy of sex workers;
- The material benefit, procuring, and advertising offences engage the liberty interests of third parties, as conceded by the Attorney General of Canada; and,
- The communications and stopping traffic offences engage the liberty interests of sex workers, as conceded by the Attorney General of Canada.

F. Does PCEPA Violate The Principles Of Fundamental Justice?

[365] At the second stage of the s. 7 analysis, the Applicants must show that the deprivations found at the first stage are in not accordance with the principles of fundamental justice. There are three inter-related concepts: arbitrariness, overbreadth, and gross disproportionality. The question is whether the law's purpose is connected to its effects, and whether the purported negative effect(s) of the law are grossly disproportionate to its purpose. Specifically, the person claiming the violation must show that "the law deprives her of life, liberty, or security of the person in a manner that is not connected to the law's object or is grossly disproportionate to the law's object."[310] The analysis is qualitative, not quantitative – it does not matter how many people are affected, as long as there is at least one.[311] The efficacy of the law, such as whether it achieves its objective or is sound policy, does not factor into this analysis.

[366] Arbitrariness describes a situation where there is no connection between the effect and the object of the law.[312] In *Carter*, the Supreme Court stated:

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[310] *Bedford (SCC)* at para. 127.
[311] *Bedford (SCC)* at paras. 78, 93, 123, 125, 127.
[312] *Bedford (SCC)* at para. 98.

> The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.[313]

[367] Overbreadth was described in *R. v. J.J.* at paras. 136-137:

> … A law is overbroad when it is "so broad in scope that it includes *some* conduct that bears no relation to its purpose" (*Bedford*, at para. 112 (emphasis in original)). For an impugned provision to be overbroad, there must be "no rational connection between the purposes of the law and *some*, but not all, of its impacts" (Bedford, at para. 112 (emphasis in original)).[314]

[368] The Court went on to say that overbreadth is to be understood relative to the legislative purpose. The purpose of the legislation can be gleaned through three factors: (1) statements of purpose in the legislation; (2) the text, context and scheme of the legislation; and (3) extrinsic evidence, such as legislative history and evolution. The presumption is that the legislation is appropriate and *Charter*-compliant.[315]

[369] In *Carter*, the Supreme Court stated that "a law that is drawn broadly to target conduct that bears no relation to its purpose 'in order to make enforcement more practical' may therefore be overbroad" (see *Bedford*, at para. 113). Parliament need not choose the least restrictive measure but must not choose a legislative solution that has no connection to the mischief contemplated. The focus is on the impact of the measure on the individual who claims a violation.[316]

[370] In *Bedford (SCC)* McLachlin C.J.C. noted that gross disproportionality:

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[313] *Carter* at para. 98.
[314] *J.J.* at paras. 136-137.
[315] *J.J.* at paras. 136-137; *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at paras. 29, 31 ("***Safarzadeh-Markhali***"); *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at paras. 30-31 ("***Moriarity***").
[316] *Carter*, at para. 85.

> … targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.[317]

[371] The Supreme Court also stated in *Carter*:

> This principle is infringed if the impact of the restriction on the individual's life, liberty or security of the person is grossly disproportionate to the object of the measure. As with overbreadth, the focus is not on the impact of the measure on society or the public, which are matters for s. 1, but on its impact on the rights of the claimant. The inquiry into gross disproportionality compares the law's purpose, "taken at face value", with its negative effects on the rights of the claimant, and asks if this impact is completely out of sync with the object of the law (*Bedford*, at para. 125). The standard is high: the law's object and its impact may be incommensurate without reaching the standard for *gross* disproportionality…[318]

[372] The effect must be completely "out of sync" with the law's purpose. McLachlin C.J.C. illustrated the point by reference to a hypothetical: where the object of the law is keeping the streets clean, but at the same time, the law imposes life imprisonment for spitting on the sidewalk. As she put it, "the connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society."[319]

i. Is the purchasing offence arbitrary, overbroad, or grossly disproportionate?

[373] As I have found, there are two specific harms associated with the purchasing offence. The first specific harm is that it deprives outdoor sex workers of security of the person because it makes it difficult to screen customers, making encounters between sex workers and customers potentially more dangerous. The second specific harm of the purchasing offence is that it prohibits sex workers from engaging in sexual activity for consideration, thus interfering with the fundamental personal choices and autonomy of sex workers.

[374] I will deal first with the question of arbitrariness. Is there a connection between the object of the purchasing offence and these specific harms? Or, as McLachlin C.J.C. asked in *Bedford (SCC)*, is there a connection between the effect and the object of the law?

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[317] *Bedford (SCC)* at para. 120.
[318] *Carter* at para. 89.
[319] *Bedford (SCC)* at para. 120.

[375] Recall the three objectives of PCEPA:

- The demand reduction objective;
- The exploitation of others objective; and,
- The safety-enhancing objective.

[376] The purchasing offence is designed to achieve the first two objectives. Parliament chose to achieve these objectives by prohibiting the exchange of sexual services for consideration. There is an obvious connection between reducing the demand for sex work by prohibiting the exchange of sexual services for consideration.

[377] The deprivations – of bodily autonomy and personal choice and the difficulties in screening customers – must also be evaluated in light of the specific harms that Parliament sought to reduce. Parliament was concerned about the harms associated with sex work, including exploitation, the risk of violence, the objectification of the human body and the commodification of sexual activity. It can hardly be arbitrary to prohibit the very activity that Parliament has found is the source of the harms it wishes to eliminate, denounce, and discourage. If the exchange of sexual services for consideration involves exploitation, commodification, violence, and objectification, then it is not arbitrary to prohibit it, even if some sex workers voluntarily choose to participate in sex work.[320] Many people choose to participate in activities that are harmful to themselves and sometimes to others – such as taking illegal drugs, or street racing, or driving while impaired. My findings of fact support the view that sex work often involves, violence, coercion, exploitation, and other harms. My findings of fact support the view that many of these harms fall on marginalized or vulnerable people. That is the case even if some exchanges of consideration for sexual services do not involve exploitation and violence. The purchasing offence is also rationally connected to the first two objectives even if it means that some encounters between sex workers involve a lower level of screening of customers by outdoor sex workers. It is true that the purchasing offence does not speak primarily to the safety-enhancing objective. A particular section need not conform to each and every purpose of the legislation.[321]

[378] Governments must respond to issues that are complicated. Governments must try to craft responses that are sensitive to multiple, often competing concerns. Governments must make difficult choices that usually involve trade-offs. A "government activity is not 'arbitrary' because it minimizes certain interests or gives preference to one interest over another."[322] Parliament has a broad latitude within which it may legislate.[323] The purchasing offence

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[320] *N.S.* at paras. 130-131.
[321] *N.S.* at para. 119.
[322] *Albarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414 para. 49.
[323] *Malmo-Levine* at para. 175.

combined with the immunity provisions (and PCEPA as a whole) is an example of a multi-faceted policy response to a complicated issue. Parliament's policy response was to use a very targeted tool (asymmetrical prohibition) designed to reduce demand while at the same time permitting sex workers to take safety measures.[324] That is not arbitrary.

[379] I turn next to overbreadth. Does the purchasing offence deprive a claimant of rights in a way that supports the object of the law, but goes too far by denying the rights of some individuals in a way that bears no relation to the object? I find that the answer is also "no" in light of the first two objectives of PCEPA. More broadly, I also find that the answer is "no" in light of the statement of purpose in the legislation, the text and context of the legislation, and the extrinsic evidence.[325]

[380] Again, if the exchange of sexual services for consideration involves exploitation, commodification, and violence, then a law which prohibits that exchange is not overbroad. Again, this is so even if some sex workers voluntarily choose to participate in sex work. It is also so even if some exchanges of consideration for sexual services do not involve exploitation, commodification, and violence. Sex workers themselves cannot be prosecuted for the exchange of sexual services for consideration. In other words, it is the customers, not the sellers, who are at risk of criminal liability. The purchasing offence is thus quite narrowly focussed. It does not over-reach.

[381] I now turn to gross disproportionality. Are the effects of the purchasing offence so completely out of synch with the objectives of the law, such that the impact is so draconian it is entirely outside the norms of our free and democratic society?

[382] Again, Parliament was concerned about exploitation, the risk of violence, the objectification of the human body and the commodification of sexual activity. Again, if the exchange of sexual services for consideration involves exploitation, commodification, violence, and objectification then I find it difficult to understand how a law which creates a maximum penalty of five years is grossly disproportionate. My findings of fact bear out these concerns. While it is obviously not ideal that sex workers have more challenges screening clients, it is so draconian that it is entirely outside the norms of our free and democratic society. Moreover, and importantly, contrary to the pre-*Bedford* situation, outside workers have an option that does not involve displacement to more dangerous spaces. Sex workers cannot be prosecuted for an offence if they move to a fixed indoor location where they may work alone or in association with other sex workers. It is no longer a binary choice. It is also a collateral consequence. Parliament cannot be prohibited from using its criminal law power to create an offence simply because it makes committing that offence more dangerous. If that were the case, then there

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[324] *N.S.* at para. 59.
[325] *Safarzadeh-Markhali,* at para. 31; *Moriarity,* at para. 31.

would be many activities that Parliament could not prohibit, including drug trafficking. The effect must not be merely disproportionate, but grossly disproportionate.

[383] The other effect of the law, the interference with the fundamental personal choices and autonomy of sex workers, must also be evaluated considering the objectives of the legislation. Again, given Parliament's objectives, the impact is hardly draconian. It is not the equivalent of life imprisonment for spitting on the street. Parliament has also enacted safety valves. For example, all three courts in *Bedford* agreed that the bawdy house provision met the test for gross disproportionality. There was evidence that moving to an indoor location for sex work – something that was legal – would improve the safety of sex workers. By forbidding sex workers from doing so, the law prevented sex workers from doing something legal in a safe manner. The bawdy house provision was framed by Parliament as a measure to reduce nuisance. The cost of that law was too high. As McLachlin C.J.C. put it, "A law that prevents street prostitutes from resorting to a safe haven… while a suspected serial killer prowls the streets has lost sight of its purpose."[326]

[384] In my respectful view, the interference with bodily integrity cannot be considered arbitrary, overbroad, or grossly disproportionate. The purchasing offence does not prohibit sexual relations. It does not interfere with bodily integrity in the way that forcing a woman to carry a pregnancy to term interferes with bodily integrity; it does not interfere with bodily integrity in a way that forcing medical care on an unwilling person interferes with bodily integrity. Rather, the purchasing offence only interferes with the commercial aspect of sexual relations. Parliament frequently has the interferes with aspects of personal choices. For example, people can put as much alcohol in their body as they want. There is no interference with bodily integrity in that sense. They cannot, however, then get into a car and drive. Parliament has banned that aspect of the transaction because of the potential harm to the driver and to others. By banning the commercial aspect of the sexual relationship, Parliament also seeks to mitigate the potential harm to the sex workers and to others. As I have found, Parliament's view that those harms are real is well grounded in the evidence.

[385] The purchasing offence also has a safety valve. In the same way that the constitutionality of s. 4(1) of the *Controlled Drugs And Substances Act* (the prohibition on illegal drugs) could not be analyzed without reference to s. 56 (the power of the Minister to grant exemptions), the asymmetric prohibition on the exchange of sexual services for consideration cannot be analyzed without reference to the safety valve provided by the immunity provisions.[327] In my respectful view, that safety valve is an answer to any arguments about overbreadth, arbitrariness, or gross disproportionality.

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[326] *Bedford (SCC)*, para. 136.
[327] *PHS* at paras. 108-112.

ii. Are the material benefit, procuring, and advertising offences arbitrary, overbroad, or grossly disproportionate?

[386] The Attorney General of Canada concedes that the material benefit, procuring, and advertising offences on their face engage the liberty interests of third parties (such as the Applicant Tiffany Anwar). Does the deprivation accord with the principles of fundamental justice?

[387] In my view, *N.S.* provides a complete answer. The Court of Appeal upheld all three offences as constitutional based on the hypotheticals presented.[328]

[388] Even if I had found that I had the ability to revisit *N.S.*, I would not. Based on the record before me, it is very difficult for me to see how the procuring, the advertising, or the material benefit offences are arbitrary, overbroad, or grossly disproportionate.

[389] The specific objectives of these offences are to reduce the demand for sex work and to denounce and prohibit the sexual exploitation of others in order to protect communities, human dignity, and equality.[329] Prohibiting the procuring of others for the purposes of selling sex and profiting from it is the very essence of exploitation. Parliament's view of the procuring offence can be seen from the potential penalty – 14 years imprisonment, the highest penalty in the *Criminal Code* other than those offences which carry a life sentence. It can hardly be arbitrary to prohibit it – there is a rational connection between the objective and the offence. Nor can the procuring section be said to be overbroad – there is no suggestion that the offence captures conduct unrelated to the objective. Nor can it be said to be grossly disproportionate. A maximum sentence of 14 years for the serious criminality captured by the procuring offence is hardly comparable to a life sentence for spitting on the sidewalk. Given my findings of fact regarding the presence of exploiters and traffickers in the sex industry – that they exist and that many sex workers are subject to violence, manipulation, and coercion from them – the penalties cannot be said to be grossly disproportionate for any of the three offences.

[390] There is an obvious rational connection between reducing the exploitation of sex workers by third parties and prohibiting exploitive third party relationships. As well, there are "safety valves" associated with the material benefit section. Although Ms. Anwar and other third parties cannot take advantage of the immunity provisions, sex workers can.

[391] Moreover, I have made findings of fact that many third parties are exploitive, violent, manipulative, and coercive. Many are exploiters and many are human traffickers. The evidence is in conformity with Parliament's first two objectives. These findings are highly relevant to the

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[328] *N.S.* at paras. 124-125, 153-154,
[329] *N.S.* at para. 121.

issue of gross disproportionality. Based on the facts as I have found them, the measures are not grossly disproportionate.

[392] With all due respect to Ms. Anwar and the other Applicants, the argument that the material benefit offence is a violation of s. 7 of the *Charter* amounts to an assertion that there is a constitutional right for a third party to operate an escort service. On its face, that is an absurd proposition. To find a constitutional breach somewhere in the minutiae of the arbitrariness, overbreadth, or gross disproportionality analysis would be a triumph of legalistic form over constitutional substance. That is not what the *Charter* demands. Moreover, to find that there is a constitutional right to operate an escort service risks bringing the administration of justice into disrepute – notwithstanding that the reputation of the administration of justice is not part of this particular constitutional analysis. It may or may not be that it is better as a matter of policy for escort services to be decriminalized and regulated, but that is for Parliament to decide.

iii. Are the stopping traffic and communications offences arbitrary, overbroad, or grossly disproportionate?

[393] As noted, the Attorney General of Canada conceded that the liberty interests of sex workers are engaged in relation to the stopping traffic and communications offences. The Attorney General disputes, however, that the offences ultimately violate s. 7 of the *Charter*. I agree. There is no violation of the principles of fundamental justice.

[394] The previous ban on communications was complete and total. At the time of *Bedford (SCJ)* and *Bedford (SCC)*, s. 213(1) of the *Criminal Code* read:

> 213. (1) Every person who in a public place or in any place open to public view
>
> > (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
> >
> > for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence…

[395] Himel J. found that the previous communications offence violated s. 7 of the *Charter*. The Court of Appeal (MacPherson J.A. dissenting) would have overturned that finding and restored the constitutionality of the section. The Supreme Court of Canada agreed with Himel J. and MacPherson J.A.[330]

[396] Himel J. found that communication for the purpose of screening was an important safety measure for sex workers. She found that communications that would allow sex workers to

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[330] *Bedford (SCC)*, paras. 148-159.

screen clients for a propensity for violence was caught. The communications provision as it stood was not arbitrary on its own but was arbitrary when analyzed with other sections (such as the common bawdy house section). For example, sex workers could not resort to indoor sex work as it was illegal. In the context of a legal activity (the sale of sexual services for consideration) the communication offence was, however, over-broad. She also found that it was grossly disproportionate to the legislative purposes because the violation was serious and far reaching.[331]

[397] The previous section was overbroad and grossly disproportionate because it caught all communications for the purposes of sex work, without limitation. It was one of the things that made a legal but risky activity riskier. The three offences at issue in the original *Bedford* decision were primarily concerned with public nuisance, as well as the exploitation of sex workers. The previous offence of communication for the purposes of prostitution was meant to address soliciting in public places and prevent the nuisances that outdoor sex work can cause.[332]

[398] The communications offence as it now stands is aimed at protecting children from exposure to sex work, which is viewed as harmful. It is also aimed at preventing the normalization of sex work, which could result in children being drawn into it. The communications offence is also aimed at reducing the exposure of children to associated harms of sex work, such as the drug trade, and unsanitary trash such as used condoms and needles.[333] As I have pointed out, the harm identified by Himel J. does not exist under PCEPA. A sex worker who cannot communicate in public need not resort to a more isolated and dangerous location. That sex worker may resort to a fixed indoor location, either on her own or in association with other sex workers.

[399] The objective of the current stopping traffic offence is directed at community harms by prohibiting the stopping of vehicular traffic or the free flow of pedestrian traffic for the purpose of exchanging sexual services for consideration. The objective is to protect residents of communities where sex work takes place form harassment by those who purchase and sell sexual services.[334]

[400] A simple reading of the legislation shows that Parliament obviously crafted the two sections as a direct response to *Bedford (SCC)*.

[401] The stopping traffic offence and the communications offence only prohibit communication for the purpose of offering, providing, or obtaining sexual services for consideration – an illegal activity – under three circumstances:

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[331] *Bedford (SCJ)*, paras. 384, 387-388, 409-410, 422-23, 426, 435.
[332] *Bedford (SCC)*, paras. 4, 131, 146-147.
[333] *Technical Paper*, p. 4, 9-10 (JAR Tab 110, pp. 11151, 11155-11156).
[334] *Technical Paper*, p. 10 (JAR Tab 110, p. 11156).

- First, where a person stops or attempts to stop a motor vehicle in a public place or in a place open to public view;
- Second, where a person impedes the free flow of pedestrian or vehicle traffic or ingress or egress from premises next to a public place;
- Third, in a public place that is frequented by children – in or next to a school ground, playground, or daycare centre.

[402] Thus, sex workers – and customers – will only be caught by these sections under very specific circumstances. I appreciate that most of the time sex workers will likely be in public places next to schools, playgrounds, or daycare centres at night when children are less likely to be present. That, however, is not the only reason to keep sex work away from these areas. As the Technical Paper points out, the section is also aimed at keeping unsanitary trash and paraphernalia away from places frequented by children. In my view, therefore, the communications and stopping traffic offences are rationally connected to the objective of the legislation. They are not arbitrary or overbroad. They only catch behaviour in a very narrow set of circumstances. Finally, they are not grossly disproportionate. They are offences that can only be prosecuted by way of summary conviction. That can hardly be considered draconian.

[403] I also appreciate that the purchasing offence prohibits communication for the purpose of purchasing sexual services. The immunity provision, however, means that it is only the customer who will face criminal liability under that section, which is a "safety valve" where communication takes place outside of the narrow geographic circumstances set out in the two offences.

G. Conclusions Regarding S. 7 Of The Charter

[404] I find that none of the challenged offences violate s. 7 of the *Charter*.

VI. Does PCEPA Violate S. 2(d) Of The Charter?

[405] The Applicants argue that PCPEA violates s. 2(d) of the *Charter* because it prevents sex workers from working in association. It is "effectively impossible" for sex workers to work in association with each other or anyone else. The prohibition on communications in the purchasing offence also makes it illegal for sex workers to associate with customers anywhere, whether by phone or virtually.

[406] The Applicants further argue that "the evidence of the effects of the impugned provisions goes far beyond the record in *N.S.*, such that this court should not be bound by the Court of

Appeal's holding that the material benefit, procuring, and advertising offences did not violate s. 2(d)".[335]

[407] The Applicants also argue that the challenged offences are much broader than the prohibition on public communication that was upheld by the Supreme Court of Canada in *R. v. Skinner*.[336] That case considered whether s. 195.1(1)(c) of the *Criminal Code* (as it then existed) was a violation of s. 2(b) and s. 2(d) of the *Charter*. The section specifically prohibited "communicating in a public place for the purpose of obtaining the sexual services of a prostitute." The Court found that the section did not violate s. 2(d) of the *Charter* because it did not prohibit an agreement between a sex worker and a customer. The Applicants argue that insofar as selling sex is permitted, there is a right to associate with others for that purpose. They argue that the dissenting reasons of Justice Wilson and L'Heureux-Dube in *Skinner* are more persuasive than the majority in that regard.

[408] As I have mentioned, I disagree that I can revisit *N.S.*, which means that I am bound in relation to the material benefit, procuring, and advertising offences. Even if I could revisit *N.S.* I would not. As I have stated, the record provides no basis to come to a different finding.

[409] I also disagree that the purchasing offence, stopping traffic offence, and communications offence violate s. 2(d) of the *Charter*.

[410] There are three associations at issue in this Application. There is the association between sex workers and customers; the association between sex workers and third parties; and the association between sex workers and each other.

[411] Under the scheme of PCEPA, sex workers are not prohibited from associating with each other. Sex workers are not prohibited from associating with non-exploitive third parties. That is one of the reasons I would not depart from *N.S.*, even if I could.

[412] Sex workers are prohibited from associating with:

- customers in public under some circumstances contrary to the stopping traffic and communications offences;
- third parties in the context of a commercial establishment contrary to the material benefit offence; and,
- exploitive third parties contrary to the material benefit and procuring offences.

[413] Arguably, sex workers may be prohibited from associating with customers generally.

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[335] Applicants' Factum, para. 250.
[336] *R. v. Skinner*, [1990] 1 S.C.R. 1235, 56 C.C.C. (3d) 1 (***"Skinner"***).

[414] These prohibitions do not, in my respectful view, constitute a violation of s. 2(d) of the *Charter*.

[415] Section 2(d) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> (d) freedom of association.

[416] To determine whether a restriction on the right of freedom of association violates the *Charter*, a court must look at the associational activity in its full context and history.[337] McLachlin J., for the majority of the Court in *Mounted Police*, adopted Dickson C.J.C.'s dissenting view in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, over-ruling the earlier case. There are now three aspects to freedom of association protected by s. 2(d) of the *Charter*: the constitutive, derivative, and purposive approaches.[338]

[417] The constitutive approach protects only the bare right to form an association. The government cannot interfere with people forming an association but can interfere with the activities pursued by associations. The derivative approach also protects the right to form an association but in addition, protects the right to associational activities that specifically relate to other constitutional freedoms.[339]

[418] The purposive approach defines the scope of s. 2(d) of the *Charter* "by reference to the purpose of the guarantee of freedom of association." Section 2(d) protects "the individual from state-enforced isolation in pursuit of his or her ends." The approach enables those with less societal power to meet those with greater societal power on more equal terms. The purposive approach protects associational activity. It empowers individuals to achieve collectively what they could not achieve individually. The purposive approach is historically rooted in the protection of minority groups. Minority groups could achieve rights, protect those rights, and make social, economic and political gains by doing so in association. The purposive approach encompasses the protection of individuals joining together to form an association (the constitutive approach); collective activities in support of other constitutional rights (the derivative approach); and collective activity that enables those with less social and economic

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[337] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3 at para. 47 ("***Mounted Police Association***").
[338] *Mounted Police Association*, para. 51; quoting *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313 ("***Alberta Public Service***").
[339] *Mounted Police Association*, paras. 51-53.

power to meet on more equal terms those "with whom their interests interact and, perhaps, conflict."[340]

[419] The Applicants argue that PCEPA impacts on all three aspects of the right to freedom of association. They argue that PCEPA prohibits sex workers from associating with each other, impairing the constitutive right; PCEPA prohibits sex workers from associating in pursuit of other rights, notably security of the person, personal autonomy, life, liberty, free expression, and equality, impairing the derivative right; and PCEPA prohibits sex workers from associating with others to advance equitable labour practices and working conditions, impairing the purposive right.

[420] I disagree. PCEPA obviously does not interfere with the constitutive and derivative aspects of s. 2(d) of the *Charter*. It also obviously does not interfere with sex workers associating with each other to advocate for equitable labour practices and working conditions. That argument is simply incorrect. This Application is evidence enough of that. Sex workers clearly have the right to form collectives to advocate for themselves. One of the Applicants in this case is an association made up of associations and collectives of sex workers.[341] Several of these organizations made presentations to the Parliamentary committees considering Bill C-36. The fact that the Applicants have been unsuccessful in obtaining their goals through the political process does not mean that they have been denied that opportunity. That is the content of the right that s. 2(d) protects, and the Applicants have been able to exercise it.

[421] The Applicants rely on the dissenting reasons of Wilson J. in *Skinner*. Skinner challenged the predecessor to the stopping traffic and communications offences. He argued that it violated both his s. 2(d) and his s. 2(b) *Charter* rights. Dickson C.J.C., for the majority, found that the offence targeted expressive conduct of a commercial nature. The sale of sexual services contemplated the association of individuals in some form of sexual activity, but the focus of the offence was on communication. The specific type of communication was that by a customer or sex worker in a public place for the purpose of exchanging sexual services for consideration. The target was therefore expressive conduct, rather than associational conduct. Because sex work was itself legal, the offence did not prohibit the actual association for sexual purposes. The offence was more properly analyzed under s. 2(b). The majority found that the offence violated s. 2(b) of the *Charter* but was saved under s. 1. Wilson J., in dissent, argued that s. 2(d) guaranteed the right to associate with others, regardless of whether an association in the technical sense is formed. The focus must be on whether one person seeks to associate with another person, not the activities that they wish to pursue in common. Freedom of association is important because it is often linked to the exercise of other constitutionally protected rights and freedoms. The parties sought to associate for the purpose of a lawful commercial transaction, the

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[340] *Mounted Police Association*, para. 54, 56, 62; *Alberta Public Service* at p. 366.
[341] *N.S.* at para. 169; Clamen Affidavit, paras. 22, 24-29.

exchange of sexual services. Parliament prohibited public meetings between sex worker and customers. According to Wilson J., that was a violation of the right to freedom of association.

[422] On a strict application of the majority in *Skinner*, the communications and stopping traffic offences do not violate the constitutive aspect of s. 2(d). Given the evolution of the case law under s. 2(d) of the *Charter*, however, and especially in light of *Mounted Police Association*, the Applicants may well be right that the analysis of the minority in *Skinner* is now preferrable in freedom of association cases. It is unnecessary, however, to decide that point because the minority analysis in *Skinner* turned on the fact that the predecessor section prohibited association for the purposes of conducting a lawful activity.

[423] In contrast to *Skinner*, the Applicants seek to associate for the purpose of conducting a prohibited activity. I cannot agree that s. 2(d) protects the rights of sex workers and customers to come together for the purpose of committing a crime (the purchasing offence) in the context of the stopping traffic and communications offences. I also cannot agree that s. 2(d) protects the rights of sex workers and exploiters to come together for the purpose of committing crimes (the material benefit and procuring offences). That would be stretching the content of the right far beyond what the purposive aspect is meant to protect.

[424] In *N.S.* Hoy J.A. rejected the argument that s. 2(d) applied to the material benefit and procuring offences. She stated:

> This case is not about unionized employees and the impact on collective bargaining; nor is it about persons engaging in lawful work. It is about persons who are providing sexual service for consideration, contrary to law…
>
> … The PCEPA does not prevent individuals from joining or forming an association in the pursuit of a *collective* goal. Rather, it precludes both individuals and groups from undertaking certain activities, subject to the exceptions and immunities already described in these reasons.[342]

[425] That logic applies when considering the purposive aspect of the right in relation to the purchasing, stopping traffic, and communications offences – the three offences not dealt with in *N.S.* Section 2(d) no more protects the association between sex workers and customers than the association between drug dealers and customers.

[426] As I have already emphasized, properly interpreted, PCEPA does not prevent sex workers from forming an association or a collective where it is not a commercial enterprise. In other

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[342] *N.S.* at paras. 168-169.

words, PCEPA would not permit the Applicant Tiffany Anwar to legally re-establish her escort agency, as she wishes.[343] PCEPA does not, however, prohibit Ms. Anwar from merely associating with sex workers – perhaps as a hired receptionist or security guard in a collective established by her former employees. What PCEPA specifically prohibits Ms. Anwar from doing is profiting from the sexual services provided by others.[344]

[427] Moreover, the associational activity that PCEPA really seeks to prohibit is associational activity that exploits vulnerable persons. Section 2(d) of the *Charter* is aimed at reducing, not enhancing social imbalances. Striking down the material benefit and procuring offences would bring a perverse result. Sex workers already enjoy the right to freedom of association, but exploiters do not. If the procuring and material benefit offences were struck down, it is not the right to freedom of association of sex workers that would be expanded. It would be the right to freedom of association of exploiters.[345] That is not what s. 2(d) of the *Charter* is meant to protect.

[428] Finally, I turn to the association between sex workers and customers. For similar reasons, I find that s. 2(d) of the *Charter* does not protect that association. Customers do not have the right to communicate or associate with sex workers, whether virtually, by phone, or in person. The immunity provisions do not make it legal for sex workers to have these communications, but they immunize sex workers from prosecution for doing so. In other words, it is not associational rights of sex workers at issue – it is the associational rights of customers.

VII. Do The Marterial Benefit And Procuring Offences Violate S. 2(b) Of The Charter?

[429] The Applicants argue that all the challenged offences violate s. 2(b) of the *Charter*. This is obviously a broader argument than the one that was before the Court of Appeal in *N.S.* The accused in *N.S.* only argued that the advertising offence violated s. 2(b).

[430] Specifically, the Applicants argue that the stopping traffic and communications offences effectively prevent communication. They argue that the purchasing offence prohibits all communications for the purpose of exchanging sexual services for consideration. The material benefit, procuring, and advertising offences prevent communications by sex workers with customers or third parties. Those communications are critical to establishing terms and conditions for the exchange of sexual services for consideration.

[431] The Attorney General of Canada concedes that the stopping traffic, communications, and advertising offences violate s. 2(b) of the *Charter*. The Attorney General of Canada also concedes that s. 286.1(1), the purchasing offence, constitutes a *prima facie* breach of the s. 2(b)

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[343] Anwar Affidavit, para. 24.
[344] *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.
[345] *Mounted Police Association* at para. 59.

rights of purchasers. The constitutionality of those three offences must be determined by s. 1, which I will turn to in a later section of these reasons.

[432] In *N.S.* the Crown also conceded that the advertising offence *prima facie* violated s. 2(b) of the *Charter*. The Court of Appeal went on to find that the advertising offence was saved by s. 1 of the *Charter*. I am bound by that finding.

[433] Thus, the question on this aspect of the Application is whether the material benefit and procuring offences violate s. 2(b) of the *Charter*.

[434] Section 2(b) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[435] The scope of speech protected by s. 2(b) of the *Charter* is very broad.[346] Any activity that conveys meaning is protected. Freedom of expression is not, however, without limits. It certainly does not protect violence as a form of speech, and it does not protect speech that is criminal in nature – such as the words spoken when a robber robs a bank.[347] To determine whether expression merits *Charter* protection, the court must ask three questions:

- Does the activity have expressive content, bringing it, *prima facie*, within the scope of s. 2(d) of the *Charter*?
- Is the activity excluded from protection because of the location or method of expression?
- If the activity is protected, does an infringement of the right result from either the purpose or effect of the government action?[348]

[436] It is extremely difficult to understand how any speech associated with the material benefit or procuring offences is expressive content that *prima facie* falls with in the scope of s. 2(b) *Charter* protection. Recall that those two offences, properly interpreted, prohibit only exploitive relationships. Those offences also prohibit commercial enterprises from receiving a material benefit from the sexual services of sex workers.[349] As noted, the procuring offence catches behaviour that involves the recruitment, harbouring, concealing, or exercising control, direction,

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[346] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 81.
[347] *Canadian Broadcasting Corporation v. Canada (Attorney General)*, 2011 SCC 2 t para. 35 ("**CBC v. Canada**").
[348] *CBC v. Canada* at para. 38.
[349] *N.S.* at para. 77.

or influence over a sex worker for the purposes of providing sexual services for consideration. In other words, it is that feature of exploitation that both offences is meant to address.[350]

[437] I agree with the Attorney General of Canada that the material benefit and procuring offences simply do not engage any rights under s. 2(b) of the *Charter*. In my respectful view, any speech caught by the material benefit or procuring offence is simply incidental speech that facilitates the commission of an offence. I do not agree that the offences target even commercial speech. The expressive content that s. 2(b) protects must be within the sphere of conduct that the *Charter* is meant to protect. Content that is worthy of protection includes thoughts, opinions, beliefs, and other expressions of the heart and mind, even if distasteful and contrary to mainstream beliefs. Speech of this nature – if it is speech at all – is not the type of expression that in a free and democratic society we value. It does not posit a diversity of beliefs that have inherent value. There is simply no expressive content contained in any speech that facilitates those offences.[351] The speech in question does not survive the first question in the *CBC v. Canada* test.

[438] In any event, the speech – if it is speech – that is targeted in these sections is not the speech of sex workers. It is the speech of exploiters and traffickers. It is criminal speech. Criminal speech is clearly not protected by s. 2(b). Even though one would think that proposition needs no illustration, I will illustrate it anyway. The speech contemplated by the material benefit and procuring offences is no more entitled to protection than the speech of a bank robber who tells a teller to hand over the money or he will shoot; it is no more protected than the speech of two drug dealers who conspire to import or sell controlled substances.

VIII. Does PCEPA Violate S. 15 Of The Charter?

A. The Section 15 Framework

[439] Section 15(1) of the *Charter* states:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[440] The parties agree that in order to show a *prima facie* violation of s. 15 of the *Charter*, a claimant must demonstrate that the challenged law or state action:

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[350] *N.S.* at paras. 107-108, 110-113.
[351] *Irwin Toy* at p. 966-968.

- First, on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and,
- Second, imposes burdens or denies a benefit in a manner that will reinforce, perpetuate, or exacerbate the disadvantage.[352]

[441] The purpose of s. 15 is remedial. It is to prevent and remedy discrimination against groups that are subject to social, political, and legal disadvantage. In asking the first question – whether a law or state action creates a distinction based on enumerated or analogous grounds – s. 15(1) aims at ensuring that those who access it are part of a group that the section is designed to protect. In asking the second question – whether a law or state action is discriminatory – the court determines whether the law or state action is discriminatory. It does not matter whether the law or state action created the social, political, or legal disadvantage.[353] The ultimate issue is whether the law or state action violates the "animating norm of substantive equality."[354] Section 15(1) targets the denial of equal treatment based on immutable grounds, such as race or gender, or constructively immutable grounds, such as religion.[355]

[442] Thus, the s. 15(1) analysis encompasses two questions: first, whether sex work is an analogous ground of discrimination and thus whether sex workers are a group for the purposes of s. 15(1); and second, if so, whether PCEPA imposes a burden or denies a benefit in a manner that reinforces, perpetuates, or exacerbates the disadvantage.

B. Is Sex Work An Analogous Ground For The Purpose of Section 15 Analysis?

[443] The Applicants argue, supported by several interveners, that sex workers are subject to discrimination as a group based on gender, occupational status, and other intersecting grounds such as race and Indigeneity. Many sex workers belong to historically marginalized and vulnerable communities, thus calling for an intersectional analysis. In the unusual circumstances of this case, sex work is a unique form of occupation and worthy of s. 15 protection as an analogous ground. They rely on Justice L'Heureux-Dubé's concurring reasons in *Delisle*:

> … occupation and working life are often important sources of personal identity, and there are various groups of employees made up of people who are generally disadvantaged and vulnerable. Particular types of employment status, therefore, may lead to discrimination in other cases, and should be recognized as analogous grounds when it has been shown that to do so would

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[352] *Fraser v. Canada (Attorney General)*, 2020 SCC 28 ("**Fraser v. Canada**").
[353] *Ontario (Attorney General) v. G.*, 2020 SCC 38 at paras. 41-42 ("**Ontario v. G**").
[354] *Ontario v. G.* at para. 43.
[355] *Corbiere v. Canada* (Minister of Indian & Northern Affairs), at para. 13 ("**Corbiere**").

> promote the purposes of s. 15(1) of preventing discrimination and stereotyping and ameliorating the position of those who suffer social and political disadvantage and prejudice.[356]

[444] *Delisle* was primarily a freedom of association case. The applicant was an RCMP officer. He was denied the right to form an association to represent RCMP officers. The majority of the court (including Justice L'Heureux-Dubé in her concurring reasons) found no violation of s. 15(1).

[445] That comment was repeated by Justice L'Heureux-Dubé in *Dunmore*. *Dunmore* was also a freedom of association case. The applicants in that case challenged legislation excluding farm workers from Ontario's labour relations regime. The Supreme Court found that the legislation violated s. 2(d) of the *Charter.* The majority did not consider whether farm work was an analogous ground of discrimination. Justice L'Heureux-Dubé, in concurring reasons, agreed that the legislation violated the right to freedom of association. She found, however, that given the traditional marginalization, lack of power, and vulnerability of farm workers, their occupational status should be considered an analogous ground of discrimination.[357] In his dissent, Justice Major specifically disagreed with Justice L'Heureux-Dubé on that point.[358]

[446] The Applicants argue that in *Ontario (Attorney General) v. Fraser* (a 2011 case not to be confused with the 2020 case of *Fraser v. Canada*), the majority of the Supreme Court appeared to adopt Justice L'Heureux-Dubé's reasoning in *Delisle* and *Dunmore*.[359] Like the farm workers in *Ontario v. Fraser*, sex workers face stigma, marginalization, and exclusion as a result of occupational status. As a group, sex workers suffer from the harms that are the hallmark of an analogous ground of discrimination.[360]

[447] With respect, I disagree that sex work is an analogous ground of discrimination. I cannot agree that the line of reasoning suggested in the concurring decisions of *Dunsmore* and *Deslisle* can be bootstrapped into a finding that occupational status can be an analogous ground considering *Ontario v. Fraser*. I do not agree that *Ontario v. Fraser* indicates that the Supreme Court apparently accepted farm work as an analogous ground of discrimination.

[448] *Ontario v. Fraser* considered the successor farm worker legislation enacted after *Dunmore*. It too was primarily a freedom of association case. The s. 15 claim was an alternative to the main freedom of association claim. In a very short analysis, the majority found that the s.

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[356] *Delisle v. Canada* (Deputy Attorney General), [1999] 2 S.C.R. 989 at para. 8.
[357] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at paras. 168-170 ("***Dunmore***").
[358] *Dunmore* at para. 215.
[359] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 ("***Ontario v. Fraser***"); Applicant's Factum at paras. 235-236.
[360] *Corbiere* at para. 13.

15 claim could not succeed. Section 15 contemplates "substantive discrimination that impacts on individuals stereotypically or in ways that reinforce exiting prejudice and disadvantage." There was no evidence that the legislative regime "utilizes unfair stereotypes or perpetuates existing prejudice and disadvantage."[361] In his concurring decision, Rothstein J. found that the category of "agricultural worker does not rise to the level of an immutable (or constructively immutable) personal characteristic of the sort that would merit protection against discrimination under s. 15."[362] Justice Deschamps agreed in her concurring decision that employment status was not an analogous ground under s. 15 but did agree with Justice L'Heureux-Dubé's argument in *Dunmore* that more analogous grounds should be recognized.[363] Justice Abella, in dissent, did not address s. 15.

[449] I draw the following conclusion: in *obiter* comments in concurring decisions, two Supreme Court of Canada judges, Justices Deschamps L'Heureux-Dubé, suggested that in the future further analogous grounds not based on immutable or constructively immutable characteristics could be recognized. Respectfully, the day when that may happen has not arrived. I say that because those comments were made in the context freedom of association cases. Equality rights were not at play in a significant way in any of those cases. I find that the non-obiter comments of the majority and Rothstein J. in *Ontario v. Fraser* are binding. Occupational status, even in light of other intersecting grounds of discrimination, is not an analogous ground.

[450] *Corbiere* is the leading authority on the question of what constitutes an analogous ground of discrimination. In identifying an analogous ground, the majority decision (written by McLachlin J., as she then was, and Bastarache J.) stated that analogous grounds are like the grounds set out in s. 15 – they constitute characteristics that often serve as the basis for stereotypical decisions that are not made based on merit. Rather, they are characteristics that are immutable or changeable only at unacceptable costs to one's personal identity. They are characteristics that cannot be changed or "the government has no legitimate interest in expecting us to change to receive equal treatment under the law."[364]

[451] *Corbiere* illustrates another logical problem at the core of the Applicants' s. 15 claim: if sex work is a choice, even a constrained choice, then it can hardly be an immutable characteristic or even a constructively immutable characteristic. It is something that can be changed.

[452] In *Sauvé v. Canada (Chief Electoral Officer)*, the federal *Elections Act* denied voting rights to prisoners serving federal sentences. The case was primarily about the application of s. 1 of the *Charter*. The government conceded a *prima facie* violation of s. 3 of the *Charter* – the voting rights section. In the Federal Court of Appeal, the majority decision, written by Linden

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[361] *Ontario v. Fraser* at paras. 114-116.
[362] *Ontario v. Fraser* at para. 295.
[363] *Ontario v. Fraser* at paras. 315, 319.
[364] *Corbiere* at para. 13.

J.A., upheld the constitutionality of the legislation based on s. 1. He found that prisoners are not an analogous ground under s. 15. The Supreme Court of Canada, in a 5-4 decision, reversed the Federal Court of Appeal's decision and found the section of the *Elections Act* unconstitutional. The majority found it unnecessary to deal with s. 15. The minority decision, written by Gonthier J., adopted the reasoning of Linden J.A. in the Federal Court of Appeal on the equality rights point:

> I cannot describe one's status as a prisoner as "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". Imprisonment is neither immutable nor unchangeable; for all but a few prisoners it is a status that is meant to change over time. Further, it cannot be said that "the government has no legitimate interest in expecting" prisoners to change in order "to receive equal treatment under the law". In fact, the contrary is true—the government has every reason to expect convicted criminals to change their behaviour in order to achieve equal treatment under the law. That is the very reason for imprisonment.[365]

[453] In a point relevant to an intersectional analysis, Gonthier J. noted that an alternative argument in the case was that imprisonment should be recognized as an analogous ground because Indigenous people make up a disproportionate number of inmates. Gonthier J. rejected that argument. The adverse impact was based on the status of prisoner, not Indigenous status.

[454] Given that this is the minority opinion, the point carries only limited weight. As well, Gonthier J.'s point regarding Indigenous prisoners may have been overtaken by other developments in the law. That said, I believe that the weight of the authorities still does not assist the Applicants on this point. In *Baier*, the Supreme Court considered the constitutionality of the local elections legislation, which required school board employees to take a leave of absence if they ran for school trustee and then resign if they won. In what was primarily a freedom of expression case, the Court upheld the legislation. The Court also considered whether s. 15 applied. The court found that occupational status is not an analogous ground.[366]

[455] A line of authority in the Federal Court of Appeal also rejects characteristics that are not immutable or constructively immutable as an analogous ground. While decisions of the Federal Court of Appeal are not binding on this court, they are nonetheless persuasive. In *Toussaint v. Canada*, the applicant had entered Canada as a visitor and overstayed her visa. She later applied for and was denied health coverage under a federal government program that paid the health care

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[365] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 196; *Sauvé v. Canada (Chief Electoral Officer)*, [2000] 2 F.C. 117 at para. 166.
[366] *Baier v. Alberta*, 2007 SCC 31 at paras. 63, 65.

costs for certain immigrants. Although primarily a s. 7 case, the applicant also argued that the program discriminated against her based on immigration status. She argued that her immigration status was an analogous ground under s. 15. In rejecting her argument, Stratas J.A. stated:

> "Immigration status" is not a "[characteristic] that we cannot change". It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status"—in this case, presence in Canada illegally—is a characteristic that the government has a "legitimate interest in expecting [the person] to change". Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada.

[456] I agree with the reasoning of Stratas J.A. and find that *Toussaint* has application to this case. The occupational status of sex workers, like that of immigrants, is not immutable or changeable only at unacceptable cost. Indeed, the evidence in this case shows that many sex workers seek to exit the sex industry because staying in it is what imposes unacceptable personal costs.

[457] *Canadian Doctors for Refugee Care* also concerned the federal government bearing the health care costs of certain categories of immigrants and refugees, but not others. One of the categories was country of origin. There were several arguments before the Court, including a s. 15 argument. The Federal Court of Appeal, following *Toussaint*, rejected immigration status as an analogous ground, but did find a violation based on national origin as the government program discriminated among immigrants and refugees in part on their countries of origin.[367]

[458] In *Alcorn v. Canada (Commissioner of Corrections)* the Federal Court of Appeal held that prisoners do not constitute an analogous group for the purposes of s. 15.[368] *Alcorn* was released six months before *Sauvé* and cited by Gonthier J. in that case.

[459] The intervenor LEAF argues that this court should apply an intersectional analysis. Intersectional analysis has been accepted by the Supreme Court of Canada in s. 15 cases, LEAF argues.[369] In its factum, LEAF describes intersectionality:

> Intersectionality is an approach that asks adjudicators to acknowledge that discrimination occurs not just based on a "single axis of social division" such as gender, race, or class, but "many axes that work together and influence each other." Intersectional

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[367] *Canadian Doctors for Refugee Care v. Canada (Attorney General)* at paras. 869-872.
[368] *Alcorn v. Canada (Commissioner of Corrections)*, 2002 FCA 154 at para. 7.
[369] *Law v. Canada*, [1991] 1 S.C.R. 497 at para. 94; *Fraser v. Canada* at para. 116.

> discrimination is not merely additive, but a distinct form of discrimination that cannot be understood by looking at a single axis alone.
>
> […]
>
> An intersectional approach must be a structural one that goes beyond identifying the multiple, intersecting grounds engaged in the claim. A structural intersectional analysis focuses on how our existing systems — including laws — have created conditions for, and contributed to, the marginalization and discrimination of the claimants by targeting those grounds as the basis of exclusion, either directly or indirectly.[370]

[460] The Applicants, joined by the intervenor LEAF and other intervenors, argue that sex workers belong disproportionately to marginalized communities with intersecting forms of discrimination. These include Indigenous people (especially Indigenous women who disproportionately comprise outdoor sex workers), trans people, and racialized people, especially racialized migrants. Sex workers are, of course, highly gendered, made up primarily of cis women and girls. The Applicants and intervenors supporting them argue that PCEPA perpetuates these structural inequalities, intersecting in such a way as to make sex workers a unique group that is analogous to the grounds enumerated in s. 15. Relying on Justice L'Heureux-Dubé's reasons in *Dunmore*, the Applicants state in their factum:

> The same analysis applies here. The evidence is clear that sex workers face stigma, marginalization and exclusion from protections as a result of their occupational status. While individual sex workers will not experience this marginalization in the exact same ways, as a group they experience the vulnerabilities which are the hallmark of an analogous ground.[371]

[461] LEAF puts it this way in its factum:

> A structural intersectional analysis reveals the extent to which the impugned provisions reinforce and perpetuate structural inequality faced by sex workers, resulting in discrimination on the intersecting grounds of gender, race, Indigeneity, gender identity, and disability. Put differently, it is not sex work that is the source

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[370] Factum of LEAF at paras. 9-10.
[371] Factum of the Applicants at paras. 235-236.

> of structural inequality, but the effects of the impugned provisions…[372]

[462] Even accepting that an intersectional analysis is a proper basis of analysis under s. 15, an intersectional analysis does not advance the claim that sex work should be treated as an analogous ground for the purposes of this case. In effect, the Applicants (and intervenor LEAF) argue that PCEPA itself creates the analogous ground.

[463] I do not agree. Based on my findings of fact, I do not accept that PCEPA has created the conditions that give rise to the discrimination and harms complained of. While accepting that many sex workers face discrimination and marginalization based on intersecting conditions, the evidence does not support the claim that PCEPA is the source, or a dominant source, of those conditions.

C. Does PCEPA Impose Burdens Or Deny A Benefit In A Manner That Reinforces, Perpetuates, Or Exacerbates The Disadvantage?

[464] Given that s. 15 cannot apply because sex workers do not comprise an analogous group, it is unnecessary to go on to the second question of the analysis. In any event, given the factual findings that I have made in this case, the claim cannot succeed on the second ground. The evidence does not support the Applicants' position that PCEPA creates or perpetuates prejudice, stigma, economic exclusion, social exclusion. Arguably, by immunizing sex workers, PCEPA does the opposite. The evidence demonstrates that many complicated factors perpetuate discrimination, prejudice, stigma, and economic exclusion for many of the trans, Indigenous or racialized women who are sex workers. The causes are many and varied. PCEPA did not create these harms, and if it is one of those causes perpetuating them (and the evidence does not support that claim) then it is certainly not a significant cause.

IX. Are The Offences Saved By S. 1 Of The Charter?

[465] In *N.S.,* the Court of Appeal found that even though the advertising offence violated s. 2(b) of the *Charter*, it was saved by s. 1. It is not open to this court to make a different finding. I will therefore consider whether the violations of s. 2(b) of the *Charter* in respect of the stopping traffic, communications, and the communication aspect of the purchasing offence are saved under s. 1.

A. The Section 1 Framework

[466] Section 1 of the *Charter* states:

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[372] Factum of LEAF at para. 11.

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[467] The test under s. 1 was originally formulated in the case of *R. v. Oakes*. The test was summarized in *Carter*:

> In order to justify the infringement of the appellants' s. 7 rights under s. 1 of the *Charter*, Canada must show that the law has a pressing and substantial object and that the means chosen are proportional to that object. A law is proportionate if (1) the means adopted are rationally connected to that objective; (2) it is minimally impairing of the right in question; and (3) there is proportionality between the deleterious and salutary effects of the law.[373]

[468] The standard is proof on a balance of probabilities.[374] A question/answer formula was used in *Hutterite Brethren*:

- Is the purpose for which the limit is imposed pressing and substantial?
- Is the means by which the goal is furthered proportionate?
- Is the limit rationally connected to the purpose?
- Does the limit minimally impair the right?
- Is the law proportionate in its effect?[375]

[469] When considering s. 1, and what Parliament is entitled to do, it is useful to re-iterate the words of McLachlin C.J.C. in *Bedford*:

> I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the

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[373] *Carter* at para. 94; *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 67-71 ("**Oakes**").
[374] *Oakes* at para. 67.
[375] *Hutterite Brethren of Wilson Colony v. Alberta* (Attorney General), 2009 SCC 37 at para. 27 ("**Hutterite Brethren**").

> assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.

B. Is The Prostitution Reference Binding In Relation To The Stopping Traffic And Communications Offences?

[470] The intervenors, Canadian Civil Liberties Association ("CCLA") and Sexual Health Coalition take the position that the *Prostitution Reference* is no longer binding given the many social, political, and evidentiary developments that have taken place in the intervening years.[376] Himel J. agreed in *Bedford (SCJ)* that she could re-examine whether s. 213(1)(c) of the *Criminal Code* was in violation of s. 2(b) of the *Charter*, notwithstanding the *Prostitution Reference*. Himel J. preferred the minority view in the *Prostitution Reference*.[377]

[471] The text of s. 213(1)(c) as considered by Himel J. was considerably wider in scope than the text of the current stopping traffic and communications offences:

> 213. (1) Every person who in a public place or in any place open to public view
>
> > (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

[472] Himel J. ultimately found that s. 213(1)(c) was an unjustifiable limit on freedom of expression.[378] In *Bedford (SCC)*, McLachlin C.J.C. found that Himel J. was entitled to revisit the question. She found, however, that it was unnecessary to decide whether the *Prostitution Reference* was still binding because the Court could decide the issues in *Bedford (SCC)* solely on the basis of s. 7 of the *Charter*.

[473] Based on McLachlin C.J.C.'s comments in *Bedford (SCC)* I agree that I can revisit the *Prostitution Reference,* but in my respectful view, it is not necessary for me to do so. The current prohibitions are different from the earlier prohibitions. The communication aspect of the

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[376] Factum of the CCLA, paras. 31-32; Factum of the SHC, paras. 31-32.
[377] *Bedford (SCJ)* at para. 471.
[378] *Bedford (SCJ)* at paras. 74, 83, 505.

purchasing offence only prohibits communications for the purpose of purchasing sexual services. It did not exist at the time of the *Prostitution Reference* or *Bedford*. The communications offence dealt with by Justice Himel prohibited communications in respect of a lawful activity. The communications offence as it now stands only prohibits communications for an unlawful purpose near a place that children frequent.

C. Other Free And Democratic Societies Have Adopted The Nordic Model

[474] As a free and democratic society, Canada often looks to other members of the community of free and democratic nations governed by the rule of law. In evaluating whether a legislative measure is a reasonable limit on a *Charter* right, Canadian courts often have regard to the legislative and policy choices of other free and democratic societies.[379]

[475] Other free and democratic societies – countries with which Canada has close economic, social, legal, military, and political ties – have adopted the Nordic Model. Each country has modified the model to suit local circumstances, but the salient feature of the model that appears to have been universally adopted is the ban on the purchase of sex by customers and immunity from prosecution of sex workers. Countries that have adopted the Nordic Model include Sweden, Norway, Iceland, Northern Ireland, the Republic of Ireland, France, and Israel.[380] Sweden introduced what came to be known as the Nordic Model in 1999 after decades of decriminalization.[381] Each of these free and democratic societies have chosen, like Canada, to treat sex work as a form of sexual exploitation.

[476] International institutions have also endorsed the Nordic Model. The European Parliament endorsed the Nordic Model in February 2014. In April 2014, the Council of Europe recommended that member and observer states consider adopting the Nordic Model (Canada is an observer state of the Council of Europe). The United Nations Committee on the Elimination of Discrimination against Women has also endorsed the Nordic Model.[382] Canada is not an outlier in this regard.

[477] Other free and democratic societies have identified the discouragement of sex work as a pressing and substantial objective. Other free and democratic societies have adopted means to discourage sex work that are like the means chosen by Parliament, at least in respect of the purchasing offence. That is a significant factor that this court can consider when evaluating, in

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[379] *R. v. Nguyen*, [1990] 2 S.C.R. 906 at para. 133 (McLachlin J., as she then was, in dissent but not on this point); *R. v. Lucas*, [1998] 1 S.C.R. 439 at para. 51; *R. v. Zundel*, [1992] 2 S.C.R. 731 at paras. 54, 175.
[380] *Skilbrei Report* at para. 65.
[381] *Bedford (SCJ)*, at para. 206.
[382] Technical Paper, p. 11158.

the Canadian context, whether the objectives are pressing and substantial and the whether the means chosen are rationally connected to the objective.

D. Is The Purpose Of PCEPA Pressing And Substantial?

[478] The purpose of PCEPA was characterized in the government's Technical Paper as follows (I excerpt the key portions):

> … Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution's harms is to bring an end to its practice.

[479] The specific objective of the communications and stopping traffic offences is to reduce the community harms associated with sex work and prevent the normalization of sex work around children. Of course, it is part of PCEPA and the over-arching objectives apply.

[480] Parliament is accorded a substantial amount of deference in determining whether an objective is pressing and substantial. In *Hutterite Brethren*, the Alberta legislature imposed a photograph requirement on drivers' licences in order to reduce fraud and identity theft. The Hutterite Community opposed, on religious grounds, being photographed. The Supreme Court held that the reduction of fraud and identity theft was a sufficiently pressing and substantial objective that the legislature. The Court did strike down the requirement as an infringement on religious freedom that was not justified under s. 1. The Court noted, however, that governments must have a measure of leeway when determining whether the regulation or limitation of social or commercial interactions is justified.[383]

[481] In my respectful view, it is difficult to imagine that the goal the challenged offences is not pressing and substantial. In my findings of fact I have identified violence, coercion, manipulation, and sexual exploitation as features of the commercial sex industry. Other free and democratic societies have identified the goals of PCEPA as pressing and substantial.

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[383] *Hutterite Brethren* at para. 35.

[482] Moreover, some of the key findings of fact in these reasons support that the objective is pressing and substantial (I repeat and condense some of my earlier findings of fact):

- Significant numbers of sex workers come from marginalized and racialized groups. Indigenous women and girls make up a disproportionate number of those involved in the sex trade.
- Large numbers of sex workers are coerced or trafficked into the sex trade. Many, of those who are coerced and trafficked are themselves women and girls from marginalized groups.
- There is a very strong link between sex work and human trafficking.
- Violence and the threat of violence are present in the everyday lives of many sex workers.
- Sex workers have not been displaced to more isolated and dangerous areas as a result of the communications and stopping traffic offences.

[483] I find that the Attorneys General have provided empirical evidence to show that Parliament has chosen to respond to a real issue that is pressing and substantial. I also agree with the Respondents that the Applicants are essentially arguing that decriminalization and regulation are the only constitutional responses to the issues associated with the sale of sexual services for consideration. With respect, that is not a tenable position.

[484] Parliament has the right, and arguably the duty, to enact criminal legislation to protect those it sees as vulnerable to exploitation and violence. Parliament may enact laws using its criminal law power that targets conduct reasonably apprehended as a threat to our central moral precepts.[384] This is pre-eminently an area in which the courts should defer to the choices made by legislatures.

E. Is The Means Chosen By Parliament Proportionate To The Object Of PCEPA?

i. Is the limit rationally connected to the purpose of PCEPA?

[485] The government must demonstrate that the measures it has chosen are rationally connected to its objective. The test is not particularly onerous. The government need not show that the measure will inevitably achieve the objective. Rather, a "reasonable inference that the means adopted by the government will help bring about the objective suffices."[385] The connection may not always be scientifically measurable and may be demonstrated based on

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[384] *Genetic Non-Discrimination* at para. 73.
[385] *Mounted Police Association* at paras. 143-44.

reason or logic. A simple common-sense analysis may also satisfy the rational connection test.[386]

[486] The courts must afford Parliament a substantial amount of deference when considering its chosen approach. McLachlin C.J.C. stated in *JTI-Macdonald*:

> Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.[387]

[487] The Applicants have devoted a considerable amount of effort to show that PCEPA replicates the harms identified by *Bedford*. I have found as a fact that the evidence does not support that claim. The Applicants have also devoted a considerable amount of their evidence to show that decriminalization and regulation is a better way to protect sex workers and reduce harms than the means chosen by Parliament. The Respondent Attorney General of Canada filed expert evidence that legalization of the sex trade increases human trafficking through the expansion of prostitution markets. The parties then filed expert reports and affidavits criticizing the other's methodologies and conclusions.[388] The government's Technical Paper drew on two studies linking decriminalization and legalization of sex work to higher rates of human trafficking for sexual exploitation.[389]

[488] Respectfully, the debate over which option is best is not relevant to the question of the means chosen. The question is not whether Parliament might have chosen something that might, in theory, have been better. The question is whether Parliament has chosen from a range of reasonable alternatives.[390] It is relevant that the means chosen is backed up by much evidence. I appreciate that it is evidence that the Applicants contest, but there is considerable evidence that Parliament is entitled to accept. I have indicated in my findings of fact, there is a factual basis for Parliament's choices. It is also relevant that Canada has adopted an over-arching approach to

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[386] *Canadian Broadcasting Corporation v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 at para. 48.
[387] *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 at para. 41.
[388] Abel Report at p. 51; Expert Report of Seo-Young Cho, January 11, 2022, at p. 2, 11-12 (JAR Tab 101); Expert Report of Ronald Weitzer, January 26, 2022 (JAR Tab 61); Reply Expert Report of Seo-Young Cho, February 14, 2022 (JAR Tab 102).
[389] Technical Paper, p. 11159.
[390] *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11 at para. 78.

sex work that other free and democratic societies have adopted, and important international institutions have endorsed.

[489] I find that Parliament has chosen a reasonable alternative from a range of reasonable alternatives. The communication aspect of the purchasing offence (and the purchasing offence generally) as it relates to outdoor sex work is clearly connected to the goal of reducing sex work, with the view of eventually eliminating it.

[490] I also find that the stopping traffic and communications offences are reasonable alternatives from a range of reasonable alternatives. One of Parliament's objectives is to reduce the community hams associated with sex work. Those harms include harms associated with outdoor sex work, such as unsanitary refuse (used condoms or other paraphernalia) and the exposure of children to the sex trade. The Applicants have not filed any evidence to suggest that unsanitary refuse in some communities, for example, is not a real thing. As a matter of logic, reason, and common sense, a prohibition on communications in areas frequented by children is rationally connected to the Parliament's objectives.

ii. Does the limit minimally impair the right?

[491] Respectfully, it is also clear that the communications offence, the stopping traffic offence, and the communications aspect of the purchasing offence minimally impair the right to freedom of expression. Again, it is questionable whether this is even speech deserving of protection. If it is speech, then it is either in furtherance of the commission of a criminal offence, or speech that is commercial in nature. Again, the asymmetric prohibition on the purchase of sexual services for consideration significantly changes the context.

[492] Leaving aside how the speech is characterized, the communications offence is geographically limited. It is only an offence to communicate for the purpose of the sale of sex near places that are frequented by children. That is hardly a broad-based ban on communications.

[493] The stopping traffic offence is also hardly a broad-based ban. It simply bans anyone stopping traffic for the purposes of exchanging sexual services for consideration. It is difficult to see how anyone in a free society can have the right to simply stop vehicle or pedestrian traffic. It is even more difficult to see how anyone can have to right to simply stop vehicle or pedestrian traffic to engage in a prohibited activity. From an evidentiary point of view, I have found that the stopping traffic and communications offences are not responsible for displacing outdoor sex workers to more isolated and dangerous locations.

[494] Finally, the communications aspect of the purchasing offence prohibits communications for the purpose of purchasing sex. The asymmetric prohibition, coupled with a criminal sanction, applies to customers, who drive the demand for sex for consideration. It is part of the overall legislative scheme of immunizing sex workers from prosecution for the sale of their own

sexual services. Customers can be prosecuted and convicted – but sex workers cannot. In my respectful view, that minimally impairs the right.

iii. Is PCEPA proportionate in its effects?

[495] When considering this aspect of the s. 1 analysis, the court must determine whether there is proportionality between the effects of the measure and the objective of the measure.[391] It is a "broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation." The court must evaluate the "salutary and deleterious" effects of the measure.[392]

[496] The Applicants' position is set out in their reply factum:

> Canada must demonstrate that the deleterious effects of the impugned provisions on the Applicants' *Charter* rights are proportionate to the salutary effects achieved by fulfilling their objective. The more severe the effects of a measure on the Applicants' *Charter* rights, the more important their objective must be for the Court to accept that they are demonstrably justified in a free and democratic society. In conducting this analysis, the Court must take full account of the severity of the deleterious effects of the impugned provisions on the Applicants' *Charter* rights. In this case, the salutary effects of the impugned provisions are not established in evidence. By contrast, the deleterious effects of sex workers' *Charter* rights is severe, and in the most extreme cases the effects costs sex workers their lives.

[497] I do not agree. With respect, I have found in my analysis of the evidence that the Attorneys General have established at least some salutary effects since the enactment of PCEPA. In contrast, I have found that it is the deleterious effects that the Applicants have not, for the most part, been able to establish.

[498] I have already mentioned one salutary effect. The number of women charged with communications or stopping traffic offences since the enactment of PCEPA has declined sharply. The number was already declining significantly prior to PCEPA, but the number has continued to fall. Prior to PCEPA, the number of women charged with communications or stopping traffic offences resulted in a majority being found guilty and many being sentenced to jail terms. In the five-year period after PCEPA only two women in Canada were found guilty and neither were sentenced to jail. Over the same period, the number of men charged with the purchasing offence

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[391] *Oakes* at paras. 70-71.
[392] *Hutterite Brethren* at paras. 77, 79, 86.

has increased.[393] While correlation is not causation, these results were an objective of the immunity provisions, as well as the narrow targeting of the new communications and stopping traffic offences.

[499] Another salutary effect is that the number of homicides of sex workers has also declined. Again, it is unclear if there is a causal effect with PCEPA, or with better policing, or commensurate with a drop in the homicide rate generally, but it is real. What is also striking is that in the five years prior to PCEPA the perpetrator of a homicide against a sex worker was identified as being in a criminal relationship with the victim in 43% of those cases (a client, drug dealer or client, or gang member); in the five years after PCEPA this number was 29%. The number of Indigenous homicide victims among sex workers also declined: from 20 of 54 sex workers in the five years prior to PCEPA, to 7 of 35 sex workers in the five years after. Of course, even one homicide is one homicide too many. As well the statistical significance has limits, given the small numbers. Nonetheless, the numbers are real.[394] Certainly there is no evidence that homicides of sex workers have increased. If PCEPA had replicated the pre-*Bedford* harms, one would expect to see no change or an increase in the numbers of homicides.

[500] Finally, as I have emphasized in these reasons, when the offences are properly interpreted, sex workers are able to take measures to enhance safety without fear of prosecution.

F. Conclusions With Respect To Section 1

[501] Overall, I find that Parliament's response to a pressing and substantial concern is a carefully crafted legislative scheme that prohibits the most exploitive aspects of the sex trade while immunizing sex workers from prosecution. The offences minimally impair the *Charter* rights of sex workers. The offences also permit sex workers to take safety measures. The communications offence, stopping traffic offence, and the communications aspect of the purchasing offence are constitutionally compliant.

X. Disposition

[502] The application is dismissed. As agreed by the parties, no costs are awarded.

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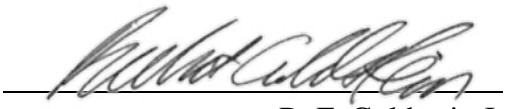
[393] *Juristat*, p. 3, 5.
[394] Aucoin Cross-Examination, p. 99-100.

[503] I thank all counsel, parties as well as intervenors, for their professionalism and skill dealing with this challenging matter. The quality and level of organization of the written submissions and the evidence, and the high quality of the advocacy, made my job much easier.



R. F. Goldstein J.

Date: September 18, 2023

CITATION: Canadian Association of Sex Workers v. Attorney General, 2023 ONSC 5197
COURT FILE NO. CV-21-00659594-0000
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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

Intervenor

AND:

Amnesty International Canadian Section (English speaking), Association for Reformed Political Action Canada, AWCEP Asian Women for Equality Society, Black Legal Action Centre, Bridgenortth Women's Mentorship & Advocacy Services, British Columbia Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Civil Liberties Association, Parents Against Child Trafficking Coalition, Defend Dignity, Egale Canada and The Enchante 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)

Intervenors

REASONS FOR DECISION

R.F. Goldstein J.

Released: September 18, 2023