W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code.* This subsection and subsection 486.6(1) of the *Criminal Code,* which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

> **486.4 Order restricting publication — sexual offences.** — (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (*a*) any of the following offences:
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph *(a)*.
>
> (2) **MANDATORY ORDER ON APPLICATION** — In proceedings in respect of the offences referred to in paragraph (1)(*a*) or (*b*), the presiding judge or justice shall
>
> (*a*) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
>
> (*b*) on application made by the complainant, the prosecutor or any such witness, make the order.
>
> . . .
>
> **486.6 OFFENCE** — (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Anwar*, 2020 ONCJ 103
DATE: 2020 02 21
COURT FILE No.: London 18-5872
Kitchener 19-236

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Hamad Mhasood ANWAR and Tiffany Suzanne HARVEY

Before Justice A. T. McKay
Heard on February 6, 7, 15, March 19, April 11, and May 8, 2018,
and January 30, April 23, 24 and June 13, 2019
Reasons for Judgment released on February 21, 2020

Mr. Michael Carnegie and Mr. Brian White.....counsel for the Crown
Mr. James Lockyer.....counsel for the accused Hamad Mhasood ANWAR
Mr. Jack Gemmel.....counsel for the accused Tiffany Suzanne HARVEY

McKAY J.:

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I. INTRODUCTION

[1] On December 20, 2013, in *Bedford v. Canada (Attorney General)* (2014), 303 C.C.C. (3d) 146 (S.C.C), the Supreme Court of Canada declared unconstitutional three *Criminal Code* offences addressing prostitution related conduct on the basis that they violated section 7 of the *Canadian Charter of Rights and Freedoms*. In response, Parliament amended the *Criminal Code* by passing Bill C-36, the *Protection of Communities and Exploited Persons Act* (the "*PCEPA*"). That legislation received Royal Assent on November 6, 2014. The Bill altered Canada's criminal law approach to prostitution. The purchase of sex and communication for that purpose were criminalized. The Bill also criminalized the actions of third parties who economically benefit from the sale of sex. It criminalized advertising the sale of sexual services. The Bill treated sellers of their own sexual services as victims who need support and assistance, rather than blame and punishment. Accordingly, it granted immunity from prosecution to individuals who sell their own sexual services or who advertise those services.

[2] Mr. Anwar and Ms. Harvey are charged under the *Criminal Code* as result of their operation of an escort service which employed a number of adult women. The charges relate to the operation and activities of the escort agency from December 4, 2014 until November 8, 2015. The Information includes charges under section 286.2(1) (receiving a material benefit); section 286.3(1) (procuring); and section 286.4 (advertising an offer to provide sexual services for consideration).

[3] Mr. Anwar and Ms. Harvey brought an Application challenging the constitutionality of those provisions. They submit that the interplay between the challenged sections create a legal regime intended to prevent sex workers from lawfully using third parties to protect them and to prevent them from forming their own associations to create a system of mutual protection. The Applicants suggest the effect is, at a basic level, to deprive sex workers of those things that are natural, expected and encouraged in all other sectors of the economy. As a result, sex workers, who are more likely in need of protection than most workers, are denied the benefits accorded to mainstream labour.

[4] Specifically, the Applicants submit that s. 286.2(1) violates sections 7 and 2(d) of the *Charter*; s. 286.3 violates ss. 7 and 2(d) of the *Charter*, and s. 286.4 violates s. 2(b) of the *Charter*. Given the acknowledgement by the Crown regarding s. 2(b), the Applicants make no submissions regarding any possible s. 7 violation by s. 286.4. They further submit that none of these *Charter* violates are justified under s. 1 of the *Charter*.

[5] A judge of a provincial court has the power to decide the constitutional validity of a section of the *Criminal Code (R. v. Big M Drug Mart Ltd. (1985),* 18 C.C.C. (3d) 385 (S.C.C.) at 402 and *R. v. Lloyd (2016),* 334 C.C.C. (3d) 20 (S.C.C.) at paras. 14-20). However, the provincial court does not have the power to make a formal declaration that a law is of no force or effect under s. 52(1) of the *Constitution Act, 1982.* The Applicants request that this court declare ss. 286.2(1), 286.3(1) and 286.4 are constitutionally invalid as part of its decision making in this case.

[6] At the outset, the Crown acknowledged that the advertising prohibition in section 286.4 violates the section 2(b) *Charter* right to freedom of expression. However, the Crown took the position that the limitation on the section 2(b) right is justified under section 1 of the *Charter.* The Crown opposes the Applicant's submission that sections 286.2 and 286.3 violate section 7 of the *Charter*. The Crown suggests that the legislation does not engage the security interests of a person who sells their own sexual services given the immunization from prosecution and the exemptions contained in the legislation. The Crown acknowledges that given that the Applicants face potential jail sentences, the threshold for "security of the person" is met. However, the Crown suggests that this case is distinguishable from the *Bedford* decision in that it is the third-party profiteer, and not the seller of sexual services, who seeks constitutional protection. The Crown submits that the economic interests of a third-party profiteer in the sex industry are not protected under section 7 of the *Charter.*

[7] For the reasons which follow, I have determined as follows:

1. The advertising ban contained in section 286.4 violates section 2(b) of the *Charter.* The violation is not justified under section 1 of the *Charter;*

2. The procuring provisions in section 286.3 violate section 7 of the *Charter*. The violation is not justified under section 1 of the *Charter;* and

3. The material benefits provisions in section 286.2 violate section 7 of the *Charter*. The violation is not justified under section 1 of the *Charter.*

In light of those conclusions, it is not necessary for me to consider whether the provisions violate any other sections of the *Charter*.

II. EVIDENCE

Agreed Statement of Fact

[8] The facts are set out in an Agreed Statement of Fact signed by the parties. It includes summaries of police interviews with six employees of the agency, to which Mr. Anwar and Ms. Harvey attach the following qualification:

Anwar and Harvey cannot speak to the statements below about personal feelings and motives of the escorts but agree that the statements fairly reflect what the escorts said in their police interviews following the arrest of Anwar and Harvey on November 7, 2015.

[9] The facts can briefly be summarized as follows.

[10] The Applicants are common law spouses. From December 6, 2014 to November 7, 2015, they ran an escort business named Fantasy World Escorts, the business having been in operation since 2008. Mr. Anwar owned the business, and Ms. Harvey performed day-to-day management duties. The business had an administrative office in London, Ontario. Sexual services were provided for financial consideration at two apartments in London Ontario, at times at other predetermined locations in London, and at other times at hotels and apartments in Calgary and Edmonton.

[11] Mr. Anwar and Ms. Harvey controlled all aspects of the advertising of their business, including operating a website which was used to advertise sexual services of their employees for financial consideration, inform potential clients of the terms of service and acceptable conduct, and to recruit new employees. The website included a Code of Ethics for clientele. It also contained a job information and application form listing salary information averaging between $2500-$5000 per week, an annual paid vacation, full health and dental insurance, and payment of 50 percent of tuition costs and books if the employee was a student. Family coverage was available under the benefit plan. The services of the business were also advertised on various other Internet-based advertising sites and forums where sex workers advertise their services. In addition, Fantasy World placed advertisements on various bus stop locations throughout the City of London.

[12] Mr. Anwar set the fee schedule for sexual services. If Outcalls[1] were being provided, employees were driven to the location by one of the accused. Ms. Harvey screened all calls, texts and messages from clients seeking escort services. She maintained a contacts list which contained a brief description of clients, their preferences and past behaviour, and the employees with whom they had encounters. The list included approximately 400 entries for blacklisted callers and restricted callers who were either generally unacceptable, or unacceptable to a particular employee. It also contained the names of known drug users, prank callers, no-shows and men who lived at the building in London where the two apartments used for Incalls[2] were located.

[13] Fantasy World maintained a Code of Ethics for clientele. It contained standards of safety, hygiene and behaviour. It included the right of an employee to refuse to see a client, and the right to end a session at any time if the employee felt uncomfortable or unsafe. Clients who violated the Code of Ethics were banned from the business. The business did not tolerate drug use by clientele on the premises. From time to time, some employees would travel to Calgary or Edmonton where they would stay in either an apartment or a hotel. The Applicants would arrange appointments for clientele to attend that location.

[1] Outcall – a visit by a sex worker to an address provided by the caller.
[2] Incall – a visit by a purchaser of sexual services to an address provided by the sex worker.

[14] Customers would make appointments by contacting Fantasy World through its phone number or its website. The Applicants set the appointment up with the desired escort and informed her of the type of appointment, any special requests, and the amount of money to collect. Money was collected and left in the apartments in a safe. Customers could pay by cash or credit card.

[15] Information about the recruitment of employees was obtained by interviewing six employees. In addition, an undercover police officer attended a job interview with Mr. Anwar. During the interview, Mr. Anwar advised the officer that the job involved the provision of sexual services for money. He explained the process, and the fact that new employees would receive training. He informed the officer that, depending upon the time spent working and the services provided, his employees would earn from $3000-$12,000 per month, tax-free. He explained that the business took 50 percent of the gross revenue generated by the escort. Mr. Anwar also advised the officer that if she had any negative views then she should not become involved in the work. He asked her to think about her interest in the position for 48 hours and then contact Ms. Harvey rating how badly she wanted the job. Two days later, the officer sent Ms. Harvey a text saying that she was unable to commit to the job at that time. Ms. Harvey responded by indicating that was fine and wished the officer well.

[16] Interviews with employees of the business indicated a similar recruitment method. Individuals applied for the job. They were interviewed by Mr. Anwar, who provided them with information about salary and benefits, and how the business worked. They were told that clients were screened and that monitoring cameras observed clients entering the premises. They were told to think about how badly they wanted to work in the business and given a period of time to do so. They would then contact Fantasy World with a rating from 1-10 as to how badly they wanted the job. After that process was complete, they were offered the job.

[17] The employees were asked about their feelings associated with their arrangement with Fantasy World. Some employees indicated that they felt fortunate to have the job. Others expressed an indication, after working there for a period of time, they had some negative feelings related to isolation because of the inability to discuss their work.

[18] In October 2015, an undercover police officer booked an appointment with a particular Fantasy World escort for an Outcall at a hotel in London. The escort attended the hotel room and received $220 from the officer. The officer then indicated that he was nervous and having second thoughts. The escort contacted Ms. Harvey by text message to see if she could return some of the money. During a conversation with the officer, she indicated that management of the company was very understanding and that they were “extremely good” to the employees. She indicated that if an employee was having an off day, management would let her stay home. The escort did not receive a response to her text message regarding return of some of the money, so she left.

[19] A forensic accounting analysis from January 1, 2015 to November 7, 2015 indicated that the proceeds from Fantasy World’s escort activities was $500,000.

Expert Evidence

[20] At the outset, the Applicants urged the court to consider the factual findings made in *R. v. Bedford* as a starting point, one which would go a long way in dealing with the issues in this case. The Applicants pointed out that *R. v. Bedford* was a mammoth undertaking by the parties involved which subsumed tens of thousands of pages of material and numerous experts. The Applicants took the position that it was unnecessary to repeat all of the work undertaken in *Bedford*, and that they simply did not have the resources to call evidence which was that extensive.

[21] The Applicants called two witnesses who were qualified as experts. The Crown also called two individuals who were qualified as experts. Each expert filed an Affidavit and testified *viva voce*. The experts referred to an extensive array of documents related to social science studies and opinions.

[22] The language used by various experts and commentators on prostitution is often emotionally charged and laden with value judgements. For example, some object to referring to prostitution as work or employment, seeing every act of prostitution as an act of violence. Others see it simply as a choice of one's employment or profession. For consistency and clarity of language, I will refer to the sale of sexual services for money as sex work, and the practice of prostitution as the sex industry.

Applicant's Experts

a) Chris Atchison

[23] Chris Atchison is a sociological and criminological researcher who has been involved in research into the sex industry in Canada since 1995. He describes his work as evidence-based. All his writings have been peer reviewed. He has been the co-principal investigator on four major studies of Canadian sex workers and sex industry clients, a co-investigator on three other major studies and a research consultant, resource or assistant for six other studies of various aspects of the off-street sex industry. He is currently a Research Associate at the University of Victoria's Department of Sociology and has completed all but his dissertation in the Ph.D. program at the University of Toronto's Department of Sociology. He has been an instructor for the Department of Sociology and Anthropology at Simon Fraser University since 2003 and has presented papers and published extensively on the Canadian sex industry and on the quantitative and qualitative research methods used in the social and health sciences.

[24] On consent, Mr. Atchison was qualified to give expert evidence following area:

> *Expert in the field of social science research and theory on the structure and operation of the sex industry in Canada and other jurisdictions, and in the legal regime surrounding the sex industry in Canada and other jurisdictions.*

[25] Mr. Atchison is a quantitative researcher who has been involved in considerable evidence-based research. The focus of his research includes sex workers who are

adults, legally able to work in Canada, and active enough in sex work to have received money for sexual services at least 10 times in the previous year.

[26] Mr. Atchison cited studies which highlighted the diverse experiences of individuals working in the sex industry. Paragraph 7 of his Affidavit indicates the following:

> *Research studies have shown that sex workers are a heterogenous group with diverse experiences within the sex industry. Moreover, research indicates that 80-90 % of sex work occurs in off-street venues in metropolitan areas of Canada. Consistent with much of the contemporary Canadian research, our studies have shown that most sex workers either work independently or through a third-party agency or business in indoor work with a minority working in street-level prostitution. In our national study (2011-2016) of sex workers, in five metropolitan areas across Canada, 60% of our sample worked independently in indoor work, 19% in managed indoor work and only 21% in independent street- level prostitution. Most workers were women (76%), 17% were men and 7% transgender or equivalent. On average, the study participants were 34 years old, had first sold a sexual service at age 24, had worked in the industry 9.7 years and earned significantly more than the equivalent Canadian ($49,080 vs. $37,830). Workers identifying as aboriginal were disproportionately represented (19% vs. 4%), particularly in street-based prostitution - this was likely a product of our sampling and recruitment strategy. Our study of massage parlour-based sex workers in Vancouver found a similar mean age when first involved in the sex industry (27.2) but with the majority of the workers being of Asian ethnicity. Finally, preliminary results from our most recent national study of the impact of ICT [my note: Information and Communication Technologies] use indicate that the sex workers in our samples are 35 years old, they first sold sexual services at the age of 25, and they have been working in the sex industry for 9.7 years. The majority (88.4%) do not identify as a visible minority. Moreover, most (77.9%) respondents report that they work independently or are self-employed, 14.7% work both independently and for a managed establishment or in a managed environment and 4.2% work exclusively in a managed establishment or environment. Despite this, 61% of sex worker respondents indicate that they have been employed by third-party on one or more occasions during their time working in the sex industry.*

[27] Mr. Atchison also testified as to the risk of violence to those who engage in sex work. Empirical studies show that the risks vary widely based upon the type of sex work and the location where it is carried out. He noted an extreme risk of severe violence to women engaged in street-based prostitution including targeting by serial killers. He testified that because of heightened enforcement of criminal prohibitions against communicating for the purpose of prostitution either on the street or by clients and the social stigma surrounding their work, street-based sex workers frequently do not have the opportunity to carefully screen clients and are typically relegated to more isolated

and dangerous locations. The result is that street-based sex workers are particularly vulnerable to both predatory and situational violence.

[28] Mr. Atchison outlined a harm reduction approach to prostitution. In his opinion, criminalizing prostitution makes clear and detailed communication between the sex worker and the client difficult or impossible. That prevents the sex worker from using safeguards such as client screening. It creates an antagonistic dynamic by leading some clients to not be forthcoming with information for fear of prosecution. It potentially moves the location of sex work to higher risk locations. Allowing sex workers to engage third parties and work in managed venues can mitigate potential harms by putting checks into place which do not exist in street prostitution. Criminalization also continues the stigma associated with sex work.

[29] Mr. Atchison cited studies illustrating that off-street sex workers experience much safer working conditions than street-based sex workers. A study of Vancouver indoor sex workers found that 63 percent of respondents reported not having experienced any victimization while working in the sex industry. Of those who reported experiencing violence, being threatened was the most common form of victimization experience, followed by being physically or sexually assaulted. Research has indicated that those sex workers who work from an established location were able to ensure appropriate facilities and work conditions, establish security measures appropriate to their location, and control entry to their work site. That is contrasted by studies illustrating the extreme risks of violence experienced by street-based sex workers.

[30] Mr. Atchison testified that the results of studies which he has been involved in have been consistent with earlier Canadian research and have consistently shown that sex workers who work from an indoor location experience lower instances and risks of situational violence than street-based sex workers. At paragraph 9 of his Affidavit, he states the following:

> *… Consistent with earlier Canadian research and the findings of Justice Himel in Bedford, results from our studies have consistently shown that sex workers who work from an indoor location experience lower instances and risks of situational violence than their street-based counterparts. This is, in part, due to the fact that many off-street sex workers are better able to take measures to protect their safety. More specifically, they are able to advertise terms of service and prices (thereby reducing potential sources of misunderstanding that have the possibility to lead to conflict), screen potential clients by measures such as obtaining names and contact information; insisting on no call-blocking or pay-phone calls and checking numbers and identities against blacklists: using safer and controlled locations such as apartments or hotels with on-site security; and enlisting the help of third parties to whom they communicate information about their location and the arrival and leaving time of a client. Moreover, sex workers who work for a third-party owned business such as a massage parlour, brothel or escort agency typically have receptionists and/or managers to vet calls and on-site managers or fellow workers to offer additional security.*

[31] Mr. Atchison was asked to comment on stigma of sex workers. His opinion is that the approach of the *PCEPA* reinforces, recasts and broadens the stigma of being a sex worker. The legislation aims to denounce and discourage prostitution as a source of social harm. Prostitution is characterized as an affront to "human dignity and the equality of all Canadians" with a "disproportionate impact on women and children" and as inherently exploitive. Mr. Atchison cited research indicating that the social stigma attached to sex work adversely impacts medical health, psychological well-being, drug use and physical safety of sex workers. Research also indicates that clients feel the stigma purchasing sex but based upon the accounts of those clients, it does not affect their demand for sexual services.

[32] The preamble of the *PCEPA* refers to *"grave concerns about the exploitation that is inherent in prostitution".* Mr. Atchison addressed that approach in paragraphs 10 through 12 of his Affidavit. His evidence includes the following:

> *Part of these concerns is the assumption that all women (there is no explicit acknowledgement of male and trans* people) are coerced into prostitution. This does not appear to be true for all or even most sex workers and in particular it does not appear to be true in the case of independent and managed sex workers who work indoors. Many of these workers report making a conscious choice to engage in this kind of work in the context of the socio-economic realities of their lives. As is the case with the decision to engage in all forms of paid labour, results from our research have indicated that the need or desire for money is a predominant factor in why people choose sex work. Personal factors such as independence, flexibility and the nature of the work are also cited as reasons by some sex workers. Moreover, some indoor sex workers have reported enjoyment and satisfaction from the sexual nature of the work and/or the social interaction with clients. Finally, life circumstances such as limited occupational prospects, lack of education, and difficult or abusive childhoods have also been identified as "push" factors for some people deciding to sell sexual services. In our national study (2011-2016) of sex workers, 87% identified the need or desire for money as a factor in engaging in sex work. Of that group, approximately 40% described being in acute need of money all the time due to lack of work, underemployment, children or other dependents and/or overwhelming debt. Slightly more than one in four (27%) cited the personal appeal of the work as a factor; this factor was very common for independent indoor workers and rare for street-based workers. One third (33%) cited past adversity as a factor, including foster care, estrangement from family and institutional supports, and/or a history of physical or sexual abuse. A study by McCarthy et al, comparing sex workers with food and beverage servers and hairstylists - low income occupations with low barriers to entry - found that while such adverse life experiences were more common for sex workers, they were not uncommon for workers in the other occupations.*

[33] Mr. Atchison addressed the issue of allegedly pervasive coercion and control of sex workers by third parties. He acknowledged that there are situations where sex

workers are exploited by third parties. However, he testified that the research indicates that “pimps” do not play a large part in street-based or off-street sex work in Canada. For those sex workers that do work for business owners or managers, coercion, violence and control do not necessarily predominate. He referred to a recent Canadian study that suggests that approximately 80 percent of the managers interviewed in the study were women and most were former or current sex workers. In the national study of managers of licensed escort agencies and massage parlours that he was involved in from 2011-2016, 63 percent of the managers were women, 69 percent of whom had worked as a sex worker. The managers were involved in typical supervisory activities and actively worked to prevent and reduce conflict between clients and workers, amongst workers themselves, and between workers and management. Conflicts between management and workers typically centred on workplace rules, client complaints or unacceptable behaviour and were verbal in nature.

[34] Mr. Atchison also testified that studies that he was involved in do not support the characterization of the relationship between clients and sex workers as being inherently exploitive. The majority of clients dealt directly with independent sex workers rather than through a third party. Fees and services were set by the sex worker in advance, or on occasion negotiated over the course of several communications before meeting in person. Verbal arguments were rare and physical confrontations were rarer still.

[35] Mr. Atchison was also asked to address the issue of advertising the sale of sexual services. In his view, the safety of a sex worker depends in part on her or his ability and opportunity to communicate with prospective clients both to assess the potential risks and to detail terms of service in advance. Advertising is a key component of any communication strategy to address those issues. The 2011-2016 Canadian study indicated that the sex workers surveyed in the study who advertise in newspapers, online classifieds or on a sex worker advertisement website are more likely to communicate extensively with potential clients before meeting them and more able to set the terms of service than street-based sex workers. The study suggests that the Internet has become an effective way for sex workers to advertise services and communicate any health or safety conditions to clients. In addition, 54.2% of sex workers reported that they regularly or always use the Internet or an online database/forum to cross reference the information provided to them by prospective clients.

[36] Mr. Atchison voiced concern about the legal impediments to advertising created in the *PCEPA.* His concern was that the grant of prosecutorial immunity to a sex worker who advertises their own sexual services does not extend to the third parties necessary for advertising, whether the third party is a newspaper publisher, web host or Internet service provider. In his view, the realities of communications technology make it impossible for a sex worker to advertise her or his services without using the business services of a third party. Providing those services would put the third party in legal jeopardy. The ability of sex workers to communicate and advertise their services establishes boundaries. The development of information technology over the past 20 years has changed the dynamics of the sex industry. The evolution of that technology coincided with a migration of sex workers from street-based sex work to indoor work.

The indoor environment offers greater security for the safety and physical and mental health of sex workers.

[37] Mr. Atchison noted that the *PCEPA* was based upon the prohibitionist model of legislation first adopted by Sweden (the "Nordic model"). He believes that there is insufficient evidence to evaluate whether the Nordic model has been effective in Sweden either in reducing the number of sex workers or deterring demand from clients. He suggested that the decriminalization model adopted by New Zealand has been shown to have a positive impact on the health and safety of sex workers without any significant increase in the number of sex workers.

[38] In cross-examination, Mr. Atchison indicated that he would not consider himself an advocate for decriminalization of sex work. He simply advocates for an evidence-based approach to legislation. He agreed that before a parliamentary committee, he advocated against criminalization of prostitution because in his opinion criminalization produces harm. He was cross-examined as to the methodology employed in various studies. He indicated that the conclusions of the study are as good as the sample upon which the study was based. He agreed that indoor workers are a completely different group of sex workers than street-based workers.

b) Andrea Stirling

[39] Andrea Stirling is a PhD student at the University of Toronto's Centre for Criminology and Sociological Studies. She is Chair of the Board at *Maggie's*, a Toronto sex workers' action project which works towards the health and safety of sex workers. She is an advocate for sex workers' rights in Canada and is a member of the Canadian Alliance for sex work law reform, which advocates decriminalization of sex work. For her Masters' degree in Criminology, Ms. Stirling conducted research to help determine the impact of the advertising offence in section 286.4 of the *Criminal Code*. In her doctoral thesis, Ms. Stirling is studying the regulation of sex workers in Canada. She is the research coordinator for a study examining the sexual and reproductive health needs of young adult sex workers.

[40] On consent, Ms. Stirling was qualified to give expert evidence following area:

> *Expert in the field of social science research and theory on the structure and operation of the sex industry in Canada and other jurisdictions, and in the legal regime surrounding the sex industry in Canada and other jurisdictions.*

[41] Ms. Stirling described the research she conducted for her Masters' theses. She described the methodology and the population of the individuals who made up the study "high-end" independent escorts working indoors in Toronto and Montréal. The criteria required the escorts to be 21 or older, individuals who had not been coerced or trafficked, and active in the sex industry for at least two years so that they have experience working in the sex industry both prior to and after the enactment of the *PCEPA.* All of the participants had a personal website, and exclusively advertise their services on the Internet. Typically, personal websites contained a photo gallery, information regarding rates, the types of services provided, a biography, and

expectations for clients. Typically, they listed duo partners and had banner ads which created links to other providers. The websites were used for screening protocols.

[42] Typically, participants used Internet ad sites to host postings, and provide a link to their personal websites. Escorts can also advertise on various websites and use them as online discussion forums. A popular site was the “Preferred 411” site. In order to access that site, a potential client had to be referred to the site by a sex worker. The potential client then paid an annual fee to create a profile and username. Participants viewed this as a very effective form of screening for personal safety. The site also allowed escorts to remain anonymous. It allowed for the ability to obscure their faces in photos, obscure any identifiers such as tattoos, set parameters of service, control space and ask potential clients for references. It meant that they could sell her services without going into bars to solicit potential clients.

[43] These ad sites also created informal social networks of friends working together. Those networks lessen the feeling of isolation for participating sex workers. It also allowed for mentoring, emotional support and arrangements for safety calls, and follow-up calls after appointments. The networks created also led to a method of sharing resources. Indoor sex work was viewed as much safer than outdoor sex work, but maintaining a location was expensive. Sex workers would communally rent space for Incall sex work in order to share the cost of maintaining premises.

[44] The participants in the study were asked about the process of creating their personal websites. They describe third party involvement in that process in terms of purchasing or renting domain space from service providers, hiring website designers specific to the industry, and hiring photographers experienced in the industry.

[45] With the passage of the *PCEPA,* participants reported being required to change the information on their websites in ways that increased risk to their personal safety in order to comply with the legislation. Many third-party advertising sites would no longer allow the use of terms that describe the services provided, or links to websites that contain those terms. That removed the ability to set service parameters prior to meeting the client and increased risk because of ambiguity and potential frustration on the part of clients. The “Preferred 411” site added a requirement that escorts upload an unobscured photo of their face. That was viewed as a risk. Participants were reluctant to provide information which could be seized pursuant to a search warrant in a criminal investigation. As a result, many of the participants in the study no longer use that website for screening purposes.

[46] The legislation also led to the removal of ads regarding duos and banners with links to other providers because of concern of being exposed to prosecution for advertising the sexual services of another person. Ms. Stirling is of the opinion that the *PCEPA* as re-created the very conditions found to have created a risk of harm to sex workers in the *Bedford* decision. The subjects of her study feel they are no longer able to communicate effectively with clients prior to meeting with them.

[47] Ms. Stirling was cross-examined extensively on her advocacy on behalf of sex workers. She indicated that her desire for decriminalization of the sex industry is based upon evidence-based research. Her advocacy is not simply limited to decriminalization

of the sex industry. She confirmed that her study was not limited to advertising issues. It covered a broad topic range regarding sex work. Participants expressed concerns about specific risks and discussed how to deal with them. The participants did not recount any specific incidents of violence against them. The risks most frequently discussed were being "stalked" and being "outed". Stalking was the only incidence of violence which was reported to her.

[48] Ms. Stirling agreed that the ability to advertise on the Internet was also a business marketing tool which resulted in economic benefit for escorts. However, she maintained that participants were more concerned about personal safety. Some participants did mention an income decline after the passage of the *PCEPA,* which has led to them taking on clients they did not know or that they would previously not have taken on. She was of the view that the study results should not be limited to the 18 participants. The findings should apply to people who meet the same criteria for inclusion but were not part of the participating group. She also indicated that the findings of her study reflect what has been found in other studies, including one in the United Kingdom. She agreed that sex work does involve some risk of violence but testified that the Canadian experience does not reflect an assertion that sex work is inherently violent.

[49] She also testified that the concept of intuition is widely reported as a main risk management study in locations where prostitution is criminalized. In her opinion, taking other steps in combination with intuition such as appropriate screening is the most effective risk management approach.

Crown Experts

c) Cherry Smiley

[50] Ms. Smiley is a researcher and advocate on the issue of male violence against women and girls with emphasis on the prostitution of Indigenous women and girls in Canada. From 2008-2009, she was a full-time transition house and crisis worker at the Vancouver Rape Relief and Women's Shelter. From 2008-2012, she volunteered with the Aboriginal Women's Action Network in Vancouver, an organization which advocates for Indigenous women addressing issues of prostitution, other forms of male violence and the criminal justice system. Ms. Smiley holds a Bachelor of Arts degree, a Bachelor of Fine Arts degree, a Masters' degree in Fine Arts and is a third-year PhD student in the Communications Program at Concordia University.

[51] In obtaining her Masters' of Fine Art, she created an artistic work, an installation of photo-text images of places in Vancouver which have significance to women who have been prostituted or affected by prostitution. She indicated that in her PhD program, she is researching the ways in which the prostitution of Indigenous women and girls in Canada is related to colonization and patriarchy. Ms. Smiley has not engaged in social science research studies with methodology similar to the majority of researchers. She described her methodology as being grounded in feminist decolonizing and Indigenous methodology and testified that she is in the process of constructing a new methodology that better helps in working with Indigenous women, and which could be categorized as a decolonizing feminist methodology.

[52] On consent, Ms. Smiley was qualified to give expert evidence in the following area:

> *The study of the overrepresentation of Indigenous women and girls in prostitution including causes, impacts and the corresponding links between colonization, patriarchy and sexualized male violence in Canada.*

[53] Ms. Smiley described herself as both a researcher and an advocate in the field prostitution. She testified that it is important to acknowledge that the issues surrounding prostitution are very controversial. All research on the topic is therefore subjective. Researchers are conducting the research from a particular perspective or to develop a perspective during the course of their research. She attributes a subjective motivation to anyone who would choose to research prostitution.

[54] She cited a 2005 study conducted in Vancouver that found 52 percent of women in street prostitution were Indigenous even though Indigenous peoples generally comprised approximately 1.7% of the city's population. She discussed historical portrayals of Indigenous women and the historical prostitution of Indigenous women and girls in Canada. In her view, the concepts of choice and consent are a false dichotomy when prostitution is examined within the context of patriarchy, capitalism, racism and colonization. She objects to the framing of prostitution as sex work because that fails to consider the role of patriarchy, capitalism or colonization in the prostitution of Indigenous women and girls or to acknowledge larger systems of oppression.

[55] Ms. Smiley stated the following at paragraph 19 of her Affidavit:

> *The Nordic model of prostitution law and policy acknowledges that prostitution is a form of male violence against women and girls and that it is a consequence and expression of inequality and the oppression of women and girls and is the model that should be fully adopted to address prostitution.*

[56] Ms. Smiley characterized prostitution in Canada for Indigenous women as a practice of colonization and patriarchy and a result of inequality, irrespective of the location. It is her position that any attempt to make prostitution "safer" for prostituted women actually benefits buyers of sex and pimps by providing easier access to prostituted women and increased profits. She characterizes prostitution as simply a form of violence against women. Efforts to create a larger cultural shift which abolishes prostitution goes beyond criminalizing certain behaviours. Prostitution itself is the harm. Looking at prostitution as a form of labour simply conceals the underlying causes for people entering prostitution.

[57] In cross-examination, she agreed that a study that she referenced is not published and was funded and carried out by an organization which intervened in the *Bedford* appeal in favour of the Nordic model. She was cross-examined on a journal article that she has written, *"Stealing native women's "unceded" bodies"*. She disagreed that it was an attempt to denigrate those who want to legitimize prostitution as work. When questioned about her use of the phrase "they say" in the article, she indicated that the article was simply her interpretation of what people say, not a quote of anything

anyone specific said. She agreed that her Masters' project had a political purpose. She indicated that she has not conducted any research project which requires ethical approval. Her CV listed three peer-reviewed publications, but she agreed that her CV was incorrect, and that she has never published in a peer-reviewed publication.

[58] When questioned regarding her research, Ms. Smiley testified that Indigenous researchers face issues that are not faced by non-Indigenous researchers. All of the statistics involved in research have faces and names to an Indigenous researcher, and that leads to an emotional response by the Indigenous researcher. She generally looks at systemic issues in her professional work. Attempting to individualize a systemic issue fails to capture the complexity of the issue. Prostitution is about larger systemic issues such as patriarchy and colonization.

[59] Ms. Smiley testified that she disagreed with the finding in the *Bedford* decision that indoor sex work is less dangerous than street prostitution, because she defines the term "dangerous" in a different manner than the court did. When asked, she indicated that she has never read the *Bedford* decision in its entirety. She also indicated that she was unaware of any country in the world which has successfully abolished the practice of prostitution.

d) Dr. Madeleine Coy

[60] From 1999 to 2006, Dr. Madeleine Coy was a senior residential childcare officer for young women who had been identified as sexually exploited, including some who were exploited in street prostitution and indoor prostitution. From 2006 to 2017, Dr. Coy was employed in a number of capacities at London Metropolitan University, becoming a senior lecturer. She taught courses on violence against women, sexual violence and sexual exploitation of children, and taught research methods. In 2007, she received her PhD from Loughborough University. For her thesis, she conducted life story interviews of 14 women with the experience of being in care and exploited in prostitution. It also involved working with an artist who did art work with approximately 40 women about how they felt about their body and their self as a result of their involvement in prostitution. From September 2017 to the present she has been employed as a lecturer in the Centre for Gender Sexualities and Women's Studies Research at the University of Florida.

[61] Dr. Coy describes herself as a qualitative, not a quantitative, researcher, specializing in the topic of violence against women and girls, with a focus on sexual exploitation and the prostitution system. She has not conducted any research related to Canada. She is active in a number of organizations, including being a co-founder of the Nordic Model Information Network. She has been involved with reviews of prostitution policy across the European Union.

[62] On consent, Dr. Coy was qualified to give expert evidence in the following area:

> *The theory, research and policy on prostitution as a practice in gender inequality including different international approaches to the regulation of prostitution.*

[63] Dr. Coy is of the opinion that no research on prostitution is value free. Views about whether prostitution is inherently harmful or unequal influence all research design and findings. The position that prostitution is a commercial transaction between freely consenting adults is not neutral. In her opinion, prostitution itself is harmful for the bodily integrity and autonomy of women involved in it. Her research indicates that the lived experience of prostitution parallels experiences of sexual violence. Some women are only able to name the harms and violation of prostitution once they have managed to exit.

[64] Dr. Coy describes the Nordic model as having three pillars: criminalizing the purchase of sex; decriminalizing the sale of sex; exit programs and support to exit prostitution. The fundamental premise of that approach is that prostitution is built on inequality and rests on women's more limited options for economic independence and men's perceived entitlement to women's sexualized bodies. The Nordic model approach is an approach for more broadly dismantling inequality and promoting equality. Criminalizing the purchase of sex can change behaviour. Dr. Coy also testified that the link between prostitution and human trafficking for sexual exploitation cannot be separated.

[65] Dr. Coy testified that proponents of decriminalization rely upon evidence from New Zealand. She pointed out the relatively small size of that country and testified that research suggested that few women in the New Zealand sex industry report violence to the police. She also gave evidence critical of the legalization model enacted in Germany.

[66] Dr. Coy was cross-examined regarding the hypothetical of a 21-year-old university student who knew nothing about the sex industry but wanted to enter it. The hypothetical student wanted a third-party manager and experienced coworkers in order to make up for their lack of knowledge. She testified that inevitably there is a tension between individual rights and the type of society we desire. Dr. Coy desires a society which is free of prostitution. She rejects the idea that third parties can make sex-work safer, even if one is referring only to physical safety. Her definition of safety includes psychological and emotional safety.

[67] Dr. Coy was cross-examined regarding the findings of fact made by the trial court in *Bedford* at paragraph 421. Briefly stated, there was very little that she would agree with in the court's findings of fact. Her position is that prostitution simply cannot be made safe. She disagrees with the premise that prostitution is work and can be analogized to other types of work. Health and safety and employment protections are not appropriate for prostitutes because that would legitimize practice of prostitution as work instead of a form of abuse. Prostitution cannot be described as a completely consensual act. The ability to advertise on the Internet does not reduce risk because one cannot vet or screen out propensity for violence. The Internet enables exploitation.

[68] Dr. Coy was referred to an academic paper entitled "Beyond Pimps, Procurers and Parasites: Mapping Third Parties in the Incall/Outcall Sex Industry". She dismissed the paper, indicating that the researchers started from the perception that prostitution is not harmful. Accordingly, by the time they reached their conclusions, they had sanitized

the harmful effects of prostitution revealed by their own research. She also indicated that it was a deliberately misleading sample.

[69] Dr. Coy was asked a question regarding whether, among other things, prostitution could be a commercial transaction between two people. Her response was that at an individual level, some people may think that they are making a choice. However*, "the act does not take away from the documented harms that we can demonstrate are so prevalent… therefore risk of violence and harm are intrinsic the practice of prostitution".* In her view, prostitution is symbolic violence against women. Dr. Coy also testified that it is not possible to separate the sexual exploitation of children from the concept of prostitution. It is part of the "prostitution system".

[70] Dr. Coy agreed that the trial court in *Bedford* found the evidence of Melissa Farley to be problematic. She agreed that she often cites Ms. Farley's work and she disagrees with the trial court's criticism of Ms. Farley's research. She testified that objectivity is not possible in social science. She is an academic, and she critiques the work of other academics.

The Role of Expert Witnesses

[71] Each of the expert witnesses was qualified, on consent, to provide opinion evidence within the scope of their expertise. In reviewing the evidence of both expert witnesses called by the Crown, the court is concerned with the issue of impartiality. The court is also concerned that both witnesses adopted the role of an advocate as opposed to a witness. The level of concern is high enough that the court must review the issue of the admissibility of that evidence.

[72] Expert evidence is admissible when it meets the threshold requirements of admissibility, and it passes scrutiny at the gatekeeper stage. That threshold is met when the trial judge determines that the benefits of admitting the evidence outweighs its potential risks, considering such factors as relevance, necessity, reliability, and the absence of bias. In the law of evidence, an opinion means an inference from observed fact. An expert's opinion must be impartial in the sense that it reflects an objective assessment of the questions at hand. It must be unbiased the sense that it does not unfairly favour one party's position over another. Examples of bias include noble cause distortion (the expert's belief that a particular outcome is right), and confirmation bias (a tendency for the expert to seek evidence that supports a preferred conclusion): see *R. v. France,* 2017 ONSC 2040. The duty that the expert witness owes the court is to provide fair, objective, nonpartisan answers within the scope of the witness' expertise.

[73] If the impartiality of an expert witness is in issue, the court can turn to the principles outlined in *White Burgess Langille Inman v. Abbott and Halliburton Co*., 2015 SCC 23. The proponent of expert evidence must establish the threshold requirements of admissibility. Those requirements are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert). Evidence which does not meet those threshold requirements should be excluded. The issue then turns to an expert witness' duty to the court. The duty is to provide independent assistance to the court by way of an objective unbiased opinion in relation to matters within the expertise of the expert witness. An expert witness should never assume the role of an advocate.

Underlying the formulation of the duty are three related concepts: impartiality, independence and the absence of bias. A trial judge must determine whether the expert is able and willing to carry out his or her primary duty to the court.

[74] The next question is whether the elements of the witness' duty go to the admissibility of the evidence rather than simply to its weight. The court in *White Burgess* stated the following at paragraphs 33 and 34:

> *Should the elements of this duty go to admissibility of the evidence rather than simply to its weight?; And, if so, is there a threshold admissibility requirement in relation to independence and impartiality? … the answer to both questions is yes: a proposed expert's independence and impartiality goes to the admissibility and not simply to weight and there is a threshold admissibility requirement in relation to this duty. Once that threshold is met, remaining concerns about the expert's compliance with his or her duty should be considered as part of the overall cost-benefit analysis which the judge conducts to carry out his or her gatekeeping role.*

[75] At paragraph 49 of the decision, the court indicated the following:

> *This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court… an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than a clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.*

Research Approaches

[76] References were made throughout the evidence to both quantitative research, and qualitative research. Quantitative research can be said to focus on logical and statistical procedures to quantify attitudes, opinions, behaviours and other defined variables and to generalize results from a sample population. Qualitative research is primarily exploratory research. It is used to gain an understanding of underlying reasons, opinions and motivations. It uses measurable data to formulate facts and uncover patterns. Qualitative research can be said to be a process of naturalistic inquiry that seeks in-depth understanding of social phenomena within their natural setting. It focuses on the "why" rather than "what". To ensure rigour and trustworthiness, the researcher attempts to maintain a position of neutrality while engaged in the research process.

Assessment of the Expert Evidence

[77] The expert witnesses in this case disagree upon whether a harm reduction approach is of any benefit to sex workers. They disagree in large part because they approach the issue using different language, values and terminology. Generally speaking, the experts called by the Crown view prostitution as inherently violent and harmful. They view safety as impossible given the inherent violence involved and a concept of safety which includes their own viewpoints related to the psychological and emotional safety of sex workers.

[78] Mr. Atchison and Ms. Stirling are both quantitative researchers. I find that they take an evidence-based approach to the study of prostitution. The conclusions which they have reached based upon their own research and the research of others leads them to take a position in the debate over prostitution. However, it is not a position which is based on any bias. Both witnesses contributed significant evidence-based opinions to the factual underpinnings of this case.

[79] Dr. Coy and, to an extent, Ms. Smiley, were either unwilling or unable to separate issues such as human trafficking and child prostitution from the concept of the prostitution of adults who were not coerced into sex work. Both are committed advocates for the abolition of the sex industry.

[80] Ms. Smiley has limited research experience, and limited experience in the academic study of prostitution. Of even greater concern was the fact that she was clearly acting as an advocate on behalf of the Nordic model and did not attempt to make any pretense of objectivity. At the very least, those issues significantly limit the weight to be given to her evidence. The latter concern raises an issue about the admissibility of her evidence.

[81] Dr. Coy, throughout her lengthy cross-examination, displayed a complete inability or unwillingness to concede that any viewpoint other than her own could conceivably be correct. It was clear throughout her evidence that she simply views herself as an advocate and that she is not prepared to consider any possibility outside of her own viewpoint. She clearly believes that the only correct outcome is the one that she advocates. She is a qualitative researcher who makes no attempt to maintain a position of neutrality while engaged in the research process. Her bias is apparent to the point where it raises questions not only about what weight, if any, should be given to her evidence, but whether it is admissible at all under the criteria outlined in *White Burgess*.

[82] The Supreme Court of Canada has indicated clearly that the threshold requirement for admissibility is not particularly onerous. This is a case where the trier of fact is a judge alone, minimizing the risk involved in admitting the evidence. Counsel for the Applicants did not raise an issue regarding admissibility of the evidence. Given those factors, I will admit the evidence. However, given the lack of impartiality and objectivity, and the inability of both witnesses to consider any position other than their favoured ideology, the evidence of the two Crown expert witnesses will be given no weight.

III. FINDINGS OF FACT

[83] It is apparent that adult sex workers in Canada are motivated to take part in the sex industry for a wide variety of reasons. The most frequent motivation is the desire to earn money. The vast majority of the sex industry has evolved into indoor locations. There is data which indicates that indoor sex workers earned significantly more money than those involved in unskilled labour. A significant portion of sex workers are self-employed or at least work independently a significant amount of time. There is data which indicates that the level of violence faced by indoor sex workers may be lower than the level reported by professions such as emergency room nurses. Canadian research suggests that coercion and control of sex workers by third parties is not pervasive. A significant proportion of third parties working in the sex industry have experience as sex workers.

[84] The nature and practice of the sex industry in Canada has fundamentally changed over the past 20 years. The vast majority (80-90%) of the industry has transitioned to indoor venues. Previously, it was primarily known for the nuisances involved with “street walking”, “public solicitation” and “curb crawling”. It is now primarily an indoor industry where those who wish to sell sex can make that willingness known through advertising on the Internet. Those who wish to purchase sex can find sellers on the Internet and the parties can communicate in advance regarding price, the services available and the conditions of the interaction.

[85] The move to indoor locations for sex work has evolved along with the increased use of technology and the commonplace use of the Internet as a means for sex workers to engage in screening practices. The use of the Internet has allowed sex workers to take steps to protect their anonymity, set parameters for service and cross reference information provided by potential clients. The use of client screening sites is a particularly helpful way to enhance the safety of sex workers. Sex workers can effectively screen potential clients through use of the Internet and can potentially take a wide variety of steps to enhance their safety and security by controlling the location of the interaction. Communication in advance allows sex workers to set boundaries, which reduces the risk of situational violence.

[86] The use of Internet technology to advertise sexual services has led to a number of other developments. Those developments include the creation of informal social networks among sex workers. That has provided emotional support for sex workers. It has also allowed for practical arrangements such as safety checks and “make call arrangements” with other sex workers. It has enhanced safety by facilitating space sharing by sex workers, thereby assisting them in obtaining control over their work environment at manageable costs. Advertising inevitably calls for the involvement of third parties such as web domain hosts, web designers and professional photographers.

[87] Sex workers arrange their activities into a wide range of configurations, including working independently and engaging third-party services, or seeking employment at a managed business. Those configurations change. The majority of indoor sex workers at some point in time have been employed by a third party.

[88] Given the relatively brief period of time that the *PCEPA* and similar Nordic model-based legislation been in effect, research into the impact of that type of legislation is limited. Many of the conditions that prevailed pre-*Bedford* continued to prevail now. Based on the evidence of this case, the findings of Himel, J in subparagraphs 1 and 2 of paragraph 421 of *Bedford* remain current. Specifically, I make the following findings:

1. Sex workers, particularly those who work on the street, are at a high risk of being the victims of physical violence;
2. the risk that a sex worker will experience violence can be reduced in the following ways:
    a) working indoors is safer than working on the streets;
    b) working in close proximity to others, including paid security staff, can increase safety;
    c) taking the time to screen clients for intoxication or propensity to violence can increase safety;
    d) having a regular clientele can increase safety;
    e) when a sex worker's client is aware that the sexual acts will occur in a location that is predetermined, known to others, or monitored in some way, safety can be increased;
    f) the use of drivers, receptionists and bodyguards can increase safety; and
    g) indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring, and financial negotiations done in advance can increase safety.

[89] I find that Indigenous women are over-represented, particularly in street prostitution in Canada. In addition, there is insufficient evidence to support the proposition that the Nordic Model of legislation reduces the existence of, or demand for, prostitution. I also find that the stigmatization of sex work has significant negative consequences to the physical, psychological and emotional health of sex workers. There is no satisfactory evidence to establish that the passage of the *PCEPA* has encouraged sex workers to report incidents of violence to police.

[90] Finally, with respect to third parties, I find that there are a wide range of third parties in the sex industry who carry out various roles. In some instances, those third parties are abusive partners, predators and/or "pimps" who may coerce a sex worker and take substantially all of their earnings. However, the available evidence indicates that in the majority of cases, third parties are not involved in coercion and simply fulfil similar roles to that which they would fill in other industries. Those roles include administration related to business activities, training and mentorship, and security. Some sex workers have neither the resources or capacity to work independently and prefer to work in a managed environment where someone else assumes responsibility for the administration of business. Not surprisingly, the value and the effectiveness of the services provided by third parties varies from one third-party provider to another.

[91] Strategies can be employed by sex workers to maximize their safety and security. Those strategies can be taught to sex workers by mentors and/or managers, thereby enhancing their safety.

IV. THE APPLICABLE LEGISLATION

Criminal Code Provisions

Prohibition on the Sale of Sexual Services (s. 286.1)

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

> *(a)* an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
>
> (i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
>
> (A) for a first offence, a fine of $2,000, and
>
> (B) for each subsequent offence, a fine of $4,000, or
>
> (ii) in any other case,
>
> (A) for a first offence, a fine of $1,000, and
>
> (B) for each subsequent offence, a fine of $2,000; or
>
> *(b)* an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,
>
> (i) in the case referred to in subparagraph (a)(i),
>
> (A) for a first offence, a fine of $1,000, and
>
> (B) for each subsequent offence, a fine of $2,000, or
>
> (ii) in any other case,
>
> (A) for a first offence, a fine of $500, and
>
> (B) for each subsequent offence, a fine of $1,000.

Prohibition on Receiving a financial or Material Benefit (s.286.2)

286.2(1) Material benefit from sexual services
Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.

….

286.2(3) Presumption
For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services

for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

…

286.2(4) Exception
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.

…

286.2(5) No exception
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.

286.2(6) Aggravating factor
If a person is convicted of an offence under this section, the court that imposes the sentence shall consider as an aggravating factor the fact that that person received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Prohibition on Procuring (s. 286.3)

286.3(1) Procuring
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.

Prohibition on Advertising the Sale of Sexual Services (s. 286.4)

286.4 Advertising sexual services
Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or
(b) an offence punishable on summary conviction and liable to imprisonment for a term of not more than 18 months.

The Immunity Provision (s. 286.5)

286.5(1) Immunity — material benefit and advertising
No person shall be prosecuted for
(a) an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or
(b) an offence under section 286.4 in relation to the advertisement of their own sexual services.

286.5(2) Immunity — aiding, abetting, etc.
No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

Canadian Charter of Rights and Freedoms Provisions

Section 2(b)

2. Fundamental freedoms
Everyone has the following fundamental freedoms:

…

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[92] The section protects all forms of expression, whether oral, written, pictorial, sculpture, music, dance or film. It in extends to those engaged in expression for profit,

and to the recipients as well as the originators of communication. The Supreme Court of Canada has held that "prohibitions against engaging in commercial expression by advertising infringe upon the freedom of expression in s. 2(b) of the *Charter*:" see *RJR-MacDonald v. Attorney General of Canada* (1996), 100 C.C.C. (3d) 449 (S.C.C.). If it is determined that the activity at issue comes within the scope of freedom of expression, the next step is to determine whether the purpose or effect of the government action is to restrict freedom of expression.

Section 2(d)

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

[93] The purpose of freedom of association is to guarantee that activities and goals may be pursued in common. It is designed to allow the achievement of individual potential through interpersonal relationships and collective action. It protects the exercise in association of those rights which have *Charter* protection when exercised by an individual, together with the freedom to associate for the purpose of activities which are lawful when performed alone.

Section 7

> **7. Life, liberty and security of person**
> 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.

[94] In undertaking an analysis under section 7 of the *Charter,* the court conducts a two-stage analysis. The first stage involves the determination of whether there has been a deprivation of life, liberty and/or security of the person. Economic interests are not protected by section 7.

[95] Within the criminal context, it is the liberty interest which is usually at the forefront of section 7 issues. The meaning of the liberty interest is still not completely settled in Canadian law. However, section 7 scrutiny is triggered anytime that imprisonment is a possibility. In addition, the Supreme Court has held that "security of the person" protects both the physical and psychological integrity of the individual. The trial Court in *Bedford* held that the challenged sections deprived the Applicants of security of the person by preventing sex workers from taking precautions that could decrease the risk of violence towards them: see *Bedford et al. v. Canada (Attorney General),* 2010 ONSC 4264 at paragraph 365. The Supreme Court found that the evidence supported trial court's conclusion.

[96] At the second stage of the analysis, if the deprivation has been shown, the question is whether that deprivation was in accord with the principles of fundamental

justice. That stage of the analysis focuses on whether the law's negative affect on life, liberty and/or security of the person is in accordance with the principles of fundamental justice.

[97] McLachlin C.J. summarized the principles in para. 105 and 107 of *Bedford:*

> The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.
>
> Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stuart calls "failures of instrumental rationality" - the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it".

[98] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty or security of the person must meet. The term *"principles of fundamental justice"* have been described as a qualifier of the rights to life, liberty and security of the person. Those principles relate to an analysis of basic values represented through the individual concepts of gross disproportionality, arbitrariness and overbreadth. In *Bedford,* McLachlin, C.J. noted in paragraphs 108 and 109 that the concepts of gross disproportionality, arbitrariness and overbreadth have been judicially interpreted to address two different evils:

> …The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve - the situation where the law's deprivation of an individual's life, liberty or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the laws purpose and the s. 7 deprivation.
>
> The second evil lives in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

The s. 7 analysis is concerned with capturing inherently bad laws, laws that take away life, liberty or security of the person in a way that runs afoul of our basic values. (see *Bedford,* para. 96*)*

[99] A law is considered arbitrary if it bears no connection between the effect of the law on the individual and the object of the law. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty or security of person. Arbitrariness therefore asks whether there is a direct connection between the purpose of the law and the impugned effect on the

individual, in the sense that the effect on the individual bears some relation to the law's purpose.

[100] An overbreadth analysis under s. 7 turns on the relationship between the objective of the law and the effects flowing from the means which the law adopts to achieve it – in other words the relationship between the law's purpose and what it actually does. In essence, does the law go too far and interfere with some conduct that bears no connection to the law's objective? McLachlin C.J. described it as follows in para. 112, 113 and 117 of *Bedford:*

> Overbreadth deals with a law that is so broad in scope that it includes some conduct that bears no relation to its purpose. In this sense, the law is arbitrary in part. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts…
>
> Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose…
>
> the ultimate question remains whether the evidence establishes that the law violates basic norms because there is no connection between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[101] A law is grossly disproportionate where its effects on life, liberty or security of the person are so out proportion with its purposes that it cannot rationally be supported. It is essentially a balance between the purpose/objective of the law against the negative effect on the individual. Gross disproportionality under s. 7 of the *Charter* does not consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, not against the societal benefit that might flow from the law. Gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects. A grossly disproportionate effect on one person is sufficient to violate the norm.

[102] The analysis under s. 7 involves determining whether anyone's life, liberty or security of the person has been denied by a law that is inherently bad. A grossly disproportionate, overbroad or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Section 1

[103] Section 1 of the *Charter* guarantees the rights and freedoms set out therein:

> **1. Rights and freedoms in Canada**

> 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.

[104] If the breach of a *Charter* right has been established, the onus of justifying the limitation on that right is on the Crown. The Crown must establish that;

1. the objective that the limit aims to achieve is of sufficient importance to warrant overriding the constitutionally protected right or her freedom;

2. the measure chosen to achieve the objective is proportional to it. The proportionality requirement has three aspects:

   a) the measures chosen must be rationally connected to the objective;

   b) the measures chosen must impair the guaranteed right or freedom as little as possible; and

   c) there must be proportionality between the deleterious effects of the measures and their salutary effects.

[105] The analysis under s. 1 differs from the analysis under s. 7. Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. The question is whether the broader public interest justifies the infringement of individual rights. The law's goal must be pressing and substantial. The law must be a rational means for the legislature to pursue its objective. "Minimal impairment" examines whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislatures reasonable alternatives. The final stage of the analysis requires the court to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good.

V. STATUTORY INTERPRETATION

Principles of Statutory Interpretation

[106] The statutory interpretation of an impugned section is a necessary precondition to the determination of its constitutionality. Driedger's Modern Principle of Interpretation focuses on the Act as a whole with an emphasis on the object/purposes of the Act, the legislative scheme and the consequences of adopting one interpretation as opposed to another. Words are assumed to bear their ordinary meaning unless that assumption becomes untenable. The plain meaning rule can be summarized as follows:

> 1. It is presumed that the ordinary meaning of a legislative text is the meaning intended by Parliament. In the absence of a reason to reject it, the ordinary meaning prevails.
>
> 2. Even if the ordinary meaning is plain, courts must consider the full range of relevant contextual considerations including purpose, related provisions in the

same and other Acts, legislative drafting conventions, presumptions of legislative intent, absurdities to be avoided and the like.

3. In light of these considerations, the court may adopt an interpretation that modifies or departs from the ordinary meaning, provided the interpretation adopted is plausible and the reasons for adopting it are sufficient to justify the departure from ordinary meaning.

[107] This approach requires consideration of the total context of the words being interpreted, no matter how plain those words may seem upon an initial reading. The inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole and enacting the particular provision at issue. The interpretation which best gives effect to the legislative intention should prevail against an interpretation which runs counter to the principle and spirit of the legislation. Where the ordinary meaning of language could lead to a contradiction of the apparent purpose of the Act, or some absurdity which could not have been intended, an interpretation which modifies the plain meaning of the words can be given on the grounds that Parliament could not have possibly intended what the plain meaning of the word signify. Courts can rely upon the object/purpose of an Act to justify a preference for a narrow rather than a broad interpretation.

Interpretation of the Challenged Provisions

[108] The parties take different positions regarding the appropriate statutory interpretation of the challenged provisions, and what the provisions actually prohibit. The PCEPA prohibited the purchase of sexual services. Section 286.1(1) of the *Criminal Code* makes it an offence to obtain for consideration or communicate with anyone for the purpose of obtaining for consideration, the sexual services of a person.

[109] The Crown submits that the legislative scheme of the *PCEPA* demonstrates a careful balance between the reduction of prostitution, with a future aim of abolishing prostitution, while recognizing the need to be responsive to the *Charter* concerns raised in *Bedford* by removing barriers to a person's ability to take safety precautions when selling their own sexual services. Exemptions in the legislation allow one selling their own sexual services to hire support services, as long as the individuals providing support are not recruiting and/or encouraging women into prostitution.

[110] One of the positions articulated by the Crown in response to this Application is that the Applicants have urged the court to take the widest possible meaning of terms such as *"commercial enterprise",* as part of asserting that all of the statutory defences found in section 286.2(4) have been effectively negated. As pointed out by the court in *R. v. Sharpe,* [2001] 1 SCR 45 at para. 32, *"it is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored".*

[111] The *PCEPA* was Parliament's response to the decision of the Supreme Court of Canada in *Bedford*. The preamble to the Act provides an indication of the intent of

Parliament, and assistance in identifying the objects of the Act. The preamble mentions:

> 1. Parliament's *"grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it";*
>
> 2. that Parliament recognizes *"the social harm caused by the objectification of the human body and the commodification of sexual activity";*
>
> 3. that *"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";*
>
> 4. that *"it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution";*
>
> 5. that *"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";*
>
> 6. that Parliament *"wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution";* and
>
> 7. that Parliament *"is committed protecting communities from the harms associated with prostitution".*

[112] The Parliamentary Narrative notes that generally, international law treats prostitution in one of three ways:

1. Decriminalization/legalization;
2. Prohibition; and
3. Abolition (the "Nordic Model").

[113] It is clear from the Parliamentary Narrative that the intent of the Act is to implement a version of the Nordic Model in order to abolish the sex industry. Statements by the Minister of Justice indicated that both the criminalization of the purchase of sexual services and the advertising offence were aimed at reducing the demand for sexual services. The Minister also indicated that the material benefit offence was not applicable to non-exploitative relationships. At one point, the Minister acknowledged that the legislation would not *"make prostitution disappear from the landscape of Canada or anywhere. It is what we believe to be a comprehensive response to a very difficult and complex social issue".* (*Hansard*, Minister MacKay, June 12 at 6724).

VI. ADVERTISING – s. 286.4

Section 2(b) Issues

Applicant Position

[114] The Applicants argue that s. 286.4 violates s. 2(b) of the *Charter*.

Crown Position

[115] The Crown concedes that the advertising prohibition in section 286.4 breaches s. 2(b) the *Charter* but takes the position that the breach should be saved pursuant to an analysis under s. 1 of the *Charter.* The Crown position is that the limitation is proportionate to the objectives of the *PCEPA,* including deterring the commodification of sexual services and preventing the exploitation of vulnerable persons. The Crown submits that the advertising of the sale of sexual services is largely a form of economic expression. Given that obtaining sexual services for consideration is now an offence, and given clearly defined objectives of the legislation, this type of economic activity does not fall within the core values protected by s. 2(b) of the *Charter*.

[116] The Crown takes the position that the decision of the Supreme Court of Canada in the *Prostitution Reference,* [1990] S.C.J. No. 52, is not only persuasive but arguably determinative of the challenge to section 286.4. That decision held that the limitations on communicating for the purposes of prostitution in the legislative scheme represented infringement on section 2(b) of the *Charter,* but the provision was upheld as a reasonable limit under section 1. This court must apply the reasoning of higher courts to the facts before it. A legal precedent "may be revisited only if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (*Bedford,* SCC at para. 42*).*

[117] The Crown further submits that the principle of judicial comity requires this court to look at the recent trial decision in *R. v. Boodhoo,* 2018 ONSC 7205, and, absent compelling reasons to the contrary justifying a departure from that analysis, to follow that reasoning. In that case, at the conclusion of a jury trial, the accused were convicted of a number of offences, including section 286.4. Based on four hypotheticals, the Applicants challenged the legislation and the court found a s. 2(b) violation, but the legislation was saved by section 1 of the *Charter*.

[118] The Crown also suggests that given the nature of the expression at issue in this case, it is less worthy of protection and its infringement is less serious. The expression is commercial in nature and far removed from the core values protected by section 2(b) of the *Charter*. The expression at issue is also capable of harming vulnerable persons. Finally, a reasoned apprehension of harm is sufficient to ground a section 1 justification.

[119] The Crown's position can be briefly summarized as follows. The advertising offence is an integral part of a regime of offences aimed at dealing with a pressing and substantial objective, that of reducing the demand of prostitution and reducing the harms caused by prostitution. The promotion of an illegal activity by advertising is

characterized by the Crown as an antithetical. The predominant purpose of advertising is suggested to be an economical one. The ban on advertising is proportionate and rationally connected to the objectives of the legislation. It is one option within a range of reasonably supportable alternatives, and therefore meets the minimal impairment test. Protecting commercial expression which, in effect promotes the commodification of sex does not reach into the core values protected by the *Charter*.

Analysis – Section 286.4 – Advertising

[120] As it is conceded that s. 286.4 breaches s. 2(b) of the *Charter*, I will focus my analysis on s. 1 of the *Charter*.

[121] It is noteworthy that section 286.4 is a penal provision that undermines the liberty interest. A conviction can result in a sentence of up to five years imprisonment. As pointed out by the Supreme Court of Canada in the *Prostitution Reference,* when a *Charter* freedom is infringed by state action that takes the form of criminalization, the Crown bears a heavy burden in justifying that infringement. The Supreme Court also pointed out in *Alberta v. Hutterian Brethren Wilson Colony,* [2009] 2 S.C.R. 567, that less deference is paid to a penal measure as opposed to a complex regulatory regime.

[122] Section 286.4 operates as a complete ban on a form of expression, the advertising of an offer to provide sexual services for consideration. The ban prohibits any content which constitutes an offer to provide sexual services for consideration. The term “advertises” includes any means of communicating the availability of goods or services to third parties. The prohibition places no limitations on its scope including place, means of communication or intended audience. The ban relates to an activity which is now illegal, although an individual selling their own sexual services is given immunity from prosecution.

[123] Section 286.4 criminalizes the activities of third parties, including mainstream businesses who offer services to the public at large and have no direct involvement in the sex trade. That includes newspapers, Internet service providers, website administrators, social media companies and website designers, all of whom are not in any type of parasitical relationship with a sex worker. Immunity from prosecution is granted to the sex worker who advertises their own services. However, given section 23.1 of the *Criminal Code*, third parties who assist or provide services to a sex worker in advertising their own sexual services face criminal liability. The exceptions for liability to third parties that apply to section 286.2 and 286.4 are not available to third parties providing a service or good related to the advertising of sexual services, even if the service is one that they offered to the general public or one whose benefit is proportionate to the value of the service.

[124] Both the Legislative Record and the Technical Paper support the interpretation that section 286.4 creates criminal liability for third parties if the Crown proves knowledge of the existence of the ad, and the fact that the ad related to the sale of sexual services. The comments made by the Ontario Court of Appeal in *R. v. Gallone,* 2019 ONCA 663 in paragraphs 84-99. indicate that the section captures “those who assist sellers in advertising their sexual services even if there were no exploitative relationship between them*”.* It matters not if the assistance is minimal.

[125] The decision of the Supreme Court of Canada in the *Prostitution Reference* is not determinative in this case. The statutory provisions under consideration are different in their language, scope and nature. The objectives of this legislation are significantly different. Section 286.4 is part of a legally different statutory framework and approach to the criminalization of sex work than the provisions considered by the Supreme Court of Canada. The *Prostitution Reference* focused largely on the problem of street-level prostitution. In the 29 years since it was decided, the sex industry has largely moved indoors and now operates in a different historical and legal context, in the face of significant additional social science research and radical change in communication technologies.

[126] The Applicants urge this court, after considering the issue of judicial comity and the reasoning in *R. v. Boodhoo,* not to follow that reasoning. The Applicants submit that the record before the court in *Boodhoo* was not nearly as thorough or complete as the record before this court, given that the constitutional issue was raised only after the completion of a jury trial. The entire hearing on all issues took two days and the Applicants relied heavily on four hypotheticals. There is significant social and legislative evidence before this court, and the court's duty is to evaluate and weigh that evidence in order to arrive at necessary findings of fact. The Applicants submit that the trial court in *Boodhoo* relied heavily on the Technical Paper for findings of fact. The Applicants suggest that the Technical Paper does not purport to be a balanced review of the research in the area, and that it selectively relies only on research that supports the government's rationale for the legislation.

[127] I accept the submissions regarding the completeness of the record before this court, and respectfully decline to follow the reasoning in *Boodhoo.* This court cannot simply cite the principle of judicial comity and ignore the significant evidence called in this case in furtherance of what, from the outset, was intended as a challenge to the constitutionality of the provisions. When discussing the role of a trial judge the Supreme Court stated in *Bedford* at para. 49:

> When social and legislative evidence is put before a judge of the first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case.

[128] Advertising the sale of sexual services is not simply a commercial expression which attempts to increase profits. The evidence in this case establishes that advertising provides an important and effective gateway to many other important objectives of sex workers. It opens safe channels of communication prior to meeting face to face. It enables sex workers to clearly communicate the terms and conditions of their services to potential clients, thereby helping them minimize the risk of situational violence. It allows sex workers to work independently and to avoid the high level of risk attributed to street sex work. It facilitates the creation of social networks which reduce isolation and stigma and enhance the ability to take additional safety precautions. The evidence which I have accepted suggests that sex workers view the ability to advertise as a communication tool which is more important to security and safety concerns than it is to promoting their economic interests.

[129] As I interpret the Crown's submissions, nothing short of a complete ban on the advertising of sexual services would meet the objectives of the legislation. There is nothing before the court to suggest that Parliament contemplated anything short of a full ban on advertising in order to pursue its legislative goals. It does not appear to have considered whether the objectives could be met by placing restrictions over content, audience, time and place.

[130] Section 286.4 fails to meet the minimal impairment requirement. It imposes criminal liability on third-parties even if they are in non-exploitative commercial relationships with sex workers offering services at the same cost that they generally make available to the public. That imposes criminal liability on third parties who would even fall within the exceptions to the material benefits offence. Those third parties would include newspaper and magazine publishers, website designers, website administrators, social media companies and Internet providers. Given the practical necessity for the vast majority of sex workers of involving third parties in the creation of advertising, it also has the practical effect of depriving sex workers of critical tools which enhance the safety of sex workers.

[131] The deleterious effects of section 286.4 are disproportionate to the salutary effects associated with its objective. The deleterious effects include an impact on the safety and security of sex workers. The issues of safety and security are not academic issues. Limiting the ability of sex workers to clearly communicate terms and conditions for their services and to effectively screen potential clientele will result in a significantly increased risk of serious injury or death. The disproportionality includes the criminalization of third parties who are in non-exploitative relationships with sex workers.

[132] I find that s. 286.4 of the *Criminal Code* violates section 2(b) of the *Charter* and the infringement is not justified under section 1.

Section 7 Issues

[133] Given my conclusion on s. 2(b) of the *Charter* in the paragraphs above, it is not necessary for the court to determine whether s. 286.4 also violates section 7 of the *Charter.*

VII. PROCURING – s. 286.3

[134] The procuring provision is also challenged. Its predecessor – section 212(1) of the *Criminal Code* – was not part of the *Bedford* constitutional challenge. S. 286.3 restates the previous procuring and exercising control offences and adds a prohibition against harbouring a person who provides sexual services for consideration. The harbouring provision is essentially a re-enactment of the old bawdy house offences of the *Criminal Code*.

Section 7 Issues

Applicant Position

[135] The Applicants submit that section 286.3 makes it a criminal offence to:

1. procure a person to offer or provide sexual services for consideration;
2. recruit, hold, counsel or harbour a person who provides sexual services; and
3. exercise control, direction or influence over the movements of a sex worker.

[136] As a result, the section criminalizes managers, receptionists and security personnel, and prevents any business offering sexual services from operating legally. The definition of the word “harbour” is to provide a home or shelter. The Applicants submit that the legislation does not draw a line between sex workers who exercise autonomy, and those who are exploited. Sex workers are unable to hire managers or administrators as part of a business offering sexual services. That puts sex workers in a position where they must work alone if they want to work legally. The result is greater isolation and less community for a sex worker. In addition, the legislation privileges those sex workers with better resources. Marginalized sex workers, including Indigenous, poor and immigrant sex workers may be unable to afford the essential tools and may not possess the essential confidence and skills to enable them to work alone in relative safety.

[137] The existing case law makes the offence of procuring all encompassing. The Supreme Court of Canada has defined procuring as behaviour which would include *“to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged”.* For example, the holding out of large compensation in the course of interviewing a potential sex worker constitutes the *actus reus* of procuring. (see *R. v. Deutsch* (1986) 27 S.C.C. (3d) 385 esp. at para. 37).

[138] Similarly, the phrase “exercise control” has broad sinister connotations. In *R. v. Perrault* (1996), 113 C.C.C. (3d) 573 (Que. C.A.), it was found that the element of control refers to invasive behaviour, ascendancy which leads little choice to the person control. Therefore, it includes acts of direction and influence. The exercise of direction does not exclude the person being directed from having latitude or margin for initiative. Finally, the exercise of influence includes any action exercised over a person with a view to aiding, abetting or compelling that person to engage in or carry on prostitution. Yet the Applicants submit that, considered in a non-exploitive context, it involves no more than the kind of control exercised by all employers over employees – the setting of work times, work arrangements and in-house work rules.

The Use of Reasonable Hypotheticals

[139] It is settled law that when conducting a *Charter* review, a court may look not only at the offender’s situation, but at other reasonably foreseeable situations where the impugned law may apply.

[140] In *R. v. Nur* (2015), 322 C.C.C. (3d) 149 (S.C.C.) at para. 61 and 63, McLachlin C.J. stated the following:

> Determining the reasonable reach of a law is essentially a question of statutory interpretation. At bottom, the court is simply asking: What is the reach of the law? What kind of conduct may the law are reasonably be expected to catch? What is the law's reasonably foreseeable impact? Courts have always asked these questions in construing the scope of offences and in determining their constitutionality.
>
> Not only is looking at the law's impact on persons whom it is reasonably foreseeable the law may catch workable – it is essential to effective constitutional review… The protection of individual's rights demands constitutional review that looks not only to the situation of the offender before the court, but beyond that to the reasonably foreseeable reach of the law.

[141] The Applicants rely upon the following two hypotheticals as part of their submissions under s. 7 of the *Charter.*

Hypothetical 1

[142] A husband-and-wife run an escort agency for women who provide sexual services to men for a fee set by the agency.

[143] Prospective escorts apply to the agency in response to recruitment ads. The agency provides each applicant with an information package outlining the nature of the work and conducts a number of interviews to ensure that each applicant understands the nature and conditions of the work, and the fee sharing arrangements. The agency satisfies itself that each applicant has no alcohol or drug dependencies, no mental health issues, and is otherwise a good fit for the agency and the work.

[144] After each interview, the applicant is asked to rate her interest in working for the agency. If the applicant expresses doubts or insufficient interest, the process ends. If accepted by the agency, the applicant is asked to confirm whether she is still interested. An applicant can drop out at any time before or after acceptance without financial consequence. An escort, once accepted, can quit at any time.

[145] The fees for service are set by the agency. An escort receives 50% of the fee paid by her clients to the agency and keeps all tips and gifts.

[146] The agency pays all expenses relating to an escort's work, including:

- advertising the services of the agency and the escort,
- arranging for a photoshoot for the escort,
- renting, furnishing and maintaining the workplace (condo or house),
- receiving, handling and screening calls from prospective clients,
- maintaining a database of banned clients,

- matching clients to the escort in accordance with her stated preferences,

- providing security and managerial services on site, including controlling entrance to the workplace,

- providing transportation and security for outcalls, and

- processing cash, debit and credit card payments.

[147] The agency provides employment benefits, including full health and dental services after three months and a Christmas bonus of either a paid vacation or $1000 cash. After a year, the agency covers 50% of the escort's home rental or mortgage. If the escort wants to go to school while working part-time with the agency, the agency will pay 50% of her tuition fees.

[148] An escort can choose her working schedule, the nature of the services she wishes to provide and her preferences for type of client. She can cancel an appointment if unhappy with a client and any clients she reports as having acted inappropriately are banned from the agency. Drug use and drinking (other than a glass of wine with a client) on-the-job are forbidden.

[149] The agency sets appointments for the escort and transports clients to the escort at the arranged time and place and remains nearby until the session is concluded. Escorts carry a cell phone which enables them to call for assistance on a 24/7 basis. Calls for assistance should lead to a response within 2 to 3 minutes.

[150] Using the workplace operated by the agency allows an escort to maintain her privacy while working as she does not reveal her home address or real name to clients and enables her to avoid disclosing the nature of her work to family members, friends, neighbours or landlords.

[151] Security precautions are such that the agency can advise that the incidence of violence or assaultive behaviour by clients towards the agency's escorts is effectively zero.

[152] The Applicants submit that in carrying out this hypothetical business, the husband and wife have committed indictable offences under section 286.2(1), 286.3(1) and 286.4(1) of the *Criminal Code* exposing them to maximum sentence of 10 years, 14 years and 5 years imprisonment respectively.

Hypothetical 2

[153] Two or more 21-year-old students at the University of Western Ontario are unable to afford their tuition and living expenses at university. They decide to become sex workers, a profession with which they are entirely unfamiliar.

[154] They approach a known sex worker for assistance and advice. She facilitates their plan by helping them set up, including helping them find rental premises out of which to operate, helping them hire security and the receptionist, and arranging for a

professional photographer and website designer to facilitate their advertising on the Internet. The two or more students then leased premises, hired security, a receptionist and a bookkeeper, and commenced to sell sexual services.

[155] The Applicants submit that:

1. the students in this hypothetical have committed indictable offences under ss. 286.2(1), 286.3(1) and 286.4(1);

2. the sex worker whom they approached has committed the offence of procuring under section 286.3(1) and is a party to offences under section 286.2(1) and 286.4(1);

3. the landlord has committed an offence under s. 286.2(1) because he/she is receiving rent in the context of a commercial enterprise that offers sexual services for consideration;

4. the security personnel, the receptionist and bookkeeper have committed an offence under s. 286.2(1) because he/she is receiving remuneration in the context of a commercial enterprise that offers sexual services for consideration; and

5. the professional photographer, the website designer and the Internet provider have committed the offence of advertising under s. 286.4(1) as principals or parties.

Crown Position

[156] The Crown referred the court to the overview of the legislative scheme for section 286.3 contained in the Technical Paper related to Bill C-36:

> Bill C-36's procuring offence can be proven in one of two ways. First, the offence can be proven if the accused "procured" another person for the purposes of prostitution. The term "procure" has been interpreted by the Supreme Court of Canada as meaning "to cause, induce or have persuasive effect," which necessarily entails active involvement in the prostitution of another on the part of the accused. Second, the offence can be proven if the accused recruited, held, concealed or harboured a person for the purposes of prostitution or exercises control, direction or influence over the movements of a person for that purpose. This approach builds on existing jurisprudence interpreting one of the existing procuring offences and the human trafficking offence, both of which use some of the same language is found in new section 286.3 (Technical Paper, at p. 8-9).

[157] The Crown submits that passage supports an interpretation of the legislative scheme in section 286.3 that is consistent with existing procuring offences and the human trafficking offence. Accordingly, the court should conclude that the meaning of the word "influence" is restricted by the meaning of the words "control" and "direction". The Crown submits that the proper interpretation of the subsection results in a much narrower meaning than the interpretation suggested by the Applicants.

[158] The Crown further submits that the title of the *PCEPA* expressly states the intention of Parliament to be responsive to the Supreme Court of Canada decision in

Bedford. In addition, the Supreme Court of Canada has held a preference for an interpretation of a statute that is in conformity with *Charter* values: see *R. v. Sharpe, supra.*

[159] The Crown submits that the Applicant's argument is premised on the belief that terms such as "commercial enterprise", "procuring", "exercise", "control", and "harbouring", should be given the widest possible definition, thus ignoring the context and legislative intent of the legislation. It is submitted that taking that approach would result in a conclusion that Parliament provided protections for sex workers in section 286.2(4), with the full knowledge that sections 286.2(5)(d) and (e) would negate those protections. Parliament is entitled to the presumption that the *PCEPA* was enacted with the intention of conformity with the *Charter.* The Crown submits that the appropriate interpretation of the provisions is one which recognizes that the provisions target third party profiteers rather than those third parties who fall under the non-exploitative exemptions provided.

[160] The Crown submits that the legislation does not engage the s. 7 security interests of a person who sells their own sexual services, given the immunization and exemptions in place. It is only the third-party profiteers whose security interests could be engaged. Therefore, any constitutional challenge based on section 7 would be based upon the protection of the economic interests of a third-party profiteer in the sex industry. The rights protected by section 7 of the *Charter* do not include the right to engage in any particular type of profession or regulated economic sector. Section 7 does not protect freedom to transact business whenever one wishes.

Analysis – s. 286.3 – Procuring

[161] Section 286.3 makes it an offence to procure a person to offer sexual services for consideration. Further, anyone who engages in a range of actions for the purpose of facilitating the sale of sexual services commits an offence. Those actions include anyone who "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".

[162] Principles of statutory interpretation require an interpretation which recognizes that the section prohibits a wide range of actions. That is supported by a plain reading of the section. That position is also supported by the comments of the Ontario Court of Appeal in *Gallone,* above. In that case, the court dealt with the correctness of jury instructions in the context of a trial for human trafficking, procuring and advertising sexual services for consideration. There was no constitutional challenge of any of the sections of the *Criminal Code*. However, the court made certain comments regarding the interpretation of the sections.

[163] In discussing the human trafficking provisions in section 279.01 of the *Criminal Code,* which is similarly drafted to prohibit a wide range of conduct, the court made the following comments at paragraphs 34 through 36:

> There is nothing in the offence provision, the other provisions concerning human trafficking or the Criminal Code as a whole that indicate that the use of the word "or"

> in this provision should be given anything other than its ordinary and grammatical meaning – i.e. one requiring that the various conduct caught by the provision be read disjunctively rather than conjunctively.
>
> Moreover, a disjunctive interpretation is consistent with the object of the human trafficking provisions, which is "to criminalize a wide range of intentional conduct that has, as its purpose, the exploitation of vulnerable persons". A. A., at para. 88 (emphasis added). A disjunctive reading of the various conduct caught by section 279.01(1) supports the achievement of this object by capturing various and diverse types of offending conduct, including some which are "preliminary or preparatory conduct, such as recruitment." A. A. at para 88. A conjunctive interpretation, melding the meanings of all of the different conduct into one single meaning capable of capturing only one single type of conduct, would hinder the objective of the provision.
>
> A disjunctive interpretation also ensures that each one of the listed types of conduct in s. 279.01 has its own meaning…

[164] I also note the Court's comments regarding the jury instructions on the meaning of some of the terms in section 279.01. The court's comments suggest that the expansive interpretations of procuring in previous case law are still applicable. At paragraph 47, the court commented:

> Consistent with Perreault, I would define "exercises influence: over the movements of a person for the purpose of s. 279.01(1) as something less coercive than "exercises direction". Exercising influence over a person's movements means doing anything to affect the person's movement. Influence can be exerted while still allowing scope for the person's free will to operate. This would include anything done to induce, alter, sway or affect the will of the complainant. Thus, if exercising control is like giving an order that the person has little choice to obey, and exercising direction is like imposing a rule that the person should follow, and exercising influence is like proposing an idea and persuading the person to adapt it.

[165] The same principles apply to section 286.3.

[166] Section 286.3 prohibits a wide and diverse range of actions within the context of interacting with someone who sells their sexual services related to that activity. In contrast to section 286.2, it does not come with any exceptions. Contrary to the Crown's submission, the section does not simply criminalize third-party profiteers. It captures those who are in non-exploitative relationships with a sex worker if their actions fall within the broad range of prohibited conduct. It does so because the legislation is framed in a way that characterizes any action falling within this broad range of conduct as parasitic.

[167] The section clearly criminalizes any employee or owner of a managed business who might have any persuasive effect on an individual's decision to engage in sex work. That is the case even for individuals who might be approached by potential sex workers who want information about the type of income they might earn, how to maximize their physical and emotional health and safety and generally how to establish themselves in the sex industry while effectively managing risk. That is the case even if it is a

completely noncoercive, non-exploitative relationship which might simply enhance the health and safety of the potential sex worker. The husband and wife referred to in hypothetical 1 would have committed an offence under this section.

[168] The net result of the section does privilege those sex workers with better resources. Marginalized or inexperienced sex workers are effectively prevented from approaching established sex workers or individuals involved in managed employment situations in order to obtain advice and support. The result is that those types of sex workers will face greater risks to their physical and emotional health and safety if they engage in sex work. The known sex worker referred to in hypothetical 2 has committed an offence under the section, even in the absence of any coercion, exploitative behaviour or even profit on the part of the known sex worker. The evidence establishes that, at some point in their career as a sex worker, the majority of sex workers work in a managed environment. It is logical to think that inexperienced sex workers entering the sex industry might prefer to work in managed employment in order to gain experience and learn how to reduce risk and maximize their own health and safety. The section prevents them from doing so.

[169] Given the broad range of actions captured by the control, direction or influence over the movements of the person provisions of the section, the ability to hire personnel for administrative and security tasks is severely constrained. It would appear that a receptionist or security employee who receives a telephone call from a prospective client, accepts an appointment on behalf of the sex worker, and then provides the sex worker with the information required to attend the appointment would at the very least be exercising influence over the sex worker. That would constitute an offence under the section, even for an employee who is in a noncoercive, non-exploitative role.

[170] The procuring section denies the *Charte*r guarantees of liberty and security of the person of individuals whom it is reasonably foreseeable that the law will impact. The issue then becomes whether it does so in a way that runs afoul of our basic values.

[171] The stated objects of the legislation related to this section appear to centre around the following concerns:

> "exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it…
>
> ..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…
>
> to encourage those who engage in prostitution to report incidents of violence and to leave prostitution"

[172] This provision criminalizes individuals who offer advice related to health and safety and tangible efforts or advice at enhancing the safety of a sex worker without coercion. It criminalizes employees who, in exchange for a salary, would simply be offering a sex worker the type of administrative and safety services that are provided to

people in other industries. It criminalizes individuals who give shelter to a sex worker for the purpose of selling sex, even in a non-exploitative, noncoercive scenario. The definition of *"harbour"* is *"to give shelter or refuge to".* Accordingly, the provision lacks a connection between the effect of the law on individuals and the object of the law. It is therefore arbitrary.

[173] The section is also overly broad given that it includes some conduct that bears no relation to its purpose. The section creates penal consequences, a maximum of 14 years imprisonment, for people who engage in a wide range of prohibited conduct even in the absence of coercion, exploitation or profit. For that reason, the section is also grossly disproportionate in its effects on liberty and security of the person.

[174] I find that s. 286.3 of the *Criminal Code* violates s.7 of the *Charter.*

Section 1

[175] The Crown submits that the preamble to the legislation and the Technical Paper clearly set out Parliament's concerns and illustrate a pressing and substantial objective. The legislation features a section 15 equality issue which should form part of the court's review of the salutary effects of the legislation.

[176] The Crown makes the following submissions regarding proportionality. There is a clear, rational connection between the provision and the objective of denouncing, deterring and ultimately abolishing prostitution to the greatest extent possible in recognition of the multiple social harms associated with it. The test of whether the limit on rights is rationally connected to the purpose of the legislation is not onerous. The test for minimal impairment is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Finally, in considering the deleterious effects of the law on protected rights and the salutary effect of the law in terms of the greater good, the court must consider how profound the legislative goal is – in this case, the eventual eradication of prostitution.

[177] I am of the view that the provision is so broadly drafted that it is not a rational means for Parliament to pursue its objective. There does not appear to be an attempt by Parliament to minimally impair the rights impacted by the provision. Finally, the deleterious effects of the law are disproportionate to the salutary effects of the legislation.

[178] The limits on s. 7 rights created by the provision have not been shown by the Crown to be reasonable limits justified under section 1 of the *Charter*.

Section 2(d) Issues

[179] Given my decision with respect to section 7, it is not necessary for the court to rule on the issue of whether the provision also violates section 2(d) of the *Charter.*

VIII. MATERIAL BENEFIT – s. 286.2

[180] The material benefit provision in section 286.2 effectively replaced the former section 212(j) of the *Criminal Code*, which provided that "Everyone who… lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence…" In discussing the former section of the *Code*, the Supreme Court of Canada stated the following:

> While targeting parasitic relationships, (*R. v. Downey,* [1992] 2 S.C.R. 10, (SCC)), it has broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute (*R. v. Grillo* (1991), 2 O.R. (3d) 514 Ont. C.A.; *R. v. Barrow,* (2001), 54 O.R. (3d), 417 (C. A.)). In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The Application judge found that by denying prostitutes access to those security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of person (para. 361). As such, she found that the law engages s. 7 of the *Charter*. (see *Bedford*, supra, at p. 66).

Section 7 Issues

Applicant Position

[181] The Applicants submit that section 286.2(1) re-enacts and broadens the old offence of living off the avails which was ruled unconstitutional in *Bedford.* The case law under the old provisions prohibiting "living off the avails" interpreted that provision to extend those who are in the business of rendering services to sex workers. The new section criminalizes the receipt of money or other benefits from a sex worker, making it broader than the previous avails section by explicitly encompassing the receipt of financial or material benefits derived directly or indirectly from the sale of sexual services. The subsection restricts the availability of defences when compared to the old "avails" offence. Sections 286.2(4)(a), (b) and (c) reproduce recognized common-law defences. Section 286.2(4)(d) adds a complex new defence for third parties providing services or goods to a sex worker but makes the application of the section difficult to ascertain or define and practice. The availability of the statutory defences is therefore effectively negated by sections 286.2(5)(d) and (e). The Applicants submit that the result is that the sections are arbitrary, overly broad and grossly disproportionate to the state interest.

[182] The Applicants further submit that section 286.2(5)(e) makes the statutory defences unavailable when the benefit is received *"in the context of a commercial enterprise that offers sexual services for consideration".* An independent sex worker who operates a small business would meet any reasonable definition of a commercial enterprise. This exception to the exception has the effect of removing the statutory defences for anyone who receives benefits from a sex worker in return for the provision of services or goods relating to the sex worker's business or employment. As a result, the section denies sex workers access to security enhancing safeguards which would reduce risks they face and therefore negatively impacts their security of the person. The section also prevents a group of sex workers from pooling their resources, sharing

the rental of a communal workplace or setting up a joint business given that the shared benefits would not be exclusively derived from each worker's own services. The section prevents them from paying for third party services such as client directories, or from being employed by an escort agency.

[183] Section 286.2(3) creates an evidentiary presumption that a person who lives with a sex worker is, "in the absence of evidence to the contrary", receiving a material benefit from the sex workers sexual services. Section 286.2(5)(d) makes the statutory defences unavailable if the person who has received the benefit *"engaged in conduct, in relation to any person, that would constitute an offence under section 286.3"* (the "procuring" provision). A person who receives a direct or indirect benefit while providing a sex worker with a safe place to work would lose the availability of the statutory defences because of the new harbouring offence included in section 286.3. That creates new barriers and legal uncertainty for sex workers who seek to work from a secure Incall location.

[184] The Applicants further submit that drivers who drive sex workers to Outcalls and receptionists who screen clients and set up appointments would be seen to be exercising direction and control over the movements of a sex worker, contrary to section 286.3. Such individuals would not benefit from the new statutory defences and would be criminally liable under section 286.2(1).

[185] The Applicants' position is that the criminalization of third parties is contrary to the interests and safety of sex workers, citing Canadian research which outlines examples of the negative effects of criminalization, including:

1) Criminalization obscures and enables labour exploitation;
2) criminalization excludes sex workers from protective labour legislation;
3) criminalization prevents clear communications with clients;
4) criminalization constrains the organization of on-site or on-call security;
5) criminalization obliges third parties to conceal their activities;
6) criminalization encourages willful blindness on the part of third parties;
7) criminalization discourages openness and trust between third parties and sex workers;
8) criminalization hinders the training of new sex workers;
9) criminalization can undermine the ability of sex workers to place appropriate screening procedures in place;
10) criminalization limits access to the justice system;
11) criminalization increases the importance of customer satisfaction;
12) criminalization impedes the establishment of safe Incall locations;
13) criminalization makes sex workers vulnerable to being criminally charged as third parties.

[186] The Applicants suggest that section 286.2(1) constitutes a comprehensive prohibition against sex workers associating with third parties. Both a third party's and a sex worker's association with any aspect of a commercial enterprise are criminalized through section 286.2(5)(e). The legislation prohibits drivers, receptionists and managers from providing services to sex workers that enhance their personal safety and inhibits sex workers from banding together to share expenses and resources to that end. The immunity from prosecution for selling one's own sexual services does not apply to indirect benefits flowing to a sex worker from sharing expenses, income or resources with another sex worker, nor does it protect third parties. The Applicants suggest that the net effect of the legislative scheme is to force sex workers to work in isolation and to proscribe others from assisting or associating with them.

Crown Position

[187] The Crown position is that the exemptions for liability for receiving a material benefit contained in section 286.2(4) protect third parties who are not involved in exploitative relationships with a sex worker. Previous case law has considered these concepts and terminology in separating non-exploitative relationships from those described as parasitic in nature: see *R. v. Grillo*, [1991] O.J. No. 413 (ON. C. A.).

[188] Parliament differentiated between non-exploitative and parasitic relationships by enacting the exceptions to the exceptions contained in section 286.2(4) by essentially categorizing certain relationships as parasitic in section 286.2(5).

[189] The inclusion of subsection 286.2(5)(e) effectively classifies anyone who receives a material benefit in the context of a commercial enterprise that offers sexual services for consideration as being in a parasitic relationship with the sex worker. The Crown urges the court to apply the *ejusdem generis* rule when interpreting this provision. That rule stands for the proposition that a word or phrase derives its meaning through the associated words within that same section. The Crown submits that context requires the term "commercial enterprise" to be interpreted as a commercial enterprise in the context of exploitation, or third-party profiteering.

[190] Subsection 286.2(5)(d) includes anyone who commits the offence of procuring pursuant to section 286.3 as being in a parasitic relationship with the sex worker.

Analysis – s. 286.2 – Material Benefit

[191] The *Bedford* decision struck down the former *Criminal Code* provisions related to "living off the avails". Parliament's response was the enactment of 286.2, which criminalizes the receipt of a financial or other material benefit derived directly or indirectly from the sale of sexual services if the recipient knows that the source of the benefit is the sale of sexual services. A plain reading of section 286.2(1) shows that it is intended to be a broad prohibition. The predecessor section provided that everyone commits an offence *"lives wholly or in part on the avails of prostitution of another person".* Previous decisions have held that the offence did not require proof of coercion. The prohibition contained in section 286.2(1) is broader than the predecessor section, covering financial or other material benefits, obtained by or derived directly or indirectly from the sale of sexual services.

[192] Section 286.2(3) creates a rebuttable presumption that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is proof that the person received a financial or other material benefit from those services.

[193] The parties in this case differ in their interpretation of the impact of the exceptions contained in section 286.2(4), and the exceptions to the exceptions contained in section 286.2(5).

[194] Section 286.2(4) contains exceptions to the prohibition on receiving material benefits. The section is drafted so as to recognize previous jurisprudence regarding non-exploitative relationships. Subparagraphs (a), (b) and (c) incorporate previously recognized common law defences.

[195] Subsection (d) exempts those who received the benefit 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. The words "counsel" and "encourage" have extremely broad meanings. For example, the definition of *"counsel"* is *"advice given especially as a result of consultation".* The definition of *"encourage"* is *"to inspire with courage, spirit or hope; to attempt to persuade; to spur on; or to give help or patronage to".* The subsection is extremely broadly drafted. The qualification for the exemption that the person receiving the benefit cannot counsel or encourage the sex worker makes the exception extremely restrictive. The result is potential criminal liability for individuals receiving a benefit directly or indirectly from a sex worker for a service or good is even where the benefit is proportionate to the value of the service or good provided.

[196] The exceptions contained in section 286.2(4) are complicated by "exceptions to the exceptions" contained in section 286.2(5), which disqualify individuals from the exceptions in certain circumstances. Those circumstances include those engaged in obvious parasitic relationships, including those using violence, intimidation or coercion; those abusing a position of trust, power or authority; and those providing drugs or alcohol to the sex worker for the purpose of aiding or abetting the provision of sexual services for consideration. Those circumstances are not present in this case. Section 286.2(5)(d) also refers to those who commit the offence of procuring. The offence of procuring has been broadened by the inclusion of the word "harbouring". Anyone committing the broadly defined offence of procuring does not have an exception to an offence under the material benefit section.

[197] The Applicants submit that the inclusion of section 286.2(5)(e), aimed at those who received the benefit in the context of a commercial enterprise, effectively negates the availability of the exceptions in section 286.2(4)(c) and (d). The Applicants suggest that the term *"commercial enterprise*" is so broad that it would capture any two people who work together to generate revenue. The Applicants suggest that all but prevents the sex worker from taking place in a fixed, indoor location unless the sex worker buys an apartment or house and operates the business as an individual.

[198] The Crown submits that in the context of the *PCEPA*, the term *"commercial enterprise"* necessarily involves third-party profiteering. The immunity from prosecution for the sale of one's own sexual services means that individuals who sell their own sexual services, whether independently or cooperatively from a particular location, cannot be prosecuted.

[199] An individual involved in selling their own sexual services is involved in commercial activity. Does that mean that they are involved in a commercial enterprise? Webster's dictionary defines the word *"enterprise"* as *"A unit of economic organization or activity".* Black's law dictionary defines the word *"enterprise"* as *"a corporation, business, firm, company, or registered group with a designated purpose".* Black's defines the word *"business",* indicating *"This word embraces everything about which a person can be employed. That which occupies the time, attention and labour of people for the purpose of a livelihood or profit*".

[200] I am not persuaded that the term *"commercial enterprise"* should be interpreted as broadly as the Applicants suggest. The immunization from prosecution for one who sells their own sexual services protects them from prosecution for the sale of their own sexual services. If a sex worker is sophisticated enough to navigate the legislation correctly, they would still be immune from prosecution if they sold sexual services cooperatively with another individual or individuals, for example, by sharing space. However, as a practical matter, given the criminalization of receiving a financial or other material benefit, directly or indirectly, it would be a minefield to successfully navigate while working cooperatively with other individuals without violating the law. The likelihood of doing so successfully is minimal for many sex workers.

[201] I am of the view that the legislation would allow a sex worker who is selling only their own sexual services to retain the services of third parties such as drivers, receptionists, assistants or security personnel. However, the complexity involved in doing so while pooling resources with other sex workers without running afoul of the term *"commercial enterprise*" would make it difficult to impossible for the vast majority of sex workers. Working cooperatively with other sex workers to achieve health and safety related gains by means such as sharing space, sharing staff, creating and maintaining joint safety measures and support networks among sex workers would become a trap for many sex workers, rendering them liable for offences under s. 286.2.

[202] The objects of the legislation link procurement to prostitution and the development of economic interests in the exploitation of others. It starts with an assumption that all third parties involved in prostitution are profiteers in a parasitic relationship with the sex worker. That assumption simply is contrary to the evidence in this case.

[203] What the section clearly prohibits is the scenario where a third-party manager hires or coordinates the activities of a sex worker or workers and profits from that. A third-party manager who is not engaged in coercion and simply fulfils the same sorts of roles that they would in another industry clearly commits an offence section 286.2. Any employee of a third-party manager who provides services such as security, transportation or administrative services commits an offence under section 286.2, even

if they are not engaged in coercion and are simply fulfilling the same sort of role that they would in another industry.

[204] Sex workers who pool resources in order to engage in the sex industry in a way which reduces risk through shared secure locations, shared staff and shared security arrangements who do not have a very high degree of sophistication regarding the law face a substantial likelihood of running afoul of the material benefit provisions and exposing themselves to criminal liability. Any employees of sex workers who are pooling resources and who lack a high degree of sophistication regarding the law risk potential criminal liability, even in relationships free of coercion in which the employee simply provides the same types of services that a similar employee would provide in a different industry. The result is liability for sentence of up to 10 years imprisonment.

[205] The overall effect of the material benefits provisions, including the exceptions and the exceptions to the exceptions, is to prohibit sex workers from working with third-party managers, and make it extremely difficult and fraught with the risk of criminal liability for sex workers to pool resources in ways which minimize risks to the physical and emotional health of the sex workers. The provisions also expose third parties, including employees, who are in non-exploitative, non-coercive relationships with sex workers to criminal liability. The prohibition on involvement with third-party managers disproportionately impacts those sex workers most at risk – the inexperienced and/or marginal sex worker. It is logical that it would also deter many third parties who are not part of the criminal element from becoming involved in the sex industry. What it is unlikely to deter is the involvement of the criminal element as third parties in the sex industry.

[206] Given this impact, the material benefits provisions deprive sex workers and other individuals within the expected reach of the provisions of the right to liberty provided in section 7.

[207] The preamble of the legislation outlines Parliament's concerns regarding the sex industry. Those concerns listed include exploitation and the risk of violence to those engaged in the industry. Aspects of the material benefits provisions actually have the effect of increasing the risk of violence to and the exploitation of sex workers. Those aspects of the provisions bear no relationship to some of the stated purposes of the law. The effect is arbitrary.

[208] Parliament could potentially have focused the effect of the law on third parties who are in coercive, exploitative relationships with sex workers. However, the provisions are drafted so broadly that they expose sex workers who desire to work cooperatively with other sex workers to the risk of criminal liability, and employees in noncoercive, non-exploitative relationships with sex workers to criminal liability. Sex workers who lack the desire, sophistication and means to work independently are prevented from exploring the possibility of relationships with third-party managers on terms acceptable to the sex worker which might enhance the health and safety of the sex worker. The provisions are overly broad.

[209] The effects of the provisions significantly impact the security of the person interest provided by section 7. Legislation for which the stated purposes include

eliminating exploitation and reducing the risk of violence to sex workers actually has the effect of exposing sex workers to an increased risk of exploitation by discouraging all third parties other than the criminal element from becoming involved in the sex industry. The provisions also increase the risk of violence by preventing or restricting the way in which many effective safety measures can be implemented by sex workers. The result is a law which has grossly disproportionate effect.

[210] The material benefit provisions of s.286.2 violate s. 7 of the *Charter.*

Section 1

[211] The Crown emphasizes the pressing and substantial objectives of the legislation as outlined in the preamble to the Technical Paper. Some of those concerns are related to gender inequalities, the furtherance of pre-existing power imbalances, the development of economic interests in the prostitution of others and the incentive for exploitative conduct created by that interest. The Technical Paper also indicates that prostitution is extremely dangerous regardless of the venue or legal framework in which it takes place.

[212] The Crown further suggest that the measures chosen to achieve the objective are proportional, meeting the requirements of a rational connection, minimal impairment, and proportionality between the deleterious effects of the measures and their salutary effects.

[213] Some of the effects of section 286.2 actually make sex work more dangerous. The result is the lack of a rational connection to the objective, a failure to meet the minimal impairment test, and a lack of proportionality. Similarly, the criminalization of third parties who are in non-coercive, non-exploitative relationships with sex workers fails to meet the minimum impairment requirement, or the proportionality requirement.

[214] The limits on s. 7 rights created by Section 286.2 have not been shown by the Crown to be reasonable limits justified under section 1 of the *Charter*.

Section 2(d) Issues

[215] Given my decision with respect to s. 7, it is not necessary for the court to rule on the issue of whether the provision also violates s. 2(d) of the *Charter.*

IX. CONCLUSION

[216] I find sections 286.4, 286.3 and 286.2 of the *Criminal Code* to be unconstitutional.

Released: February 21, 2020

Signed: Justice A. T. McKay