Court File No. CV-21-00659594-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN ALLIANCE FOR SEX WORK LAW REFORM, MONICA FORRESTER, VALERIE SCOTT, LANNA MOON PERRIN, JANE X, ALESSA MASON and TIFFANY ANWAR

Applicants

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

ATTORNEY GENERAL OF ONTARIO

Intervener

FACTUM OF THE INTERVENER THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

August 10, 2022

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

André Schutten

Counsel for the Intervener,
The Association for Reformed Political Action (ARPA) Canada

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I. Overview

1. Sexual touching without consent is sexual assault. Does the *Charter* require that men be legally permitted to secure consent to sexual touching through payment? Or do the *Charter* values of equality and dignity justify the continued prohibition of such transactions? Sexual encounters between human beings are profoundly personal and intimate, but the intimacy is good only when it is voluntarily chosen by all concerned, and not procured. When 'consent' is not voluntarily given, but is instead purchased, the intimacy of sex instead works incredible damage on both personal and societal levels. By commercializing sex, prostitution imposes upon the sex act the hard realities of contractual obligations and the inequalities of bargaining power so often present in the world of commerce. The commercial exchange of sex is inherently exploitative in the sense that it takes place within conditions of inequality and power imbalance, along lines of sex/gender, race, and economic status. Those imbalances are exploited by the purchaser for their own gratification, often at great personal cost to the seller, reinforcing and perpetuating those conditions of inequality.

2. Canadian judicial and legislative institutions have consistently recognized the vulnerability created and the dignity denied when sex is commercialized through prostitution. The harms of commercializing sex are almost exclusively imposed upon and experienced by women and girls, who are by far the vast majority of sellers, while the nearly universal purchasers of sex are men.[1] This factum will therefore follow the approach of international and current Canadian law and focus on the effect of prostitution on women and girls.[2]

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[1] Bruckert cross Q 546, JAR Tab 47, at p 3795. See also, *Bedford v Canada*, 2010 ONSC 4264, Applicant's Book of Authorities [**ABA**] **Tab 3**, at paras 119, 121 [*Bedford v Canada*].

[2] Note that while the applicants prefer to identify themselves as "sex workers" the term "sex work" is defined primarily in scholarly literature and, as a term, is not easily defined in a manner required in a legal setting. In our factum we will use the term "seller." See, Debra Haak, "Re(De)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking" (2019) 40 Windsor Rev Legal Soc Issues 67 at 71, 78, 88-89. As opposed to "sex work," prostitution does have a concise legal definition—the exchange of sexual services of one person in return for payment by another. See also, *Reference re ss 193 and 195.1(1) of the Criminal Code*, [1990] 1 SCR 1123, **ABA**

3. In 2014, Canada joined Sweden, Norway, and Iceland in enacting what these countries and others (now including France, Ireland, Northern Ireland, and Israel) accept as the best way to address prostitution in a free, liberal democratic society.[3] The *Protection of Communities and Exploited Persons Act* ("*PCEPA*")[4] gave expression to the Canadian values of equality, particularly equality between male and female persons, and human dignity as Parliament took seriously its commitment to eliminating discrimination and violence towards women and children.[5]

4. Focusing on the rights to equality, and expressive and associative freedom, ARPA argues:

a. *PCEPA* fits within s. 15(2) of the *Charter* as recognized by the *Charter* jurisprudence affirming the state's role in promoting equality for vulnerable and gendered groups;

b. *PCEPA* is structured to only minimally, and justifiably, limit freedom of expression. Expression for the purposes of prostitution sits at the periphery of s. 2(b) protection. Canadian law is familiar with addressing s. 2(b) concerns in this context of preventing such sexual and gendered harms; and

c. Prostitution is not protected by s. 2(d) of the *Charter*, the purposive interpretations of which focuses on the promotion of a vibrant civil society where the voices of the marginalized are heard. Canadian jurisprudence recognizes prostitution as exploitative, and the exchange of sexual services for consideration as a criminal act, which is fundamentally at cross-purposes with s.2(d).

Tab 45, at 1159, 68 Man R (2d) 1 [*Prostitution Reference*]. See also *R v Mara*, (1996) 27 OR (3d) 643, ARPA Book of Authorities [**ARPABA**] **Tab 12**, at 14, 133 DLR (4th) 201 (On CA); *R v Tremblay*, [1991] RJQ 766, **ARPABA Tab 5**, at 22-29, 41 QAC 2441; *R v Juneja*, 2009 ABQB 243, **ARPABA Tab 11**, at para 27; *R v Evans*, 2017 ONSC 4028, **ARPABA Tab 9**, at para 136.

[3] The European Parliament has endorsed the same approach as Canada: European Union, Press Release, "Punish the client, not the prostitute" (26 February 2014), **ARPABA Tab 26**.

[4] *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, **ARPABA Tab 21**.

[5] *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 at 17 art 6, **ARPABA Tab 19**, (entered into force 3 September 1981), which reads: "States Parties shall take all appropriate measures, including legislation, to supress all forms of traffic in women and exploitation of prostitution of women".

II. Substantive Equality Making a Substantive Difference – *PCEPA* Inspired by s. 15(2)-style Amelioration

A. Law's Longstanding Recognition that Prostitution is a Form of Gendered Harm

5. Canadian courts have long recognized that prostitution is inherently harmful to, and exploitative of, women. In the *Prostitution Reference*, Dickson C.J. spoke of the "exploitation, degradation and subordination of women that are part of the ***contemporary reality*** of prostitution."[6] Two years later, in *R v Downey*, Cory J, reflecting on reports commissioned by Parliament, notes that sellers "have no control over their lives, they are subject to constant exploitation."[7] Furthermore, sellers are a "particularly vulnerable segment of society" who suffer "cruel abuse" at the hands of others.[8] These are not outdated views. Recently, this court found that prostitution is an "extremely dangerous activity" often resulting in physical and psychological harm to the sellers, perpetrated both by purchasers and third parties, regardless of setting or context.[9]

6. When people are consistently abused and exploited in and by a particular activity, the harm associated with that activity always ripple beyond the immediate victim, affecting the broader community. Justice Cory recognized "the tragedy and the gravity of the social problem posed by prostitution."[10] The Supreme Court of Canada has consistently shown concern for the vulnerability of those who sell sex – a population disproportionately made up of women and girls. As recognized by this court four years ago:

> Prostitution reinforces gender inequalities in society at large by normalizing the treatment of primarily women's bodies as commodities to be bought and sold. Prostitution harms everyone by sending the message that sexual acts can be bought by those with money and power. Prostitution allows men, who are primarily the purchasers of sexual services, paid access to female bodies, thereby demeaning and degrading the human dignity of all women and girls by entrenching a clearly gendered practice in Canadian society.[11]

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[6] *Prostitution Reference*, *supra* note 2, **ABA Tab 5**, at 1134-35 (Emphasis added).
[7] *R v Downey*, [1992] 2 SCR 10, **ARPABA Tab 8,** at 32, 90 DLR (4th) 449 [*Downey*].
[8] *Ibid* at 39. See also *Bedford v Canada*, *supra* note 1, **ABA Tab 3,** at para 293.
[9] *R v Boodhoo and others*, 2018 ONSC 7205, Ontario Book of Authorities [**OBA**] **Tab 18**, at para 52 [*Boodhoo*].
[10] *Downey*, *supra* note 7, **ARPABA Tab 8,** at 39 (emphasis added).
[11] *Boodhoo*, *supra* note 9, **OBA Tab 18**, at para 52.

7. Consistent with Canadian courts' understanding of the harms inherent in the commercial exchange of sex, *PCEPA* is founded on an understanding that prostitution is an inherently gendered activity that is inconsistent with substantive equality for women in Canada. Parliament has a vital role to play in protecting the equality rights of vulnerable groups and subgroups, such as women and girls, particularly within the context of prostitution—an inescapably dangerous activity.[12] Justices McLachlin (as she then was) and Iacobucci say the following in an analogous context: "Courts do not hold a monopoly on the protection and promotion of rights and freedoms. Parliament also plays a role in this regard and is often able to act as a ***significant ally for vulnerable groups***. This is especially important to recognize in ***the context of sexual violence***."[13]

B. Prostitution Hinders the *Charter*'s Promise of Substantive Equality

8. Substantive equality is the driving force behind s. 15 of the *Canadian Charter of Rights and Freedoms*.[14] Substantive equality is pursued through both s. 15(1) and s. 15(2), which must be read harmoniously.[15] Subsection (1) prohibits discrimination by governments, whereas subsection (2) empowers governments to "pro-actively *combat* discrimination."[16] Subsection (2) affirms that substantive equality requires *positive action* when it comes to improving the situation of a group suffering from a societal disadvantage.[17] A robust application of substantive equality is necessary for a just society because "identical treatment may frequently produce serious inequality."[18]

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[12] *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act (Updated December 1, 2014)*, **JAR Tab 110** at 11150.
[13] *R v Mills*, [1999] 3 SCR 668, **ARPABA Tab 13,** at para 58, 180 DLR (4th) 1 (emphasis added).
[14] Part I to the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, **ARPABA Tab 18**.
[15] See Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2007) (loose-leaf updated 2019, release 1) vol 2 at 55-65, **ARPABA Tab 29**. Substantive equality in particular as between men and women is also embodied elsewhere in the *Charter*, particularly s. 28, see generally, Beverley Baines, "Section 28 of the *Canadian Charter of Rights and Freedoms:* A Purposive Interpretation" (2007) 17 CJWL 55 at 64, **ARPABA Tab 22**.
[16] *R v Kapp*, 2008 SCC 41, **ABA Tab 32,** at para 37 (emphasis added).
[17] Jena McGill, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013), 63 SCLR (2d) 521 at para 9, **ARPABA Tab 32**.
[18] *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, **ARPABA Tab 2** at 164, 56 DLR (4th) 1.

9. *PCEPA* is rooted in the principles that animate s. 15(2) and seeks to protect the substantive equality of particularly vulnerable women and children. Striking down *PECEPA* would be a setback to the promise of substantive equality by creating a legal market for both sex and for consent. Such an approach would suppose that all parties to the "contract for sexual services" are equal in bargaining power and can equally walk away from the transaction. Such an approach would represent formal, rather than substantive, equality as it would treat every actor – pimp/manager, john/purchaser, and seller/provider – identically, thereby ignoring the power dynamics which have inhered in prostitution for centuries and continue to exist today. The idea that women or children who are engaged in prostitution are engaging in a self-validating exercise of free choice borders on absurdity, by premising the legal analysis on a demonstrably flawed factual assumption.[19]

10. In any event, even if the choice to sell sex is voluntary, "[w]omen's voluntary engagement in prostitution cannot be extracted from the social conditions in which such decisions are made."[20] If prostitution allows men paid access to female bodies, it has a direct effect on the way society perceives women.[21]

11. Section 15 of the *Charter* allows for and even demands the government recognize the gendered reality of prostitution. In her majority opinion on a similar issue, Justice Bertha Wilson writes, "Nevertheless, there are ***certain biological realities that one cannot ignore and that may legitimately shape the definition of particular offences***."[22] Wilson J recognizes that, particularly as regards sexual equality, s. 15 supports a substantive conception of equality grounded in

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[19] An exchange of money for sexual services always contains the potential for violence. See Debra Haak, "The Case of the Reasonable Hypothetical Sex Worker" (2022) 60:1 Alta L Rev at 19-21 (forthcoming), **ARPABA Tab 28**.
[20] Maddy Coy & Janine Benedet, "Prostitution on a Continuum of Violence Against Women" (Paper delivered at National Research Day, Simon Fraser University, 9 November 2012), **ARPABA Tab 24**.
[21] *Technical Paper*, **JAR Tab 110** at 11150.
[22] *R v Hess; R v Nguyne*, [1990] 2 SCR 906, **ARPABA Tab 10,** at 929, 79 CR (3d) 332 (emphasis added).

biological realities. Although Wilson J was speaking in the context of a law which made it an offence when a man engages in sexual activity with a female person under the age of 14, the principles are transferable to the offences contained in *PCEPA*. It is true that not all sellers of sex are women, but the vast majority are.[23] The biological realities of prostitution show that, when analyzing *PCEPA* through the twin lenses of section 15, the court must not forget to bring into focus the subsection (2) lens.

12. *PCEPA* recognizes the biological reality that prostitution exists within a gendered supply-and-demand framework. Men constitute the demand and women generally the supply. In response to the demand, *PCEPA* asserts that women's bodies, sex, and consent are not for sale. *PCEPA* inverts the power imbalance between the one demanding sex and the one supplying it. By criminalizing the (overwhelmingly male) purchase of sex, but not the (overwhelmingly female) sale of sex, *PCEPA* "raises her status; [and] lowers his privilege"[24] Without *PCEPA*, a privilege persists which assumes the right to purchase and use other people, thereby commodifying them and making a mockery of their "equal worth and human dignity."[25] Through its targeted, rather than blanket prohibition, *PCEPA*'s asymmetry has a substantive equalizing effect.[26]

C. *PCEPA* Fits the Definition of an Ameliorative Law

13. For s. 15(2) to be triggered, the "law, program or activity" must meet the qualifications for a "genuinely ameliorative program."[27] Amelioration must either be the sole purpose of the law, program, or activity, or part of several of its objectives.[28] However, there is "little justification for

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[23] See Dr. Krüsi Report, JAR Tab 54, at p 4783, 4785; Dr. Benoit Report, JAR Tab 42, at p 3089.
[24] Catharine A. MacKinnon, "Trafficking, Prostitution, and Inequality" (2011) 46:2 Harv CR-CCL Rev 271 at 301, **ARPABA Tab 31**.
[25] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, **ABA Tab 30**, at para 53, 151 DLR (4th) 577.
[26] Catharine A. MacKinnon, "Trafficking, Prostitution, and Inequality" (2011) 46:2 Harv CR-CCL Rev 271 at 301, **ARPABA Tab 31**.
[27] *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37, **ARPABA Tab 1**, at para 44 [*Cunningham*].
[28] *Ibid*, at para 45.

requiring the ameliorative purpose to be the sole object of a program."[29] A legal objective must always be analyzed in its full context. It should "focus on the ends of the legislation rather than on its means, be at an appropriate level of generality, and capture the main thrust of the law in precise and succinct terms."[30] Therefore, for *PCEPA* to be a "genuinely ameliorative program" for the purposes of s. 15(2), it must have at least one of its objects must be for an ameliorative purpose, and that purpose must be analyzed within the entire context of the law. Several factors demonstrate that *PCEPA* is a "genuinely ameliorative program."

14. The first factor is *PCEPA*'s short title which provides evidence of its purpose: the *Protection of Communities and Exploited Persons Act*. A law's title may be evidence of legislative purpose. As Wilson J said in *R v Thompson*, "When Parliament enacted the amendments to the *Criminal Code* to establish Part IV.1, they did so through the *Protection of Privacy Act* (citations omitted). This legislation, in my view, was enacted to do just that, protect privacy."[31] In similar fashion, *PCEPA* was "enacted to do just that," protect communities and exploited persons.

15. The second factor is *PCEPA*'s preamble. Four recitals illustrate *PCEPA*'s ameliorative design focusing on exploited women and girls' disadvantage. Like short titles, preambles illuminate legislative purpose.[32] Three recitals identify the "mischief" or the harm to be remedied:

> **Whereas** the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;
>
> **Whereas** the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;
>
> **Whereas** it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

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[29] *Kapp*, *supra* note 16, **ABA Tab 32**, at para 51.
[30] *R v Moriarity*, 2015 SCC 55, **ABA Tab 26**, at para 26.
[31] *R v Thompson*, [1990] 2 SCR 1111, **ARPABA Tab 15**, at 1158, 73 DLR (4th) 596 (La Forest performs a similar succinct analysis at 1160).
[32] Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc., 2016) at 163, **ARPABA Tab 35**.

The last of the four sets out the primary ameliorative "end" of the legislation.

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

16. The purpose of *PCEPA*, then, is to ameliorate the position of victims of prostitution by imposing sanctions on those who would perpetuate a market for the purchase and sale of sexual services, while – at the same time – providing immunity for the vulnerable, exploited, and abused to exit that market.[33] The preambular recitals reveal a distinct remedial flavour – a particular concern for the sellers who experience the worst prostitution has to offer. In sum, the recitals above make it clear that Parliament was guided by that which Chief Justice Dickson and Justice Cory had observed decades earlier – that prostitution is debasing, and constitutes a social problem, and that its (gendered) victims' positions require amelioration.

D. *PCEPA*'s Ameliorative Purpose Applies Despite the Applicants' Identities

17. The applicants in this case are members of the broader group whose position *PCEPA* seeks to ameliorate. The applicants seek to argue that PCEPA's impact on them personally is negative.[34] However, this claim does not end the *Charter* analysis for two reasons. First, the applicants cannot rebut *PCEPA*'s ameliorative purpose simply by applying the term – sex worker – to themselves. Simply put, the Applicants do not represent the experience of most Canadian sellers. Second, in the quest for equality, the *Charter* permits a law to have some detrimental effects on certain privileged individuals (the applicants) within the larger group (women), if it effectively ameliorates the situation of the disadvantaged sub-set within that group.

18. On the first point, how a seller of sex subjectively experiences prostitution varies to some degree. The vulnerable women to whom *PCEPA* is most directly targeted, do not regard

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[33] *R v NS*, 2022 ONCA 160, **ABA Tab 4**, at para 59 [*NS*]. See also *R v Alcorn*, 2021 MBCA 101, **ARPABA Tab 6**, at para 14.
[34] Factum of the Applicants, at para 79.

prostitution as a form of agency; they experience a lack of choice and self-determination in their everyday lives.[35] It is settled law that prostitution inflicts structural and broad societal deleterious effects on most women and children. Section 15(2) of the *Charter* says that Parliament is permitted to protect them; there is no constitutional requirement that those women and children simply put up with those deleterious effects, or be willing to tolerate them.[36] The simple fact that, in this case, women are intervening on both sides of the issue illustrates that this court should not consider this as a simple matter of *PCEPA* being a failed ameliorative law harming rather than helping the intended beneficiaries. Instead, as explained above, the law distinctly aims at aiding those who experience the dehumanizing effects of prostitution and want to leave it behind.

19. Secondly, in the quest for equality, the *Charter* permits a law to have some detrimental effects on some individuals within a broader disadvantaged group while working to improve the station of its particularly disadvantaged members. The current situation is akin to *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*[37] where the Supreme Court considered the validity of the *Métis Settlement Act* ("*MSA*"). The *MSA* did not permit Status Indians to become members of any formal Métis settlement in Alberta. The court upheld the *MSA*'s imposition of certain prohibitions on Status Indians, who as members of the Indigenous community are part of a historically disadvantaged group, in order to benefit another subset of the Indigenous community—the Métis people living in Alberta.[38] In its decision, the court paid particular attention to the title, preamble, and individual recitals of the *MSA*, all of which spoke of

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[35] See e.g. Redsky Affidavit at para. 76, **JAR, Tab 67**, pp 6421-2; Rubner Affidavit at para 42, **JAR, Tab 83**, p 8170, and McGuire-Cyrette Affidavit at paras 19-20, **JAR, Tab 64**, pp 6115-6.
[36] Debra Haak, "Re(De)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking" (2019) 40 Windsor Rev Legal Soc Issues 67 at 77-78, **ARPABA Tab 27**.
[37] *Cunningham*, *supra* note 26, **ARPABA Tab 1**.
[38] *Metis Settlement Act*, RSA 2000, c M-14, s 0.1, **ARPABA Tab 20**.

a desire to preserve "unique Métis heritage."[39] In *Cunningham*, as in the instant case, the title and the preamble, including its particular recitals, were of particular importance.[40]

20. This is not to draw moral equivalencies between the Indigenous community in Alberta and those who sell sex. However, the approach the court took when dealing with a policy that seeks to ameliorate the situation of an intersectional group is instructive. In *Cunningham*, the Supreme Court upheld a *good*-faith effort at amelioration of the situation of a subgroup, despite some correlated detriment to certain members of the broader group who also face historic discrimination. Such an approach embodies the substantive equality approach adopted as s. 15's "animating norm" by Canadian courts.[41] A similar approach should be applied to the relationship between *PCEPA*, women and children as broadly disadvantaged groups, and sellers as a sub-group subject to a set of unique disadvantages and stereotyping requiring particular amelioration.

21. *Quebec (Attorney General) v Alliance*[42] and its companion case *Centrale des syndicats du Québec v Québec (Attorney General)*[43] are distinguishable.[44] In both cases, the group the law sought to benefit and the group challenging the law were the same and united in their outlook on the law. With regard to prostitution, some women, including some of the applicants, argue that prostitution can be empowering while others, including a number of interveners, argue that prostitution disenfranchises and humiliates them. In neither *Services Sociaux* nor *Centrale* did anyone argue that pay inequity was somehow a positive for women — as might be expected. Therefore, the Supreme Court's approach in *Cunningham* is the more applicable analytical framework. Under the *Cunningham* framework, Parliament was well within its constitutional

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[39] *Cunningham*, *supra* note 26, **ARPABA Tab 1**, at paras 7, 18, 33, 54, 63, 67, 69-75, 86.
[40] *Ibid*, at paras 18, 63, and 69.
[41] See *Fraser v Canada (Attorney General)*, 2020 SCC 28, **ABA Tab 35**, at para 42 [*Fraser*].
[42] 2018 SCC 17, **ABA Tab 37** [*Quebec (AG) v Alliance*].
[43] 2018 SCC 18, **ARPABA Tab 4** [*Centrale v Quebec*].
[44] *Quebec (AG) v Alliance*, *supra* note 41, **ABA Tab 37,** at paras 31-32; *Centrale v Quebec*, *supra* note 42, **ARPABA Tab 4**, at paras 37-41.

boundaries when it identified and chose to ameliorate the position of a particular subset of women – those who suffer exploitation due to their particular vulnerabilities – through *PCEPA*.

III. Delineating Freedom of Expression's Ambit

A. Soliciting Commercial Sexual Transactions lands at s. 2(b)'s Periphery

22. The values which underly freedom of expression are truth-seeking, participation in political decision-making, and individual self-fulfillment and human flourishing.[45] While the communications prohibitions in *PCEPA* engage freedom of expression, as Chief Justice Dickson observed, "it can hardly be said that communications regarding an economic transaction of sex for money lie at, *or even near*, the core of the guarantee of freedom of expression."[46]

B. The Well-Established Connection between Objectification and Harm in s. 2(b)

23. The social ills that arise from the objectification of women have been well noted by Canadian courts. The Supreme Court has explicitly considered harm arising from societal attitudes that commodify the female body in the context of s. 2(b). In a context that parallels prostitution – pornography – Sopinka J's majority opinion noted, citing *R v Red Hot Video Ltd.*:

> there is a growing concern that the ***exploitation of women and children***, depicted in publications and films, can, in certain circumstances, ***lead to "abject and servile victimization***" (at pp. 43-44). … ***if true equality between male and female persons is to be achieved***, we cannot ignore the threat to equality resulting from exposure to audiences of certain types of violent and degrading material. Materials portraying ***women as a class as objects for sexual exploitation and abuse have a negative impact on "the individual's sense of self-worth and acceptance.***"[47]

Thus, the themes recognized by the Supreme Court and discussed above – equality and exploitation of women and children – feature as equally relevant considerations in the s. 2(b) context as they

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[45] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, **ABA Tab 43**, at 976, 58 DLR (4th) 577 [*Irwin Toy*]
[46] *Prostitution Reference*, *supra* note 2, **ABA Tab 45**, at 1135 (Emphasis added). Cited with approval in *NS*, *supra* note 32, **ABA Tab 4**, at para 163.
[47] *R v Butler*, [1992] 1 SCR 452, **RBA Tab 23**, at 496-97, 89 DLR (4th) 449 (emphasis added).

did in the s. 15 context. These particular harms become all the more relevant in the context of s. 2(b) because, when Parliament crafts legislation that purposefully aims merely at harmful physical consequences of particular expressive conduct, rather than at the substantive content of the expression *per se*, the fundamental purpose of freedom of expression is not undermined.[48] *PCEPA*'s criminal prohibitions concerning advertising and communicating the sale of sex are focused on the exact problems first identified in the *Prostitution Reference*.[49] Therefore, when this Court begins its constitutional analysis, it ought to take into account that there exists a "causal link between what a person says or expresses and the undesirable behavior of his or her audience."[50]

C. *PCEPA* Respects Freedom of Expression, However Perimetric It May Be

24. From *R v Keegstra*[51] through *R v Butler*,[52], and culminating in *R v Sharpe*[53], the Supreme Court of Canada employs a "close reading" of impugned legislation requiring courts to carefully link the restrictions on freedom of expression to the identified harms that may arise in the absence of the prohibition.[54] When legislation "recognizes the importance of free expression and the danger of a sweeping criminal prohibition"[55] a court should take notice and analyze the impugned prohibition accordingly. In keeping with its equality-enhancing asymmetrical consequences design, *PCEPA* avoids making a sweeping criminal prohibition with the "immunity" provision—286.5(1)-(2)—which creates a broad class of people who would be exempt from the provisions that engage s. 2(b)—the advertising and communicating provisions.

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[48] *Irwin Toy*, *supra* note, **ABA Tab 43**, 44 at 975-76.
[49] Lisa Dufraimont, "Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7" (2014), 67 SCLR (2d) 483 at para 35, **ARPABA Tab 25**.
[50] Peter J. Carver, "A Principle of Vital Importance": The Supreme Court's Approach to Purposeful Limits on expression in Section 2(b)" (2017), 78 SCLR (2d) 191 at para 20, **ARPABA Tab 23**.
[51] [1990] 3 SCR 697, 114 AR 81, **RBA Tab 28**.
[52] *Supra* note 46, **RBA Tab 23**.
[53] 2001 SCC 2, **ARPABA Tab 14** [*Sharpe*].
[54] Peter J. Carver, "A Principle of Vital Importance": The Supreme Court's Approach to Purposeful Limits on expression in Section 2(b)" (2017), 78 SCLR (2d) 191 at para 48, **ARPABA Tab 23**.
[55] *Sharpe*, *supra* note 52, **ARPABA Tab 14**, at para 73.

25. The tailored prohibitions are in keeping with the scheme of the entire act, another factor that should weigh into the interpretation of the advertising and communicating provisions. Legislation is "to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[56] Having explored the intention of Parliament above, *PCEPA*'s scheme now takes centre stage. Exemptions to the broader criminal sanctions are not simply a feature of the provisions engaging s. 2(b). Instead, they are a feature of the act as a whole.[57] The exemptions and immunities provided for in *PCEPA* demonstrate that *PCEPA* is no "sweeping criminal prohibition." Rather, it is tailored with an eye to the ambit of free expression, to what is and is not appropriate for the criminal law to prohibit in the expressive context. In the alternative, if the communication for the purposes of selling sex is protected under section 2(b), exemptions notwithstanding, the limit is easily justified under section 1, as the Ontario Court of Appeal has ruled in *R v N.S.*[58]

IV. Freedom of Association Promotes a Particular Human Good

A. Equality is s. 2(d)'s Lodestar

26. Like freedom of expression, the foundation of freedom of association specifically protects the well-being of Canada's social fabric. Chief Justice Dickson identifies the central purpose of s. 2(d)'s conceptual range as the recognition that human endeavors are profoundly social in nature.[59] More recently Chief Justice McLachlin and Justice LeBel describe s. 2(d) as "essential to the development and maintenance of the vibrant civil society upon which our democracy rests" and "root[ed] in the protection of religious minority groups."[60] The jurisprudence has evolved such

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[56] *Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27, **ARPABA Tab 17** at para 21, 36 OR (3d) 418. See also, *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, **ARPABA Tab 3**, at para 26.
[57] See e.g., *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 s. 286.2(4), **ARPABA Tab 21**.
[58] *NS*, *supra* note 32, **ABA Tab 4**, at paras 155-163.
[59] *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313, **ARPABA Tab 16**, at para 86, 78 AR 1.
[60] *Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1, **ABA Tab 47**, at paras 49 and 56 [*Mounted Police*].

that freedom of association has primarily been litigated in a labour context.[61] Fundamentally, however, freedom of association aims at a broader goal—that of empowering vulnerable groups and contributing to a more balanced and equitable society.[62] A purposive approach to freedom of association means that this particular fundamental freedom protects individuals joining together to form associations, collective activity in support of other constitutional rights, and collective activity which enables the vulnerable to correct the power dynamic as they interact with others.[63]

B. Prostitution Incompatible with a Purposive Approach to s. 2(d)

27. A purposive approach to section 2(d), by definition, results in some associational activity falling outside its scope. The type of activity will also be a factor in the s. 1 analysis if a rights violation is made out.[64] But, first and foremost, freedom of association does not protect association in pursuit of criminal, commercial transactions. With *PCEPA* as *prima facie* valid criminal law, a criminal offence occurs whenever sex is negotiated or obtained for consideration.[65] Although sellers are not criminalized, "prostitution itself is now illegal."[66] Consequences stemming from a criminal law, one squarely within Parliament's legislative competence, are part of the social costs of having a criminal justice system.[67]

28. Section 2(d) does not protect certain specific activities (e.g. prostitution), only the associational nature of certain activities. As the Court of Appeal for Ontario has said, *PCEPA* does

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[61] André Schutten, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98 SCLR (2d) 399 at para 1, **ARPABA Tab 33**.
[62] *Mounted Police*, *supra* note 59, **ABA Tab** 47, at 58.
[63] *Ibid* at para 54.
[64] *Ibid* at 61.
[65] Before *PCEPA* was enacted, prostitution was a legal activity. See *Canada (Attorney General) v Bedford*, 2013 SCC 72, **ABA Tab 1**, at para 1.
[66] *R v Alexander et al*, 2016 ONCJ 452, **ARPABA Tab 7**, at para 14. Academics agree with the courts. See for example, Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69 at 79 **ARPABA Tab 34**; Debra Haak, "Re(De)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking" (2019) 40 Windsor Rev Legal Soc Issues 67 at 67, **ARPABA Tab 27**; Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 CJLS 5 at 7, **ARPABA Tab 30**.
[67] *R v Malmo-Levine; R v Caine*, 2003 SCC 74, **RBA Tab 23**, at para 174.

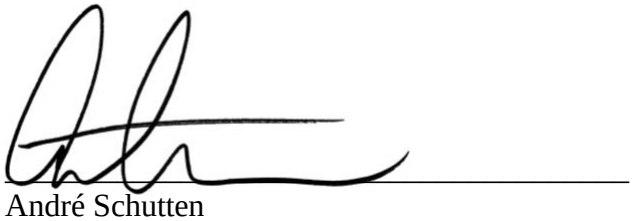
not "prevent individuals from joining or forming an association in pursuit of a collective goal."[68] Section 2(d) is not engaged.

29. Even if associational activity related to prostitution could be said to fall within s. 2(d) protection, it would be at the absolute periphery; it would "do little to promote, and can in fact impede, the values underlying" freedom of association.[69] As previously noted, s. 2(d) exists to promote equality, but prostitution intrinsically subordinates women and works against their equality and against the values underlying the *Charter* and s. 2(d) in particular. In this case, any commercial aspect of prostitution-related activity asserted as coming under the protection of s. 2(d) is analogous to the argument that hate speech comes under the protection of s. 2(b) and should be analyzed in a similar manner under section 1 of the *Charter*.[70]

V. Conclusion

30. Equality for all is a lofty promise, but one nevertheless eminently worthy of pursuit. A legal regime that leaves vulnerable and marginalized individuals to independently manage their risk is cold comfort indeed and would be a triumph of formal equality over substantive equality. A law that promotes the rights of women must extinguish possibilities for their would-be violators and expand possibilities for those who are violated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 10th day of August, 2022.



André Schutten
Counsel for the Intervener, ARPA Canada

[68] *NS*, *supra* note 32, **ABA Tab 4**, at para 169.
[69] See *Mounted Police*, *supra* note 59, **ABA Tab 47**, at para 61.
[70] *Mounted Police*, *supra* note 59, **ABA Tab 47**, at para 61.

VI. Table of Authorities

	Cases	Book of Authority Tab #
1	*Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, 2011 SCC 37	ARPABA 1
2	*Andrews v Law Society of Canada*, [1989] 1 SCR 143 at 164.	ARPABA 2
3	*Bedford v Canada*, 2010 ONSC 4264.	ABA 3
4	*Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42.	ARPABA 3
5	*Canada (Attorney General) v Bedford*, 2013 SCC 72.	ABA 1
6	*Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18.	ARPABA 4
7	*Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.	ABA 30
8	*Fraser v Canada (Attorney General)*, 2020 SCC 28.	ABA 35
9	*Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927.	ABA 43
10	*Mounted Police Association of Ontario v Canada (Attorney General)*, 2015 SCC 1.	ABA 47
11	*Quebec (Attorney General) v Alliance du personnel professional et technique de la santé et des services sociaux*, 2018 SCC 17.	ABA 37
12	*R c Tremblay*, [1991] RJQ 2766.	ARPABA 5
13	*R v Alcorn*, 2021 MBCA 101.	ARPABA 6
14	*R v Alexander et al*, 2016 ONCJ 452.	ARPABA 7
15	*R v Boodhoo and others*, 2018 ONSC 7205.	OBA 18
16	*R v Butler*, [1992] 1 SCR 452.	RBA 23
17	*R v Downey*, [1992] 2 SCR 10 at 32.	ARPABA 8
18	*R v Evans*, 2017 ONSC 4028.	ARPABA 9
19	*R v Hess; R v Nguyne*, [1990] 2 SCR 906.	ARPABA 10
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26	*R v Moriarity*, 2015 SCC 55.	ABA 26
27	*R v NS*, 2022 ONCA 160.	ABA 4
28	*R v Sharpe*, 2001 SCC 2.	ARPABA 14
29	*R v Thompson*, [1990] 2 SCR 1111.	ARPABA 15
30	*Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313.	ARPABA 16
31	*Reference re ss. 193 and 195.1(1)(c) of the criminal code (Man.)*, [1990] 1 SCR 1123.	ABA 45
32	*Re: Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27.	ARPABA 17

	Legislation and Regulations	Book of Authority Tab
33	*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s.52.	ARPABA 18
34	*Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).	ARPABA 19
35	*Metis Settlement Act*, RSA 2000, c M-14.	ARPABA 20
36	*Protection of Communities and Exploited Persons Act*, SC 2014, c 25.	ARPABA 21

	Scholarly Articles and Other Materials	Book of Authority Tab
37	Baines, Beverly, "Section 28 of the *Canadian Charter of Rights and Freedoms*: A Purposive Interpretation" (2007) 17 CJWL 55.	ARPABA 22
38	Carver, Peter J., "A Principle of Vital Importance": The Supreme Court's Approach to Purposeful Limits on expression in Section 2(b)" (2017) 78 SCLR (2d) 191.	ARPABA 23
39	Coy, Maddy & Benedet, Janine, "Prostitution on a continuum of violence against women" (Paper delivered at National Research Day, Simon Fraser University, 9 November 2012).	ARPABA 24
40	Dufraimont, Lisa, "Canada (Attorney General) v. Bedford and the Limits on Substantive Criminal Law under Section 7" (2014) 67 SCLR (2d) 483	ARPABA 25
41	European Union, Press Release, "Punish the client, not the prostitute" (26 February 2014).	ARPABA 26
42	Haak, Debra, "Re(De)fining Prostitution and Sex Work: Conceptual Clarity for Legal Thinking" (2019) 40 Windsor Rev Legal Soc Issues 67.	ARPABA 27
43	Haak, Debra, "The Case of the Reasonable Hypothetical Sex Worker" (2022) 60:1 Alta L Rev (forthcoming).	ARPABA 28
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46	MacKinnon, Catherine A., "Trafficking, Prostitution, and Inequality" (2011) 46:2 Harv CR-CCL Rev 271.	ARPABA 31
47	McGill, Jena, "Section 15(2), Ameliorative Programs and Proportionality Review" (2013) 63 SCLR (2d) 521.	ARPABA 32
48	Schutten, André, "Recovering Community: Addressing Judicial Blindspots on Freedom of Association" (2020) 98 SCLR (2d) 399.	ARPABA 33
49	Stewart, Hamish, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69.	ARPABA 34
50	Sullivan, Ruth, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law Inc., 2016).	ARPABA 35