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

-and-

AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, AWCEP ASIAN WOMEN FOR EQUALITY SOCIETY, BLACK LEGAL ACTION CENTRE, BRIDGENORTH WOMEN'S MENTORSHIP & ADVOCACY SERVICES, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CANADIAN CIVIL LIBERTIES ASSOCIATION, PARENTS AGAINST CHILD TRAFFICKING COALITION, DEFEND DIGNITY, EGALE CANADA AND THE ENCHANTÉ NETWORK, EVANGELICAL FELLOWSHIP OF CANADA, MIGRANT WORKERS ALLIANCE FOR CANADA, ONTARIO COALITION OF RAPE CRISIS CENTRES, SEXUAL HEALTH COALITION, WOMEN'S EQUALITY COALITION, and WOMEN'S LEGAL EDUCATION AND ACTION FUND (LEAF)

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OVERVIEW

1. The *Criminal Code* sections being challenged by the Applicants work together as a comprehensive scheme governing the exchange of sexual services for consideration. The Canadian Civil Liberties Association (CCLA) intervenes in this application to address the freedom of expression implications of this scheme, focusing on the provisions that most directly and explicitly target expressive activity: sections 213,[1] 286.1 and 286.4 (collectively, the "impugned provisions"). These provisions violate section 2(b) of the *Canadian Charter of Rights and Freedoms* and cannot be saved by section 1.

2. Following the Supreme Court of Canada's decision in *Canada (Attorney General) v. Bedford*,[2] Parliament passed the *Protection of Communities and Exploited Persons Act*[3] *("PCEPA")* which criminalized the exchange of sexual services for consideration for the first time. *PCEPA* characterized those who sell sexual services as individuals in need of protection. It created several new offences and made minor amendments to the public communication offence (s. 213(1)(c)) that had been declared unconstitutional.

3. Given the fundamental shift in the law ushered in by *PCEPA*, the CCLA submits that this Court is not bound by the Supreme Court of Canada's decision in *Reference re ss. 193 and 195.1(1)(c)* (the "*Prostitution Reference"*).[4] This decision is largely irrelevant to the issues before this Court.

4. Further, sections 213 and 286.1, when read together, essentially replicate the prohibition on public communication that was struck down in *Bedford* and expand it to all sectors and settings.

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[1] References to section 213 should be read as referring to both sections 213(1) (stopping or impeding traffic) and 213(1.1) (communicating to provide sexual services for consideration).
[2] 2013 SCC 72 [*Bedford*].
[3] SC 2014, c 25.
[4] [1990] 1 SCR 1123 [*Prostitution Reference*].

These provisions significantly restrict the ability of sex workers[5] to communicate about issues that are central to their work and safety in carrying it out. They infringe section 2(b) of the *Charter* and cannot be justified under section 1.

5. The prohibition on advertising set out in section 286.4 also directly targets expressive activity and violates section 2(b). Any salutary benefits that flow from this provision are outweighed by the harms to sex workers disclosed by the evidence. This provision cannot be upheld under section 1.

PART I – FACTS

6. The CCLA accepts and adopts the facts as stated by the Applicants, and specifically notes the following evidence with respect to the impact of sections 213 and 286.1.

- Several of the law enforcement affiants describe how they make use of section 213. Their evidence discloses that they do not use it to criminally charge sex workers but do use it as a justification for stopping and questioning sex workers to investigate various offences.[6] This evidence is supported by the scarcity of case law considering section 213 post-*PCEPA* and by the statistics related to charges included in the Joint Application Record.[7]
- The sex worker affiants and the affiants of those who provide support to sex workers describe the prohibition on communication in certain public places as requiring forced negotiations with clients and the need to work in more isolated, less safe areas.[8] This

[5] The expressive freedoms of the purchasers of sexual services are implicated as well, although the CCLA's focus before this Court is the impact of the provisions on sex workers.

[6] Transcript of the cross-examination of Dominic Monchamp held December 15, 2021 [Monchamp cross] at qq. 49-53, 66-68 and 71-6, Joint Application Record [JAR], Tab 74, pp. 7133-7135, 7140, and 7142-3. Transcript of the cross-examination of Maria Koniuck held September 10, 2021 [Koniuck cross] at qq. 145-161, JAR, Tab 78, pp, 7491-5. The evidence of some of the police witnesses who appeared before the Standing Committee on Justice and Human Rights when it studied *PCEPA* also indicates an intention to use section 213 to investigate other offences and not lay charges: *HOC*, Standing Committee on Justice and Human Rights, *Evidence*, 41-2, No. 38 (9 July 2014) at 10, 20-23, JAR, Tab 124, pp. 11326, 11336-11339.

[7] Affidavit of Kathy Aucoin, sworn December 15, 2021 [Aucoin Affidavit], Exhibit A at p. 10, JAR, Tab 86, p. 8281.

[8] Affidavit of Jenn Clamen, affirmed July 13, 2021 [Clamen Affidavit], at paras. 59-67, JAR, Tab 10, pp. 176-8; Affidavit of Jane X, affirmed July 10, 2021 [Jane X Affidavit], at paras. 11-15, JAR, Tab 17, pp. 1675-7; Public Affidavit of Alessa Mason, affirmed July 13, 2021 [Mason Affidavit], at paras. 19-21, JAR, Tab 19, p. 1705; Affidavit

is consistent with the evidence, accepted by the Supreme Court in *Bedford*, about the impact of the previous prohibition in section 213(1)(c),[9] and also corroborates the expert evidence before this Court.[10]

- Section 286.1 of the *Code* prohibits communications for the purposes of purchasing sexual services (i.e. the other side of the communication exchange) in *any place*, extending the practical scope of the prohibition on communicating for both sex workers and clients. Section 286.1 is not confined to public spaces – it is a broad prohibition on communication in all contexts and sectors.

7. Section 286.4 prohibits the advertising of sexual services; those who advertise their own sexual services are immune from prosecution.[11] This immunity does not extend to those who assist sex workers in advertising their own sexual services.

PART II – ISSUES

8. Sections 213, 286.1 and 286.4 violate section 2(b) of the *Charter* and cannot be justified under section 1.

PART III – SUBMISSIONS

A) *The Interaction of the Impugned Provisions*

9. The CCLA's submissions are focused on the provisions that most directly impact freedom of expression: sections 213, 286.1 and 286.4. These provisions work together, and as part of the *PCEPA* scheme, in ways that have significant impacts on the rights and safety of sex workers.

10. Section 213(1)(c) of the *Criminal Code* was found unconstitutional by the Supreme Court of Canada in *Bedford.* That section made it an offence for anyone in a "public place or in any place

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of Sandra Wesley, affirmed July 12, 2021 [Wesley Affidavit], at paras. 35-38, JAR, Tab 22, pp. 1757-8; Affidavit of Nora Butler-Burke, affirmed July 13, 2021 [Butler-Burke Affidavit], at para. 38, JAR, Tab 25, pp. 2174-5; Affidavit of Ellie Ade-Kur, affirmed July 12, 2021 [Ade-Kur Affidavit], at paras. 29-30, JAR, Tab 29, pp. 2368-9.

[9] *Bedford*, at paras. 68-72

[10] Affidavit of Dr. Chris Bruckert, affirmed July 13, 2021 [Bruckert Affidavit], JAR, Tab 45, p. 3670; Affidavit of Dr. Chris Atchison, affirmed July 13, 2021 [Atchison Affidavit], JAR, Tab 48, pp. 4202-3; Affidavit of Dr. Andrea Krüsi, affirmed July 13, 2021, JAR, Tab 54, pp. 4786-93.

[11] The immunity is set out in section 286.5(1)(b).

open to public view" to "stop or attempt[s] to stop any person or in any manner communicate[s] or attempt[s] to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute."

11. Following *Bedford*, Parliament repealed this subsection, revised some of the language in the remaining portion of section 213(1) (which prohibits stopping or impeding traffic) and added section 213(1.1) which states:

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

12. Although the re-enacted provision is narrower in scope than the provision declared unconstitutional in *Bedford*, it continues to significantly restrict sex workers' expressive rights in a broad range of venues. Moreover, the Supreme Court did not strike down section 213(1)(c) because of the breadth of its geographic scope. The Court found that the communication ban not only displaced sex workers to isolated areas, but also prevented them from bargaining for conditions that would materially decrease their risk.[12]

13. The newly narrowed scope of section 213 must be viewed in conjunction with section 286.1. While section 213 targets communication for the purposes of offering or providing sexual services, section 286.1 makes it an indictable offence to communicate with anyone for the purpose of *obtaining* sexual services for consideration "in any place". Since the transaction of sexual services for consideration requires a buyer and seller, the broadest prohibition applicable to either party impacts both. In short, the narrowing of the public communication offence (s. 213) has been undermined by the breadth of section 286.1, which extends to all sectors and contexts.

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[12] *Bedford* at para. 156.

14. Section 213 is an outlier in the legislative scheme imposed by the *PCEPA* in that it directly criminalizes the actions of individuals who exchange sexual services for consideration. Unlike other aspects of the scheme, there is no prosecutorial immunity for sex workers who violate section 213 in selling their own services.

15. Finally, section 286.4 introduced a prohibition on advertising an offer to provide sexual services for consideration with limited immunity for those advertising their own sexual services. The Ontario Court of Appeal has found that this immunity does not extend to those who advertise the sexual services of others, even where there is no exploitative relationship between the seller and the person assisting with advertising.[13] The evidence indicates that there are few if any circumstances in which a sex worker could advertise their services without the a third party.[14]

16. As conceded by the Respondent, the impugned provisions clearly and directly limit freedom of expression that is protected by section 2(b) of the *Charter*.[15] In each case, the purpose and effect of the law is to limit sex workers' ability to communicate about issues that are central to their work, their capacity to communicate and establish consent, and their safety and autonomy in carrying it out. This is not a minor or trivial violation of section 2(b). The Supreme Court has held that the values underlying freedom of expression include individual self-fulfilment.[16] Self-fulfilment is not possible without self-protection.

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[13] *R v Gallone*, 2019 ONCA 663 at paras 84-89.
[14] See e.g. Atchison Affidavit, JAR, Tab 48, pp. 4204-6.
[15] Factum of the Attorney General of Canada at para 169; factum of the Attorney General of Ontario at para. 143-4.
[16] *R. v. Sharpe*, 2001 SCC 2 at para. 23.

B) *The Prostitution Reference is No Longer Binding Authority*

i) Treatment of the Prostitution Reference to date

17. The Supreme Court of Canada first considered the constitutionality of section 213's predecessor in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code.*[17] With respect to freedom of expression, the majority found that the public communication provision (then section 195.1(1)(c) of the *Criminal Code*)[18] violated section 2(b) of the *Charter* but was justified under section 1.[19] A majority of the Court characterized the public communication provision's objective as addressing the various forms of social nuisance arising from the public display of the sale of sex. The legal status of sex work – referred to as "prostitution" in that decision – was a crucial piece of the context in which the *Prostitution Reference* was decided.

18. When *Bedford* was before the Ontario Superior Court, Justice Himel commented on the impact of the *Prostitution Reference* in the case before her, stating:

> In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today… As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me.[20]

19. The Ontario Court of Appeal in *Bedford* held that Justice Himel was not bound by the *Prostitution Reference* with respect to the section 7 claims being advanced, but that she was so bound with respect to the section 2(b) claims and the public communication offence.[21]

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[17] *Prostitution Reference*.
[18] Section 195.1(1)(c) is identical to section 213(1)(c) which was at issue in *Bedford*.
[19] Justices Wilson and L'Heureux-Dubé, dissenting, would have found that the provision could not be justified under a section 1 analysis.
[20] *Bedford v. Canada*, 2010 ONSC 4264 [*Bedford Trial Decision*] at para. 83.
[21] *Canada (Attorney General) v. Bedford*, 2012 ONCA 186 [*Bedford ONCA Decision*] at paras 71-85.

20. The Supreme Court of Canada generally agreed with the Court of Appeal that the holding in respect of section 2(b) was binding on the lower courts. Ultimately, however, the Court declined to consider in detail whether it should depart from its previous decision on the section 2(b) aspect of the case since it was able to resolve the appeal based on section 7 alone.[22]

ii) A fundamental shift has taken place since the Prostitution Reference

21. Lower courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate".[23]

22. While the Attorney General of Canada (and Attorney General of Ontario) seeks to rely on the *Prostitution Reference* as a precedent by which this Court is bound, it also argues that the legal regime ushered in by *PCEPA* did indeed represent a "fundamental shift" which transformed the criminal law related to the sale of sexual services.[24]

23. In light of this "fundamental shift", this Court is not bound by the holding in the *Prostitution Reference* with respect to the public communication provision's alleged breach of section 2(b). Indeed, for the reasons set out further below, the CCLA submits that the Supreme Court of Canada's decision in the *Prostitution Reference* is largely irrelevant to this application.[25]

a. *Prostitution Reference* was devoid of evidence

24. In *Bedford,* the Ontario Court of Appeal held that the "robust application of stare decisis" is of particular import in *Charter* litigation, remarking that the evolution of the evidence and

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[22] *Bedford*, paras. 46-7.
[23] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44.
[24] Factum of the Respondent, Attorney General of Canada at para. 15.
[25] Sections 286.1 and 286.4 were not enacted at the time of the *Prostitution Reference*, therefore that decision can have no impact in respect of those provisions.

legislative facts alone is not a sufficient basis on which a lower court may reconsider a Supreme Court precedent.[26]

25. However, it is significant that the *Prostitution Reference* did not involve a live case or controversy. Rather, it was a reference, seeking an advisory opinion from the Court, in which *no evidence* was before the Court.[27]

26. Where the claim being advanced is that the impact of a law breaches an individual's *Charter* rights, the complete absence of *any* evidence from those directly affected by the legislative scheme is more than a minor gap. Ignoring the sworn testimony of sex workers in this application on the basis of a Supreme Court precedent decided in an evidentiary vacuum would not serve the interests of justice.

b. The limit on freedom of expression is not confined to commercial speech

27. The Court in the *Prostitution Reference* characterised the expression at issue as purely commercial in nature. The findings of fact in *Bedford* established that the public communication provisions prohibit more than merely commercial expression and had significant impacts on sex workers' safety. In *Bedford*, the Supreme Court accepted that the public communication law prevented screening clients and setting terms for the use of condoms or safe houses; it accepted the trial judge's conclusion that face-to-face communication was an "essential tool" in enhancing the safety of those engaged in street-based sex work.[28]

28. The evidence in this application goes further than that in *Bedford* in highlighting the self-protective nature of the expression that is curtailed by the interaction of sections 213 and 286.1.

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[26] *Bedford ONCA Decision* at paras. 83-4.
[27] The Appellant's factum in the *Prostitution Reference*, made available online through the David Asper Centre for Constitutional Rights at the University of Toronto, begins with an explanatory note at page 2, stating: "This being a constitutional reference pursuant to the Constitutional Questions Act, no evidence was presented."
[28] *Bedford* at para. 69.

The provisions limit the extent to which sex workers can protect themselves and one another from potential predators and problematic clients, limit their ability to negotiate terms and, most importantly, consent to sexual activity, and mitigate any dangers that may arise from street-based sex work. Ellie Ade-Kur describes the impact of these provisions on sex workers:

> Maggie's participants report that being able to communicate beforehand is important so that clients can acknowledge boundaries, prices, and expectations, and that these conversations are essential for establishing consent and for practicing safer sex. Without these communications, Maggie's participants have reported that clients are more likely to push boundaries and push sex workers to provide services that they do not want to provide. Participants have also expressed that the inability to clearly communicate pricing, boundaries, and expectations with clients before sessions puts sex workers at greater risk of being shortchanged and not paid. Overall, not being able to communicate pricing, boundaries and expectations upfront can lead to tense, unfair, and sometimes dangerous dynamics.[29]

29. This and other evidence, which was not before the Court in the *Prostitution Reference,* alters the legal analysis that the Court must undertake under section 1 of the *Charter*. Courts have often characterized commercial expression as speech of "lower value"[30] and, as a result, limitations on commercial speech are not subject to the same kind of rigorous justification analysis under section 1. Given the nature of the expression at issue in this case, a more rigorous and robust approach to justification under section 1 is required.

c. The legislative scheme and text have changed

30. The majority decision in the *Prostitution Reference* emphasized that Parliament had criminalized a lawful activity (communication) directed at achieving another lawful activity (the sale of sex).

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[29] Ade-Kur Affidavit, para. 29, JAR, Tab 29, p. 2368.

[30] *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 at paras 68, 94, 115, *Thomson Newspapers v Canada*, [1998] 1 SCR 877 at para 91, *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para. 75.

31. While the text of section 213 has changed in relatively modest ways since the *Prostitution Reference* was decided, the legislative scheme in which it is situated has been dramatically altered. The purchase of sexual services for consideration is now an illegal activity; *PCEPA* represents a fundamental shift in how people who trade or sell sexual services are characterized: as people requiring protection and not prosecution.[31]

32. In light of the foregoing, the legislative purpose against which the infringements of section 2(b) were measured in the *Prostitution Reference* is no longer the legislative purpose to be considered, rendering the decision largely irrelevant to the issues currently before this Court.

C) *The Infringement of Freedom of Expression is not Justified*

i) Legislative objective of the impugned provisions

33. In the *Prostitution Reference*, the majority characterized the objective of the public communication provision as taking solicitation for the purposes of prostitution off the streets and out of public view.

34. The scheme enacted by the *PCEPA* has a much different and broader purpose. Its stated aims are to eradicate, or at a minimum decrease, sex work in Canada; provide protections for those who engage in sex work as sellers; and reduce the community harms (particularly to children) that Parliament says are caused by the sale of sexual services in public. These go well beyond the social nuisance objective that was at the heart of the analysis in the *Prostitution Reference.*

35. For the purposes of section 1, CCLA is focused on the final proportionality stage in *Oakes.*

ii) The final stage of Oakes

36. The CCLA submits that the means chosen by Parliament and embodied in the *PCEPA* are neither rationally connected to the objectives nor minimally impairing of the rights at issue. But,

[31] Both the Attorney General of Canada (para. 15) and Attorney General of Ontario (paras. 1-3) acknowledge the significance of this shift in their factums before this court.

in any event, even if this court finds that the government has satisfied the first two stages of the *Oakes* proportionality analysis, PCEPA must be struck down under the third.

37. The final stage of *Oakes* rarely receives the attention garnered by some of the other aspects of the test, yet it serves a unique function. In *Thomson Newspapers*, Justice Bastarache described it as providing "an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*".[32]

38. The description flows from Chief Justice Dickson's characterization of the role of the final branch in *Oakes* itself, in which he said:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.[33]

39. In *Hutterian Brethren* Chief Justice McLachlin characterized the case as one where "the decisive analysis falls to be done at the final stage of *Oakes,"*[34] noting:

> It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis — pressing goal, rational connection, and minimum impairment — could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups".[35]

40. The case was one where the majority had to examine the negative impact of the law on the applicants' religious freedom and put it alongside the public good achieved by the measure in question. The majority ultimately concluded that the balance tipped in favour of pursuing the

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[32] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877 at para. 125.
[33] *R v Oakes*, [1986] 1 SCR 103 at para. 71.
[34] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [*Hutterian Brethren*] at para. 78.
[35] *Hutterian Brethren* at para. 76.

public good. In the instant case, when the impacts of the impugned laws on the applicants are measured against any public good they achieve, the balance tips heavily in the other direction. The harms to the applicants outweigh any marginal public benefit the measures may achieve.[36]

iii) Operation of the provisions based on the evidence

a. Sections 213 and 286.1

41. The combined effect of sections 213 and 286.1 is to undermine the expressive freedoms of sex workers severely and substantially. A prohibition on public communication (or any communication in the case of s. 286.1) is effectively an attempt to render sex workers and sex work invisible to the public. It is the legal embodiment of the stigma that is attached to the sex trade. Although section 213's prohibition on communication is geographically limited in scope, section 286.1 which criminalizes the other side of the conversation (i.e. communication for the purposes of purchasing) applies to communication in "any place". The result is that the impacts of section 213 and 286.1 on the expressive freedoms of sex workers are largely indistinguishable.

42. As noted above, the communication that is being restricted is not purely or even primarily commercial in nature. Sex workers need to communicate in order to conduct essential screening of clients, to negotiate consent, and to establish terms of service.

43. The evidence in this application demonstrates that sections 213 and 286.1 have a serious and detrimental impact on the ability of sex workers to take steps to protect themselves. Some of the identified harms are:

- inability to clearly negotiate consent due to rushed initial encounters;
- inability to clearly negotiate terms of service due to rushed initial encounters;
- inability to screen potential clients for signs of potential risks of harm;
- increased risk of violence as a result of the inability to screen and negotiate in advance; and

[36] See also the conclusion of Justice Himel in *Bedford Trial Decision* at paras. 491-504.

- displacement and relocation to isolated and remote public and indoor locations (and the risks to health, safety and autonomy associated with this relocation) to avoid detection.[37]

44. Evidence of the salutary effects of section 213 is sparse. The evidence in this application suggests that section 213 is almost never enforced with a criminal charge but may be used by law enforcement to justify stopping and interrogating suspected sex workers or urging them to relocate.[38]

45. The salutary effects of section 286.1 have not been established on the record before this Court, however two points emerge. First, law enforcement rely on sex work offences in order to investigate other, more serious charges (including human trafficking), although the extent to which these tools are effective is an open question.[39] Second, there continues to be demand for sexual services.

46. On balance, CCLA submits that the deleterious impacts of ss. 213 and 286.1 outweigh any salutary benefits.

b. Section 286.4

47. In *R v N.S.*, the Ontario Court of Appeal upheld the constitutionality of section 286.4.[40] With respect, the decision in *N.S.* should be approached with caution for two reasons. First, the Court in that case did not have the benefit of the extensive evidentiary record that has been put before the Court in this application. Second, the analysis in *N.S.* was skewed because section 286.1,

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[37] Clamen Affidavit at paras. 59-67, JAR, Tab 10, pp. 176-8; Jane X Affidavit at paras. 11-15, JAR, Tab 17, pp. 1675-7; Mason Affidavit at paras. 19-21, JAR, Tab 19, p. 1705; Wesley Affidavit at paras. 35-38, JAR, Tab 22, pp. 1757-8; Butler-Burke Affidavit at para. 38, JAR, Tab 25, pp. 2174-5; Ade-Kur Affidavit, at paras. 29-30, JAR, Tab 29, pp. 2368-9.
[38] Koniuck cross at qq. 145-161, JAR, Tab 78, pp, 7491-5 and Aucoin Affidavit, Exhibit A at pp. 10-13, JAR, Tab 86, p. 8281-4.
[39] See Cara Locke, "Debating the Rule of Law: The Curious Re-enactment of the Solicitation Offence" (2021) 58:3 Alta L Rev 687. This article uses Hansard to demonstrate that the primary purpose of section 213(1.1) is not to create an offence, but to serve as a detention power, and highlights the rule of law concerns that accompany this approach.
[40] *R v N.S.*, 2022 ONCA 160 at paras 154 and 163.

the centrepiece of *PCEPA,* was not at issue or the subject of a challenge. Section 286.1 is a crucial piece of context that helps to inform the constitutional analysis relevant to all other provisions of *PCEPA.* As a result, and in light of the submissions below, the holding in *N.S.* should be revisited.

48. The prohibition on advertising sexual services (with a narrow immunity for those advertising their own services) has a number of negative effects. As a practical matter, it is almost impossible for sex workers to advertise their own services without third party assistance.[41] As a result, even with the immunity from prosecution, sex workers may be unable to rely on standard commercial service providers and often must rely on friends and colleagues being willing to risk a criminal charge to assist with their advertising. Many of the sex worker affiants also note that they have to be less explicit in their advertising, resulting in a greater likelihood of miscommunication with prospective clients.[42]

49. The salutary effects of the prohibition on advertising have not been clearly established in the record. The objective of this provision was characterized by the Court of Appeal as reducing the demand for the provision of sexual services. The evidence highlighted by the Attorney General of Ontario, however, suggests that the nature of advertising has not fundamentally changed despite the new offence created by *PCEPA.*[43] In other words, while deterring sex workers from effectively communicating and managing client expectations with their ads, the provision has been wholly ineffective in its stated aim.

50. The evidence in this application does disclose that online advertising is, in practice, used for a distinct government purpose. Evidence produced by law enforcement witnesses suggests that online advertising is a rich source of material for police seeking to investigate offences related to

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[41] Atchison Affidavit, JAR, Tab 48, p. 4206.
[42] Jane X Affidavit at paras. 5-8, JAR, Tab 17, pp.1674-5; Bruckert Affidavit, JAR, Tab 45, p. 3698; Atchison Affidavit, JAR, Tab 48, p. 4205.
[43] Factum of the Attorney General of Ontario at para. 29.

the exchange of sexual services and human trafficking.[44] Advertisements are also used by police to connect (through deception) with sex workers to see if they require assistance or are being exploited.[45] While police view this as an important outreach tool, the evidence in this application provided by sex workers demonstrates that it is perceived as harassment, deepening the distrust that already exists between sex workers and police.[46]

51. In sum, CCLA submits that there are no legitimate salutary impacts to measure against the harms described above. The infringement cannot therefore be justified.

PART IV – ORDER SOUGHT

52. The CCLA takes no position on the outcome of this application but respectfully requests that it be determined in accordance with these submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 10th of August, 2022

Cara Faith Zwibel
Counsel for the CCLA

[44] Affidavit of Colin Organ, sworn December 20, 2021 [Organ Affidavit] at paras. 97-100, JAR, Tab 75, pp. 7259-60; Transcript of the cross-examination of Colin Organ, held April 6, 2022 [Organ cross], qq. 277-284, JAR, Tab 76, pp. 7390-2; Transcript of the cross-examination of Brian McGuigan, held March 28, 2022, qq. 37-48 & 84-119, JAR, Tab 82, pp. 7820-3 & 7832-42; Transcript of the cross-examination of Andrew W. Taylor, held April 22, 2022, qq. 184-196, JAR, Tab 100, pp. 10360-3.

[45] Organ Affidavit, paras. 86-89, JAR, Tab 75, p. 7257 ; Organ cross, qq. 195-211, JAR, Tab 76, pp. 7361-7; Transcript of the cross-examination of Darryl Ramkissoon, held April 21, 2022, qq. 363-370, JAR, Tab 80, pp. 7736-8.

[46] Public transcript of the cross-examination of Jane X, held March 21, 2022, q. 140, JAR, Tab 18, p. 1693-4; Bruckert Affidavit, JAR, Tab 45, p. 3671.

SCHEDULE "A" – LIST OF AUTHORITIES

Jurisprudence

1. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37
2. *Bedford v. Canada*, 2010 ONSC 4264
3. *Canada (Attorney General) v Bedford*, 2012 ONCA 186
4. *Canada (Attorney General) v Bedford*, 2013 SCC 72
5. *Canada (Attorney General) v JTI-Macdonald Corp.*, 2007 SCC 30
6. *Carter v Canada (Attorney General)*, 2015 SCC 5
7. *R v Gallone*, 2019 ONCA 663
8. *R v N.S.*, 2022 ONCA 160
9. *R v Oakes*, [1986] 1 SCR 103
10. *R v Sharpe*, 2001 SCC 2
11. *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199
12. *Reference re ss. 193 and 195.1(1)(c)*, [1990] 1 SCR 1123
13. *Thomson Newspapers v Canada*, [1998] 1 SCR 877

Academic Articles

14. Cara Locke, "Debating the Rule of Law: The Curious Re-enactment of the Solicitation Offence", (2021) 58:3 Alta L Rev 687

SCHEDULE "B" – STATUTES RELIED ON

Criminal Code, RSC 1985, c C-46, s. 213, s. 286.1, s. 286.4, s. 286.5

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

(a) stops or attempts to stop any motor vehicle; or

(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.

(c) [Repealed, 2014, c. 25, s. 15]

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

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

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

(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,

(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,

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

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

(ii) in any other case,

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

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

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

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

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

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

(ii) in any other case,

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

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

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

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

286.5(1) No person shall be prosecuted for

(a) an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or

(b) an offence under section 286.4 in relation to the advertisement of their own sexual services.

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

CANADIAN ALLIANCE FOR SEX WORK LAW REFORM et al.
Applicants

and

ATTORNEY GENERAL OF CANADA
Respondent

Court File No.: CV-21-00659594-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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