

## WARNING

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

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4 of the *Criminal Code*:

(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347;

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

486.6 (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.

**CITATION:** R. v. N.S. 2021 ONSC 1628  
**NEWMARKET COURT FILE NO.:** CR-17-009179  
**DATE:** 20210304

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
Her Majesty the Queen	)	
	)	Kellie Hutchinson, for the
Respondent	)	Respondent/Provincial Crown
	)	
– and –	)	
	)	
N.S.	)	Carlos Rippell, for the Applicant/Defendant
Applicant/Defendant	)	
	)	
	)	
	)	
	)	<b>HEARD: October 6, 7, 8 and 9, 2020 via</b>
	)	<b>virtual hearing</b>

2021 ONSC 1628 (CanLII)

**REASONS FOR DECISION ON CHARTER CHALLENGE TO SECTIONS 286.2, 286.3 and 286.4 OF THE CRIMINAL CODE**

<p><b><u>RESTRICTION ON PUBLICATION</u></b></p> <p><b>The publication and broadcast of this ruling is banned pursuant to subsection 486.4 and subsection 517 of the <i>Criminal Code of Canada</i>.</b></p>
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**SUTHERLAND J.:**

**Introduction**

- [1] Canadians live in a constitutional democracy. As such, Parliament and the provincial legislators may enact laws they deem necessary and appropriate for Canadian society. These laws, however, are subject to the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms* (the *Charter*).
- [2] For decades, Parliament and other countries have grappled with commercial sex work, and remuneration for sexual contact with a person over 18 years of age. Should commercial sex work be abolished? Should commercial sex work be fully or partially criminalized? Are sex workers exploited? Do sex workers need protection? Is commercial sex work immoral? Or should commercial sex work be decriminalized and regulated? Is commercial sex work labour like any other form of labour? The answers to these questions are delicate, multifaceted and complex. There is no consensus on the answers to these questions. One consistent theme is that there is no agreed answer on how societies, here and abroad, should approach and consider commercial sex work.<sup>1</sup>
- [3] Parliament criminalizes certain behaviours through the *Criminal Code of Canada* (the *Criminal Code*).<sup>2</sup> Previously, Parliament did not *per se* make commercial sex work criminal but did criminalize certain behaviours, namely living off the avails, the purchase of sexual contact and communicating in public for purposes of prostitution.
- [4] In 2013, the Supreme Court of Canada unanimously decided in *Canada (AG) v. Bedford* that sections 210 (“bawdy house” prohibition), 212 (1) (j) (living off the avails) and 213(1)(c) (prohibitions on communicating in public) of the *Criminal Code* infringed the *Charter* and were not saved by section 1. These provisions were struck down, although the declaration of constitutional validity was suspended for a year.<sup>3</sup>
- [5] In response to the *Bedford* decision, Parliament enacted Bill C-36, the *Protection of Communities and Exploited Persons Act (PCEPA)*.<sup>4</sup> In the *PCEPA*, Parliament, for the first time, criminalized aspects of commercial sex work. It is illegal to purchase sexual services for consideration. Parliament, also, provided limited immunity from prosecution to individual sex workers, meaning individuals over the age of 18 who sell their own sexual contact services.
- [6] The Applicant, N.S., has been charged with six offences. He is alleged to have violated sections 279.01(1), 279.02(1), 286.1(1), 286.2(1), 286.3(1) and 286.4 of the *Criminal*

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<sup>1</sup> See: Cecelia Benoit & Leah Shumka, *Sex Work in Canada*, May 7, 2015; Cecelia Benoit et al., “Well, It Should Be Changed for One, Because It’s Our Bodies”: Sex Workers’ Views on Canada’s Punitive Approach towards Sex Work, (2017) 6:2 Social Sciences 52; Chris Bruckert & Tuulia Law, *Beyond Pimps, Procurers and Parasite: Mapping Third Parties in the Incall/Outcall Sex Industry*, Report, (University of Ottawa, 2013).

<sup>2</sup> R.S.C. 1985, c. C-46.

<sup>3</sup> 2013 SCC 72, [2013] 3 S.C.R. 1101.

<sup>4</sup> S.C. 2014, c. 25.

*Code*, between May 12, 2017 and October 31, 2017. In addition, he is charged that on or about May 11, 2017, he violated section 286.3(1) of the *Criminal Code*.

- [7] The Applicant argues that Parliament’s legislative response to *Bedford* also violates the *Charter*. He contends that sections 286.2 (material benefit), 286.3(1) (procuring), and 286.4 (advertising) of the *Criminal Code* (the impugned sections) violate sections 2 (b), 2(d) and 7 of the *Charter* and cannot be saved by section 1. The Applicant therefore contends that the impugned sections must be found to be of no force and effect. To support this view, the Applicant has provided the Court with four hypotheticals in which he says the provisions would operate in a way that offends the *Charter*.
- [8] The Crown takes a different view. The Crown contends that the impugned sections do not violate sections 2(b), 2(d) and 7 of the *Charter*. The Crown argues that if any of the impugned sections do violate sections of the *Charter*, the criminalization of commercial sex work as enacted by Parliament, is a legitimate and compelling concern in Canadian society that is justifiable in a free and democratic society, under section 1 and thus should not be found to be of no force and effect, as requested by the Applicant.
- [9] For the reasons to follow, I conclude that:

Sections 286.2, 286.3(1) and 286.4 of the *Criminal Code* infringe section 7 of the *Charter* and is not a justifiable limit under section 1 of the *Charter*.

### **Role of the Court**

- [10] This application brings with it a multitude of policy issues. Such policy issues are not in the realm of this court to tackle. This court’s role is limited and focused. The issues for this court to adjudicate is whether the impugned sections comply with the applicable provisions of the *Charter* or not. Whether commercial sex work is legitimate work or like any other types of work is not for this court to decide. Whether the criminalization of commercial sex work is the best approach to deal with commercial sex work is again not in the realm of this court to decide. Such pure public policy decisions are for the legislative branch, Parliament, to address.<sup>5</sup>
- [11] However, as the Supreme Court of Canada held in *Bedford*, “Parliament may only impose limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes”.<sup>6</sup> It is the court’s responsibility to scrutinize legislation to ensure that it is constitutionally valid. As Lamer J. (as he then was) noted in the *BC Motor Vehicle Act Reference*:

...It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by courts but by the elected

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<sup>5</sup> *R. v. Heywood* 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761 at pg. 793 and *Reference re ss. 193 and 195.1 (1) (c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at paras. 66-67.

<sup>6</sup> *Supra*, note 3 at para. 5.

representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility...<sup>7</sup>

### **Analytical Approach**

[12] In ascertaining whether legislation violates the *Charter*, the court embarks on a three-step analysis. The court must first determine if the impugned legislation violates a provision of the *Charter*. If the court determines that there is no violation of the *Charter*, the analysis ends. If the court determines that the legislation does violate the *Charter*, the next step is for the court to determine if the violation is saved through an analysis of the impugned legislation and section 1 of the *Charter*. If the court determines that the violation is saved by section 1, the analysis ends. If the court determines that the impugned legislation is not saved by section 1, the court then must determine the appropriate remedy.<sup>8</sup>

[13] For this application, I will proceed to outline the issues.

### **Issues**

[14] The issues for this court to determine are:

- (a) what is the purpose of the *PCEPA* and the impugned sections?
- (b) do the impugned sections violate section 7 of the *Charter* and if so, are the sections saved by section 1 of the *Charter*?
- (c) does section 286.4 of the *Criminal Code* violate section 2(b) the *Charter* and if so, is it saved by section 1 of the *Charter*?
- (d) do sections 286.2 and 286.3 violate section 2(d) of the *Charter* and if so, are the sections saved by section 1 of the *Charter*?
- (e) if any of the impugned sections that violate the *Charter* are not saved by section 1, what is the appropriate remedy?

I will return to these issues following a review of the legislative scheme, the evidence presented, the *Bedford* decision and the hypotheticals posed by the Applicant.

### **The Criminal Code and Commercial Sex Work**

[15] The Supreme Court of Canada in *Bedford* found that the previous provisions of the *Criminal Code* dealing with commercial sex work, namely sections 210, 212 (1)(j) and

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<sup>7</sup> 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at para.16.

<sup>8</sup> *R. v. Mills*, [1999] 3 S.C.R. 668; *R. v. Darrach* 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Sharma*, 2020 ONCA 478.

213(1)(c) violated the *Charter*, and declared the sections to be invalid, though suspending the declaration of invalidity for one year.

[16] In response to *Bedford*, Parliament enacted *PCEPA*, which received Royal Assent on November 6, 2014 and became law on December 4, 2014.

[17] The pertinent provisions are:

**Obtaining sexual services for consideration**

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

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

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

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

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

(ii) in any other case,

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

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

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

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

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

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

(ii) in any other case,

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

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

### **Obtaining sexual services for consideration from person under 18 years**

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

- (a) for a first offence, six months; and
- (b) for each subsequent offence, one year.

### **Subsequent offences**

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

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

### **Sequence of convictions only**

(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

### **Definitions of *place* and *public place***

(5) For the purposes of this section, *place* and *public place* have the same meaning as in subsection 197(1).

### **Material benefit from sexual services**

**286.2 (1)** Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of

- (a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or
- (b) an offence punishable on summary conviction.

### **Material benefit from sexual services provided by person under 18 years**

(2) Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

#### **Presumption**

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

#### **Exception**

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the benefit

(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;

(b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;

(c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or

(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

#### **No exception**

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

### **Aggravating factor**

(6) 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.

### **Procuring**

**286.3 (1)** Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

### **Procuring — person under 18 years**

(2) Everyone who procures a person under the age of 18 years to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(2), recruits, holds, conceals or harbours a person under the age of 18 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 and to a minimum punishment of imprisonment for a term of five years.

### **Advertising sexual services**

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

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

(b) an offence punishable on summary conviction.

### **Immunity — material benefit and advertising**

**286.5 (1)** No person shall be prosecuted for

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

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

**Immunity — aiding, abetting, etc.**

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

[18] These provisions enacted by Parliament are known as the *Nordic Model*, which originated in Sweden, Iceland, Norway and Finland.<sup>9</sup> Aspects of commercial sex work are illegal in Canada, with the exception of individuals selling their own sexual services. The previous provisions that were the subject matter of *Bedford* did not criminalize commercial sex work by making that behaviour illegal. Parliament decided to take a different approach with these provisions and fundamentally altered how commercial sex work is categorized and considered in Canada, that is, to criminalize aspects of commercial sex work.

[19] Parliament indicated in the summary of the *PCEPA* that the amendments to the *Criminal Code*, are among other things, to:

(a) create an offence that prohibits purchasing sexual services or communicating in any place for that purpose;

(b) create an offence that prohibits receiving a material benefit that derived from the commission of an offence referred to in paragraph (a);

(c) create an offence that prohibits the advertisement of sexual services offered for sale and to authorize the courts to order the seizure of materials containing such advertisements and their removal from the internet;

(d) modernize the offence that prohibits the procurement of persons for the purpose of prostitution;

(e) create an offence that prohibits communicating — for the purpose of selling sexual services — 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;

(f) ensure consistency between prostitution offences and the existing human trafficking offences; and

(g) specify that, for the purposes of certain offences, a weapon includes anything used, designed to be use or intended for use in binding or tying up a person against their will.

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<sup>9</sup> Benoit & Shumka, *supra*, note 1 at 15; Cecilia Benoit et al., *supra*, note 1 at 2.

[20] In the preamble of *PCEPA*, Parliament indicated:

- i. concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;
- ii. social harm is caused by the objectification of the human body and the commodification of sexual activity;
- iii. the importance to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;
- iv. the importance to continue to denounce and prohibit the sexual services because it creates a demand for prostitution;
- v. the importance to denounce 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;
- vi. encouragement of those who engage in prostitution to report incidents of violence and to leave prostitution;
- vii. a goal to protect communities from the harms associated with prostitution.

[21] In addition, the Department of Justice of Canada released a Technical Paper in 2014 (the Technical Paper) that explains “the Government’s legislative response” to *Bedford*.<sup>10</sup> The Technical Paper outlines the Government’s rationale and intention for Bill C-36 which includes explaining the purpose, objective and the effect of each offence.

### **The Pertinent *Charter* and Constitution Act, 1982 Provisions**

[22] The *Charter* provisions pertinent to the application are:

Section 2: Everyone has the following fundamental freedoms:

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

...

(d) freedom of association.

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<sup>10</sup> Canada, Department of Justice, *Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, (Technical Paper), (Ottawa: DOJ, 2014).

Section 7: 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.

Section 1: 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.

The *Constitution Act, 1982*, states:

Section 52(1): The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.

### **The Expert Evidence**

- [23] The Applicant presented one expert who gave evidence. The expert was Mr. Chris Atchison. The Crown did not present any witnesses.
- [24] Mr. Atchison received a Bachelors in Arts degree in criminology (major) and sociology (minor) in 1996 from Simon Fraser University, and a Masters in Criminology in 1998 from Simon Fraser University. Mr. Atchison is a research administrator at the School of Population & Public Health (SPPH) at The University of British Columbia. He also is a Research Associate in the Department of Sociology at the University of Victoria. He has been employed as a research associate and has performed independent research and consultation since 1999. He has published numerous academic articles and research studies on sex work in Canada. He has authored and co-authored book chapters on sex work in Canada and books on research decisions and methodologies. Mr. Atchison has been conducting social science research on the commercial sex industry in Canada since 1994.
- [25] Mr. Atchison has provided expert testimony in the Ontario Court of Justice and provided testimony to the Department of Justice, Canada, on the Roundtable on Former Bill C-36, and to the House of Commons Standing Committee on Bill C-36 and the Senate Standing Committee on Bill C-36.<sup>11</sup>
- [26] The Crown and Applicant agreed that Mr. Atchison be qualified as an expert to provide the court with expert opinion on commercial sex work. An issue arose as to the breadth of Mr. Atchison's opinion. The Crown did not contest that he can provide an expert opinion on commercial sex work in Canada but opposed that he can provide an opinion on commercial sex work outside of Canada and an opinion of the legal aspects of commercial sex work in Canada with an opinion concerning the impugned sections.
- [27] In my oral decision at the hearing, I concluded that Mr. Atchison can provide expert evidence on:

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<sup>11</sup> *R. v. Anwar*, 2020 ONCJ 103.

The field of social sciences research, theory and findings on the structure, operation and composition of commercial sex work in Canada and other jurisdictions and the legal regime concerning commercial sex work in Canada and other jurisdictions but not on the legality of the impugned sections and commercial sex work in Canada.

[28] Mr. Atchison in his testimony adopted the following from his Will Say Statement:

My opinion is that the various provisions of the *PCEPA* do not reflect the empirical realities of the sex industry in Canada and it does not adequately address the safety issues identified by the Supreme Court of Canada in *Bedford*.<sup>12</sup>

[29] Mr. Atchison asserted that his approach is to provide empirical evidence to assist in formulating policy dealing with commercial sex work. He does not consider the issues a binary debate that is, to criminalize or not to criminalize. Is commercial sex work a legitimate form of work or not? He is not set to a particular set of interests. As far as he is concerned, every methodology should be “on the table to answer the questions” concerning commercial sex work. His research looks through a “transactional lens” not from a lens of a sex worker or purchaser. He asserted that how you perceive and understand something depends on the lens you look through. He stated: “People make choices not always under conditions of their choosing.”

[30] Mr. Atchison testified that:

- (a) The sex industry encompasses a wide range of paid sex services, sex workers and commercial settings. Paid sex services could be sex workers on the street, out of a bar or casino, massage parlor, escorts for an agency, brothel, bathhouse, and independent calls. Sex services could not necessarily involve physical contact such as with telephone sex work, web camera sessions, paid actors in pornographic movies and video productions and longer-term material benefits provided by older men to younger women, or men in return for sexual favours and companionship.
- (b) Research shows that 80-90% of sex work is off street venues. The composition of sex workers are approximately 75-76% women, 17-18% men and 7% transgender or other. The majority of purchasers of sexual contact are male. Up to 30% are bisexual or gay men which seek the services of bi or gay sex workers.
- (c) The vast majority of respondents to the research work independently or are self-employed. The majority indicate that at some point they were employed by a third party.
- (d) The risks of violence for sex workers varies widely based on the type of sex work and the location where the service is carried out. Street based sex work is

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<sup>12</sup> “Will Say” Statement of Chris Atchison, at para. 4.

the riskiest with a high risk of violence. Street based sex workers are particularly vulnerable to “both predatory and situational violence.” Street based sex workers are a fraction of the commercial sex industry.

- (e) Sex workers who work indoors experience lower instances and risks of situational violence. This lower instances of violence is in part due to their ability to screen prospective clients and set out expectations beforehand through advertising terms of services and prices, communicate before in person attendances and be in control of the location such as apartments or hotels with on site security or enlisting the assistance of third parties who communicate with the prospective client and/or provide security.
- (f) Research indicates that individuals in sex work are not necessarily exploited. Many sex workers reported a conscious decision to provide sex services due to the socio-economic realities of their lives along with personal factors such as independence, flexibility, need or desire for money, lack of education, and difficult or abusive childhoods. There are situations where some sex workers are exploited by third parties. But such third-party involvement, “pimps”, do not play a large part in street based or off street based commercial sex work. Studies in Canada indicate that the majority of “pimps” were women, where most were former or current sex workers.<sup>13</sup>
- (g) Stigmatization of sex work is a major problem for sex workers. The need to conceal the nature of their work from society which leads to a double life, which may result in damage to their emotional, psychological and physical health. This need to conceal, even from the police, can also affect the reporting of incidences of violence. Purchasers of sexual contact have a fear of stigmatization and arrest. This fear affects the effectiveness of the communication between the sex worker and purchaser. The communication is not direct or precise. The communication is vague and involves innuendo. This can result in conflict on issues of cleanliness, hygiene, condom use, price and service provided. Such conflict can escalate to violence.
- (h) Sex workers who advertise in newspapers, online classifieds or on sex worker websites are more likely to communicate with potential clients before meeting in person. The communication facilitates the understanding of services offered, price for such services and the need for condom use. This provides the platform for communication of health and safety conditions, by way of chat, email, text messaging or telephone communication. This results in providing a safer transaction between sex worker and purchaser.

[31] Mr. Atchison indicated that research from Canada and the Republic of Ireland, along with other jurisdictions, show a pattern that the criminalizing of commercial sex work is having a negative impact on the health and safety of sex workers. The evidence is indicating that

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<sup>13</sup> Bruckert & Law, *supra*, note 1 at 83-89.

sex workers are not reporting violence to police. There is no statistical evidence on the effectiveness of criminalizing, the making of commercial sex work illegal, or on public health and safety.

- [32] He described that the law has made it more difficult for sex workers to work indoors or work together in spaces to pool costs, security and safety measures. The aspects of the law that have made sex work illegal have forced sex workers into bathhouses, cars and back alleys, and into locations and situations that has put their health and safety into higher risk situations. The use of indoor establishments such as brothels, parlors and agencies has greatly diminished. Sex workers also now use their own residences or a shared residence, Airbnb or hotel for greater security. The use of hotels brings concerns of hotel staff contacting the police. The use of Airbnb's has a lower risk of the police being contacted and generally are more private with better security.
- [33] Before *PCEPA*, there were licensed and unlicensed indoor establishments. The licenced places would be parlours and agencies regulated by a complex set of licences through municipalities. The unlicensed establishments were individual sex workers in collective, micro-brothels or small mobile environments like private residences.
- [34] Post *PCEPA*, technology became more involved. The digital world is used more now to facilitate contact and communication. The market for commercial sex services has changed since December 2014. Parlors and brothels are no longer licenced. Their existence and location are usually by word of mouth. Some establishments have receptionists, security or require advance appointments. But these indoor establishments are no longer regulated by a licensing system and are illegal.
- [35] When pressed under cross-examination on the sex services system, he agreed that the system is complex and diverse. He agreed that the research on commercial sex work in Canada has a limited number of participants. Entities that will fund such research are usually community organizations that are involved in assisting sex workers, social science/academic organizations or the government. He also indicated that the community agencies are vital for recruitment of people to take part in the research. Participants in the sex work industry are reluctant to be involved for there is a history of mistrust and suspicion. The relationships built over time by the community organizations with sex workers and their assistance in the research studies are critical in conducting and completing such studies.
- [36] Mr. Atchison stated that, because of the smaller sample population, the research is not quantitative, but is qualitative. Quantitative research deals with statistical certainties that focus on procedures to quantify attitudes, opinions and behaviours, and other defined variables to generalize the results from a sample population to the population as a whole. Qualitative research is primarily exploratory research that uses interviews and questionnaires to gain an understanding of the reasons, opinions and motivations. It measures data and formulates patterns and directions the facts indicate. It is more an in-depth lead process to understand social behaviours and actions within a more natural

environment. Qualitative research can be considered to focus on the “reason why” rather than on statistical conclusion.

- [37] Mr. Atchison indicated qualitative researchers are aware of the concerns of trustworthiness and bias and use systems and methodologies that attempt to maintain neutrality in the research process and securitize the data received for bias and trustworthiness.
- [38] He further agreed that a more multi-faceted approach to the commercial sex industry is required. He asserted that simply criminalizing the commercial sex industry will be harmful for some and beneficial for others. Criminalization is a blunt instrument and is not necessarily the best way to resolve a diverse issue. Commodity of sex is not inherently violent or exploitative.
- [39] I conclude that the evidence of Mr. Atchison is credible and compelling. He conceded that the findings of the various studies and reports he referred to in his evidence provide qualitative findings and not statistically founded ones. He testified that he does not vie from a particular point of view on whether commercial sex work is work like any other form of labour. Commercial sex work is not necessarily immoral nor should be condemned. He conveys that he provides data with the anticipation that the decision makers would utilize the data compiled to make a coherent and fair decision concerning commercial sex work in Canada. I do not accept the Crown’s view that Mr. Atchison’s evidence along with the studies and reports provided evidence was biased with a point of view that commercial sex work is like any other forms of labour and should be fully legal. I do agree that the evidence is not statistically based but does provide a pattern of behaviour and factual underpinnings that illicit conclusion concerning commercial sex work in Canada.

**Bedford**

- [40] *Bedford* was a civil application wherein the applicants, Terri Jean Bedford, Amy Lebovitch and Valerie Scott, were seeking declaratory relief that sections 210, 212(1)(j) and 213 (1) (c) of the *Criminal Code* violated section 7 of the *Charter* and as such, are unconstitutional and of no force or effect, and that section 213(1)(c) of the *Criminal Code* violated section 2(b) of the *Charter*, and as such was unconstitutional and of no force and effect.
- [41] The application judge, Himel J. found that the applicants have met their onus and have proven on a balance of probabilities that sections 210, 212 (1) (j) and 213(1)(c) were unconstitutional. Himel J. concluded that sections 210, 212 (1) (j) and 231 (1) (c) of the *Criminal Code* violated section 7 of the *Charter* and could not be saved by section 1. Himel J. further concluded that section 213(1)(c) violated section 2(b) of the *Charter* and could not be saved by section 1. Declaratory relief requested by the applicants was granted, without suspension.
- [42] The Crown appealed the decision. The Court of Appeal allowed the appeal, in part. The Court of Appeal agreed that section 210 was unconstitutional and struck the word “prostitution” from the definition of “common bawdy house” and suspended its declaration of invalidity for 12 months. The Court also declared section 212(1)(j) was an unjustifiable

violation of section 7, ordering the reading in of words to clarify and further held the communicating prohibition under section 213(1)(c) did not violate either section 2(b) or section 7. Concerning section 2(b) of the *Charter*, the Court concluded that *stare decisis* governed.

- [43] The decision of the Court of Appeal was appealed to the Supreme Court of Canada. The Supreme Court dismissed the appeal brought by the Crown and granted the appeal brought by the applicants. The Court found that the negative impact of section 210 on the applicant's security of the person was grossly disproportionate to its objectives of preventing public nuisance. The negative impact of harm found, such as preventing the working in safer fixed indoor locations, from resorting to safe houses, was grossly disproportionate to the deterrence of community disruption.
- [44] The Court found that the prohibition of "living on the avails of prostitution" in section 212(1)(j) punishes the parasitic, exploitative conduct of pimps as well as those who could increase the safety and security of sex workers, such as legitimate drivers, managers or bodyguards. The Court further concluded that those who are involved in the business of commercial sex work, such as accountants or receptionists, were also punished by the provisions. Thus, the section, the Court concluded, included conduct that bears no relation to the purpose of preventing the exploitation of sex workers. Section 212(1)(j) was overbroad.
- [45] On section 213(1)(c), the prohibition of communication was not to eliminate commercial sex work but to take such work off the streets and out of the public view. The provision has a negative impact on the safety and lives of street sex workers who are prevented from communicating with potential clients and are prevented from screening clients for intoxication and propensity to violence. This impact was grossly disproportionate to the possibility of nuisance caused by street sex work.
- [46] The Supreme Court found that the infringements were not saved by section 1. Consequently, the Supreme Court found the challenged provisions violated the *Charter* and declared the challenged provision unconstitutional and suspended the declaration for one year.

### **The Hypotheticals**

- [47] The Supreme Court of Canada in *R. v. Nur* stated that a court can consider not only the facts of the case at hand but also other reasonably foreseeable circumstances in which the challenged law may apply.<sup>14</sup> These reasonable hypotheticals can be considered by the court in its determination of the constitutionality of a challenged law. As McLachlin C.J.C. stated in *Nur*:

...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 reasonably be expected

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<sup>14</sup> 2015 SCC 15, [2015] 1 S.C.R. 773.

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.<sup>15</sup>

- [48] What amounts to reasonably foreseeable circumstances is “grounded in judicial experience and common sense... Fanciful or remote situations must be excluded.” Chief Justice McLachlin further elaborated:

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. Refusing to consider reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter* and the ability of the courts to discharge their duty to scrutinize the constitutionality of legislation and maintain the integrity of the constitutional order. The protection of individuals' 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.<sup>16</sup>

.....

Refusing to consider an impugned law's impact on third parties would also undermine the prospect of bringing certainty to the constitutionality of legislation, condemning constitutional jurisprudence to a wilderness of single instances. Citizens, the police and government are entitled — and indeed obliged — to know what the criminal law is and whether it is constitutional.<sup>17</sup>

- [49] In using hypotheticals, the onus is on the party challenging the legislative provision to provide reasonable hypotheticals that demonstrate that the impugned provisions violate the *Charter* right in issue.<sup>18</sup>

- [50] In the present case there was no dispute that the court can consider reasonable hypotheticals.

- [51] The Applicant presented four hypotheticals. These hypotheticals are:

*Hypothetical 1: A Professionally Run Escort agency*

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

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<sup>15</sup> *Ibid*, at para. 61.

<sup>16</sup> *Ibid*, at para. 63.

<sup>17</sup> *Ibid*, at para. 64.

<sup>18</sup> *R. v. Plange*, 2019 ONCA 646, [2019] O.J. No. 4097, at paras. 31-33.

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.

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.

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.

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

- a. advertising the services of the agency and the escort;
- b. arranging for a photoshoot for the escort;
- c. renting, furnishing and maintaining the workplace (condo or house);
- d. receiving, handling and screening calls from prospective clients;
- e. maintaining a database of banned clients;
- f. matching clients to the escort in accordance with her stated preferences;
- g. providing security and managerial services on site, including controlling entrance to the workplace;
- h. providing transportation and security for out-calls; and
- i. processing cash, debit and credit card payments.

The agency provides employment benefits, including full health and dental services after three months and a Christmas bonus of either a paid vacation or \$1,000.00 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.

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.

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 cellphone which enables them to call for assistance on a 24/7 basis. Calls for assistance should lead to a response within two to three minutes.

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.

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.

In carrying out this hypothetical business, the husband and wife have committed indictable offences under ss. 286.2(1), 286.3(1) and 286.4(1) of the *Criminal Code* exposing them to maximum sentences of 10 years, 14 years and 5 years imprisonment, respectively.

#### *Hypothetical 2: Students Deciding to Do Sex Work*

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.

They approach a known sex worker for assistance and advice. She facilitates their plan by helping set them up, including helping them find rental premises out of which to operate, helping them hire security and a receptionist, and arranging for a professional photographer and website designer to facilitate their advertising on the internet. The two or more students then lease premises, hire security, a receptionist and a bookkeeper, and commence to sell sexual services.

#### *Hypothetical 3: Male Street Based Sex Worker*

Similar facts to hypothetical one except the sex worker in this hypothetical is male. He was working as a sex worker on the streets. He decides to work through the agency as in hypothetical one. He receives the same services and financial arrangements as in hypothetical one. The husband and wife are charged with the same offences as in hypothetical one.

#### *Hypothetical 4: Male Sex Worker in Rented Residence*

The sex worker is male. He is a student in his final year. He decides to lease premises, a room, with the same students in hypothetical two. He uses the premises to conduct his commercial sex work. He makes his own money. He pays rent for the use of the premises for his living residence and where he conducts his commercial sex work. He is charged

under ss. 286.2(1), and 286.3(1). The landlord and third parties are charged with the offences as outlined in hypothetical two.

## Analysis of the Issues

### A. What is the purpose of the *PCEPA* and the impugned sections?

- [52] The purpose of the *PCEPA* is to immunise from prosecution any individual sex worker who performs sex work, and to allow the assistance of third parties in limited circumstances, while making all other aspects of commercial sex work illegal.
- [53] In ascertaining the meaning and legislative intent of the impugned sections, the court will have to interpret the sections. In exercising statutory interpretation, the court must “read [the words of an Act] 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.”<sup>19</sup>
- [54] In response to *Bedford*, Parliament decided to make a “paradigm shift.” Parliament decided to no longer treat commercial sex work as a nuisance, but to consider commercial sex work “as a form of sexual exploitation that disproportionately and negatively impacts on women and girls.”<sup>20</sup> In so doing, Parliament decided to make some aspects of commercial sex work illegal, with emphasis on individuals who purchase sexual services and on third parties who exploit individuals that sell sexual services. As is stated in the Technical Paper:

Accordingly, Bill C-36 seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by thirds parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution. Bill C-36 maintains that the best way to avoid prostitution’s harms is to bring an end to its practice.<sup>21</sup>

- [55] Consequently, keeping in mind the objectives of safety and prevention of exploitation, as illustrated in the summary and preamble to the statute as elaborated in the Technical Paper, Parliament enacted a complicated interconnected scheme to prohibit commercial sex work for adults, individuals over the age of 18. The Technical Paper conveys it this way:

...In addition, Bill C-36 does not prohibit individuals from taking certain measure to protect themselves when selling their own sexual services. In

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<sup>19</sup> *Michel v. Graydon*, 2020 SCC 24, at para. 69. Also see: *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788, at para. 19; *R. v. Gallone*, 2019 ONCA 663, at paras. 30-31; *R. v. Joseph*, 2020 ONCA 733, at para. 77.

<sup>20</sup> Canada, *supra*, note 10 at p. 3.

<sup>21</sup> *Ibid*, at p. 4.

*Bedford*, the Supreme Court of Canada found that the impugned *Criminal Code* prostitution-related offences prevented sellers of sexual services from taking safety measures when engaging in a risky, but legal activity. These protective measures are: selling sexual services from fixed indoor locations, hiring persons who may serve to enhance safety and negotiating safer conditions for the sale of sexual services in public spaces. Bill C-36 seeks to balance these concerns with other broader safety and societal concerns posed by prostitution more generally: the need to protect those subjected to prostitution from violence and exploitation; the need to protect communities from prostitution's harmful effects, including exposure of children; and, the need to protect society itself from the normalization of a gendered and exploitative practice.<sup>22</sup>

- [56] Section 286.1, in broad terms, makes it a criminal offence for everyone who obtains or communicates with anyone to obtain, for consideration, sexual services. This section does not prohibit the sale of sexual services for consideration. This section prohibits everyone who “obtains for consideration” or communicates for “the purpose of obtaining for consideration” sexual services for consideration. From the plain meaning of the section, it is my view, that this section prohibits only the purchase and not the sale of sexual services for consideration. However, a sex worker could be prosecuted for aiding and abetting, or conspiring for the sale of sexual services.
- [57] Section 286.2(1) makes it an indictable offence, liable to imprisonment for up to 10 years, for everyone who receives a financial or other benefit, knowing that the benefit is obtained or derived directly or indirectly from the commission of an offence under section 286.1.
- [58] Section 286.2(3) makes it a presumption that living with or being habitually in the company of a person who offers or provides sexual services for consideration is proof that the person received a financial or material benefit, unless there is evidence to the contrary.
- [59] Section 286.2(4) provides an “exception.” The exception indicates that the offences in section 286.2 do not apply to a person who receives the benefit in a legitimate living arrangement, legal or moral obligations of the person who receives a benefit from sexual services, for services or goods that are offered in same terms to the public or goods or services that are not offered to the general public as long as they do not counsel or encourage that person to provide sexual services and the benefit received is proportionate to the “value” of the service or good.
- [60] Section 286.2(5) indicates that the exceptions in (4) do not apply in specific situations outlined in the subsection. These are the exceptions to the exceptions.
- [61] Section 286.3 makes it an offence to procure a person to offer or provide sexual services for consideration or facilitates. An offence under section 286.1, recruits, holds, conceals or

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<sup>22</sup> *Ibid*, at pp. 10-11.

harbours or exercises control, direction or influence over the movements of a person who offers or provides sexual services for consideration.

- [62] Section 286.4 makes it an offence to knowingly advertise to provide sexual services for consideration.
- [63] Section 286.5(1) provides an immunity from prosecution any person per section 286.2 or 286.4 for their own sexual services. It should be noted that the immunity does not directly apply to section 286.1(1). This would make sense given that the selling of sexual services for consideration in section 286.1 is not prohibited. However, section 286.5(2) does provide immunity from prosecution to any person “for aiding, abetting, conspiring or attempting to commit an offence under any sections 286.1 to 286.4, or being an accessory after the fact or counselling a person to be a party” only “if the offence relates to the offering or provision of their own sexual services.” I am of the view that the immunity section was included to make clear that the legislation is primarily to criminalize the buyers of sexual services and not individual sex workers selling their own sexual services. The immunity, I believe, was to clarify that individual sex workers are not to be prosecuted under section 286.2, even in circumstances where their actions may be prohibited by section 286.2.
- [64] From reviewing the plain and grammatical meaning of the sections along with the objectives and purpose as outlined in the preamble of the *PCEPA* and the Technical Paper, I find that the following can be ascertained concerning the *PCEPA*:
- i. all aspects of purchasing and receiving a benefit from the purchasing of sexual services for consideration/commercial sex work is illegal;
  - ii. knowingly advertising for commercial sex work is illegal;
  - iii. the *Act* aims to facilitate the reporting of violence in commercial sex work and for persons to leave commercial sex work;
  - iv. the selling of one’s own sexual services is not prohibited;
  - v. a sex worker is protected by immunity to aiding, abetting or conspiring on the purchase of their own commercial sex work;
  - vi. a sex worker is protected by immunity in receiving a financial and other material benefit from their own commercial sex work;
  - vii. a sex worker is protected by immunity in advertising their own commercial sex work;
  - viii. individual sex workers may retain the specific services of others for their own commercial sex work;
  - ix. third parties who provide legitimate services to sex workers that do not abuse or exploit commercial sex workers or are provided a benefit from a person’s

commercial sex work that is legitimate in service and a price, as is provided in the public, are excepted from prosecution;

- x. the *Act* aims to promote the protection of the health and safety of commercial sex workers, predominately women and young girls;
- xi. commercial sex work is exploitative and dangerous for abuse and violence perpetrated by others against sex workers, and as such commercial sex workers require protection from such abuse, violence and exploitation;
- xii. no exception applies to any person that is: exploitative, violent, uses coercion, abuses a position of trust, power or authority over a commercial sex worker, provides a drug, alcohol or intoxicating substance to a commercial sex worker for the benefit of aiding or abetting commercial sex work, engages in conduct or procuring per section 286.3 or receives a benefit “in the context of a commercial enterprise that offers sexual services for consideration;”
- xiii. predominately, women and girls are susceptible to exploitation, abuse and violence in commercial sex work;
- xiv. the goal is to discourage persons to be commercial sex workers and over time, eliminate commercial sex work entirely.<sup>23</sup>

[65] Consequently, Parliament has determined that commercial sex work for individual sex workers is allowed, and such sex workers may have the assistance of third parties in limited circumstances to facilitate their health and safety in conducting their commercial sex work. Thus, aspects of commercial sex work, purchasing, communicating, advertising and the receiving of a benefit is illegal. But individual sex workers and the benefits such sex workers receive from their own work or their aiding, abetting, conspiring or attempting to commit the purchase of their sexual services is allowed.

**B. Do the impugned sections violate section 7 of the *Charter* and if so, are the sections saved by section 1 of the *Charter*?**

[66] I have considered the Applicant’s hypotheticals in my analysis of the impugned sections.

[67] Regarding s. 286.2 (material benefit), I find that the sex worker students’ right to liberty and security of the person has been infringed, because the sex workers are receiving a benefit from each other which increase their respective profits; they do not qualify for immunity under s. 285.5 because each sex worker would be receiving a financial benefit which is not “derived from the provisions of their own sexual services”; and their security of the person is infringed because they would not be able to hire third parties in a cost

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<sup>23</sup> *Gallone, supra*, note 19 at para. 92. Associate Chief Justice Hoy concludes that the objective of the new offences is to discourage entry into prostitution and abolish it “to the greatest extent possible.”

sharing arrangement to assist with their security, as the workers would be subject to prosecution by losing their immunity and receiving a financial benefit.

- [68] I rely on the same analysis for section 286.5(1) (immunity), which contains no ambiguity. The immunity from prosecution only applies to a benefit derived from “their own sexual services,” and the exceptions to exceptions mean the exceptions are not operative with shared arrangements or cooperatives between sex workers to share the expenses. This infringes a sex worker’s security of the person, in preventing an ability to hire third parties for services and goods.
- [69] As for s. 286.4 (advertising), the security of the students in the hypotheticals would be infringed by their inability to frankly and in detail provide information in their advertisement of the sexual services offered and expectations for such sexual services, but their right of liberty has not been infringed.
- [70] Section 286.3(1) (procuring) is broad in scope in making an offence in the procuring, recruiting, holding, concealing or harbouring for the purpose of facilitating the purchase of commercial sex work, including the directing or influencing of the movements of a sex worker for the purpose of facilitating commercial sex work. Providing of advice on how to set up, advertise and obtain clients and how to conduct oneself in the commercial sex work is conduct that clearly falls within the meaning of the section. The liberty of sex workers is infringed, in that they are subject to prosecution for procuring, an offence with an incarceration term of up to 14 years. Their security of the person has been infringed, by the inability to receive advice, instruction and direction on the processes and methods for their own protection and safety.
- [71] I find that the impugned provisions are not arbitrary but are overbroad and grossly disproportionate. These *Charter* violations are not capable of being saved by s. 1. As in *Bedford*, the laws’ effect of preventing sex workers from taking measures that would increase their safety, and possibly save their lives, outweigh the law’s positive effect of protecting sex workers from exploitative relationships and the objective of Parliament to decrease or eliminate commercial sex work.

*The Scope and Parameters of the s. 7 Analysis*

- [72] In *Bedford*, the Supreme Court of Canada considered the scope and intent of section 7 of the *Charter*: “Section 7 provides that the state cannot deny a person’s right to life, liberty or security of the person, except in accordance with the principles of fundamental justice.”<sup>24</sup>
- [73] The court must ascertain whether a person’s right to life, liberty or security of the person have been infringed. If so, the court then ascertains whether such infringement is “in accordance with the principles of fundamental justice.”
- [74] The question is whether the law in question deprives a person from right to life, liberty or security of the person. The impugned law is to be examined to ascertain if the law has an

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<sup>24</sup> *Bedford*, *supra*, note 3 at para. 58.

effect on a person's basic values of life, liberty or security of the person. If the law infringes life, liberty or security of the person, the court is to securitize the law as to its accordance with the principles of fundamental justice on whether the law is arbitrary, overbreadth and/or grossly disproportionate in contrast to the law's purpose.<sup>25</sup>

[75] Chief Justice McLachlin summarized as follows:

All three principles-arbitrariness, overbreadth, and gross disproportionality-compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of 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.<sup>26</sup>

[76] In determining if the law is arbitrary

one 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. 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 the person.<sup>27</sup> (citation omitted)

[77] Overbreadth concerns

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.<sup>28</sup>

[78] The gross disproportionality lens is different than arbitrariness and overbreadth. Gross disproportionality targets

the law's effect on life, liberty or security of the person are so grossly disproportionate to its purpose that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the

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<sup>25</sup> *Ibid*, at paras. 57-60, 93-123; *Sharma, supra*, note 5 at paras. 138-141.

<sup>26</sup> *Bedford, supra*, note 3 at para. 123.

<sup>27</sup> *Ibid*, at para. 111.

<sup>28</sup> *Ibid*, at para. 112.

seriousness of the deprivation is totally out of sync with the objective of the measure.<sup>29</sup>

[79] As in *Bedford*, the Applicant in this case is concerned whether a person's liberty and security of the person has been infringed. The Applicant argues that a person's liberty and security of the person has been infringed by sections 286.2, 286.3 and 286.4. The Applicant contends that the evidence provided shows that the prohibitions in the scheme of criminalizing commercial sex work, yet allowing individual sex workers to continue, does not lessen but heightens risks to commercial sex workers, which was found to be unconstitutional by the Supreme Court in *Bedford*. The Crown disagrees and contends that the scheme of criminalizing commercial sex work, with the named exceptions, exceptions to the exceptions and immunity to individual sex workers, does exactly what the legislation intended, that is, the eventual end of commercial sex work, and to provide the means to protect the security of those individual sex workers that continue with the selling of sexual contact services.

[80] I will turn to the sections at issue, 286.2 (material benefit) and 286.3 (procuring) and 286.4 (advertise) in context with the overall scheme.

Section 286.2 (material benefit)

[81] From its plain meaning, section 286.2 prohibits the receipt of financial or other material benefit knowing that it is obtained, directly or indirectly, from consideration of sexual services, a commission of an offence under section 286.1. Section 286.1, by its plain reading, is a provision that is a broad prohibition.

[82] The goal of section 286.2 is to denounce and prohibit economic interests and the commercialization of sexual services for consideration.<sup>30</sup>

[83] This section captures all relationships between sellers and third parties that involve a vested economic interest on the sex worker's services. This interest can be direct or indirect with a financial benefit or any "other material benefit."

[84] However, persons covered by this section do not include the exceptions described in section 286.2(4) or the seller of the commercial sex services due to the immunity provided in section 286.5(1)(a). It is clear that the intention of Parliament is to make it an offence for anyone who benefits financially or receives other material benefit, directly or indirectly, from the sale of sexual contact, except for those excepted and the seller themselves. This may include: a roommate, spouse or child that resides with the sex worker, a dependant parent or child or a recipient of a gift purchased with earnings from sex work, an accountant, landlord, pharmacist or security company who provides good or services that are of the same terms and conditions to the general public, or one that provides administrative or protective services which benefit received is proportionate to the good or

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<sup>29</sup> *Ibid*, at para. 120.

<sup>30</sup> Canada, *supra*, note 10 at pp. 6-7.

services provided and the person who provided the service or good did not encourage, counsel or incite the provisions of sexual contact services.<sup>31</sup>

- [85] The exceptions do not apply if, as set out in section 286.2(5), the exceptions to the exceptions, the person used or threatened to use or attempted to use violence, intimidation or coercion; abused a position of trust, power or authority; provided a drug, alcohol or any other intoxicating substance to the sex worker for the purpose of aiding or abetting that person to offer or provide sexual services for consideration; engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Position of the Applicant and the Crown

- [86] The applicant contends that section 286.2 infringes a sex worker's security of the person by failing to allow the sex worker to utilize third parties for their safety and protection. The applicant argues that the exceptions would not apply and further, if they did apply, the exceptions to the exceptions, namely section 286.2(5)(d) and (e), make it probable that the persons set out in the hypotheticals would be convicted under section 286.2. The applicant contends that the husband and wife would be convicted in hypotheticals one and three. All the participants in hypothetical two and four, except for the photographer, web designer and internet provider would be convicted under the material benefit section. The applicant contends that to do so infringes both the female sex worker and the male sex worker, liberty and security of their persons. The applicant argues that by the evidence presented and the findings of fact in *Bedford* with the effect of section 286.2 prevents a sex worker from taking steps outlined in *Bedford* which infringes their section 7 right to liberty with the possible consequence of imprisonment and security of the person by increased risk of harm.
- [87] The Crown disagrees. The Crown contends that section 282.2 does not infringe section 7. Given the purpose of the *PCEPA* in context with the overall scheme, there is no infringement. Commercial sex work is illegal, contrary to the circumstances in *Bedford*. The exception allows the sex worker to retain the services of others who are not involved with the making of money in the sex work and who are not exploitative. A sex worker has measures they could take such as retaining third parties for security, administration and receptionist that fall within the criteria set out in the sections. In addition, the exceptions to exceptions do not apply in the circumstances of the hypotheticals. Thus, the section does not infringe a sex worker's right to liberty and security of the person.

Analysis

- [88] On the hypotheticals provided, does section 286.2 infringe the liberty and security of a sex worker, as described? The first step is to determine if the said sex worker's right to liberty and security of the person has been infringed.

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<sup>31</sup> *Ibid*, at p. 7.

[89] I accept from the evidence presented at this hearing along with the factual findings described in the trial decision in *Bedford* that:

- (a) the sex industry encompasses a wide range of paid sex services, sex workers and commercial settings;
- (b) research shows that 80-90% of sex work is performed in off street venues. The composition of sex workers is approximately 75-76% women, 17-18% men and 7% are transgender or equivalent. The majority of purchasers of sexual contact are male;
- (c) the vast majority of respondents to the research work independently or are self-employed. The majority indicate that at some point they were employed by a third party;
- (d) not all sex workers make enough resources to solely pay for expenses that would lessen risk of confrontation and violence;
- (e) the risks of violence for sex workers varies widely based on the type of sex work and the location where the service is carried out. Street based sex work is the riskiest with an extreme risk of violence. Street based sex work is particularly vulnerable to “both predatory and situational violence.” Street based sex workers are a fraction of the commercial sex industry;
- (f) sex workers who work indoors experience lower instances and risks of situational violence. Indoors can facilitate security safeguards such as closed-circuit cameras, monitoring, no-locked door policy, monitored entrance and emergency call buttons. Working indoors is safer than working outdoors;
- (g) Research indicates that individuals in sex work are not necessarily exploited. There are situations where some sex workers are exploited by third parties. But such third-party involvement, “pimps”, do not play a large part in street based or off street based commercial sex work. Studies in Canada indicate that the majority of “pimps” were women, where most were former or current sex workers and are not the stereotypical predator, abusive partner or exploitative “pimp”;
- (h) Working in close proximity to others increases safety;
- (i) Use of third parties such as a receptionist, driver, security detail provides the ability to screen clients, obtain and collect personal information, and on site security strategies adds safety and security for commercial sex workers and as such reduces the likelihood of confrontation and violence;
- (j) Sex workers that advertise in newspapers, online classifieds or on commercial sex work websites are more likely to communicate with potential clients before meeting in person. The communication facilitates the understanding of services offered, price for such services and the need for condom use. This provides the

platform for communication of health and safety conditions, by way of chat, email, text messaging or telephone communication. In addition, websites and such like platforms provide the ability of sex workers to share information concerning clients, referrals, bad experiences and mentorship. This results in providing circumstances of safer transaction between sex worker and purchaser and a safer environment for the sex workers;

(k) Post *PCEPA*, technology has become more utilized. The digital world is used more now to facilitate contact, communication and the providing of information. The market for commercial sex services has changed since December 2014.<sup>32</sup>

[90] The facts outlined above are in large part accepted by the Crown. The Technical Paper along with the exceptions indicate that a sex worker may retain the services and goods from third parties such as receptionist, paid security staff, drivers and shared indoor accommodations to enhance protection and security to the individual sex worker.<sup>33</sup>

[91] The issue becomes the exceptions to the exceptions. The Applicant argues that the exceptions to the exceptions vitiates the sex workers' ability to liberty and security of the person by retaining third parties, as outlined in the exceptions. Specifically, the Applicant directs the court to section 286.2(5)(e), which states that the exceptions to the offences in subsections 286.2(1) and (2) do not apply if the person charged under section 286.1 or 286.2 "received a benefit in the context of a commercial enterprise that offers sexual services for consideration."

[92] Justice A.T. McKay in *R. v. Anwar and Harvey* found that section 286.2 violated section 7 of the *Charter*.<sup>34</sup> In so doing, he was presented with the same factual hypotheticals as in hypotheticals one and two herein. In reviewing section 286.2(5)(e), A.T. McKay J. concluded that the sophistication of the scheme of the law and the term "commercial enterprise" is a "minefield" for a sex worker to navigate. He concluded that what is clear is that section 286.2(5) prohibits the scenario

where a third-party 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 be in another industry clearly commits an offence under section 286.2.<sup>35</sup>

[93] I agree with A.T. McKay J. that third parties, such as an escort service or agency, as in hypothetical one and three, are not permitted whether the third party is engaged in coercion or not. It is my view that an escort service or agency service as described in hypothetical one and three do not qualify as an exception per section 286.2(4)(c) or (d). I am also of the view that the question however is not whether the sections prevent a sex worker to use a service like another industry. Parliament has made it clear in the objectives of the *PCEPA*,

<sup>32</sup> *Bedford v. Canada (AG)*, 2010 ONSC 4264, at paras. 421 (1) and (2).

<sup>33</sup> *Canada, supra*, note 10 at p. 11.

<sup>34</sup> *Anwar, supra*, note 11.

<sup>35</sup> *Ibid*, at para. 203.

as described above in the preamble, objectives and the Technical Paper, that Parliament does not wish nor intends to treat commercial sex work like another industry of labour. Parliament has the prerogative to make such a policy decision.

- [94] It is my view that the service provided by the husband and wife is not generally offered to the general public. Further, the court cannot conclude based on the hypothetical one and three if the husband and wife did not counsel or encourage other persons to provide sexual services; nor can the court determine if “the benefit is proportionate to the value of the service” provided.
- [95] The evidence for the court to rely on is nonexistent on whether the escort agency service provided by the husband and wife fall within subsection (c) or (d) of the exceptions. Accordingly, the court must conclude that the service described in hypothetical one and three do not fall within the gambit of the exceptions in section 286.2(4), based on the wording of these exceptions themselves rather than because of the operation of section 296.2(5).
- [96] Even if the exceptions in section 296.2(4) do apply, I find that the husband and wife would not be able to rely on the exceptions because of section 286.2(5)(e). The husband and wife would still be receiving a benefit in the context of their own commercial enterprise that “offers sexual services for consideration”.
- [97] In hypothetical one and there, Parliament has not infringed a sex worker’s liberty, for the selling of sexual services for consideration is not prohibited and a sex worker is immune from prosecution. Further, Parliament allows a sex worker to hire third parties for security, receptionist, driving and other third-party goods and services as outlined in the exceptions. I am of the view that disallowing agencies or escort agencies or similar like services from operating does not infringe a sex worker’s right to security. The sex worker has other services and goods from third parties that can be utilized, as allowed by the exceptions and that do not fall within the exceptions to the exceptions-section 286.2(5). Respectfully, I disagree with the conclusion in *Anwar & Harvey* that a sex worker’s liberty and security of the person has been infringed. I agree with the Crown that section 7 of the *Charter* does not provide a right to the “best” possible means of security. It only provides a person with security of the person. Thus, the court cannot conclude that the security of the person in the hypothetical one and three has been infringed.
- [98] Turning to hypothetical two and four, can a sex worker, male or female, that are in a cooperative like setting: share space, share expenses and third-party services, do so with other sex workers without being subject to violating section 286.2? Would a third party who provides such services between sex workers, such as landlord, security, receptionist, or driver be subject to prosecution and conviction?
- [99] From the exceptions, such a third party would not be subject to prosecution if it provides a service or good like one that would be provided to the general public or, if not to the general public, who provides a benefit that is proportionate to the value of the service good. But does subsection 5, the exceptions to the exceptions, prevent a third party who provides a

service or good to multiple sex workers, or a landlord who rents to multiple sex workers, from being subject to prosecution? More specifically, would a sex worker who shares space or expenses with other sex workers lose their immunity from prosecution per sections 286.5 (1) (a) and 286.5 (2)?

- [100] Neither “benefit” or “commercial enterprise” is defined in the sections under Commodification of Sexual Activity in the *Criminal Code*.
- [101] Black’s Dictionary and the Canadian Oxford Dictionary define benefit as any profit or advantage or acquired right or privilege or income from employment be it salary or wages or nonmonetary form.<sup>36</sup>
- [102] Commercial enterprise is viewed in the Technical Paper as “necessarily involves a third party profiteering...The only type of enterprise that this phrase cannot capture is one involving individuals who sell their own sexual services, whether independently or cooperatively, from a particular location or from different locations.”<sup>37</sup> This proclamation is silent on what cooperatively means, or if the sharing of expenses such a rent, security, receptionist, driver, or website domain between sex workers is allowed under the legislative scheme.
- [103] The Canadian Oxford Dictionary defines commercial as engaged in or concerned with profit and enterprise as business or businesses collectively.<sup>38</sup>
- [104] In *R. v. Ackman*, the Manitoba Court of Appeal, in the context of a jury trial on the offence under section 286.2, commented that the exceptions under section 286.2 (4) would not have applied given the testimony of the accused that he was running a business which would have invoked the exceptions to the exceptions in section 286.2(5)(e), the commercial enterprise exception.<sup>39</sup>
- [105] It is my view, in the context of commodification of sexual activity, benefit has an ordinary meaning of any profit, advantage or acquired right or privilege and commercial enterprise means any enterprise or business entered into for profit. Hence, commercial enterprise in section 286.2(5)(e) encompasses an enterprise with the purpose of making a profit from the selling of sexual services for consideration.
- [106] The factual circumstances of hypothetical two and four are that female and male students/sex workers are sharing a rental space together and are sharing the costs of rent, security, receptionist, a photographer, internet provider and web designer. Though not explicitly stated, a logical assumption is that the sex workers/students are paying the costs of these expenses from their earnings from sex work and I make that assumption.

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<sup>36</sup> Bryan Garner, *Black’s Law Dictionary* (United States: Thomson Reuters, 2019) *sub verbo* “benefit”; Katherine Barber, *Canadian Oxford Dictionary*, (Canada: Oxford University Press, 2005) *sub verbo* “benefit”.

<sup>37</sup> Canada, *supra*, note 10 at pp. 7-8.

<sup>38</sup> Canadian Oxford Dictionary, *supra*, note 34.

<sup>39</sup> 2017 MBCA 78, [2017] M.J. No. 241, at para. 55.

- [107] In this factual circumstance, I find that the sex workers/students' right to liberty and security of person has been infringed. I come to this conclusion for several reasons.
- [108] First, I conclude that the services provided are shared expenses: rent, security, receptionist, web designer, internet provider and photographer. These are services and goods that fall within the exceptions as described in sub-sections (4) (b) and (c) and (d). These are services and goods that are entered into by a legal contractual obligation where sexual services are derived and are services and goods that are provided to the general public.
- [109] By the sharing of expenses, the sex workers are receiving a financial benefit from each other which increase their respective profits. The expenses of rent, security, receptionist, internet and website designer will be decreased in the amount of the expenses each would have to pay which would increase their respective profits for their sex work. Their respective sex work for consideration are enterprises entered into for profit with an expense sharing arrangement between sex workers. The respective sex work enterprises, I conclude, are commercial enterprises, that is an enterprise with the purpose of making a profit from selling sexual services for consideration.
- [110] In addition, each sex worker is subject to not qualifying for immunity under section 285.5 (1)(a) and (2). I come to this conclusion because each sex worker would be receiving a benefit which is not "derived from the provisions of their own sexual services." Each individual sex worker will be deriving a benefit from each others' provisions of sexual services. There is a cost sharing of rent, bookkeeper, security, photographer, receptionist and website designer which financially benefits each sex worker by decreasing costs and increasing profits. Thus, if each sex worker in the hypothetical two and four are no longer immune from prosecution, each would be subject to incarceration of up to 10 years. The consequence is that their respective right to liberty is infringed.
- [111] Moreover, their respective security of person is infringed because they would not be able to hire third parties in a cooperative/cost sharing arrangement to assist with their security because the workers would be subject to prosecution by losing their immunity and receiving a financial and material benefit. The exceptions would not apply.
- [112] The Ontario Court of Appeal in *R. v. Gallone*<sup>40</sup> reviewed section 286.5 in the context of charges for procuring under section 286.3(1). In examining section 286.5(1)(b) and (2), the court found that the immunity only extends to those persons who are involved in advertising their own sexual services. The court found that the wording is clear and there is no ambiguity.<sup>41</sup>
- [113] I rely on the same analysis for section 286.5(1)(a) and (2). The wording is clear and there is no ambiguity. The immunity from prosecution only applies to a benefit derived from "their own sexual services." The exceptions to exceptions prevent the exceptions from being operative with shared arrangements between sex workers in a cooperative or share expenses. This, I find, infringes a sex worker's ability to security of the person to hire third

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<sup>40</sup> *Gallone, supra*, note 19.

<sup>41</sup> *Ibid*, at pp. 34-36.

parties for services as goods. This result is more detrimental to a sex worker's security of the person given that they are unable to use escort services or agencies as a means of security and protection from violence and abuse. It is not disputed that commercial sex workers are less likely subject to violence if they work indoors with third party services, close in proximity. Furthermore, as the evidence indicated, not all sex workers make on their own the amounts of money required to fund solely the expenses of third parties to provide goods and services for their protection and health or accommodation where they are not subject to being discharged. For these sex workers who require benefits from a cooperative cost sharing arrangement, the legislative schemes prevent them from doing so. Particularly, for these sex workers, the legislation infringes their security of the person.

Section 286.4 (Advertising)

- [114] Section 286.4 read in concert with section 286.5(1)(b) permits a sex worker to advertise their own sexual services. However, third parties, such as a website provider, internet provider, newspapers, magazines who accept advertisements from sex workers who they know are advertising for sexual contact services are subject to prosecution. In effect, this means that sex workers who attempt to advertise must do so surreptitiously.
- [115] The evidence provided at this hearing indicates that this prohibition forces artificial speak between sex worker and purchaser. Coded language that hides the true intent has to be used. This is done to hide the purpose of the advertisement, that is for commercial sex work, so the web designer and internet provider, if in Canada, would not have knowledge of that purpose and refuse the service or remove the website from the server.
- [116] There was also evidence presented at the hearing which this court accepts as well as evidence presented in *Bedford*, which all three levels of courts accepted, that communication is critical to the safety and security of the sex worker. The better and more precise and detailed the communication, the less likely that there will be confrontation between sex worker and the purchaser. This results in a much-reduced likelihood of violence. This results in sex worker and purchaser knowing, before meeting, the terms and specifics of the transaction. As a result, there would be fewer gaps or grey areas of expectations.
- [117] Furthermore, due to the increased use of technology and the internet, and the illegality of aspects of commercial sex work in Canada, sex workers use this digital vehicle for advertising their services to indicate in detail the services provided and the expectations with sexual activity, the price for specific services, hygiene, cleanliness and condom use. The evidence indicated that even though website and internet providers are usually outside of Canada, the clear and frank detailed communication between sex worker and purchaser in Canada is still not present, for fear of prosecution.
- [118] In hypothetical two and four, the students retained the services of a web designer and internet provider to advertise their commercial sex work to obtain potential clients.

- [119] The web designer and internet provider would be subject to prosecution in Canada, if they had knowledge of the advertisement for commercial sex work and if they are in Canada.
- [120] The loss of immunity for advertising as described in section 286.5, is if the advertisement, the website and internet provider, are not solely for the sexual services of the individual sex worker. However, the hypothetical does not indicate if the use of the website or internet provider is jointly used by the students or each student has an individual website that advertises each commercial sex services.
- [121] Accordingly, the court concludes that the security of the students in the hypotheticals would be infringed by their inability of frank and detailed information and communication in their advertisement of the sexual services offered and expectations for such sexual services. However, the right of liberty has not been infringed, for the immunity in section 286.5 (1)(b), on the facts of the hypotheticals, still applies.

Section 286.3(1) (Procuring)

- [122] Section 286.3(1) reads:

(1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

- [123] The section requires the person who procures to do so “for the purpose of facilitating an offence under subsection 286.1(1).” The intent required “for the purpose of” signals a subjective specific intent, namely, a specific intent of facilitating the obtaining of sexual services for consideration.

- [124] From my reading, there appears to be three pathways for the offence:

- i. everyone who procures to offer or provide sexual services for consideration;
- ii. everyone who for the purpose of facilitating an offence under section 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration;
- iii. everyone for the purpose of facilitating an offence under subsection 286.1(1) exercises control or influence over the movements of that person.

- [125] It appears to me that for ii) and iii), the specific intent of facilitating an offence under section 296.1(1) is necessary. If the provisions were understood such that specific intent of facilitating an offence were not read as part of iii), I am of the view that iii) would make no sense taking the context of the provisions into consideration. The provisions relate to an

offence of obtaining sexual services for consideration. Exercising control or influence over the movements must relate to the facilitating an offence of obtaining sexual services for consideration.

- [126] The Supreme Court of Canada in *R. v. Deutsch* agreed with the meaning of procure in the context of section 195(1)(a) of the *Criminal Code*, a charge of attempting to procure a person to have illicit sexual intercourse, as “to cause, or induce or to have a persuasive effect upon the conduct that is alleged.”<sup>42</sup>
- [127] The Supreme Court of Canada in *R. v. Legare* reviewed section 172.1(1) which made it an offence to communicate by computer with underaged children or adolescents for the purpose of facilitating the commission of the offences.<sup>43</sup> In the context of the offence, the Court indicated that facilitating “included helping to bring about and making easier or more probable.”<sup>44</sup> The phrase “for the purpose of facilitating the commission of the offences”, the Court held, makes it clear that the intention of the offender must be determined subjectively.<sup>45</sup>
- [128] The Quebec Court of Appeal found that what was involved in exercising control, direction or influence over a person:

The element of *control* refers to invasive behaviour, to ascendancy which leaves little choice to the person controlled. This therefore includes acts of direction and influence. There is the exercise of direction over the movements of a person when rules or behaviours are imposed. The exercise of *direction* does not exclude the person being directed from having a certain latitude or margin for initiative. The exercise of *influence* includes less constricting actions. Any action exercised over a person with a view to aiding, abetting or compelling that person to engage in or carry on prostitution would be considered influence.<sup>46</sup>

- [129] The Ontario Court of Appeal in *R. v. Joseph* in examining section 286.3(2) concluded that “harbour” includes “to shelter.” The Court decided that the trial judge’s interpretation that “harbours” in section 286.3 included “to clandestinely or secretly shelter and protect” was incorrect.<sup>47</sup>
- [130] The Technical Paper describes the difference between procuring and material benefit as follows:

The difference between the material benefit and the procuring offences hinges on the level of involvement in the prostitution of other persons. As

<sup>42</sup> 1986 CanLII 21 (SCC), 1986 [1986] 2 S.C.R. 2, at para. 32; *Gallone, supra*, note 19 at paras. 56-63.

<sup>43</sup> [2009] 3 S.C.R. 551.

<sup>44</sup> *Ibid*, at para. 28.

<sup>45</sup> *Ibid*, at para. 32.

<sup>46</sup> 1996 CarswellQue 3093, 1996 CarswellQue 1069 (Que. C.A.) at para. 11; *R. v. Griffiths*, 2015 ONSC 6237, [2015] O.J. No. 5674 (SCJ), at para. 41; *Gallone, supra*, note 19 at paras. 44-50.

<sup>47</sup> *Supra*, note 19 at paras. 74-91.

with procuring offences replaced by Bill C-36, the new procuring offence requires active involvement in the provision of another person's sexual services; whereas, passive involvement is sufficient to make out the material benefit offence. For example, a "classic pimp" is likely to be caught by both the procuring offence and the material benefit offence, because pimps generally induce or cause others to offer or provide their sexual services and they economically benefit from the activity. In contrast, a person who derives a benefit from the prostitution of others, without actively inciting the provision of sexual services, such as a "bouncer," who works at a strip club and knows that prostitution takes place there, is only caught by the material benefit offence.<sup>48</sup>

- [131] The immunity provided to sex workers for section 286.5 does not apply to the procuring offences.
- [132] In hypothetical two and four, the applicant contends that the students/sex workers, the third-party workers and the sex worker providing advice have contravened section 286.3(1). The applicant argues that the hiring of a receptionist, driver or security person can engage the section by either of them exercising control, directing, facilitating or influencing over the movements of the commercial sex worker. This can be done by transporting the sex worker to a location to engage in sexual contact for consideration; or directing a sex worker to a location or appointments arranged for sexual contact for consideration; or booking accommodation for the sex worker to engage in sexual contact with a client; or a sex worker entering into a lease for accommodation where there is only one sex worker's name on the lease; or reservation of a hotel room where more than the one sex worker, whose name is not on the lease or room reservation, uses the premises to engage in commercial sex work; or a sex worker provides advice or recommendations to another sex worker on how to conduct themselves to obtain more clients, build their clientele and/or to conduct commercial sex work.
- [133] The Crown contends that based on the facts described in the hypotheticals, the requirements required in the section have not been met by all the participants set out in the factual matrix. There is a mixture of acts done by different individuals for very different purposes. The heightened intention for the elements of procurement would have to be found. The court would have to determine the elements of the offence of control, direction, influence and will have to make findings from the facts for any of the participants in the hypothetical that maybe to be subject to prosecution under the section.

### Analysis

- [134] I agree with the Crown. The hypotheticals do not lay the factual foundation that all the participants have met the elements of the offence of procuring, as suggested by the Applicant.

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<sup>48</sup> Canada, *supra*, note 10 at p. 9.

- [135] However, I find that some have.
- [136] Though the factual matrix of the hypotheticals does not clearly indicate the *mens rea* element of the offence clearly, I do surmise that by inference the *mens rea* element has been met.
- [137] Dealing with the sex workers, I am satisfied that by assisting each other in conducting commercial sex, in assisting in advertising in obtaining clients, in providing accommodation to conduct commercial sex work, that each could be prosecuted for procuring, by harbouring, concealing for the purpose of facilitating commercial sex work and directing, influencing or control over the movements of a sex worker for the purpose of facilitating commercial sex work.
- [138] Concerning the former sex worker, I agree with the Crown that giving advice on safety issues, in itself does not offend section 286.3 unless the intentional element is made out. The facts do not make out that the purpose of the advice is to facilitate an offence. However, the providing of advice on how to set up, advertise and conduct oneself clearly falls within directing, influencing, or an element of control over the movements of the sex worker for the purpose of facilitating commercial sex work. The facts infer that the intention of the advising is to assist the students setting up a commercial sex work enterprise.
- [139] The landlord, the photographer, receptionist, security and bookkeeper based on the factual matrix presented, I cannot conclude that either one of them would be prosecuted for procuring. The hypothetical does not lay a foundation that either of these third party workers have any control or provided any influence, or direction over the movements of the students for the purpose of facilitating the engagement of an offence of providing sexual services for consideration. The facts are not presented in the hypothetical two and four that illustrates that the third-party participants have met the *mens rea* or *actus reus* elements of the offence.
- [140] Based on the applicable hypotheticals, I conclude that the liberty of the students has been infringed in that they are subject to prosecution for procuring and that the offence has an incarceration term of up to 14 years.
- [141] I also conclude that their respective security of the person has been infringed. The inability to receive advice on processes and methods on how to conduct and engage in commercial sex work for either each other or from an experienced sex worker who is not acting in an exploitative manner compromises their ability to protect themselves from danger. Further, the joint use of an accommodation obtained by a sex worker for the use of multiple sex workers for the purpose of sexual services for their own protection and safety is prohibited by the provisions which also infringes a sex worker's security of the person.

*Principles of Fundamental Justice*

- [142] The impugned sections are not in accordance with the principles of fundamental justice, namely overbreadth and gross disproportionality, and therefore infringe on s. 7 of the *Charter*.

[143] Before I begin with my analysis, I wish to comment on the Crown's submission that *Bedford* does not assist in the case at bar because in *Bedford* commercial sex work was not illegal. Under the present scheme, commercial sex work is illegal. As the Crown stated in paragraphs 223 and 224 of its Factum:

223. Because there has been a paradigm shift, the framework for constitutional analysis has also changed. Claims that the law is preventing workers from taking steps to minimize risk are really claims that the law is preventing them from minimizing risk while engaging in an illegal activity. Engaging in an illegal activity will rarely be protected by the principles of fundamental justice.

224. By analysis, the Applicant's argument is equivalent to suggesting that the state has an obligation to help a person minimize risk if engaged in the drug trade.

[144] I have two comments to make on this submission.

[145] First, though I agree with the Crown that there is a difference in the law, the selling of sexual services for consideration is still not illegal. Parliament has decided to allow individual commercial sex work to continue without being subject to prosecution, by restricting conduct to the purchasers of sexual services in section 286.1 and per the immunity provision relating to section 286.2(1)(a) and (2). Given that commercial sex workers can obtain consideration for sexual contact, their rights under section 7 of the *Charter* remain engaged which includes their life, liberty and security of person shall not be deprived except in accordance with the principles of fundamental justice, as enunciated in *Bedford*. The contention of the Crown that there is a difference in legality is not supported, in my view, by the plain and ordinary reading of the provisions. There is, in my view, no functional difference between creating an exemption from the scope of the offence itself and creating an exemption that prevents certain persons from being prosecuted for that offence. I believe that substance matters more than form when considering the section 7 rights of the person Parliament has chosen to exempt from criminal prosecution.

[146] Second, the words of McLachlin C.J.C. in *Bedford* discussing "choice" are pertinent:

Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution - the exchange of sex for money - is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous.

[147] This statement by the then Chief Justice, I find, is pertinent to the impugned sections. If the conduct of a sex worker is prohibited by section 286.2, the sex worker is still allowed such conduct due to the immunity from prosecution provided. Thus, as it pertains to section 286.2, I would substitute "not illegal" with "allowed". The causal question is whether the section 286.2 makes this statutorily allowed activity of benefiting from the sale of one's selling sexual services for consideration more dangerous.

[148] There are three principles the court utilizes to scrutinize the impugned law to determine whether the impugned law is in accordance with the principles of fundamental justice. These are:

- i. Is the law arbitrary?
- ii. Is the law overbroad?
- iii. Is the law grossly disproportionate?

[149] There are three sections the court must scrutinize. These are sections 286.2 (1), 286.3 (1) and 286.4.

Analysis

[150] There is no question that objective and purpose of the impugned sections is fundamentally different than the sections scrutinized in *Bedford*. The purpose and objective of the impugned sections, as outlined earlier in this decision, is generally the protection of women and girls for exploitation, abuse and violence, to denounce commercial sex work, to prohibit commercial sex work or the communication for commercial sex work, and to decrease commercial sex work to the point of the elimination of commercial sex work over time.

[151] In *Gallone*, Associate Chief Justice Hoy, in examining the legislative intent of the *PCEPA* in the context of section 286.5, commented:

[91]...Nevertheless, the available extrinsic evidence of Parliamentary intent is both clear and reliable. This evidence confirms what is evident from the content of the legislation, namely, that, as stated in *Technical Paper*, at p. 3, the new prostitution offences enacted by Parliament represent a fundamental shift from the previous view of prostitution as a nuisance toward the conceptualization of prostitution as a form of sexual exploitation. This shift is reflected in Parliament’s choice to place the new prostitution offences in Part VIII of the *Criminal Code*, “Offences against the Person”. Previously, the prostitution-related offences were Part VII, “Disorderly Houses, Gaming and Betting”: *Technical Paper*, at p.3.

[92] As stated in the aforementioned Department of Justice Technical Paper that was tabled before the parliamentary committees that reviewed the new offence provisions, the overall objective of the new offences “is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible”: *Technical Paper*, at p. 3...<sup>49</sup>

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<sup>49</sup> *Gallone*, *supra*, note 19.

[152] With the purposes and objectives of the *PCEPA*, are the impugned sections in accordance with the principles of fundamental justice?

Arbitrariness

[153] As explained in more detail above, arbitrariness is found when there is no connection between effect and object of law. I find that in this case the impugned sections are not arbitrary.

[154] The applicant argues that nothing has changed from the legislation in *Bedford* and the impugned sections. The applicant argues that the impugned sections have no rational connection to the objectives and purposes of the *PCEPA*.

[155] I disagree.

[156] There is a rational connection to the objectives and purposes of the legislation and the measures that result in a deprivation of section 7 rights. The objective and purpose of the legislation is to prevent the continuation of commercial sex work. Parliament has determined that commercial sex work is exploitative, violent and that persons, particularly women and girls, should not enter into commercial sex work and the way to limit entry into commercial sex worker and remove the exploitation and violence is to decrease the demand for such work and rid of commercial sex work in its entirety.

[157] The purpose and objective of the impugned sections is to rid commercial sex work and in so doing rid the violence and exploitation deemed to be part of commercial sex work. The impugned sections, I find, are rationally connected to those purposes and objectives.

[158] Section 286.2(2) denounces and prohibits the economic interests and commercialization of commercial sex work. This is rationally connected to the objectives and purposes of the legislation.

[159] Section 286.2(3) denounces and prohibits the procuring and facilitating by third parties in commercial sex work. Its goal is to prohibit third parties' who make money from commercial sex work from being involved. This is rationally connected to the purpose and objectives of the legislation.

[160] Section 286.4, as Associate Chief Justice Hoy stated in *Gallone*, is central to the objective of reducing the demand for sexual services.<sup>50</sup> This is rationally connected.

[161] Accordingly, I determine that the impugned sections do not infringe the principle of arbitrariness.

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<sup>50</sup> *Ibid*, at para. 92.

Overbreadth

- [162] Overbreadth is concerned with the situation where there is no rational connection between the purposes of the law and some of its impact. I find the impugned sections to be overbroad.
- [163] The Applicant argues, as in *Bedford*, that the impugned sections go too far, and hence deprive sex workers of their security of the person and liberty in a manner unconnected to the law's objectives.
- [164] I agree. The circumstances are similar to the rationale in *Bedford*.
- [165] Parliament has indicated that one of the objectives is to protect sex workers from violence, abuse and exploitation to protect the health and safety sex workers, namely women and girls. This protection is not limited to only those sex workers who make enough money that can afford to solely retain third parties.
- [166] It is accepted that sex workers are safer and are less subject to violence and abuse if:
- i. they are indoors;
  - ii. are close to others;
  - iii. have third parties so that they can retain security, receptionist, drivers;
  - iv. can clearly disclose their services, prices, need of condom use and hygiene. Confrontation is greatly minimized if there are no gaps in understanding the expectations and limits of the transaction;
  - v. the purchasers of sexual contact are aware that there are third parties in the vicinity and the identification of the purchaser is known;
  - vi. commercial sex workers can share information of purchasers and other information to alert others sex workers of concerns and difficulties;
- [167] The impugned sections limit or prevent some if not all of these means of protection and safety for some, if not all, sex workers.
- [168] The impugned sections prevent sex workers from working in tandem and sharing expenses. They also prevent sex workers collectively from using third parties such as receptionist, security entities, drivers to assist in their commercial sex enterprise. The exceptions to the exceptions along with the loss of the immunity makes commercial sex workers under the *PCEPA* to be riskier and more prone to violence than the situation prior to the decision in *Bedford*.
- [169] The sex worker is forced to either keep their commercial sex work silent or own their own pay, which on a practical basis can only be afforded by some sex workers. Hence, some

sex workers will be conducting sexual services for consideration in a situation of diminished protection from violence and abuse.

- [170] In addition, the prohibition of advertising increases the likelihood of gaps of expectations and limits between sex workers and purchasers. It is clear from the evidence provided, and the facts enunciated in *Bedford* indicate, that the ability of a sex worker to clearly communicate with potential purchasers aid the sex worker in minimizing confrontation, which lessens possibility of violence and abuse. However, any entity that creates a website for a sex worker or an internet provider that allows a sex worker to use their platform is subject to prosecution if that entity has knowledge of the use of the service for commercial sex work.
- [171] This again compels the sex worker to covertly use the services or not use the services at all, which has a direct consequence on the safety and protection of the sex worker.
- [172] Consequently, I find that the impugned sections are overbroad. There is no rational connection between the purposes and objectives of the law to protect sex workers from violence and abuse and the impact on sex workers, as described.

Gross Disproportionality

- [173] Gross disproportionality is concerned with the law's effect on life, liberty and security of the person and are so grossly disproportionate to its purpose.
- [174] In reviewing the objectives and purposes of the legislation and the impact on sex workers, I conclude that the impact is grossly disproportionate.
- [175] The legislation allows commercial sex work to continue. It allows individual sex workers to continue to receive consideration for sexual contact. In doing so, the legislation must do so in a way that does grossly limit or prevent a commercial sex worker from taking steps to minimize their susceptibility to abuse and violence. The legislation cannot stand in the path of commercial sex workers who take steps to protect themselves and their health from violence or harm. The impugned provision cannot make an allowed activity more dangerous.
- [176] The scheme created by Parliament, I find, does exactly that: grossly limits or prevents sex workers from taking steps to protect their health and safety. And in so doing, makes the allowed activity more dangerous. The scheme gives with one hand the ability of sex workers to continue to get consideration for sexual contact, but on the other hand restricts their ability and measures to do so in a safe and protected setting. The exceptions, in concert with the exceptions to the exceptions, grossly restrict that ability. The procurement section restricts the ability of sex workers to share expenses to aid in their ability to afford protection and seek assistance from others to create a system that protects their health and safety.
- [177] The prohibition on advertising restricts the commercial sex workers' ability to have a digital platform that facilitates a clear and frank exchange of information and

communication to alert potential purchasers of the criteria and limitations for engaging in the sexual contact services of the sex worker. The ability to do so on a digital platform is more critical now than in the times of *Bedford*, given the evidence at this hearing on the reliance and use of such means for the exchange of information. The inability to utilize advertising in an open way creates a situation that *Bedford* clearly indicated was grossly disproportionate to the legislation's purpose, that is effective communication between sex worker and potential client to screen the potential client for safety concerns of the sex worker. The objective of eliminating or lessening commercial sex work through the banning of advertisement cannot be made at the safety and security of commercial sex workers.

[178] I am of the view that Parliament cannot allow commercial sex work to continue, and then grossly limit or prevent the sex worker's ability to protect their safety and health from violence and danger. These consequences of the legislation, in my view, are grossly disproportionate to the objectives of the legislation.

Section 1 of the Charter

[179] Section 1 does not save the infringements of s. 7 in this case.

[180] Section 1 guarantees the rights and freedoms set out in the *Charter* "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[181] The onus is on the Crown to satisfy the court on the balance of probabilities that the impugned provision should be saved by section 1.

[182] The Applicant urges the court to follow the analysis in *Bedford* that:

Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

[183] The Crown directs the court to the reasons in *R. v. Boodhoo* to support the view that the infringements are a reasonable limit.<sup>51</sup>

[184] *Boodhoo* is a decision of Bale J. that examined sections 286.2(2), 263.3(2) and 286.4 of the *Criminal Code*. Justice Bale reviewed the sections that deal with minors, persons under the age of 18 years old. Further, the decision was after a guilty verdict by a jury and there was no evidence called concerning the impact and effect of the impugned provisions.

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<sup>51</sup> 2018 ONSC 7205.

- [185] At first glance, the case is highly distinguishable on the facts. The accused has been found guilty. The offences involved are different, though the section 286.4 offence is the same as in this case.
- [186] Having reviewed the reasons of Bale J., I find his reasons of little assistance in my analysis under section 1 of the *Charter* and the infringements to section 7. The evidentiary foundation in this case is different. Our respective findings concerning section 7 and section 286.4 are divergent. On the evidentiary record in this application, I determined that section 286.4 infringes section 7 of the *Charter*. Bale J. came to a different conclusion based on the facts before him.
- [187] I agree with the Applicant. The reasoning of section 1 in *Bedford* is of more assistance to the court.
- [188] As in *Bedford*, the Crown here did not seriously address the issue of section 1 in her factum as it pertains to the facts of this matter, except to rely on the decision of Bale J.
- [189] There is minimal argument in the factum of the Crown for the court to determine, on the balance of probabilities, that the impugned sections violation of section 1 is different than the Crown's submissions on section 7.
- [190] In any event, it is not disputed that when there is a violation of section 7, it would very difficult to justify an infringement under section 7 as being a reasonable limit to liberty and security of the person in a free and democratic society.<sup>52</sup>
- [191] Hence, I conclude the infringements of section 7 are not saved by section 1.

**C. Does section 286.4 of the Criminal Code violate section 2(b) the Charter and if so, is it saved by section 1 of the Charter?**

- [192] The applicant argues that the prohibition of advertising violates section 2(b) of the *Charter*. However, I am bound by the Court of Appeal for Ontario's decision in *Bedford*, as well as the Supreme Court of Canada's decision in *Prostitution Reference*<sup>53</sup>. As such, I cannot find that s. 286.4 is an unjustified infringement under s. 2(b).
- [193] Section 2(b) was argued in *Bedford*. The application judge found that there was a change in context in the 20 years since the leading case of the Supreme Court of Canada case of the *Prostitution Reference* determined that in the context of communication for the purpose of prostitution infringed section 2(b) of the *Charter* but was saved by section 1 of the *Charter*.

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<sup>52</sup> *Bedford, supra*, note 3 at para. 129.

<sup>53</sup> *Supra*, note 5.

[194] A majority of the Ontario Court of Appeal in *Bedford* disagreed with the applicant judge and found that the court was bound by *stare decisis* to follow the decision of the Supreme Court in the *Prostitution Reference*. The Court of Appeal stated:

...By contrast, we conclude that the application judge erred in reconsidering whether or not the communicating provision is an unjustified infringement of s. 2(b) of the *Charter*. The Supreme Court definitively decided this issue in the *Prostitution Reference*, and only that court may revisit it.<sup>54</sup>

[195] The Supreme Court of Canada in *Bedford* declined to revisit the issue of whether the communication provisions are an unjustified infringement of section 2(b) of the *Charter*.

[196] The Supreme Court in *Bedford* described the majority of the Court of Appeal reasoning as follows:

[31] In considering the doctrine of *stare decisis* and whether the application judge was bound by the *Prostitution Reference*, the court adopted a narrow view of when a trial judge can reconsider previous decisions of the Supreme Court of Canada on the basis of changes in the social, economic or political landscapes: the trial judge cannot change the law, but is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. Reasons that justify a court departing from its own prior decisions cannot justify a lower court revisiting binding authority. This applies to determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras.75-76).<sup>55</sup>

[197] The Supreme Court later indicated that whether the communication provision in *Bedford* is a justified limit on the freedom of expression has been decided in the *Prostitution Reference*.<sup>56</sup>

[198] Section 286.4 prohibits knowingly advertising “an offer to provide sexual services for consideration.” The immunity section permits a sex worker to “the advertisement of their own sexual services.” An individual sex worker can advertise. However, any other person who knowingly advertises is prohibited from doing so.

[199] The Applicant contends that in the digital age, third parties are inevitably involved, be it internet providers, web domain providers, web designers and professional photographers. The applicant argues that section 286.4 by prohibiting advertising as it does, it prohibits freedom of expression in limiting communication between the sex worker and prospective purchaser.

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<sup>54</sup> 2021 ONCA 186, at para. 52.

<sup>55</sup> *Bedford, supra*, note 3 at para. 31.

<sup>56</sup> *Ibid*, at paras. 46 and 47.

- [200] The Crown submitted that there is no infringement and if there is, the *Prostitution Reference* decision governs. A prohibition on communication for the purposes of sexual contact for consideration is a justifiable limit under section 1 of the *Charter*.
- [201] The Applicant did not provide any submissions on whether the court is bound or not by the reasoning of the majority of the Court of Appeal in *Bedford* that the *Prostitution Reference* is binding authority and can only be changed by the Supreme Court. Nor did the Applicant provide any submissions or evidence on the basis of which this court may find that *stare decisis* does not apply.
- [202] Without evidence or submissions that persuade the court to the contrary, based on *stare decisis*, I am of the view that this court is bound by the decision of the Ontario Court of Appeal in *Bedford*.
- [203] Because of the Ontario Court of Appeal decision in *Bedford* and the reasoning in the *Prostitution Reference*, section 286.4 is a reasonable limit, demonstrably justified in a free and democratic society.

**D. Do sections 286.2 and 286.3 violate section 2(d) of the Charter and if so, are the sections saved by section 1 of the Charter?**

- [204] Having determined that section 7 of the *Charter* has been infringed and that infringement is not a reasonable limit in a free and democratic society, I decline to deal with the alleged infringement to section 2(d) of the *Charter*.

**E. Remedy**

- [205] Section 52(1) of the *Constitution Act, 1982*, indicates that the Constitution is the supreme law of Canada and that “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency of no force or effect.”
- [206] The Applicant seeks a declaration that sections 286.2, 286.3(1) and 286.4 of the *Criminal Code* be found unconstitutional and be immediately made of no force and effect as it relates to the Applicant and a similar remedy in *Bedford* be granted, that is, the declaration be suspended for one year.
- [207] The Crown provided no submissions on remedy.
- [208] After the hearing of this application, on November 20, 2020, the Supreme Court of Canada released the decision of *Attorney General of Ontario v. G*. In that decision the Court discussed the appropriate remedy in constitutional challenges to legislation.
- [209] Accordingly, the court requires further submissions from the parties on the appropriate remedy in this case.
- [210] The applicant has fourteen days from today to serve and file his written submission on the appropriate remedy and the Crown has fourteen days thereafter. After receipt of the

submissions, the court will ascertain whether oral submissions are required, the written submissions to be no more than ten pages, doubled spaced.

**Disposition**

[211] This court finds that sections 286.2, 286.3(1) and 286.4 of the *Criminal Code* infringe section 7 of the *Charter* and the infringement is not justifiable under section 1 of the *Charter*. Further submissions are required concerning the appropriate remedy. The timeline for those submissions is set out in paragraph 210 above. If further time is required, either party may make a written request to me through the Trial Coordinator.

**CITATION: R. v. N.S., 2021 ONSC 1628  
NEWMARKET COURT FILE NO.: CR-17-009179**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Her Majesty the Queen

**– and –**

N.S.

Defendant

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**REASONS FOR DECISION ON *CHARTER*  
CHALLENGE TO SUBSECTIONS 286.2, 286.3  
AND 286.4 OF THE *CRIMINAL CODE***

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Justice P.W. Sutherland

**Released:** March 4, 2021