

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

Appellant/Respondent on Cross-Appeal  
(Appellant in Appeal)

- and -

**TERRI JEAN BEDFORD, AMY LEBOVITCH AND VALERIE SCOTT**

Respondents/Appellants on Cross-Appeal  
(Respondents in Appeal)

AND BETWEEN:

**ATTORNEY GENERAL OF ONTARIO**

Appellant/Respondent on Cross-Appeal  
(Appellant in Appeal)

- and -

**TERRI JEAN BEDFORD, AMY LEBOVITCH AND VALERIE SCOTT**

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(Respondents in Appeal)

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**FACTUM OF THE INTERVENERS, CANADIAN ASSOCIATION OF SEXUAL  
ASSAULT CENTRES, NATIVE WOMEN'S ASSOCIATION OF CANADA, CANADIAN  
ASSOCIATION OF ELIZABETH FRY SOCIETIES, ACTION ONTARIENNE CONTRE  
LA VIOLENCE FAITE AUX FEMMES, LA CONCERTATION DES LUTTES CONTRE  
L'EXPLOITATION SEXUELLE, LE REGROUPEMENT QUÉBÉCOIS DES CENTRES  
D'AIDE ET DE LUTTE CONTRE LES AGRESSIONS À CARACTÈRE SEXUEL AND  
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## **PART I: OVERVIEW AND STATEMENT OF FACTS**

1. This intervention is brought in coalition by seven national, provincial and local women's groups<sup>1</sup> whose members, decision-making bodies, and clients include prostituted women ("Women's Coalition for the Abolition of Prostitution" or "Women's Coalition"). The Women's Coalition members provide front line crisis and anti-violence services, representation and advocacy for women and girls who are or have been prostituted, who are criminalized and incarcerated in relation to prostitution, who are trying to escape prostitution, who are targeted for prostitution, and who have been subject to male violence, including prostitution.

2. Prostitution is a practice of sex inequality. Most of those prostituted are women and girls. Almost all buyers/johns and most pimps/profiteers are men. The buying and selling of women's bodies in prostitution is a global practice of sexual exploitation and male violence against women that normalizes the subordination of women in a sexualized form. It exploits and compounds systemic inequality on the basis of sex, Aboriginality, race, poverty, age and disability. The Court of Appeal erred in failing to recognize how these inequalities produce and define the prostitution industry and how they are relevant to each stage of the *Charter* analysis under s. 7.<sup>2</sup>

3. The s. 7 *Charter* analysis must be consistent with substantive equality for women, with particular attention to Aboriginal women, as guaranteed in ss. 15(1), 25 and 28 of the *Charter*. A substantive equality analysis must reflect the fact that the challenged laws simultaneously criminalize two distinct groups: (a) the women who are prostituted; and (b) the johns, pimps, brothel owners and others who exploit prostituted women and profit from the sale of their bodies. That the laws have dual functions – punishing prostituted women and interfering with the men who harm them – is significant for all stages of the *Charter* analysis. It must affect the understanding of the liberty and security of the person interests at stake, the analysis of principles of fundamental justice, and the remedial implications under s. 52.

4. The Women's Coalition submits that the *Charter*, interpreted consistently with Canada's two-fold international commitments to (a) protect prostituted women and (b) constrain those who

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<sup>1</sup> The Women's Coalition members are: Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action Ontarienne contre la Violence Faite aux Femmes, la Concertation des Lutttes contre l'Exploitation Sexuelle, Le Regroupement Québécois des Centres d'Aide et de Lutte contre les Agressions à Caractère Sexuel and Vancouver Rape Relief Society.

<sup>2</sup> *Canada (AG) v Bedford*, 2012 ONCA 186, **Appellants' Record** ("**AR**"), Vol 2, Tab 7 [OCA Judgment].

exploit or traffic in them, mandates the asymmetrical criminalization of prostitution<sup>3</sup> as follows:

- a. First, criminalizing prostituted women deprives them of liberty and security of the person contrary to the principles of fundamental justice because it punishes women for men's exploitation of them. Thus s. 210(2)(a) [inmate of a bawdy house] is unconstitutional in its entirety, and s. 210(1) [keeping a bawdy house] and s. 213 [communicating] are unconstitutional only to the extent that they apply to prostituted persons.
- b. Second, criminalizing johns, brothel owners and those who live off the avails of prostitution ("pimps/profiteers") does not violate the *Charter* rights of prostituted women. Instead, such laws support prostituted women's security of the person. It is contrary to principles of fundamental justice to decriminalize men's prostitution of women in order to protect women from those same men. Thus s. 210 [keeping a bawdy house], s. 210(2)(b) [found-in at a bawdy house], s. 210(2)(c) [knowingly permitting a bawdy house], s. 212(1)(j) [living on the avails] and s. 213 [communicating] are constitutional to the extent that they apply to johns, brothel owners, and pimps/profiteers.

The Women's Coalition asks the Court to take into account the inequalities between prostituted women and those who buy, pimp and profit off them, and to find that s.7 does not require and is not consistent with the decriminalization of johns, brothel owners and pimps/profiteers.

5. Prostitution, regardless of physical location, is not engaged in by a random cross-section of the domestic and international population. The sexual exploitation, coercion, and violence that define prostitution are practices committed overwhelmingly by men against women and children.<sup>4</sup> This sexual and sexualized inequality is compounded by other systemic inequalities that determine who enters and remains in prostitution and that amplify the power of those who buy and profit from prostituted women. Many women enter prostitution as children, often after being sexually abused and/or placed in state care. Many women are pushed into and remained in prostitution because of poverty, homelessness, low levels of education, and disability, including

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<sup>3</sup>Catharine A MacKinnon, "Trafficking, Prostitution, and Inequality" (2011) 46 Harv CR – CLL Rev 272 at 307. **Women's Coalition Authorities** ("WC Auth"), Tab 23. See the legal regimes in Sweden and Norway: Affidavit of Janice Raymond, **Joint Appeal Record** ("**JAR**"), Vol 55, Tab 119, pp 16061-65; Reasons of Himel J, **AR**, Vol 1, Tab 3 at paras 206-08 [OSC Judgment]. See also *Sexual Offences Act 2003* (UK), c 42, s 53A (criminalizing buyers of prostitutes controlled for gain), **WC Auth**, Tab 22.

<sup>4</sup>*Report of the Special Committee on Pornography and Prostitution in Canada, Vol 2* (1985), **JAR**, Vol 71, Tab 154B, p 20889 [Fraser Report]; Report of the Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (2006), **JAR**, Vol 82, Tab 164, pp 24918, 24930 [Challenge Report].

addictions. Many women in prostitution are racialized or have precarious immigration status. Most of these inequalities were pervasive in the lives of those who gave evidence for both parties in this case.<sup>5</sup>

6. In some Canadian cities, it is estimated that up to 50-70% of women in street prostitution are Aboriginal.<sup>6</sup> This overrepresentation is not an accident and it must be central to the analysis of the prostitution laws. It is the legacy of colonial law and policy that has frequently left Aboriginal women dispossessed of their lands, their language and culture, their “status” under law and their children. The effects of residential schools, including poverty, addiction and cycles of violence and abuse,<sup>7</sup> contribute to Aboriginal girls being taken into state care or running away to urban areas, where they are vulnerable to recruitment by pimps. Consigning Aboriginal women to bear the brunt of meeting male demand for prostitution compounds this inequality.<sup>8</sup>

## PART II: STATEMENT OF ISSUES

7. Do ss. 210, 212(1)(j) and 213(1)(c) of the *Criminal Code* violate s. 7 of the *Charter*?

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<sup>5</sup> Affidavit of Terri Jean Bedford, **JAR**, Vol 2, Tab 11, p 45 (state care age 6; entry age 16); Bedford Cross-examination, **JAR**, Vol 2, Tab 12, p 110-14 (abused by male relatives, age 8), pp 91-2 (poverty), p 140-42 (limited education/job prospects), p 88-90 (drug addiction); Cross-examination of Valerie Scott, **JAR**, Vol 4, Tab 17, p 582 (entry age 15), p 617 (limited education/job prospects); Affidavit of Wendy Babcock, **JAR**, Vol 4, Tab 19, p 791 (entry age 15); Babcock Cross-examination, **JAR**, Vol 4, Tab 20, pp 791-93 (homeless or in state care; limited education/job prospects), p 839 (childhood sexual abuse); Affidavit of Natasha Falle, **AR**, Vol 4, Tab 39, p 4 (entry age 14; left school grade 8), p 3 (in state care); Affidavit of Dawn Hodgins, **AR**, Vol 5, Tab 43, p 27 (abused by 3 men, age 6; homeless or in state care), p 28 (entry age 16; poverty); Cross-examination of Carol-Lynn Strachan, **JAR**, Vol 8, Tab 33, p 1865 (entry age 16), p 1913 (left school grade 8); Affidavit of Wendy Harris, **JAR**, Vol 7, Tab 27, p 1574 (poverty), p 1596 (left school grade 9); Affidavit of Linda Shaikh, **JAR**, Vol 8, Tab 31, p 1862 (poverty); Affidavit of Darlene Mooney, **JAR**, Vol 7, Tab 29, pp 1685-86 (poverty); Affidavit of TD, **AR**, Vol 5, Tab 44, p 47 (entry age 15, homeless or in state care); Affidavit of PM, **AR**, Vol 5, Tab 49, p 109 (abused by male relatives, age 7), p 110 (entry age 13-14 years old; homeless or in state care); Affidavit of JS, **AR**, Vol 5, Tab 45, p 57 (abused by stepfather, age 12), p 59 (left in high school); Affidavit of DS, **AR**, Vol 5, Tab 42, pp 3-5 (poverty; left in high school). See also Affidavit of Jim Morrissey, **JAR**, Vol 34, Tab 78, p 9756 (Aboriginal women disproportionately represented); Affidavit of JoAnn McCartney, **JAR**, Vol 35, Tab 32, p 10055 (addiction to hard drugs a coping mechanism and barrier to exit); Affidavit of Michelle Holm, **JAR**, Vol 35, Tab 83, p 10248 (bawdy house women often in Canada illegally; residential brothels mainly Asian); Fraser Report, *supra* note 4 at p 20890 (average age of entry likely 15-16), p 20894 (poverty a cause and a barrier); Challenge Report, *supra* note 4 at p 24918 (average age of entry likely 14-18), p 24919 (poverty a cause and a barrier); Dept of Justice, *Street Prostitution: Assessing the Impact of the Law* (1989), **JAR**, Vol 75, Tab 157, p 22349 (for girls average age 16); Amnesty International, “Stolen Sisters: A Human Rights Response to Discrimination and Violence Against Indigenous Women in Canada,” **JAR**, Vol 7, Tab 29, p 1752 (Indigenous women and girls).

<sup>6</sup> Challenge Report, *supra* note 4 at p 24920 (70% in Winnipeg); Melissa Farley, et al “Prostitution in Vancouver: Violence and Colonization of First Nations Women,” (2005) 42 J of Transcult Psych 242, **JAR**, Vol 49, Tab 113E, p 14371 (52% of participants Aboriginal) [Farley].

<sup>7</sup> *R v Ipeelee*, [2012] 1 SCR 433 at para 60, **WC Auth**, Tab 9.

<sup>8</sup> Challenge Report, *supra* note 4 at pp 24920-21; Farley, *supra* note 6 at p 14363.

### PART III: ARGUMENT

#### A. Women’s Coalition Approach to s. 7 of the Charter

8. Section 7 of the *Charter* must be interpreted harmoniously with other *Charter* rights. In particular, the guarantee of sex equality in s. 15(1) and s. 28, and the guarantee of Aboriginal and treaty rights in s. 25 of the *Charter* mandate an approach to s. 7 analysis that respects and promotes the equality rights of women, with particular attention to the circumstances of Aboriginal women.<sup>9</sup> Section 15(1) is the broadest of all guarantees and applies to and supports all other *Charter* rights.<sup>10</sup> The Court must consider the inequalities of prostitution and the relative power of those covered by the laws at each stage of the s. 7 analysis. A failure to integrate substantive equality norms into s. 7, and to consider the different positions of those affected by a challenged law, risks turning s. 7 into a means of reinforcing inequality.<sup>11</sup>

9. Section 7 must also be interpreted consistently with Canada’s international obligations.<sup>12</sup> Canada has committed itself to oppose the exploitation of the prostitution of women and the trafficking of women for prostitution.<sup>13</sup> Trafficking of women into and within Canada is driven by the domestic demand for prostitution, which increases in jurisdictions where johns are decriminalized.<sup>14</sup> The challenged laws are the only provisions that criminalize the purchase of trafficked persons. They work alongside and support other laws designed to give effect to Canada’s international commitments.

10. Canada has also committed to “take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.”<sup>15</sup> It would be contrary to these commitments to

<sup>9</sup> *R v Lyons*, [1987] 2 SCR 309 at 326, **WC Auth**, Tab 11; *R v Mills*, [1999] 3 SCR 668 at 727, **WC Auth**, Tab 13; *New Brunswick v G(J)*, [1999] 3 SCR 46 at para 115 (L’Heureux-Dubé, Gonthier and McLachlin JJ), **WC Auth**, Tab 4; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, **WC Auth**, Tab 6.

<sup>10</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 185, **WC Auth**, Tab 1.

<sup>11</sup> *R v Edwards Books and Art*, [1986] 2 SCR 713 at 779, **WC Auth**, Tab 7.

<sup>12</sup> *Canada v Khadr*, [2010] 1 SCR 44 at para 23, **AGO Auth**, Tab 8; *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at 348-49, **WC Auth**, Tab 18.

<sup>13</sup> *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, UNGAOR, 55th Sess, Annex II, UN Doc A/55/383, (2000), Art 9, **WC Auth**, Tab 21; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, 1249 UNTS 13, Art 2(f), 5(a), 6, Can TS 1982 No 31, **AGO Auth**, Tab 73.

<sup>14</sup> Factum of the AG Ontario, Appendix B (ix, xi, xiii-xv); Factum of the AG Canada at para 27.

<sup>15</sup> *Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, UNGAOR, 61st Sess, UN Doc A/61/L.67 and Add.1, (2007), Art 22, **WC Auth**, Tab 20.

decriminalize the men who buy Aboriginal women in prostitution, and those who profit from that prostitution, thereby exploiting and reinforcing this inequality.

**B. Women's Coalition Analysis of Security of the Person**

**11.** In analysing whether the security of the person of prostituted women is violated, this Court must take into account how the impugned laws apply to two distinct groups and must remain acutely attuned to the relative inequality of those two groups. The Court must analyse the effect of how the provisions criminalize prostituted women separately from the effect of how the provisions criminalize the persons who buy, traffic and profit from them.

**12.** The Women's Coalition submits that the *criminalization of prostituted women* through the communicating and bawdy house laws undermines women's security of the person, but for reasons distinct from those relied on by the courts below. A substantive equality approach to security of the person recognizes that in criminalizing prostituted women, the state punishes women for their own sexual exploitation.<sup>16</sup> A criminal record makes it even more difficult for women to find sources of income other than prostitution, endangering their personal security.

**13.** However, the Women's Coalition submits that the laws that *criminalize johns, brothel owners, pimps and profiteers*, in any location, do not cause men's violence against women and do not violate prostituted women's security of the person. The extraordinary level of danger that women in prostitution face comes from johns, brothel owners, pimps and profiteers who enforce and demand male sexual access to women's bodies in a commercially exploitative industry. The decriminalization of these men would violate women's security of the person.

**14.** The Court of Appeal erred in concluding that the safety of women in street prostitution would be enhanced by decriminalizing bawdy houses because it would allow these women to move inside. If the likelihood of a criminal charge was a determining factor, women would already be indoors, since both prostituted women and johns are already much less likely to be charged and convicted for bawdy house prostitution than for street prostitution. Women are prostituted on the street because there is male demand for street prostitution. This demand

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<sup>16</sup> Michelle Madden Dempsey, "Sex Trafficking and Criminalization: In Defence of Feminist Abolitionism" (2010) 158 U Pa L Rev 1729 at 1736-39, **WC Auth**, Tab 24.

persists regardless of the legal status of brothels.<sup>17</sup>

15. The dissenting justices in the Court of Appeal recognized that women in street prostitution would not move indoors, but erred in concluding that the security of women in street prostitution is violated by the communicating law because it decreases the time women have to “screen” johns for violence.<sup>18</sup> Decriminalizing johns and downloading responsibility for policing them onto prostituted women revives the long-discredited notion that women can and should be privately responsible for preventing male violence.<sup>19</sup> Any man can be violent at any time and women should not be expected to predict when a man will turn violent.<sup>20</sup>

16. Even assuming that one woman could reject a john she fears will harm her, the risk of harm would simply be displaced onto another woman who cannot afford to refuse. Women with the least relative privilege in terms of age, class, disability, Aboriginality or race are more likely to endure and less able to refuse the most dangerous and brutalizing kinds of prostitution, whether indoor or outdoor. The dissenting justices’ support for decriminalizing not only prostituted women but also the men who buy them, in the hope of moving street prostitution to more visible areas, truncates the inquiry. Regardless of where a john begins his purchase, his prostitution of a woman concludes in private, where the violence occurs.<sup>21</sup>

17. The Court of Appeal’s focus on location distracts attention from the men who are the source of prostitution’s harms; that the violence they inflict can be reduced in indoor settings is not “obvious” from the record.<sup>22</sup> Although the Court of Appeal relied on the proposition that “the advantages of ‘home field’ are well understood by everyone,”<sup>23</sup> the home is too often an extraordinarily dangerous place for women.<sup>24</sup> The evidence demonstrated considerable harms are present in indoor prostitution. Women who were prostituted in brothels and other indoor

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<sup>17</sup> Pratt Affidavit, Ex “C”, **Suppl JAR**, Vol 2, Tab 178, pp 26926, 26934, 26950-51; OSC Judgment, *supra* note 3 at paras 93, 189, 196; Factum of the AG Ontario, Appendix B (i, ii).

<sup>18</sup> OCA Judgment, *supra* note 2 at para 360.

<sup>19</sup> *Declaration on the Elimination of Violence against Women*, A/RES/48/104, UNGAOR, 48th Sess, UN Doc A/48/629, (1993), Art 4, **WC Auth**, Tab 19.

<sup>20</sup> *R v Evans*, 2009 BCSC 1615 at paras 36-9, **WC Auth**, Tab 8.

<sup>21</sup> *R v Pickton*, 2009 BCCA 300 at paras 25-9, 36, **WC Auth**, Tab 14.

<sup>22</sup> OCA Judgment, *supra* note 2 at paras 111, 113, 134.

<sup>23</sup> *Ibid* at para 134.

<sup>24</sup> *R v Lavallee*, [1990] 1 SCR 852 at 888-89, **WC Auth**, Tab 10. See also: *R v Whynot*, [1983] NSJ No 544 (QL), **WC Auth**, Tab 16; *BM v British Columbia (AG)*, 2004 BCCA 402, **WC Auth**, Tab 2; *R v Malott*, [1998] 1 SCR 123, **WC Auth**, Tab 12.

operations testified that they were assaulted and sexually assaulted; no one intervened. Some women considered street prostitution a better option because they could decline johns, johns were less likely to be intoxicated or refuse a condom, and pimps had less control.<sup>25</sup> As the Court of Appeal acknowledged, “prostitution is inherently dangerous in virtually any circumstance.”<sup>26</sup>

**18.** The Court of Appeal erred in relying on *Canada (AG) v PHS Community Services Society*<sup>27</sup> to conclude that decriminalization of bawdy houses would serve as a form of harm reduction for prostitution.<sup>28</sup> The analogy between supervised injection for drug use and prostitution is both flawed and incomplete. Prostitution is a gendered practice of inequality. Women are not addicted to prostitution and prostitution is not a disease. The physical risks of addiction come from a chemical substance and the equipment used to inject it; in prostitution the risks come from other people. The measures in *PHS* decriminalized only the addicted person, while here the Respondents also seek to decriminalize the people who are the source of the harms, namely johns and pimps. Attempting to direct men’s demand for prostitution to particular locations does not reduce harm when it is the demand itself that causes harm.

### **C. Women’s Coalition Analysis of the Principles of Fundamental Justice**

**19.** The majority of the court below concluded that it does not violate the principles of fundamental justice to criminalize street prostitution through the communicating law, but that it does violate the principles of fundamental justice to criminalize brothel prostitution through the bawdy house laws. The Women’s Coalition submits that this distinction, based on physical location, is not correct. The relevant distinction is that the challenged laws are contrary to the principles of fundamental justice when applied to prostituted women, but are neither overbroad nor grossly disproportionate when applied to johns, brothel owners, pimps and profiteers.

**20.** The gendered nature of prostitution, the enforcement of laws unequally against women<sup>29</sup> and the relationship between prostitution and the degradation and inequality of all women, have

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<sup>25</sup> Affidavit of Amy Lebovitch, **JAR**, Vol 2, Tab 13, p 165; Affidavit of Susan Davis, **JAR**, Vol 5, Tab 22, p 936; Affidavit of Linda Shaikh, **JAR**, Vol 8, Tab 31, p 1862; Affidavit of Natasha Falle, **AR**, Vol 4, Tab 39, pp 10-11; Affidavit of DS, **AR**, Vol 5, Tab 42, p 8; Affidavit of Dawn Hodgins, **AR**, Vol 5, Tab 43, pp 31-2; Affidavit of TD, **AR**, Vol 5, Tab 44, p 51; Affidavit of HC, **AR**, Vol 5, Tab 46, pp 79-80.

<sup>26</sup> OCA Judgment, *supra* note 2 at para 117.

<sup>27</sup> [2011] 3 SCR 134, **WC Auth**, Tab 3.

<sup>28</sup> OCA Judgment, *supra* note 2 at para 116.

<sup>29</sup> Challenge Report, *supra* note 4 at pp 24958-60.



long been a feature of the public debate about legal responses to prostitution. However, the relevance of substantive equality is not dependent on the government's specific objectives at the time of the passage of each of the challenged laws. The principles of fundamental justice in s. 7 must not reinforce inequality by artificially constraining the *Charter* values at issue.

**21.** This Court must balance the objectives of the laws against their effects in the context of the constitutional value of substantive equality by recognizing (a) the role that male demand plays in sustaining prostitution as a practice of inequality; (b) the systemic inequalities that push women into prostitution and keep them there; and (c) that the same law as applied to johns and prostituted women has different effects on these groups because of this inequality.

**22.** In a context of substantive inequality, simplistic reliance on the concept of individual choice does not aid the s. 7 analysis.<sup>30</sup> The Appellants rely on the choice of women to prostitute to argue that it is fundamentally just to criminally punish them.<sup>31</sup> The Respondents rely on the choice of women to prostitute to argue that it is fundamentally unjust to limit those choices through law.<sup>32</sup> Neither party considers the inequalities that produce and amplify the power exercised by those who buy women in prostitution. Neither confronts the inequalities that shape and constrain women's entry into prostitution and their inability to exit. These inequalities, and prostitution's harms, need not be experienced identically by all women in order for prostitution to be recognized as a discriminatory practice.<sup>33</sup>

**23.** The Women's Coalition submits that the Court must recognize the extreme imbalances of power held by the actors in the prostitution industry as a central consideration for the principles of fundamental justice. Recognizing these inequalities makes clear that the laws operate in two ways – they validly interfere with men's exploitation of women but also unjustly punish women for that exploitation.

**24. Criminalizing prostituted women is inconsistent with principles of fundamental justice.** On any version of the objectives advanced by the parties, the Women's Coalition submits that criminalizing women in prostitution is overbroad and grossly disproportionate. The

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<sup>30</sup> *Quebec (AG) v A*, 2013 SCC 5 at para 342 (per Abella J), **WC Auth**, Tab 5.

<sup>31</sup> Factum of the AG Ontario at paras 20-2; Factum of the AG Canada at para 69.

<sup>32</sup> Factum of the Respondents/Appellants on Cross Appeal at para 58.

<sup>33</sup> *Ref re Section 293 of the Criminal Code*, 2011 BCSC 1588 at paras 13, 14, 1190, **WC Auth**, Tab 17.

systemic inequalities that drive women into prostitution and keep them there must be recognized and addressed by the state. It is fundamentally unjust for the state to criminalize those who are targeted for abuse and exploitation because of their inequality and marginalization.<sup>34</sup> This is particularly true where such punishment falls disproportionately on Aboriginal women.

**25. Criminalizing johns, brothel owners, pimps and profiteers is consistent with principles of fundamental justice.** The criminalization of men who buy, sell and profit off women in prostitution is neither overbroad nor grossly disproportionate. It is consistent with Canada's domestic and international commitments to protect prostituted women and to interfere with their exploitation. There is no constitutional right of men to buy sex in any location. Decriminalizing men's purchase of women's bodies does nothing to disrupt or combat male violence against women. Instead, it validates male demand and expands the prostitution industry, reinforcing the inequality of all women and of Aboriginal women in particular. The failure of police to arrest Robert Pickton for violating the prostitution laws did not enhance women's safety. Instead, one means for the state to interfere with his violence was lost.

**26.** The majority of the Court of Appeal relied on the involvement of organized crime, the drug trade, and other criminal activity to find that the communicating law did not violate the principles of fundamental justice. These conclusions should apply equally to the principles of fundamental justice as applied to the bawdy house laws. The evidence indicated that trafficking, organized crime and child prostitution are facilitated by the secrecy of indoor venues.<sup>35</sup> The source of these harms in all locations are overwhelmingly johns and pimps/profiteers, not prostituted women.

**D. Section 212(1)(j) (living on the avails) does not violate s. 7 of the Charter**

**27.** The Women's Coalition agrees with the Appellants that prostituted women's security is not violated by criminalizing the economic interest of third parties in profiting from prostitution. Pimping and profiteering does not protect prostituted women; it subjects them to additional pressure, risk, and abuse. A requirement to prove "circumstances of exploitation" is unnecessary

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<sup>34</sup> *Ref re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] 1 SCR 1123 at 1193 (per Lamer J) and 1134-35 (per Dickson CJ), **AGO Auth**, Tab 63; *R v Mara*, [1996] OJ No 364 (CA) at 651, **AGC Auth**, Tab 41.

<sup>35</sup> Factum of the AG Canada at para 27.

because living on the avails is inherently exploitative. “Living on the avails” has been interpreted as receiving an economic benefit from another’s prostitution in the absence of any moral or legal obligation to provide that support.<sup>36</sup> This economic incentive creates a source of additional pressure for women to remain in prostitution. Prostituted women must engage in more prostitution with more johns if they must provide some or all of their income to others. This increases harm to women in prostitution, including the risk of physical and sexual violence.

#### E. Remedy

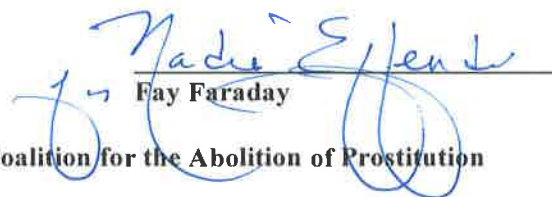
28. A declaration of invalidity must be narrowly tailored to what is required to bring a law into constitutional conformity so as not to inappropriately pre-empt or curtail Parliament’s legislative options. This caution is particularly apt where, as here, the impugned laws target the conduct of numerous differently situated actors but the *Charter* rights of only one group are at issue. The remedy for the violation of prostituted women’s s. 7 rights should advance, rather than imperil their personal security. Where, as here, parts of a challenged law are constitutional and serve to protect the interests of vulnerable persons, it is appropriate to read in an exception that declares the challenged laws to be of no force or effect only to the extent that they apply to prostituted persons.<sup>37</sup> Such a remedy is consistent with substantive equality and the *Charter*’s purposes.

#### PART IV: ORDER SOUGHT

29. The Women’s Coalition requests leave to make oral argument at the hearing of the appeal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30<sup>th</sup> DAY OF MAY 2013.**

  
 Janine Benedet

  
 Fay Faraday

**Counsel for the Intervener Women’s Coalition for the Abolition of Prostitution**

<sup>36</sup> *R v Grilo* (1991), 2 OR (3d) 514 (CA) at 522, **AGC Auth**, Tab 31; *R v Barrow* (2001), 54 OR (3d) 417 (CA) at para 29, **AGC Auth**, Tab 23.

<sup>37</sup> *R v Sharpe*, [2001] 1 SCR 45 at paras 114-27, **WC Auth**, Tab 15.

**PART V: TABLE OF AUTHORITIES**

Legend for Location in Book of Authorities:

**WC Auth = Women's Coalition for the Abolition of Prostitution Book of Authorities**

**AGC Auth = Attorney General of Canada Book of Authorities**

**AGO Auth = Attorney General of Ontario Book of Authorities**

**CASE LAW**

| <b>Case Name</b>   | <b>Paragraph in factum where cited</b> | <b>Location in Book of Authorities</b> | <b>Tab in Book of Authorities</b> |
|--|--|--|-----------------------------------|
| <i>Andrews v Law Society of British Columbia</i> , [1989] 1 SCR 143                  | 8                                      | WC Auth                                | Tab 1                             |
| <i>BM v British Columbia (Attorney General)</i> , 2004 BCCA 402                      | 17                                     | WC Auth                                | Tab 2                             |
| <i>Canada v Khadr</i> , [2010] 1 SCR 44  | 9                                      | AGO Auth                               | Tab 8                             |
| <i>Canada (Attorney General) v PHS Community Services Society</i> , [2011] 3 SCR 134 | 18                                     | WC Auth                                | Tab 3                             |
| <i>New Brunswick v G(J)</i> , [1999] 3 SCR 46  | 8                                      | WC Auth                                | Tab 4                             |
| <i>Quebec (Attorney General) v A</i> , 2013 SCC 5                                    | 22                                     | WC Auth                                | Tab 5                             |
| <i>R v Barrow</i> , (2001), 54 OR (3d) 417 (CA)                                      | 27                                     | AGC Auth                               | Tab 23                            |
| <i>R v Big M Drug Mart Ltd.</i> , [1985] 1 SCR 295                                   | 8                                      | WC Auth                                | Tab 6                             |
| <i>R v Edwards Books and Art</i> , [1986] 2 SCR 713                                  | 8                                      | WC Auth                                | Tab 7                             |
| <i>R v Evans</i> , 2009 BCSC 1615  | 15                                     | WC Auth                                | Tab 8                             |
| <i>R v Grilo</i> , (1991), 2 OR (3d) 514 (CA)  | 27                                     | AGC Auth                               | Tab 31                            |
| <i>R v Ipeelee</i> , [2012] 1 SCR 433  | 6                                      | WC Auth                                | Tab 9                             |
| <i>R v Lavallee</i> , [1990] 1 SCR 852   | 17                                     | WC Auth                                | Tab 10                            |
| <i>R v Lyons</i> , [1987] 2 SCR 309  | 8                                      | WC Auth                                | Tab 11                            |
| <i>R v Malott</i> , [1998] 1 SCR 123   | 17                                     | WC Auth                                | Tab 12                            |
| <i>R v Mara</i> , [1996] OJ No 364 (CA)  | 24                                     | AGC Auth                               | Tab 41                            |

|   |    |          |        |
|---|----|----------|--------|
| <i>R v Mills</i> , [1999] 3 SCR 668   | 8  | WC Auth  | Tab 13 |
| <i>R v Pickton</i> , 2009 BCCA 300  | 16 | WC Auth  | Tab 14 |
| <i>R v Sharpe</i> , [2001] 1 SCR 45   | 28 | WC Auth  | Tab 15 |
| <i>R v Whynot</i> , [1983] NSJ No 544 (QL)  | 17 | WC Auth  | Tab 16 |
| <i>Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)</i> , [1990] 1 SCR 1123 | 24 | AGO Auth | Tab 63 |
| <i>Reference re Section 293 of the Criminal Code of Canada</i> , 2011 BCSC 1588           | 22 | WC Auth  | Tab 17 |
| <i>Reference re Public Service Employee Relations Act (Alta)</i> , [1987] 1 SCR 313       | 9  | WC Auth  | Tab 18 |

### INTERNATIONAL INSTRUMENTS AND FOREIGN LAW

| <b>Instrument/Law</b>   | <b>Paragraph in factum where cited</b> | <b>Location in Book of Authorities</b> | <b>Tab in Book of Authorities</b> |
|---|--|--|-----------------------------------|
| <i>Convention on the Elimination of All Forms of Discrimination Against Women</i> , 18 December 1979, 1249 UNTS 13, Can TS 1982 No 31   | 9                                      | AGO Auth                               | Tab 73                            |
| <i>Declaration on the Elimination of Violence against Women</i> , A/RES/48/104, UNGAOR, 48th Sess, UN Doc A/48/629, (1993)  | 15                                     | WC Auth                                | Tab 19                            |
| <i>Declaration on the Rights of Indigenous Peoples</i> , A/RES/61/295, UNGAOR, 61st Sess, UN Doc A/61/L.67 and Add.1, (2007)  | 10                                     | WC Auth                                | Tab 20                            |
| <i>Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime</i> , UNGAOR, 55th Sess, Annex II, UN Doc A/55/383, (2000) | 9                                      | WC Auth                                | Tab 21                            |
| <i>Sexual Offences Act 2003 (UK)</i> , c 42, s 53A  | 4                                      | WC Auth                                | Tab 22                            |

**LAW REVIEW ARTICLES**

| <b>Authority</b>  | <b>Paragraph in factum where cited</b> | <b>Location in Book of Authorities</b> | <b>Tab in Book of Authorities</b> |
|---|--|--|-----------------------------------|
| Catharine A MacKinnon, "Trafficking, Prostitution, and Inequality", (2011) 46 Harv CR – CLL Rev 272                             | 4                                      | WC Auth                                | Tab 23                            |
| Michelle Madden Dempsey, "Sex Trafficking and Criminalization: In Defence of Feminist Abolitionism", (2010) 158 U Pa L Rev 1729 | 12                                     | WC Auth                                | Tab 24                            |

## PART VI: STATUTORY PROVISIONS

- 1) *Criminal Code of Canada*, RSC, 1985, c C-46, ss 210, 212 and 213
- 2) *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, ss 7, 15, 25, 28 and 52(1)

### *Criminal Code of Canada*

#### **Keeping common bawdy-house**

**210.** (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

#### **Landlord, inmate, etc.**

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

### *Tenue d'une maison de débauche*

**210.** (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans quiconque tient une maison de débauche.

#### *Propriétaire, habitant, etc.*

(2) Est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, selon le cas :

a) habite une maison de débauche;

b) est trouvé, sans excuse légitime, dans une maison de débauche;

c) en qualité de propriétaire, locateur, occupant, locataire, agent ou ayant autrement la charge ou le contrôle d'un local, permet sciemment que ce local ou une partie du local soit loué ou employé aux fins de maison de débauche.

*Procuring*

**212.** (1) Every one who [...]

(j) lives wholly or in part on the avails of prostitution of another person,  
is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[...]

*Presumption*

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j) and subsections (2) and (2.1).

**Proxénétisme**

**212.** (1) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque, selon le cas :

[...]

j) vit entièrement ou en partie des produits de la prostitution d'une autre personne.

[...]

*Présomption*

(3) Pour l'application de l'alinéa (1)j) et des paragraphes (2) et (2.1), la preuve qu'une personne vit ou se trouve habituellement en compagnie d'un prostitué ou vit dans une maison de débauche constitue, sauf preuve contraire, la preuve qu'elle vit des produits de la prostitution.

*Offence in relation to prostitution*

**213.** (1) Every person who in a public place or in any place open to public view

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

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

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person



for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

*Definition of “public place”*

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

*Infraction se rattachant à la prostitution*

**213.** (1) Est coupable d’une infraction punissable sur déclaration de culpabilité par procédure sommaire quiconque, dans un endroit soit public soit situé à la vue du public et dans le but de se livrer à la prostitution ou de retenir les services sexuels d’une personne qui s’y livre :

- a) soit arrête ou tente d’arrêter un véhicule à moteur;
- b) soit gêne la circulation des piétons ou des véhicules, ou l’entrée ou la sortie d’un lieu contigu à cet endroit;
- c) soit arrête ou tente d’arrêter une personne ou, de quelque manière que ce soit, communique ou tente de communiquer avec elle.

*Définition de « endroit public »*

(2) Au présent article, « endroit public » s’entend notamment de tout lieu auquel le public a accès de droit ou sur invitation, expresse ou implicite; y est assimilé tout véhicule à moteur situé dans un endroit soit public soit situé à la vue du public.

***Canadian Charter of Rights and Freedoms***

*Life, liberty and security of person*

**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.

**Vie, liberté et sécurité**

**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu’en conformité avec les principes de justice fondamentale.

*Equality before and under law and equal protection and benefit of law*

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

**Égalité devant la loi, égalité de bénéfice et protection égale de la loi**

**15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

*Aboriginal rights and freedoms not affected by Charter*

**25.** The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

*Maintien des droits et libertés des autochtones*

**25.** Le fait que la présente charte garantit certains droits et libertés ne porte pas atteinte aux droits ou libertés — ancestraux, issus de traités ou autres — des peuples autochtones du Canada, notamment :

(a) aux droits ou libertés reconnus par la proclamation royale du 7 octobre 1763;

(b) aux droits ou libertés existants issus d'accords sur des revendications territoriales ou ceux susceptibles d'être ainsi acquis.

*Rights guaranteed equally to both sexes*

**28.** Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

*Égalité de garantie des droits pour les deux sexes*

**28.** Indépendamment des autres dispositions de la présente charte, les droits et libertés qui y sont mentionnés sont garantis également aux personnes des deux sexes.

*Primacy of Constitution of Canada*

**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.

*Primauté de la Constitution du Canada*

**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.