

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

BETWEEN:

MIKHAIL KLOUBAKOV

APPELLANT
(Appellant)

– and –

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

– and –

HICHAM MOUSTAINE

APPELLANT
(Appellant)

– and –

HIS MAJESTY THE KING

RESPONDENT
(Respondent)

– and –

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In Canada, prostitution is not a profession. It is a crime. Despite the empowering, lucrative, and legitimizing picture that the Appellants and some interveners paint of “sex work,” it is a social evil that each year ruins – and indeed claims the lives of – exploited women and girls.
2. Nothing about the sex industry is benevolent. It is a ruthless enterprise, often run by exploitative criminal entrepreneurs. They target and groom the vulnerable, use them brutally for profit and then abandon and cast aside survivors. The connection between the sex industry and human trafficking is well understood.
3. After this Court’s decision in *Bedford*, Parliament faced a choice: legalize and regulate selling sex or criminalize and abolish it. Parliament heard from all sides and perspectives during extensive debates and committee hearings.
4. In 2014, it drew a policy line: Parliament enacted the currently impugned provisions, as part of a new *Criminal Code* regime, the *Protection of Communities and Exploited Persons Act*, S.C. 2014, c. 25 (*PCEPA*). From that point forward, prostituted women and girls would be considered exploited victims, not small business owners. This was a normative decision, and one that was open to Parliament. Moreover, it was a decision in line with Canada’s domestic responsibility and international commitments to protect the vulnerable from exploitation.
5. Manitoba intervenes in this appeal to share our jurisdiction’s experience with the sex industry, our position supporting the choice that Parliament made, and our submission that ss. 286.2 and 286.3 of the *Criminal Code* are constitutional.

B. Statement of Facts

6. Manitoba accepts the facts as set out by the parties.

PART II – RESPONSE TO QUESTIONS IN ISSUE

7. In this factum, Manitoba addresses the following question:

- (i) Do subsections 286.2(1), (4), (5) and 286.3(1) of the *Criminal Code* infringe the rights guaranteed under s. 7 of the *Canadian Charter of Rights and Freedoms*?

8. Manitoba submits the answer is no. We make no submission on a s. 1 or remedy.

9. Manitoba agrees with the Respondent that, despite the approach of the Appellants and some interveners, this appeal is not about the legality of the sex trade at large.¹ Commodifying sex is unlawful in Canada. The provisions of *PCEPA* criminalizing it are presumed to be constitutional.

10. In this case, the impugned provisions targeted individuals who were employed as drivers and money collectors by extra-jurisdictional sex-traffickers. This is not a case of drivers or security guards employed by independent businesswomen who were perhaps, as the Appellants put it, using sex work as a vehicle to join the upper echelons of society.² This is an important distinction in the context of the constitutional question.

PART III – ARGUMENT

A. Manitoba’s Position Post-*Bedford*

11. The provisions in question were enacted in 2014 in response to this Court’s decision in *Canada v Bedford*, 2013 SCC 72. Post-*Bedford*, Parliament faced a choice of whether to adopt a legalized and regulated approach to prostitution or institute a “Nordic Model” to criminalize the commodification of sexual activity and reduce demand.

12. Manitoba was a vocal proponent of the Nordic Model. The Attorney General at the time,

¹ Factum of the Respondent at para 4.

² Factum of the Appellant at para 21.

Andrew Swan (AG Swan), appeared before House and Senate committees studying what was then Bill C-36. AG Swan testified that Manitoba had already effectively adopted a Nordic Model, to the extent possible, through cooperative efforts among prosecutors, police, and community organizations. The approach was to refrain from arresting and charging victims of exploitation and instead to connect them with social work and support organizations. In contrast, the criminal justice system would target those who exploited these victims for profit.

13. AG Swan advanced this perspective:

Prostitution is not a victimless crime. Every day vulnerable persons are preyed upon by unscrupulous individuals and groups who sexually exploit them. They're women, men and children. Too many of these victims are on the streets of Winnipeg, elsewhere in Manitoba, elsewhere in Canada, and too many of these victims are Aboriginal people in this country.

...

The Manitoba Government does not support the legalization of prostitution, nor the full decriminalization of prostitution, nor de facto decriminalization of prostitution which would occur by a failure to respond to *Bedford*.

...

We believe that, to protect and help the victims of sexual exploitation, Canada needs to consider a new approach to address prostitution that focuses on reducing the demand for the purchase of sex and assisting victims to escape. Without demand, there would be no incentive to coerce others to engage in prostitution or human trafficking.

...

My government supports the Nordic Model and call[s] for similar laws in Canada. Bill C-36 primarily adopts the Nordic Model, and for that we are very happy.³

14. We note that the Nordic Model, first adopted by Norway and Sweden in 1999, has been accepted by and implemented in many democratic nations, including Iceland, Israel, Ireland, and

³ Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 19, Evidence – October 29, 2014 at 19:31 ff.

France. The European Parliament has endorsed and recommended it, as has the United Nations.⁴ Canada is well situated in making a similar policy choice.

15. Manitoba continues to endorse the position taken by Parliament that prostitution is an inherently exploitive activity and those who procure and profit from vulnerable persons should be held criminally liable.

B. Manitoba's Experience Combatting Sexual Exploitation

16. Manitoba employs integrative, multi-stakeholder strategies to combat sexual exploitation associated with the sex industry. The current iteration is Tracia's Trust: Manitoba's Strategy to Prevent Sexual Exploitation and Sex Trafficking. This strategy was developed to complement the existing efforts by community groups, respond to contemporary research on sexual exploitation, and target and deter offenders:

Since 2002, the Manitoba government has led counter sexual exploitation efforts, consulted nationally, and demonstrated leadership and innovation in this area. In 2002, Manitoba launched Canada's first provincial strategy to prevent sexual exploitation. This strategy is now known as Tracia's Trust in honour of Tracia Owen, who tragically died of suicide after she was sexually exploited. Every year, Tracia's Trust provides approximately \$10 million to fund initiatives in the areas of prevention, intervention, legislation, coordination, research and evaluation.

Tracia's Trust (the strategy) is Manitoba's response to children, youth and adults who are at risk of, or survivors of, sexual exploitation and sex trafficking. Manitoba Families is the lead department responsible for coordinating the implementation of the strategy via its Sexual Exploitation Unit.⁵

17. According to Manitoba Department of Families' Sexual Exploitation Unit:

⁴ Robert Chrismas, *Sex Industry Slavery: Protecting Canada's Youth*, 2020 University of Toronto Press at pp 130-131. [*Sex Industry Slavery*]

⁵ Tracia's Trust: Collaboration and Best Practices to End Sexual Exploitation and Sex Trafficking in Manitoba (gov.mb.ca) at p 18. [*Tracia's Trust*]

Winnipeg, in particular, is known internationally for the sex trafficking of children and youth. The Sexual Exploitation Unit is aware of many trafficking routes involving Manitoba as a source, transit or destination point across Canada. This includes an active triangular trade between Winnipeg, Thunder Bay and Kenora.

[E]very year approximately 400 children and youth are trafficked for the purpose of sexual exploitation in the visible sex trade in Manitoba, which represents approximately 10 per cent of the total number of cases. Approximately 90 per cent of cases occur in the invisible trade, meaning they take place behind closed doors or online...⁶

18. While prosecution under the *Criminal Code* provisions is only one part of Manitoba's multi-front strategy, it is an important one. Without the punitive power and the deterrent value of ss. 286.2 and 286.3, those subjected to exploitive procurement and victimization would lack the law's protections. Should the provisions be struck down, their vulnerability to exploitation – in some respects now legally-endorsed – will be increased.

19. If anything, more deterrence against exploitation is needed, not less.⁷

C. Indigenous Youth are at High Risk for Sexual Exploitation

20. Most people engaged in the sex industry in Manitoba have not, as competent and self-actualised adults, decided on it as a career path. It was not their carefully considered vocational choice to “help[] them...enter the highest ranks of society, as do lawyers and professors” as the Appellants rather colourfully, but erroneously put it.⁸

21. Rather, most are in the industry at age 18 and thereafter because they were coercively forced into it as youths, either directly or by circumstance. The adult sex industry is, in most respects, simply a progressive symptom of the sexual exploitation of youth.

22. In Manitoba, Indigenous girls are vastly overrepresented in the child welfare system and

⁶ *Tracia's Trust* at p 21.

⁷ *Sex Industry Slavery* at p 150.

⁸ Appellant's Factum at para 21.

ripe for exploitation in the sex trade.⁹ These young people are also less likely to be involved in off-street work or the commercial enterprises contemplated by the Appellants.¹⁰ Although the research varies, the average age of entry for girls is between 13 to 16 years old. A large number of them exchange sex for survival or to fund an addiction.¹¹ Many of these children then continue to sell sex as adults for the same reason they first started—simply out of necessity.¹² This is borne out in the Manitoba case law discussed below. However, these concerns are often obscured by those seeking to focus solely on decriminalization and regulation.¹³

23. According to the Manitoba Department of Families:

[H]undreds of children, youth and adults are victimized in the visible sex trade on the streets of Winnipeg and other cities each year. It is also estimated that thousands are victimized in the invisible sex trade that takes place in hidden venues such as private homes and drug houses located throughout the province.

Most adult sex trade workers report that their victimization began at a very young age; sometimes as young as 9, and at an average age of 14.¹⁴

24. Of further concern, local agencies in Winnipeg report that, “the average age of recruitment has become younger and younger.”¹⁵

25. Some evidence even indicates that the sex industry in Manitoba prevents young women from operating independently, because those who purchase sex will pay *more* for underage girls. As such, third parties (i.e., exploiters) target these young girls, demanding payment or benefit via

⁹ *R v Alcorn*, 2021 MBCA 101 at para 20 [*Alcorn*]; *Canadian Alliance for Sex Work Reform (CASWLR) v Attorney General*, 2023 ONSC 5197 at para 183. [*CASWLR*]

¹⁰ Kelly Gorkoff & Jane Runner, eds, *Being Heard: The Experiences of Young Women in Prostitution* (Winnipeg: Fernwood Publishing & Research and Education for Solutions to Violence and Abuse [RESOLVE], 2003) at p 15 [*Being Heard*].

¹¹ *CASWLR* at paras 182-183; *R v Gudmandson*, 2018 MBPC 31 at paras 34, 36, 37 [*Gudmandson*]; *Being Heard* at pp at 19-21, 24, 33-35, 39; *Tracia’s Trust* at p. 35.

¹² *Gudmandson* at paras 35, 39.

¹³ *CASWLR* at para 129.

¹⁴ Province of Manitoba | fs - How common are sexual exploitation and sex trafficking? (gov.mb.ca)

¹⁵ *CASWLR* at para 183.

threats, violence, and manipulation.¹⁶

26. Thus, Manitoba submits that the portrayal of a “free choice” exercised by adults autonomously making their way in the world is simply illusory. Worse, it masks the exploitative realities suffered by vulnerable youth who are procured and victimized within the sex trade.

D. Criminal Law as an Aspect of Reconciliation

27. The criminal law can either support or undermine the goal of reconciliation with Indigenous peoples. This is noteworthy as Manitoba’s jurisprudential history highlights that the sexual exploitation of young, vulnerable, Indigenous women and girls is a problem of longstanding concern.¹⁷ One Provincial Court Judge described it as: “[a] systemic crime against Indigenous girls in Winnipeg.”¹⁸

28. Recent observations from the Winnipeg Police Service suggest “80% of sex workers on the street in Winnipeg are Indigenous and range in age from 14-65.”¹⁹

29. Others have observed that 70 percent of sexually exploited children and youth in Manitoba have Indigenous ancestry. According to one researcher, “[t]his is a massive overrepresentation of Indigenous victims, considering they make up about 4 percent of Canada’s population.”²⁰

30. Manitoba submits that finding the impugned provisions unconstitutional would leave vulnerable Indigenous persons even more susceptible to exploitation. Recalling that many find themselves in a situation where they are forced into selling sex – either directly or by

¹⁶ *CASWLR* at para. 203

¹⁷ *Alcorn* at paras 2-3, 16- 17, 19.

¹⁸ *Gudmandson* at paras 2, 3 (Devine PJ). In *Gudmandson*, the offender was convicted of obtaining sexual services as it related to seven Indigenous girls between the ages of 12 and 17, all of whom were described as “very vulnerable to his exploitation.”

¹⁹ *CASWLR* at para 182.

²⁰ *Sex Industry Slavery* at p 86

circumstance – because of the legacy of colonial harms they experience, removing these protections is contrary to reconciliation.

31. Frontline Winnipeg police officer turned academic, Dr. Robert Christmas, while recognizing the continuing impacts of colonial harms, goes a step further. He equates the sex industry to a modern form of slavery, largely built on debt bondage. Often survivors are seen to have incurred some form of debt to pimps or traffickers – for clothing, food, shelter, drugs, protection – and must “work it off” through sexual services. In this regard, Dr. Christmas writes:

The sex industry commonly involves the forcible conscription and manipulation of vulnerable individuals into relationships in which people profit from their exploitation. The United Nations “Protocol to Prevent, Suppress, and Punish Trafficking in Persons” (United Nations, 2000; see also UNESCO, 2014) defines slavery as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation.

This UN definition fits with what we see happening to youth in the sex industry in Manitoba. ²¹

32. Through his research, Dr. Christmas recognizes: “Manitoba is a fitting place to examine sexual exploitation... [and] has a long-standing problem with exploitation, punctuated by the murders of several youths including Cherisse Houle, Hillary Wilson, and Tina Fontaine.”²²

33. In many ways, failing to address sexual exploitation via the criminal law would be a perpetuation of colonial harms. At its extreme (although sadly not uncommon), the sex industry produces outcomes like suicide and murder.

34. Manitoba is concerned that without the impugned provisions, our efforts to address the

²¹ *Sex Industry Slavery* at pp 30 and 31. Emphasis added.

²² *Sex Industry Slavery* at p 37.

problem of exploitation of youth and women, particularly those with Indigenous heritage who are significantly overrepresented, will suffer.

E. Prosecutions in Manitoba – Who are the Victims and Offenders?

35. The Appellants suggest that coercion and exploitation within sex work is uncommon. This is not reflective of the insidious realities of the sex trade in Manitoba. Although there is a continuum, much sex work is conducted by populations that are racialized, transient, and highly marginalized.²³ Manitoba’s case law reveals the absence of benevolent actors and illuminates the victimization caused by parasitic exploiters.

36. In 2016, a jury found Darrell Ackman (aka, “Mr. JetzTV”) a notorious pimp and child pornographer, guilty of 14 prostitution and sexual offences involving seven victims, five of whom were children.²⁴ In 2011, the 42-year-old offender started an “escort” business in Winnipeg, having had prior experience in the industry in Florida. He created a client list and placed advertisements on the internet. He then set out to find young females, including the victims, to perform sexual services for his own financial gain. He located clients, negotiated the terms, and acted as a driver. He kept half of the money paid for the sexual services. This enterprise lasted approximately one year until he was arrested following an undercover operation.

37. Ackman’s victims had many commonalities. Predominantly, they were young Indigenous girls. Many of them were in the child protection or youth criminal justice system. Most of them suffered from mental health and addictions issues.

38. One such victim, “D,” was a 14-year-old at-risk Indigenous child in the care of Child and Family Services (CFS). Prior to meeting the offender, she was “streetwise” and already exploited within the sex trade in Winnipeg. She was recruited and further prostituted by Ackman. He also

²³ *CASWLR* at paras 159, 161, 163, 168-169, 177, 185, 191, 269; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (Ottawa, 2019) at p. 656 [endnotes omitted]. [*NIMMIWG Final Report*]

²⁴ *R v Ackman*, 2016 MBQB 109.

videotaped himself having sex with her. Tragically, at the age of 16, she died by suicide before Ackman's prosecution commenced.

39. Ackman met one of his "adult" victims, "DA" shortly after her eighteenth birthday. She had been working on the street in the sex trade since she was 11 years old. DA was heavily addicted to opiates. She had her own apartment funded through CFS and was supposed to be attending school. Instead, she worked in the sex trade to support her drug addiction.

40. While working on a street corner on a very cold night in Winnipeg, DA accepted Ackman's offer of a ride. He eventually suggested that she work for him as an escort, promising her much more than the \$60 she would make on the street.

41. Ackman moved into DA's apartment and arranged for her to start providing sexual services. Over time, he started keeping her share of the profits, only giving her small amounts of money. DA ended their relationship and Ackman was convicted of living on the avails.

42. In 2017, Kevin Rose was sentenced for numerous sexual offences committed against five vulnerable teenaged girls and one adult woman.²⁵ He paid for and provided drugs and alcohol in exchange for them having unprotected sexual intercourse with him and other men. Rose secretly videotaped these sexual activities. During the sentencing proceedings, he contended that "he was helping the girls" he recruited into the sex trade and ultimately exploited.²⁶

43. One of Rose's victims was 13-year-old "DR." She was an Indigenous girl who had been a ward of CFS for most of her life. She was a chronic runaway and struggled with addictions and mental health challenges. Rose knew of her age and vulnerabilities, but sexually exploited her within the sex trade nonetheless. In 2016, DR met with the Crown attorneys assigned to prosecute Rose. DR died by suicide hours after this meeting.

44. Another victim, "KS," was a 23-year-old Indigenous woman, who was recruited by a 17-

²⁵ *R v Rose*, 2019 MBCA 40. [Rose]

²⁶ *Rose* at para 34.

year-old girl who was also “working” for Rose. KS had also been in CFS care and was a chronic runaway. She went to Rose’s residence, a “flop house.”²⁷ There, he took photographs of her and sent them to his potential clients. That same day, Rose booked KS on two “dates,” which took place at his house. Unbeknownst to her, he secretly videotaped her engaging in sexual activity.²⁸ He was arrested shortly thereafter.

45. In 2018, Travis Sadowy was convicted of five prostitution related offences against three victims: a 16-year-old girl who was heavily addicted to drugs; “GB,” a young woman who also struggled with a significant drug addiction and was attempting to pay off the drug debt her boyfriend owed to Sadowy; and “SA,” a single mother who had dropped out of school and needed to support herself financially.²⁹

46. GB first met Sadowy when he attended to her boyfriend’s home to collect a \$500 drug debt. GB intervened and offered to “escort” for Sadowy to pay back the money owed. At the time, GB was 19 years old and had only completed grade 11. She was attending an adult learning centre to obtain her high school diploma. She was addicted to both methamphetamine and cocaine.

47. GB eventually moved in with Sadowy. He posted advertisements online, booked all of her “dates,” and collected Bitcoin which was used to pay for her sexual services. Sadowy supplied GB with cocaine which she consumed frequently. She also “borrowed” cocaine from him to sell to clients. This was added to her debt, along with any further debt incurred by her boyfriend. GB was paying back this accruing debt out of her percentage of earnings from her sex work. Sadowy took fifty percent, plus the proceeds from the drug sales she conducted.

²⁷ *Alcorn* at para 4. Alcorn was convicted of obtaining sexual services from a child and met his victim, DR, a young Indigenous girl (discussed below) through Kevin Rose.

²⁸ *Rose* at paras 14-15.

²⁹ *R v Sadowy*, 2019 MBCA 66 – Interestingly, at sentencing, neither GB nor SA filed Victim Impact Statements (pursuant to section 722 of the *Criminal Code*) as they did not view themselves as victims and “struggled to articulate” the impact of the offences on them.

48. About one month later, Sadowy encouraged GB to recruit one of her friends to join his business. GB approached SA, a girl she had attended high school with. SA was 19 years old. She had a grade 10 education, was a single mother and needed money. She had no experience in the sex trade. SA moved into Sadowy's residence to conceal her involvement in sex work from her family. She described working from the time she woke up until the early hours of the morning. Again, Sadowy posted SA's photos online, arranged all of her dates, and determined how many clients she would see each day. He kept half of her earnings. SA explained that she began feeling fearful to leave the house as Sadowy would get angry that she was not earning money. Sadowy was arrested approximately two months after SA began working for him.

49. More recently, in August of 2023, Jean-Francois D'Asti-Brideau was convicted of human trafficking and obtaining material benefits from his 23-year-old "girlfriend," "KL."³⁰

50. KL was raised in a small town in Québec. At the age of 16, she began experimenting with drugs and developed an addiction. She stopped attending school in grade 9 and spoke very little English. Her father died when she was 18 and she began experiencing poverty. During the trial she testified that she turned to sex work as she had no other choice: "I don't think anyone is happy to do this job, but—money does bring happiness."³¹

51. D'Asti-Brideau and KL met when she was 19. She had just started working in the sex trade, placing advertisements online and seeing clients in her apartment. The pair quickly began a romantic relationship. D'Asti-Brideau convinced her to leave Québec and travel across Canada to work. KL, who had never travelled outside of the province, had no driver's licence, passport, or financial means. He drove her across the country, placed advertisements for her sexual services online, communicated with clients, set dates, and handled all of the money received.³²

52. After KL told him that she no longer wanted to work and wished to return home, D'Asti-Brideau threatened her and prevented her from doing so. Police became involved because of a

³⁰ *R v D'Asti-Brideau*, Manitoba Provincial Court, Transcript of Proceedings, Evidence of KL (April 27, 2023), Thompson PJ, pp 1. [*Transcript of KL*].

³¹ *Transcript of KL*, pp 1-3, 7-8, 55, 56, 58.

³² *Transcript of KL*, pp 2, 5-8, 11, 19, 31-32, 57-59.

physical altercation that took place between them while they travelled on the highway just outside of Winnipeg.

53. These realities belie the notions of independent sex workers typically operating without coercion or exploitation, and benevolent actors who “help” keep them safe.

F. The Purposes of *PCEPA* and the Impugned Provisions

54. Manitoba agrees with and adopts the purposes of *PCEPA* as set out by Hoy JA in *R v NS*:

first, 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, in order to protect communities, human dignity and equality; second, to prohibit the promotion of the prostitution of others, the development of economic interests in the exploitation of the prostitution of others, and the institutionalization of prostitution through commercial enterprises in order to protect communities, human dignity and equality; and, third, to mitigate some of the dangers associated with the continued, unlawful provision of sexual services for consideration.³³

55. In direct response to this Court’s decision in *Bedford*, Parliament ensured that *PCEPA* would account for the safety concerns identified. However, that purpose is limited and ancillary to the abolition and anti-commodification purposes. As Hoy JA explained, it “ensur[es] that persons who continue to provide their sexual services for consideration, contrary to law, can avail themselves of the safety-enhancing measures identified in *Bedford* and report incidents of violence.”³⁴ The Court of Appeal in the instant case adopted this conclusion.³⁵

56. When enacting *PCEPA*, Parliament also had in mind broader legislative objectives, one of which was to address human trafficking and its connection to the sex industry.³⁶ This position

³³ *R v NS*, 2022 ONCA 160 at para 59, and see para 49.

³⁴ *R v NS*, 2022 ONCA 160 at para 63. Emphasis added.

³⁵ *R v Kloubakov*, 2023 ABCA 287 at para 55.

³⁶ See Seo-Young Cho, Axel Dreher & Eric Neumayer, “Does Legalized Prostitution Increase Human Trafficking?” (2013), 41:1, *World Development* 67. See also Niklas Jakobsson & Andreas Kotsadam, “Prostitution Laws and Trafficking for Sexual Exploitation” (2010) University of Gothenburg, Working Papers in Economics, no. 458 (Revised in 2013).

was articulated by AG Swan at the Senate Committee studying Bill C-36:

[T]his bill is important because it's the first time in Canadian history there's been an effort to reduce the demand for buying sex. If Canadians did not have a demand to buy sex, there would not be human trafficking for sexual purposes. If there was not a demand for prostitution, there would be no risk of people being brought into prostitution at such a young age — sometimes 12 or 13 years old.³⁷

The effort to reduce trafficking gives effect to Canada's international commitments. As such, Manitoba submits the anti-trafficking purpose further supports the constitutionality of ss. 286.2 and 286.3.

57. The connection between human trafficking and the legalization of prostitution was explicitly referred to during the debates on *PCEPA* by then-Attorney General of Canada, Peter Mackay (AG MacKay), where he noted, “decriminalization and legalization [of prostitution] lead to increased human trafficking for the purpose of sexual exploitation.”³⁸ In a subsequent meeting of the Standing Committee on Justice and Human Rights, AG Mackay noted, “[h]uman trafficking and prostitution are often intricately linked criminal behaviours. Accordingly, criminal law responses to both activities require harmonization.”³⁹ Further, both the summary of the legislation, and the preamble make explicit reference to the legislation's objective to combat human trafficking:⁴⁰

This enactment amends the Criminal Code to, among other things,
 [...]
 (d) modernize the offence that prohibits the procurement of persons for the purpose of prostitution;
 (f) ensure consistency between prostitution offences and the existing human trafficking offences; and
 [...]
 Preamble

³⁷ Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 19, Evidence – October 29, 2014 at 19:31 ff.

³⁸ *R v NS*, 2022 ONCA 160 at para 21; See *House of Commons Debates*, 41st Parl, 2nd Sess, No 104 (11 June 2014) at 6653 (Hon Peter MacKay).

³⁹ House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl, 2nd Sess, NO 32 (7 July 2014) at 3.

⁴⁰ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25.

[...]

Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution...

58. In addition to making prostitution illegal, *PCEPA* modernized and reformulated the previous version of the procuring offence by enacting s. 286.3 of the *Criminal Code*.⁴¹ The wording of this section was built on existing jurisprudence which interpreted one of the existing procuring offences, as well as human trafficking, and shared some of the same language.⁴²

59. Parliament's approach to combat prostitution and human trafficking was not unique to Canada and was in line with our previous international commitments. As noted in the Technical Paper, the European Parliament endorsed the Nordic Model in 2014.⁴³ That same year, the Council of Europe, at which Canada has observer status, recommended that states consider criminalizing the purchase of sexual services as the most effective tool for preventing and combating human trafficking.⁴⁴

60. Prior to that, Canada was involved in a number of international treaties including the United Nations *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, ratified in May of 2002.⁴⁵ Notably, the treaty provided that a person's consent to exploitation was irrelevant if any coercion or deception was involved or any benefit was granted by the trafficker. This was adopted by Parliament under ss. 279.01(2) and 279.011(2) of

⁴¹ *R v NS*, 2022 ONCA 160 at para 26.

⁴² Technical Paper: Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford* and to make consequential amendments to other Acts, Ottawa, Department of Justice Canada, 2014, at pp. 8-9.

⁴³ European Parliament, *Resolution on sexual exploitation and prostitution and its impact on gender equality*, Adopted (26 February 2014), online: https://www.europarl.europa.eu/doceo/document/TA-7-2014-0162_EN.pdf.

⁴⁴ Technical Paper, p 12.

⁴⁵ Canada, Legal and Social Affairs Division, *Trafficking in persons*, (Ottawa, Library of Parliament, 2022) at 4.

the *Criminal Code* because of the inherent exploitation in trafficking.⁴⁶

61. While the criminalization of purchasing sexual services has not been universally adopted by the members of the European Parliament, the prohibitions have been found to be constitutional. For example, the Constitutional Council in France was asked to assess the constitutionality of criminalizing the soliciting, accepting, or obtaining relations of a sexual nature from a person who engages in prostitution.⁴⁷

62. In upholding the legislation, it noted that choosing to punish those purchasing sex denied people a source of income, but it fought against prostitution, human trafficking for sexual exploitation and criminal activities that were “founded on force and servitude of human beings.”⁴⁸ The Council also noted that the great majority of the persons working in prostitution were victims of procuring and exploitation.⁴⁹ Further, those offences were made possible by the existence of a demand for paid sex. By prohibiting the demand the Legislator had not used a means that was manifestly inappropriate.⁵⁰

63. Unfortunately, we do not need to look to distant shores to find human trafficking. It is occurring in our own communities. The final report of the National Inquiry into Missing and Murdered Indigenous Women and Girls highlighted the very real issue of domestic trafficking of people within Canada:

Although often referred to in an international context, human trafficking is a real problem in Canada, especially as it impacts Indigenous women, girls, and 2SLGBTQQIA people, and is largely a domestic issue. As a report by the Native Women’s Association of Canada (NWAC) argues:

⁴⁶ *Ibid* at 5 and 7.

⁴⁷ Decision no. 2018-761 QPC of 1 February 2019 | Conseil constitutionnel (conseil-constitutionnel.fr) (translation); This legislation is now subject to a challenge before the European Court of Human Rights, under *M. A. and Others v. France (communicated case)* – 63664/19, 64450/19, 24387/20 et al.

⁴⁸ *Ibid* at para 11.

⁴⁹ *Ibid* at para 12.

⁵⁰ *Ibid*.

Canada's colonial legacy has forced Indigenous women and girls into dangerous and precarious social and economic conditions, which in turn has made them more vulnerable to different kinds of violence. This includes situations of exploitation and human trafficking, a prevailing concern that has yet to be properly addressed and recognized.

In Canada, human trafficking often occurs between larger urban centres and communities. As of 2016, the Royal Canadian Mounted Police's (RCMP) statistics showed that 94% of human trafficking cases were domestic in nature.⁵¹

64. The Inquiry heard evidence that traffickers know how to exploit these vulnerable individuals, often in the care of child welfare agencies or traveling for medical appointments. Traffickers target locations like airports, group homes and other places where they know these victims might be.⁵² The mobility involved in human trafficking also makes it more difficult to combat, creating jurisdictional challenges, even within a single province, by potentially involving different provincial and municipal agencies.

65. In its report, the Inquiry also noted the responsibilities set out in the *Convention on the Elimination of All Forms of Discrimination Against Women*:

Aside from its general protection of women against discrimination, the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) specifically cites the state's responsibility for modifying social and cultural patterns of conduct within society, with the goal to eliminate racism and discrimination based on any idea of women's inferiority, or on stereotypes (Article 5). The convention specifically cites human trafficking in the form of exploitation and prostitution and key areas of concern for which all governments must take responsibility to eliminate (Article 6).⁵³

66. There is a strong and recognized connection between the sex industry and human trafficking. Provisions designed to abolish prostitution also attempt to address and reduce human trafficking. This is particularly so considering the government's recognition when enacting *PCEPA* that decriminalization of selling sex had led to increased human trafficking in other

⁵¹ NIMMIWG Final Report at 564-565 [endnotes omitted].

⁵² NIMMIWG Final Report at p. 565 [endnotes omitted]

⁵³ NIMMIWG Final Report at p. 609. See also *Convention on the Elimination of All Forms of Discrimination against Women*, New York, 18 December 1979.

jurisdictions.⁵⁴ Sections 286.2 and 286.3 are thus part of Canada’s domestic responsibility to protect vulnerable citizens from exploitation, and part of Canada’s international commitments to eliminate human trafficking.

G. Rights of Third Parties – Balancing the Section 7 Analysis

67. Manitoba acknowledges that accused persons have the right and standing to challenge the constitutionality of provisions under which they are charged. However, the attack on ss. 286.2 and 286.3 in this case depends not on the Appellants’ own security of the person (or other s. 7 interests), but those of third-party sex workers. Thus, their challenge invokes the rights of those they were alleged to have exploited.

68. To determine the scope of its protections, this Court has sometimes internally balanced elements of s. 7 where “finding a violation of s. 7 would undermine the rights or interests of third parties or societal interests”.⁵⁵

69. While the contours of this exercise are not entirely settled, Manitoba submits that where an applicant relies on the s. 7 rights of another to make out a *Charter* breach it is appropriate to consider and construe those rights in the context of further aspects of rights and interests of that same third party. In this case, the security interests of those whose bodies are bought and sold for sex are put in issue. Manitoba submits the anti-exploitation provisions here foster, rather than deprive, the security interests of these third parties. If a balance is to be struck on the scope of s. 7 interests, it ought to fall in favour of the victims of sexual exploitation.

70. Victims of the sex industry have a right not to be exploited and enslaved through debt bondage or threats of violence.⁵⁶ They have a right to be free from the violence and coercion perpetrated by exploiters. In an example in this case, the women were made to provide free

⁵⁴ *R v NS*, 2022 ONCA 160 at para 21.

⁵⁵ *R v JJ*, 2022 SCC 28 at para 118 (and, per Justice Rowe at para 374). See also Hogg *Constitutional Law of Canada* at 47:3.

⁵⁶ See *Sex Industry Slavery*, *supra* at pp 30 and 31.

sexual services to one of the Appellants at the direction of their extra-jurisdictional exploiters.⁵⁷

71. The risks to third parties' security of the person are not caused by the impugned provisions—they are caused by the sex industry itself. There is no way to make the sex industry completely safe. It is not Parliament's duty to make an illegal industry safe, any more than it must assure the quality and safety of illicit street drugs.

72. However, Parliament does have a duty to protect vulnerable citizens. The vast majority of those in the sex industry are not there by choice. Parliament made a normative decision that the interests of that vast majority needed to be protected. Thus, the commodification of sex was prohibited. The law says you may not procure or profit from another person's body for sex. Demarcating the boundaries of acceptable transactions is a legitimate function of the criminal law. Section 7 of the *Charter* is not a guarantee of financial prosperity or economic security, nor a guarantee of the availability of any profession, much less can exploiters claim a s. 7 right to profit unlawfully from the exploited.⁵⁸

73. With respect to the interpretation of the scope of a *Charter* protection, it is important to remain mindful of this Court's caution in *Big M Drug Mart*: "[I]t is important not to overshoot the actual purpose of the right or freedom in question".⁵⁹

74. It is unlikely that the drafters of the *Charter* conceived that a perpetrator of exploitation should benefit from the constitutionally protected interests of his victims. It was similarly, and more broadly, never an historical object of the right in question, nor the *Charter* itself, to protect persons engaged in unlawful activities from themselves or others aiding and abetting that activity. Security of the person cannot be stretched so far without distorting it out of recognition.

⁵⁷ See Respondent's Factum at para 126.

⁵⁸ *Real Estate Strategies Group Inc v Prairie Communities Corp*, 2016 ABCA 286 at para 12. See also *Siemens v Manitoba*, (Attorney General), 2003 SCC 3, [2003] 1 SCR 6 at paras 45-46.

⁵⁹ *R v Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC) at para 117, [1985] 1 SCR 295, 18 DLR (4th) 321 at 344 SCR (emphasis added).

H. Conclusion

75. The impugned provisions do not deprive the right to security of the person. In fact, their purpose and effect are to reduce risks to safety, as well as to liberty and life. They do this by seeking to abolish the practice of exchanging sex for money. It is that activity and its attendant harms – trafficking, addiction, modern slavery, violence, and even suicide and murder – that risk the life, liberty and security of survivors, not legislation to eliminate it. Manitoba’s position remains as it was articulated by AG Swan to Parliament in 2014:

In Manitoba's view, prostitution is not a victimless crime. Every day vulnerable persons—women, men, and children—are preyed upon by individuals and groups who sexually exploit them. The harm caused to those exploited is severe: alcohol and drug addiction, violent victimization, and emotional traumatization at the hands of buyers of sex, pimps, drug dealers, and others. We know that many victims in Manitoba are first sexually exploited at a very young age. The majority of those who escape suffer from deep physical and emotional scars and trauma that remain with them for the rest of their lives.⁶⁰

76. If the provisions deprive the security interests of the very victims they are meant to assist, on balance that deprivation is in accordance with the principles of fundamental justice. Sections 286.2 and 286.3 are not overbroad but do exactly what they were intended to. They prohibit conduct that is directly and rationally connected to their purposes, while accounting for the safety impacts identified in *Bedford* and serving the goal of combating human trafficking.⁶¹

77. Manitoba respectfully submits that this Court ought to uphold ss. 286.2 and 286.3.

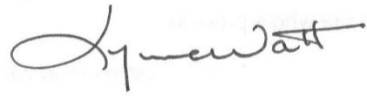
PART IV – COSTS

78. The Intervener Attorney General of Manitoba does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

⁶⁰ Standing Committee on Justice and Human Rights, Monday July 7, 2014 at 1535.

⁶¹ *R v NS*, 2022 ONCA 160 at para 124.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of May, 2024

A handwritten signature in dark ink, appearing to read "Charles Murray", is positioned above a horizontal line.

Charles Murray

Inderjit Singh

Dayna Queau-Guzzi

Counsel for the Intervener, Attorney General
of Manitoba

PART VII – TABLE OF AUTHORITIES & LEGISLATION

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