

**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Applicants

and

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Respondent

**FACTUM OF THE INTERVENER,  
WOMEN'S LEGAL EDUCATION AND ACTION FUND**

August 10, 2022

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**TABLE OF CONTENTS**

	<b>Page No.</b>
PART I - INTRODUCTION .....	1
PART II - SUMMARY OF FACTS .....	2
PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES .....	2
A. The correct approach to the s. 15 analysis .....	2
i. Substantive equality is the “animating norm” of s. 15.....	2
ii. A meaningful application of substantive equality requires a structural intersectional analysis .....	3
iii. The Court must take a flexible approach to the types of evidence that can demonstrate discrimination.....	6
iv. The stigma caused by the impugned provisions is relevant.....	10
v. The illegality of sex work does not shield the impugned provisions from s. 15 scrutiny.....	12
B. A s. 15 infringement will rarely be justified under s. 1 .....	13
C. A s. 15 violation in this case cannot be justified by a benefit to women’s equality or the protection of women .....	14
PART IV - ORDER REQUESTED.....	15

## PART I - INTRODUCTION

1. The Women’s Legal Education and Action Fund (“LEAF”) intervenes in this Application to provide the Court assistance on the correct approach to interpreting and applying s. 15 of the *Canadian Charter of Rights and Freedoms*.

2. LEAF is the leading national non-profit organization whose mandate is to use litigation to advance the equality rights of all women, girls, trans, and non-binary people as guaranteed by the *Charter*. Since its founding in 1985, LEAF has amassed 37 years of experience protecting and promoting women’s equality rights, including through litigation, law reform, and public education. As part of this work, LEAF has acted as an intervener in over 130 cases, including some of the most significant cases through which equality rights doctrine in Canada has been developed.

3. This Application raises important questions about the interpretation and application of s. 15 of the *Charter* in the context of a constitutional challenge to *Criminal Code* provisions criminalizing sex work — principally those enacted by the *Protection of Communities and Exploited Persons Act*<sup>1</sup> (“PCEPA”). Section 15 of the *Charter* was not invoked in the Court of Appeal for Ontario’s decision in *R. v. N.S.*<sup>2</sup> As such, that decision does not bind this Court in considering whether the impugned provisions violate the constitutional right to equality.

4. In considering the Applicants’ s. 15 claim of adverse effect discrimination, the Court must give effect to substantive equality by conducting a structural intersectional analysis, take a flexible approach to assessing the evidence to demonstrate discrimination, and take into account the impact of stigma resulting from the impugned laws. The illegality of sex work does not shield the impugned provisions from s. 15 scrutiny. Should the Court find a violation of s. 15, it should

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<sup>1</sup> [S.C. 2014, c. 25](#).

<sup>2</sup> *R. v. N.S.*, [2022 ONCA 160](#).

further recognize that it is rare to find such a violation to be justified under s. 1. The Court should also reject the proposition that any violation can be justified by an unfounded and illusory notion of a benefit to “women’s equality.”

## **PART II - SUMMARY OF FACTS**

5. LEAF accepts and adopts the facts as set out by the Applicants.

## **PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

### **A. The correct approach to the s. 15 analysis**

#### **i. Substantive equality is the “animating norm” of s. 15**

6. Since *Andrews*, the Supreme Court of Canada has maintained that substantive equality is the cornerstone of s. 15 and has rejected the narrower concept of formal equality, which is merely concerned with “treat[ing] likes alike”.<sup>3</sup> Most recently in *Fraser*, the majority of the Court affirmed substantive equality as the “animating norm” of s. 15.<sup>4</sup> Substantive equality requires “attention to the ‘full context of the claimant group’s situation’, to the ‘actual impact of the law on that situation’, and to the ‘persistent systemic disadvantages [that] have operated to limit the opportunities available’ to that group’s members.”<sup>5</sup>

7. To give effect to substantive equality, courts must ensure that “laws or policies do not impose subordinating treatment on groups already suffering social, political, or economic

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<sup>3</sup> *Withler v. Canada (Attorney General)*, [2011 SCC 12](#), at [para. 42](#), citing *Andrews v. Law Society of British Columbia*, [\[1989\] 1 S.C.R. 143](#), at p. 166. See also *Eldridge v. British Columbia (Attorney General)*, [\[1997\] 3 S.C.R. 624](#), at para. 61; *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), at [para. 25](#).

<sup>4</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 42](#), citing *Withler v. Canada (Attorney General)*, [2011 SCC 12](#), at [para. 2](#).

<sup>5</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 42](#), citing *Withler v. Canada (Attorney General)*, [2011 SCC 12](#), at [para. 43](#); *Kahkewistahow First Nation v. Taypotat*, [2015 SCC 30](#), at [para. 17](#); see also *Quebec (Attorney General) v. A.*, [2013 SCC 5](#), at [paras. 327-332](#); *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), at [para. 28](#); *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018 SCC 18](#), at [para. 35](#).

disadvantage in Canadian society” and recognize that “some groups may need to be treated differently to achieve equality of results.”<sup>6</sup>

**ii. A meaningful application of substantive equality requires a structural intersectional analysis**

8. A robust application of substantive equality requires an intersectional analysis that focuses on how existing systems and institutions reinforce, exacerbate, or perpetuate disadvantages that uniquely affect groups who face multiple intersecting barriers.

9. Intersectionality is an approach that asks adjudicators to acknowledge that discrimination occurs not just based on a “single axis of social division” such as gender, race, or class, but “many axes that work together and influence each other.”<sup>7</sup> Intersectional discrimination is not merely additive, but a distinct form of discrimination that cannot be understood by looking at a single axis alone. The Supreme Court indicated that “[t]here is no reason in principle [...] why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1).”<sup>8</sup> In *Fraser*, the Court affirmed that “a robust intersectional analysis of gender and parenting [...] can be carried out under the enumerated ground of sex.”<sup>9</sup>

10. An intersectional approach must be a structural one that goes beyond identifying the multiple, intersecting grounds engaged in the claim.<sup>10</sup> A structural intersectional analysis focuses on how our existing systems — including laws — have created conditions for, and contributed to,

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<sup>6</sup> Jonnette Watson Hamilton & Jennifer Koshan, “Adverse Impact: The Supreme Court’s Approach to Adverse Effects Discrimination under Section 15 of the Charter” (2015) 19:2 *Rev of Const Stud* 191 at pp. 194-195. For case law, see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 65; *Withler v. Canada (Attorney General)*, 2011 SCC 12, at para. 37; *Quebec (Attorney General) v. A*, 2013 SCC 5, at para. 331.

<sup>7</sup> Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016) at p. 2.

<sup>8</sup> *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para. 94.

<sup>9</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 116.

<sup>10</sup> Sumi Cho, Kimberlé Williams Crenshaw & Leslie McCall, “Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis” (2013) 38:4 *Signs: Journal of Women in Culture and Society* 785.

the marginalization and discrimination of the claimants by targeting those grounds as the basis of exclusion, either directly or indirectly.<sup>11</sup>

11. A structural intersectional analysis reveals the extent to which the impugned provisions reinforce and perpetuate structural inequality faced by sex workers, resulting in discrimination on the intersecting grounds of gender, race, Indigeneity, gender identity, and disability. Put differently, it is not sex work that is the source of structural inequality, but the effects of the impugned provisions — such as constant police surveillance,<sup>12</sup> obstacles to implementing standard safety measures,<sup>13</sup> lack of access to or difficulty maintaining housing,<sup>14</sup> and barriers to seeking assistance from law enforcement<sup>15</sup> and/or government supports due to the criminalization of sex work.<sup>16</sup>

12. Evidence from the Applicants demonstrates how at least some sex workers find sex work to be a source of financial security<sup>17</sup> and a positive affirmation of their gender identity.<sup>18</sup> In some cases, sex work provides a “stable income” for Black, Indigenous, or trans sex workers, who may face discrimination and stigma from “secular” employment because of racism, colonization, displacement, anti-migrant sentiment, and transphobia.<sup>19</sup>

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<sup>11</sup> Cho, Williams Crenshaw & McCall (2013) at p. 797.

<sup>12</sup> Exhibit “B” to the Reply Affidavit of Katrin Roots affirmed January 26, 2022 at pp. 5-7, Joint Application Record (“**JAR**”) Tab 39B, pp. 2634-2636.

<sup>13</sup> Exhibit “B” to the Affidavit of Chris Bruckert affirmed July 13, 2021 at pp. 36-37, JAR Tab 45B, pp. 3696-3698.

<sup>14</sup> Applicants’ factum at paras. 114 and 129 and evidence cited therein.

<sup>15</sup> Affidavit of Monica Forrester affirmed July 13, 2021 (“**Forrester Affidavit**”) at para. 30, JAR Tab 12, p. 1571; Affidavit of Jane Doe affirmed July 10, 2021 at para. 31, JAR Tab 17, p. 1681.

<sup>16</sup> Exhibit “B” to the Affidavit of Dr. Cecilia Benoit affirmed July 13, 2021 at p. 22, JAR Tab 42B, p. 3090; see also Cecilia Benoit, “COVID-19 benefits exclude sex workers in Canada”(16 October 2020) *Policy Options*, online: <<https://policyoptions.irpp.org/magazines/october-2020/covid-19-benefits-exclude-sex-workers-in-canada/>>, JAR Tab 44B, pp. 3231-3234.

<sup>17</sup> Forrester Affidavit at paras. 67-68, JAR Tab 12, p. 1580.

<sup>18</sup> Affidavit of Alessa Mason affirmed July 13, 2021 (“**Mason Affidavit**”) at para. 47, JAR Tab 19, pp. 1711-1712; Forrester Affidavit at para. 66, JAR Tab 12, p. 1580.

<sup>19</sup> Mason Affidavit at para. 47, JAR Tab 19, pp. 1711-1712; Affidavit of Jenn Clamen affirmed July 13, 2021 (“**Clamen Affidavit**”) at para. 48, JAR Tab 10, p. 172; Forrester Affidavit at para. 14, JAR Tab 12, p. 1568; Affidavit of Elene Lam affirmed July 12, 2021 at para. 16, JAR Tab 27, p. 2220.

13. The criminalization of sex work undermines sex workers' equality rights because it does not promote a "society in which *all* are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration."<sup>20</sup> The ability to make one's own decisions and have those decisions be treated with respect and consideration are integral to equality. Despite the Respondent's assertion that the Nordic approach was founded on "principles of combatting structural inequality and discrimination",<sup>21</sup> in practice, the impugned provisions have perpetuated structural inequality against sex workers in Canada by denigrating sex workers' status to those who do not deserve concern and respect, and endangering sex workers' safety. They contribute to classifying sex workers — who are disproportionately women — as a group in need of rescue. This perpetuates disadvantage based on paternalistic coloniality and infantilizing stereotypes about sex workers as a group that lacks agency and rationality.<sup>22</sup>

14. The historical context of how criminalization has been used to discriminate against Black and Indigenous peoples must form part of the s. 15 analysis. Canada's criminal laws have been used to undermine Indigenous sovereignty and self-determination by restricting movement, reducing political authority, and subjugating Indigenous peoples to the control of the colonial state.<sup>23</sup> Ongoing coloniality in Canada includes a stark overrepresentation of Indigenous women in Canada's correctional system.<sup>24</sup> As the evidence establishes, Indigenous sex workers encounter

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<sup>20</sup> *R. v. Kapp*, 2008 SCC 41, at para. 15, quoting *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 171 (emphasis added).

<sup>21</sup> Respondent's factum at para. 13.

<sup>22</sup> Reply Affidavit of Jessica Quijano affirmed January 18, 2022 at para. 11, JAR Tab 33, p. 2461.

<sup>23</sup> Jessica Evans, "Penal nationalism in the settler colony: On the construction and maintenance of 'national whiteness' in settler Canada" (2021) 23:4 *Punishment & Society* 515, and online: <<https://journals.sagepub.com/doi/full/10.1177/14624745211023455>>, at p. 523. See also Heidi Kiiwetinepinesik Stark, "Criminal Empire: The Making of the Savage in a Lawless Land" (2016) 19:4 *Theory & Event*.

<sup>24</sup> Canada, Office of the Correctional Investigator, News Release, "Proportion of Indigenous Women in Federal Custody Nears 50%: Correctional Investigator Issues Statement" (17 December 2021), online: *Government of Canada* <<https://www.oci-bec.gc.ca/cnt/comm/press/press20211217-eng.aspx>>.



increased and targeted violence because criminalization facilitates more surveillance, isolation, and displacement from communities and police services.<sup>25</sup> Indigenous women are also over-represented in street sex work and disproportionately criminalized.<sup>26</sup> The continued criminalization of Indigenous sex workers through the impugned provisions perpetuates the denial of Indigenous sovereignty and self-determination.

**iii. The Court must take a flexible approach to the types of evidence that can demonstrate discrimination**

15. To establish that a law *prima facie* violates s. 15(1), a claimant must demonstrate two things: that the law, on its face or in its impact, creates a distinction based on an enumerated or analogous ground; and that the law imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.<sup>27</sup> A law need not *create* the disadvantage at issue in order to be discriminatory: a law that allows an existing disadvantage in society to continue “perpetuates” that disadvantage and should be addressed by s. 15.<sup>28</sup> Determining whether the equality guarantees under s. 15 were breached must be done from the claimant’s perspective. The equality analysis in the present case must be done from the specific perspective of the claimants — which include sex workers and a third-party provider — not the broader group of “women”.

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<sup>25</sup> Applicants’ factum at para. 141 and evidence cited therein; Exhibit “KKK” to the Clamen Affidavit at pp. 86-87, JAR Tab 10KKK, pp. 1293-1294.

<sup>26</sup> Exhibit “B” to the Affidavit of Dr. Andrea Krüsi affirmed July 13, 2021 (“**Krüsi Affidavit**”) at p. 18, JAR Tab 54B, p. 4788.

<sup>27</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 27](#).

<sup>28</sup> *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018 SCC 18](#), at [paras. 32-33](#); See also *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), at [paras. 40-41](#); see also Jonnette Watson Hamilton, “Cautious Optimism: *Fraser v. Canada (Attorney General)*” (2021) 30:2 *Constitutional Forum* 1, online: [https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/29418/21413](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29418/21413), at p. 9.

16. Since structural intersectionality focuses on how social and political structures and systems create disadvantageous circumstances, “it is important for evidence to be led from this perspective, focussing on unearthing broader patterns rather than isolated explanations of disadvantage.”<sup>29</sup>

17. In adverse effect discrimination cases, in which the impugned law does not explicitly target a protected group for differential treatment, courts must look beyond the facially neutral features of an impugned law and examine whether it has the effect of placing members of protected groups at a disadvantage.<sup>30</sup> Thus, a claimant can satisfy the first part of the two-part test to establish a s. 15 claim by showing that the law has a disproportionate impact on members of a protected group.<sup>31</sup>

18. In *Fraser*, the majority of the Supreme Court provided important guidance on the correct approach to the assessment of evidence to establish a s. 15 claim and, in particular, a claim based on adverse effect discrimination. The Court explained that two types of evidence will be especially helpful in proving, at the first step of the s. 15 analysis, that a law has a disproportionate impact on members of a protected group.

19. The first type of evidence addresses the full context of the claimant group’s situation and the barriers members of this group face. This evidence can come from the claimant or claimants, from expert witnesses, or through judicial notice.<sup>32</sup> The second type of evidence is about the effects of the law in practice, including statistical evidence that shows that members of protected groups are being disproportionately impacted by the impugned law.<sup>33</sup>

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<sup>29</sup> Shreya Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2019) at p. 190.

<sup>30</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 53](#), citing Sophia Moreau, “The Moral Seriousness of Indirect Discrimination”, in Hugh Collins & Tarunabh Khaitan, eds., *Foundations of Indirect Discrimination Law* (Portland, Or.: Hart Publishing, 2018) at p. 125.

<sup>31</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 53](#).

<sup>32</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 57](#).

<sup>33</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 58](#).

20. While a claim would ideally be supported by both types of evidence, this is not required. In some cases, qualitative evidence about a group will make the disproportionate impact on members of a group obvious; in others, statistical disparities will establish a disproportionate impact.<sup>34</sup> In this respect, the jurisprudence requires a flexible approach, rather than “rigid rules”.<sup>35</sup>

21. In *Fraser*, the Court emphasized that establishing a distinction at the first step of the s. 15 analysis does *not* require showing that all members of a protected group are affected by an impugned law in the same way.<sup>36</sup> The Court also affirmed the relevance of an intersectional analysis where an impugned law negatively affects members of a group based on intersecting protected grounds.<sup>37</sup>

22. At the second step of the s. 15 inquiry, which asks whether the impugned law has the effect of reinforcing, perpetuating, or exacerbating disadvantage, the focus is on the harms of the impugned law — including economic disadvantage, social or political exclusion, and psychological or physical harms — which “must be viewed in light of any systemic or historical disadvantages faced by the claimant group.”<sup>38</sup> Like at the first step of the s. 15 inquiry, there is no “rigid template” of factors that are relevant to the second step of the inquiry.<sup>39</sup>

23. The type of evidence discussed in *Fraser* is available in this case and demonstrates that the impugned provisions discriminate against women and individuals experiencing oppression on intersecting grounds including gender, race, Indigeneity, gender identity, and disability.

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<sup>34</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [paras. 60-63](#).

<sup>35</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [paras. 59, 66-67](#).

<sup>36</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [paras. 72-75](#).

<sup>37</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 74](#).

<sup>38</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 76](#), quoting, in part, Colleen Sheppard, *Inclusive Equality: The Relational Dimensions of Systemic Discrimination in Canada* (Montreal: McGill-Queen’s University Press, 2010) at pp. 62-63.

<sup>39</sup> *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#), at [para. 76](#), citing *Quebec (Attorney General) v. A*, [2013 SCC 5](#), at [para. 331](#), quoting *Withler v. Canada (Attorney General)*, [2011 SCC 12](#), at [para. 66](#).

24. With respect to the first step of the s. 15 inquiry, there is unchallenged statistical evidence before the Court that the majority of sex workers are women and that members of other equity deserving communities — including Indigenous, trans, non-binary, and racialized people, and people with disabilities — are overrepresented in the sex work industry.<sup>40</sup> Coupled with this is evidence from the Applicants and their representatives, as well as from experts, of the barriers faced by sex workers and how these barriers are related to sex workers’ intersecting identities. For example, there is evidence from experts and/or fact witnesses that members of marginalized communities may engage in sex work because they are disproportionately excluded from other forms of employment<sup>41</sup> and that sex work is “often a way for people to address the impacts of intersecting structural constraints.”<sup>42</sup> Together, this evidence shows a clear association between gender, as well as other intersecting grounds, and the barriers faced by sex workers.

25. At the second step of the s. 15 analysis, there is also evidence that establishes that the adverse effects of the impugned provisions reinforce, exacerbate, and perpetuate disadvantage — and that these harms are disproportionately borne by women and people who identify with intersecting protected grounds. For example, there is extensive evidence that the impugned provisions negatively impact sex workers’ ability to screen, negotiate with, and communicate with potential clients, thereby impeding their ability to protect themselves from violence<sup>43</sup>; reinforce and perpetuate stigma and negative stereotypes that threaten the safety of sex workers<sup>44</sup>; and impede reporting of victimization to police.<sup>45</sup>

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<sup>40</sup> Applicants’ factum at para. 43 and evidence cited therein; Respondent’s factum at para. 36.

<sup>41</sup> Applicants’ factum at para. 40 and evidence cited therein; see also at para. 42.

<sup>42</sup> Applicants’ factum at para. 39 and evidence cited at footnote 130 therein.

<sup>43</sup> Applicants’ factum at paras. 80-133 and evidence cited therein.

<sup>44</sup> Applicants’ factum at paras. 134-145 and evidence cited therein.

<sup>45</sup> Applicants’ factum at paras. 146-158 and evidence cited therein.

26. Moreover, there is evidence that these harms are experienced disproportionately by sex workers experiencing intersecting grounds of oppression: for example, by sex workers who are unable to advertise by means that may be available to those with greater resources<sup>46</sup>; by marginalized sex workers less likely to be able to work indoors rather than on the street<sup>47</sup>; and by Indigenous, trans, and non-binary sex workers who are less likely to report violence to the police than other sex workers.<sup>48</sup>

**iv. The stigma caused by the impugned provisions is relevant**

27. A claimant is not required to show that a distinction will perpetuate prejudicial or stereotypical attitudes in order to make out a s. 15 claim. However, the presence of social prejudices or stereotypes may be relevant and may assist to establish that a law has negative effects on a particular group.<sup>49</sup>

28. Sex work and sex workers are deeply stigmatized in our society. Academic commentators have long observed that sex work falls into the category of “dirty work” — work that is stigmatized because it is “considered disgusting or degrading for some physical, social, or moral reason” and that “becomes tainted.”<sup>50</sup> Indeed, it has been observed that “[s]ex workers are tainted on all three accounts and are therefore triply stigmatized: their work is rooted in the physical (in the messiness of sex and the body), is perceived as antifamily (therefore antisocial), and is viewed as deeply immoral.”<sup>51</sup> Moreover, sex work is marked as female-gendered, is uniquely subject to “whore

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<sup>46</sup> Applicants’ factum at para. 106 and evidence cited therein.

<sup>47</sup> Applicants’ factum at paras. 108 and 113 and evidence cited therein.

<sup>48</sup> Applicants’ factum at para. 149, see also at para. 155, and evidence cited therein.

<sup>49</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 78.

<sup>50</sup> Meredith Ralston, *Slut-Shaming, Whorephobia, and the Unfinished Sexual Revolution* (Montreal: McGill-Queen’s University Press, 2021) at p. 86.

<sup>51</sup> Ralston (2021) at p. 86; see also Gina Grandy & Sharon Mavin, “Doing Gender in Dirty Work: Exotic Dancers’ Construction of Self-Enhancing Identities,” in Ruth Simpson et al. (ed), *Dirty Work: Concepts and Identities* (UK: Palgrave Macmillan, 2012), at p. 94.

stigma,” and — for these and other reasons — is low on the hierarchy of paid work and other social hierarchies.<sup>52</sup> The stigma that attaches to sex work contributes to harms experienced by sex workers and wrongfully validates legal exclusions of sex workers.<sup>53</sup>

29. Before this Court is evidence that the stigma attached to sex work not only underlies and is embedded in the impugned provisions, but that the impugned provisions both increase and legitimize stigma of sex work and sex workers and reinforce harmful stereotypes of sex workers — and in turn, exacerbate the harms stemming from that stigma.<sup>54</sup> This evidence is directly relevant to the Court’s consideration of s. 15 and must figure prominently in any analysis of whether the impugned provisions reinforce, exacerbate, or perpetuate existing disadvantage.

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<sup>52</sup> Grandy and Mavin (2012) at p. 94; see generally Gail Pheterson, “The Whore Stigma: Female Dishonour and Male Unworthiness” (1993) 37 *Social Text* 39.

<sup>53</sup> See, e.g., Andrea Krüsi, Thomas Kerr, Christina Taylor, Tim Rhodes & Kate Shannon, “‘They won’t change it back in their heads that we’re trash’: the intersection of sex work-related stigma and evolving police strategies” (2016) 38 *Sociology of Health & Illness* 1136, esp. at pp. 1138-1139, 1147 (discussing, *inter alia*, how sex-work-related stigma constrains opportunities, resources, and well-being of individuals, has been linked to reduce access to health care services and increased experiences of physical violence, and disproportionately affects sex workers subject to intersecting grounds of oppression), Application Record, vol. 5, Tab 16B, pp. 2148-2161, see esp. at pp. 2148-2149, 2158; Cecilia Benoit, S. Mikael Jansson, Michaela Smith & Jackson Flagg, “Prostitution Stigma and Its Effects on the Working Conditions, Personal Lives, and Health of Sex Workers” (2017) *The Journal of Sex and Research* 1, Exhibit 19 to the Cross-Examination of Dr. Cecilia Benoit held April 4, 2022 (“**Benoit Cross-Examination**”), JAR Tab 44(19), pp. 3600-3615; Cecilia Benoit & Roísín Unsworth, “COIVD-19, Stigma, and the Ongoing Marginalization of Sex Workers and their Support Organizations” (2021) *Archives of Sexual Behaviour*, online: <<https://doi.org/10.1007/s10508-021-02124-3>>, Exhibit 21 to the Benoit Cross-Examination, JAR Tab 44(21), pp. 3632-3643; Shira M. Goldenberg, Andrea Krüsi, Emma Zhang, Jill Chettiar, and Kate Shannon, “Structural Determinants of Health among Im/Migrants in the Indoor Sex Industry: Experiences of Workers and Managers/Owners in Metropolitan Vancouver” (2017) 12(1) *PLoS ONE*, Exhibit 3 to the Cross-Examination of Andrea Krüsi held April 19, 2022 (“**Krüsi Cross-Examination**”), JAR Tab 56(3), pp. 5048-5065; see also Exhibits 9, 11, 12, 14, 15, 16, 17, 19, 21, and 22 to the Krüsi Cross-Examination, JAR Tab 56, pp. 5153-5168, 5175-5198, 5208-5318, 5329-5351, 5360-5392; Exhibits 4, 5, and 6 to the Cross-Examination of Ronald Weitzer held April 20, 2022, JAR Tab 62, pp. 5805-5855. See further Pheterson (1993) at pp. 42-45; Gail Pheterson, *The Prostitution Prism* (Amsterdam: Amsterdam University Press, 1996) at p. 82 (discussing the view, held by some including law enforcement officials that a sex worker cannot be sexually assaulted because she is already stigmatized as “unchaste”).

<sup>54</sup> See Applicants’ factum at paras. 134-145 and evidence cited in those paragraphs.

**v. The illegality of sex work does not shield the impugned provisions from s. 15 scrutiny**

30. By characterizing sex work as an “illegal activity”, in contrast to “access to pension or other benefits”,<sup>55</sup> the Respondent encourages this Court to approach the Applicants’ s. 15 claim differently than the claim in *Fraser*, which involved access to the “undisputed ‘social good’” of a pension.<sup>56</sup> The restrictive approach to s. 15 advanced by the Respondent is inconsistent with the guarantee of substantive equality and undermines the role of adverse effect discrimination claims — such as the one advanced by the Applicants — which is one of the “most powerful legal measures available to disadvantaged groups in society to assert their claims to justice.”<sup>57</sup>

31. Limiting the application of s. 15 only to recipients of benefits such as pensions, which are mostly inaccessible to marginalized groups, removes the application of the equality guarantee from those who need it most: people facing consequences of criminalization and whose interests of life, liberty, and security of the person are jeopardized. It would also negate the promise of *Fraser* to fulfill the vision of substantive equality set out in *Andrews* by using s. 15 “to combat the many areas of criminal justice in which communities of colour and especially Black and Indigenous peoples are disproportionately targeted, tried, convicted, and punished”.<sup>58</sup>

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<sup>55</sup> Respondent’s factum at para. 159.

<sup>56</sup> Respondent’s factum at para. 159.

<sup>57</sup> *Fraser v. Canada (Attorney General)*, 2020 SCC 28, para. 35, quoting Hugh Collins & Tarunabh Khaitan, “Indirect Discrimination Law: Controversies and Critical Questions”, in Hugh Collins & Tarunabh Khaitan, eds, *Foundations of Indirect Discrimination Law* (Portland, Or.: Hart Publishing, 2018), at p. 30.

<sup>58</sup> Sonia Lawrence, “Critical Reflections on *Fraser*: What Equality Are We Seeking?” (2021) 30:2 *Constitutional Forum Constitutionnel* 43, available online: <[https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/29421/21416](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29421/21416)>, at p. 44.

**B. A s. 15 infringement will rarely be justified under s. 1**

32. In *Andrews*, Justice Wilson for a majority of the Supreme Court wrote that “[g]iven that s. 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one.”<sup>59</sup> In summarizing a lesson of *Andrews*, Justice L’Heureux-Dubé wrote in *Adler* that “cases will be rare where it is found reasonable in a free and democratic society to discriminate.”<sup>60</sup>

33. The Respondent urges the Court to defer to Parliament in the s. 1 analysis because the impugned provisions in this case represent a “‘complex regulatory response’ to a complex social policy issue.”<sup>61</sup> However, “a complex legislative problem or context does not vitiate the need for a high degree of section 1 scrutiny, and [...] the judiciary cannot abdicate its supervisory role in the name of judicial deference.”<sup>62</sup> The Supreme Court has recognized that even in the context of “complex” regulation of social issues, including sex work, it would be hard to imagine a situation in which a violation of s. 7 could be justified under s. 1.<sup>63</sup> This was its conclusion in *Bedford*, where the “Attorneys General [did] not seriously argue that the laws, if found to infringe s. 7, can be justified under s. 1.”<sup>64</sup> In that constitutional context, courts have been vigilant in exercising their “supervisory role” as guardians of the rights enshrined in the *Charter*. A similarly rigorous

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<sup>59</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 154.

<sup>60</sup> *Adler v. Ontario*, [1996] 3 S.C.R. 609, at para. 95, per L’Heureux-Dubé J., dissenting; see also *Lavoie v. Canada*, 2002 SCC 23, at para. 6, per McLachlin C.J. and L’Heureux-Dubé J., dissenting; Sheilah Martin, “Balancing Individual Rights to Equality and Social Goals” (2001) 80 *The Canadian Bar Review* 299, available online: <<https://canlii.ca/t/2cm6>>, at p. 363.

<sup>61</sup> Respondent’s factum at para. 180.

<sup>62</sup> Sheilah Martin, “[Balancing Individual Rights to Equality and Social Goals](#)” (2001) 80 *The Canadian Bar Review* 299, at p. 352 (describing the decision of McLachlin J. in *R.J.R. MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199).

<sup>63</sup> See, e.g., *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 161.

<sup>64</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72, at para. 161.



approach to evaluating justifications for state-imposed discrimination under s. 15 is both consistent with existing fundamental rights case law and — particularly in the context of a s. 15 violation on the basis of gender, as is alleged here — consistent with the overarching guarantee of s. 28 of the *Charter*.<sup>65</sup>

**C. A s. 15 violation in this case cannot be justified by a benefit to women’s equality or the protection of women**

34. Equality is “a broad social interest” to be considered under s. 1, which is “the proper locus for considering how much society [...] benefit[s] from the impugned law.”<sup>66</sup> However, the Court should reject the Respondent’s suggestion that a violation of the Applicants’ s. 15 rights can be justified by an illusory and unfounded assertion that the impugned provisions advance women’s equality by protecting them and the broader public from sex work itself.<sup>67</sup>

35. In assessing whether the Respondent has met its onerous burden to explain why it should be allowed to violate the substantive equality rights of marginalized groups, the Court must consider the extent to which the impugned provisions may actually produce a purported benefit. Indiscernible and speculative benefits will not suffice in the face of concrete evidence of harmful effects.<sup>68</sup>

36. The evidence in the record that the impugned provisions may enhance women’s equality is speculative. By contrast, there is extensive first-hand and expert evidence regarding the concrete harms that the impugned provisions cause sex workers, who are disproportionately women and

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<sup>65</sup> [Section 28](#) of the *Charter* states: “Notwithstanding anything in this *Charter*, the rights and freedoms referred to in it are guaranteed equally to male and female persons.”

<sup>66</sup> *R. v. Brown*, [2022 SCC 18](#), at [para. 147](#).

<sup>67</sup> Respondent’s factum at paras. 135a (citing *R. v. N.S.*, [2022 ONCA 160](#), at paras. 121, 124), 183, 190, 191. See also [PCEPA Preamble](#).

<sup>68</sup> *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#), at [para. 53](#).

who disproportionately face multiple intersecting grounds of oppression.<sup>69</sup> This must be considered when evaluating proportionality between the overall effects of the impugned provisions and the legislative objectives.

37. The Court should also reject justifying a violation of the Applicants' s. 15 rights on the basis of a patriarchal and colonial conception of protecting women. This argument rests on a theory of sex work being inherently exploitative and a practice of inherent gender inequality. The record supports finding that it is not.<sup>70</sup> To justify the impugned provisions' infringement of *Charter* rights on this basis would effectively scapegoat the Applicant sex workers and others who are similarly situated — disproportionately marginalized women, trans people, Indigenous people and/or im/migrants. It would subjugate their rights to equality, autonomy, and agency to an abstract, theoretical, and morally grounded ideal of “women” who are in need of protection that is somehow provided by causing demonstrable harm to a subset of this group.

#### **PART IV - ORDER REQUESTED**

38. LEAF takes no position on the outcome of this Application, but asks that it be determined in accordance with the submissions set out in this factum.

39. LEAF does not seek costs and asks that no costs be ordered against it.

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



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Pam Hrick / Jihyun Rosel Kim / Dragana  
Rakic

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<sup>69</sup> Exhibit “B” to the Krüsi Affidavit, at pp. 13-16, JAR Tab 54B, pp. 4783-4786.

<sup>70</sup> Applicants' factum at paras. 187-188 and evidence cited at footnotes 494-511 therein.

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**SCHEDULE “A”**  
**LIST OF AUTHORITIES**

**Case Law**

1. *Adler v. Ontario*, [\[1996\] 3 S.C.R. 609](#)
2. *Andrews v. Law Society of British Columbia*, [\[1989\] 1 S.C.R. 143](#)
3. *Canada (Attorney General) v. Bedford*, [2013 SCC 72](#)
4. *Centrale des syndicats du Québec v. Québec (Attorney General)*, [2018 SCC 18](#)
5. *Eldridge v. British Columbia (Attorney General)*, [\[1997\] 3 S.C.R. 624](#)
6. *Fraser v. Canada (Attorney General)*, [2020 SCC 28](#)
7. *Kahkewistahow First Nation v. Taypotat*, [2015 SCC 30](#),
8. *Lavoie v. Canada*, [2002 SCC 23](#)
9. *Law v. Canada (Minister of Employment and Immigration)*, [\[1999\] 1 S.C.R. 497](#)
10. *Quebec (Attorney General) v. A*, [2013 SCC 5](#)
11. *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, [2018 SCC 17](#)
12. *R. v. Brown*, [2022 SCC 18](#)
13. *R. v. Kapp*, [2008 SCC 41](#)
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21. Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016)
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23. Sonia Lawrence, "Critical Reflections on *Fraser*: What Equality Are We Seeking?" (2021) 30:2 *Constitutional Forum Constitutionnel* 43, available online: <[https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/29421/21416](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29421/21416)>
24. Sheilah Martin, "Balancing Individual Rights to Equality and Social Goals" (2001) 80 *The Canadian Bar Review* 299, available online: <<https://canlii.ca/t/2cm6>>
25. Gail Pheterson, "The Whore Stigma: Female Dishonour and Male Unworthiness" (1993) 37 *Social Text* 39
26. Gail Pheterson, *The Prostitution Prism* (Amsterdam: Amsterdam University Press, 1996)
27. Meredith Ralston, *Slut-Shaming, Whorephobia, and the Unfinished Sexual Revolution* (Montreal: McGill-Queen's University Press, 2021)
28. Jonnette Watson Hamilton & Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter" (2015) 19:2 *Rev of Const Stud* 191
29. Jonnette Watson Hamilton, "Cautious Optimism: *Fraser v. Canada (Attorney General)*" (2021) 30:2 *Constitutional Forum* 1, online: <[https://journals.library.ualberta.ca/constitutional\\_forum/index.php/constitutional\\_forum/article/view/29418/21413](https://journals.library.ualberta.ca/constitutional_forum/index.php/constitutional_forum/article/view/29418/21413)>

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY – LAWS**

***Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c. 11***

#### **Rights and freedoms in Canada**

**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.

#### **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.

#### **Affirmative action programs**

**(2)** Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### **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.

### ***Protection of Communities and Exploited Persons Act, S.C. 2014, c. 25***

#### **Preamble**

Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;

Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;

Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;

Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;

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;

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

And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution;

CANADIAN ALLIANCE FOR SEX WORK and  
LAW REFORM et al.

Applicants

ATTORNEY GENERAL OF CANADA

Respondent

Court File No. CV-21-00659594-0000

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**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

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**FACTUM OF THE INTERVENER,  
WOMEN'S LEGAL EDUCATION AND ACTION FUND**

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**WOMEN'S LEGAL EDUCATION  
AND ACTION FUND (LEAF)**

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