

Tuesday, July 30, 2024

Ms. Cheryl Milne
Executive Director, David Asper Centre for Constitutional Rights
University of Toronto Faculty of Law
78 Queen's Park
Toronto, ON
M5S 2C5

Dear Ms. Milne,

Re: Factum of the Intervener, *Mikhail Kloubakov, et al. v. His Majesty the King*, Supreme Court of Canada

My name is Andrew Sorfleet and I am president of Triple-X Workers' Solidarity Association of B.C. — Canada's first and only legally-registered labour association for Triple-X workers. I was delighted to happen across the excellent intervener factum for the David Asper Centre for Constitutional Rights on X (formerly Twitter) in the appeal to the Supreme Court of Canada, *Mikhail Kloubakov, et al. v. His Majesty the King* (Court File No. 41017). I was particularly interested in the constitutional question the factum raised regarding Section 286.2(5)(e). The question of what constitutes a "commercial enterprise" presents our organization with a legal conundrum with regard to labour organizing in the Triple-X industry in British Columbia.

Seeking clarity regarding professional associations

Triple-X Workers' Solidarity Association seeks clarification regarding the impact of Criminal Code Section 286 on the Charter right of sexual services providers to form unions and professional associations. In our view, the government has an obligation to allow solidarity organizing in the sex industry. The lack of clarity in the Criminal Code Sexual Services Offences law raises several questions:

- Does Criminal Code section 286.2 (Material Benefit from Sexual Services) violate sexual services providers' right under Charter of Rights and Freedoms section 2(d) to form and run unions and professional associations?
- If this law does effectively prohibit sexual services providers from unionizing or forming professional associations, is this discrimination justifiable under section 1 of the Charter?
- As a solidarity association, is Triple-X prevented from lawfully receiving membership fees and lawfully counselling and encouraging members to provide Triple-X services?

With respect to the purpose and the effects of Section 286.2 (Material benefit from sexual services), the Alberta Court of Appeal ruling, *R. v. Kloubakov*, 2023 ABCA 287, provides some

guidance on the definition of “commercial enterprise” in the exceptions to the exemptions in subsection 286.2(5)(e):

[para. 69] “[A] ‘commercial enterprise’ in s. 286.2(5)(e) necessarily involves the making of a profit derived from third party exploitation of the sex worker. In other words, it involves the making of a profit from the commodification of sexual activity by a third party”: NSCA at para. 76.

In February 2022, Triple-X raised the issue of the impact of PCEPA on the freedom to associate in its brief submitted to Canada’s Parliamentary Standing Committee on Justice and Human Rights review of PCEPA: *Stronger Together: Solidarity Organizing and Exploitation Prevention*. (Please see brief enclosed.)

The submission emphasized the Charter right to freedom of association with regard to the collective pursuit of common goals and workers’ right to unionize. The Triple-X submission was highlighted in the Justice Committee’s report:

“Triple-X Workers’ Solidarity Association of B.C.’s brief states that the law does not contemplate sex workers organizing unions or professional associations or the possibility of such organizations collecting membership dues, and providing services such as advertising and promotion of the industry. They call for amendments to clearly permit such organizing by sex workers.”

In October 2022, the government dismissed the Committee’s recommendations. This lack of response prompted Triple-X to write to former Attorney General of Canada, David Lametti, on November 25, 2022, asking the Department of Justice for clarification on the material benefit from selling sexual services law (Criminal Code s. 286.2) with regard to collection of association membership fees and the promotion of the Triple-X industry generally.

The Honourable David Lametti replied in his letter dated May 2, 2023, that he was unable to provide legal advice.

“Our government is very concerned about the safety of all persons engaged in the sex trade, and we are committed to taking into account the interests of all impacted groups. For this reason, we will continue to monitor the impact of the Act’s reforms including relevant Canadian case law...”

About Triple-X

Triple-X Workers’ Solidarity Association of B.C. is a registered non-profit association in British Columbia since February 2012 (Society Incorporation Number: S-0059449; Federal Business Number: 830870309BC0001).

Persons can become members of the Triple-X Workers' Solidarity Association of B.C. if they have agreed to the direct exchange of sexual stimulation for financial compensation within the last six months and they intend to continue to work in the Triple-X industry. The full list of Triple-X membership criteria as defined in our Constitution, Bylaws & Policies are available on our website: <https://triple-x.org>.

As of June 2018, the Triple-X certification mark was registered with Innovation, Science and Economic Development Canada (Certification Mark No. 1,774,304). Section 2 of the Defined Standard ensures that members have provided Triple-X with proof of age (18 years of age or older) in the form of government-issued identification or affidavit by a guarantor. Section 3 stipulates that members have signed the Triple-X form agreeing that they consider themselves a Triple-X worker and agreeing that they provide Triple-X services for financial compensation. Triple-X services involve sexual stimulation that may or may not involve physical contact.

Section 4 of the Defined Standard for certified workers ensures:

"... that they are qualified to: a) assess risks for sexually transmitted infections (STIs); and b) ensure best practices in STI prevention are followed appropriate for the service provided according to B.C. Centre for Disease Control guidelines."

Triple-X examines and analyzes federal and provincial laws and policies for potential implications on the sex industry. Triple-X has also organized and co-sponsored Vancouver's Red Umbrella March for Sex Work Solidarity, held annually since 2013.

Thank you for your time.

Sincerely,

Andrew Sorfleet, President
Triple-X Workers' Solidarity Association of B.C.

Encl.
CC:

- Gerald Chan, Stephen Aylward (Counsel for the Intervener, David Asper Centre of Constitutional Rights), Stockwoods LLP, Toronto Dominion Centre, 4130 – 77 King Street West, Toronto, ON M5K 1H1