

CASWLR v. Canada

Our Charter Challenge to Sex Work-Specific Criminal Offences

Canadian Alliance for
Sex Work Law Reform

Alliance Canadienne pour
la Réforme des Lois sur
le Travail du Sexe

This document provides basic information and does not provide legal advice.
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Sex workers know that criminalization and police are a source of harm in our lives.

We know that the Charter is meant to apply to us and that we should not be harmed by laws that the government makes. In 2014, Stephen Harper's government passed the Protection of Communities and Exploited Persons Act (PCEPA), a law that harms sex workers and violates our rights. However, the process of removing harmful laws and having those rights recognized is very complex and tedious. In 2021, after years of inaction from Parliament to repeal (remove) the current sex work offences, sex workers were forced to go to court to challenge these laws.

We have launched the court challenge to these laws in Ontario Superior Court (first level), but for a court decision to fully repeal these laws across the province and the country, the case would need to also succeed at the Appeal Court and the Supreme Court of Canada, which could take several years.

What is Our Case About?

Like *Bedford v. Canada*, our case is a constitutional challenge to certain sex work-specific criminal offences. This case is about how these offences violate sex workers' rights, which are protected by the Canadian Charter.

We are asking the court to understand how these offences harm sex workers and are unconstitutional, and for this reason to "strike down" these offences which means they would no longer be law. Since these offences were created in 2014, this is the first legal challenge to all of the interdependent sex work offences, as well as the first challenge that is led by sex workers (see info below on "Applicants").

Which sex work offences does our case try to strike down?

There have already been legal challenges to the PCEPA provisions that criminalize third parties (people that sex workers work with or for, or hire) in the industry (ss. 286.2; 286.3; 286.4). But these challenges have been led by third parties who were not sex workers, and they were made in the context of their criminal defence. This is the first legal challenge to all of the sex work-specific criminal offences, which includes sections 286.1 and 213.

This case seeks to strike down:

S.213

Criminalizes sex workers who communicate in public to sell sexual services.

S.286.1(1)

Criminalizes all clients who obtain, or communicate to try to obtain, sexual services

Offences criminalizing third parties (including sex workers acting as third parties)

S.286.2(1)

"Material Benefit" receive compensation related to someone else's sexual services

S.286.3(1)

"Procuring" facilitate the purchase of someone else's sexual services

S.286.4

"Advertising" advertise someone else's sexual services

Which of sex workers' Charter rights are violated by these offences?

S.7
Right to Life,
Liberty and Security

S.15
Right to Equality & Non-
Discrimination

S.2b
Right to Freedom of
Expression

S.2d
Right to Freedom of
Association

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Who are the “parties” involved in this case?

The “Applicants” are the organization and individuals who launched this court case

- The Canadian Alliance for Sex Work Law Reform – an alliance of 25 groups across the country with a focus or mandate for sex workers’ rights, led predominantly by and for sex workers; and
- 6 individual applicants – 5 sex workers, and one ex-owner of an escort agency.

The “Respondent” is the federal government.

- The Attorney General of Canada.
- They are responsible for the criminal laws in Canada and must “respond” to the legal arguments that the Applicants are making about the laws, and try to defend the laws.

Where is the case happening?

Our case was launched in Toronto at the Ontario Superior Court in March 2021. If the case is successful and the Court “strikes down” the laws, this would only apply to Ontario, although it would probably influence how courts in other provinces deal with the same provisions. However, if our case is appealed all the way to the Supreme Court of Canada (SCC), as in the case of *Bedford v. Canada*, the SCC decision would impact or “bind” all provinces and territories, meaning they would all need to comply with that decision. The Alliance is made up of sex worker-led and allied groups across Canada. Although the legal challenge was launched in Ontario, the evidence and issues in this case address diverse realities of sex workers from numerous communities, sectors and regions across the country.

Who are the “interveners” in the case?

The Ontario government (the Attorney General of Ontario): Because the case was launched in Ontario, that provincial government has the right to intervene in the case.

Other Interveners: These are organizations that received permission from the court to make arguments in this case because they are invested in the outcome. These include groups that explain the numerous ways sex workers are harmed by criminalization, as well as anti-sex work prohibitionist organizations who argue that sex work is inherently exploitative and all sex work/ers must be eradicated.

Who are the witnesses?

There are many witnesses involved in the case. Our witnesses (for the Applicants) include individual sex workers, representatives from sex worker-led organizations, and leading researchers in sex work in Canada and internationally. The Crown’s witnesses include police officers, anti-sex work prohibitionist service providers and academics.

Interveners Describing the Harms of Sex Work Criminalization

- Amnesty International Canadian Section (English Speaking)
- British Columbia Civil Liberties Association (BCCLA)
- Black Legal Action Centre (BLAC)
- Canadian Association of Refugee Lawyers (CARL)
- Canadian Civil Liberties Association (CCLA)
- EGALE Canada and The Enchanté Network
- Women’s Legal Education and Action Fund (LEAF)
- Migrant Workers Alliance for Change
- Ontario Coalition of Rape Crisis Centres
- Sexual Health Coalition (HIV & AIDS Legal Clinic Ontario, Coalition des organismes communautaires québécois de lutte contre le sida (COCQ-SIDA), and Action Canada for Sexual Health and Rights)

Interveners Arguing Sex Work Should Be Criminalized

- Association for Reformed Political Action (ARPA) Canada
- AWWCEP Asian Women for Equality Society
- Bridgenorth Women’s Mentorship & Advocacy Services
- Defend Dignity
- Evangelical Fellowship of Canada
- Parents Against Trafficking Coalition (Markham, Parents Against Child Trafficking, Richmond Hill; Rising Angels Awareness & Restorative Care; Men Ending Trafficking Canada; Lifeworthy; The London Anti-Human Trafficking Coalition, and the Council of Women Against Sex Trafficking in York Region)
- Women’s Equality Coalition (Concertation des luttes contre l’exploitation sexuelle (CLES); Aboriginal Women’s Action Network (AWAN); Formerly Exploited Voices Now Educating (EVE), Strength in Sisterhood (SIS)

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Comparing Our Legal Arguments

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Some of our legal arguments in a nutshell:	Some of the Crown's legal arguments in a nutshell:
<p>We argue that the Protection of Communities and Exploited Persons Act (PCEPA) violates sex workers' Charter rights in numerous ways. The evidence in our case demonstrates that the sex work offences violate sex workers' rights to:</p>	<p>The federal government argues that PCEPA is a justifiable response to regulating sex work because it attempts to "balance the competing interests" of sex workers with "vulnerable populations at risk of being pressured, induced, or coerced into providing sexual services by third parties who seek to profit from others' sexual services."</p>
<ul style="list-style-type: none">• Security as they prevent or prohibit conditions required to conduct sex work in safer and more secure settings, exposing sex workers to an increased risk of physical and psychological harm.• Liberty as they impose criminal consequences, including surveillance and imprisonment, together with adverse collateral impacts, including loss of immigration status, deportation, and property forfeiture.• Personal and sexual autonomy by violating their right to control their bodies (bodily integrity) and make related personal and fundamental decisions free from state interference.• Life as they prevent sex workers from taking reasonable steps to avoid violence that could lead to death.• Equality as they impose disadvantage on the basis of gender and occupational status, particularly for sex workers from multiple intersecting communities, undermining their dignity and reinforcing prejudice.• Freedom of expression as they prohibit sex workers from communicating and negotiating conditions to sexual activity with a client; make it impossible for both the client and the sex worker to establish clear and ongoing consent to the sexual activities in which they engage at work; and prevent sex workers from communicating and obtaining relevant and identifiable information that is vital for sex workers to establish safety practices from clients.• Freedom of association as they prohibit sex workers from associating with others (e.g. associating with clients, managers, receptionists, drivers, translators, partners, peers); associating in the pursuit of other Charter rights; and associating with others in order to advance equitable labour practices and working conditions.	<ul style="list-style-type: none">• Because the government considers sex work to be inherently exploitative, PCEPA's overarching and ultimate objective is to "end demand" for sex work.• The government also argues that there is insufficient evidence of the harms that PCEPA cause, and that the legislation is useful for police as an investigative tool allowing them to find and help providers when they are in need of assistance. <h3>What do other constitutional challenges to PCEPA mean for our Alliance challenge?</h3> <p>Some cases where people were charged with third party offences (procuring, material benefit, advertising) and have challenged those offences, have led judges to declare they are unconstitutional. One case in Ontario, called <i>R. v. NS</i>, won at the lower court (Ontario Superior Court), where a judge decided that these three offences were unconstitutional because they unjustifiably infringe sex workers' Charter rights to personal security and liberty.</p> <p>However, the Crown (government) appealed that decision, and on February 2022, the Ontario Court of Appeal (ONCA) upheld the constitutionality of the three offences, meaning the prohibitions on material benefit, procuring, and advertising are still criminal offences and people can continue to be charged and prosecuted under these offences. The ONCA decision is binding in Ontario, which means that lower courts like the Ontario Superior Court are meant to follow the decision.</p> <p>The Alliance's challenge is the first case which is led by sex workers, challenges all of the sex work offences together, has a robust evidentiary record demonstrating all of the serious harms to sex workers, and includes legal arguments related to a much broader range of Charter rights. Because of this, our case aims to challenge the deficiencies of the ONCA NS decision.</p>

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Why are sex workers going to court again?

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2013

SCC in *Bedford v. Canada* strikes down three prohibitions.

In 2013, the SCC in *Bedford v. Canada* deemed three prostitution prohibitions unconstitutional because they caused harm to sex workers and contravened their rights to liberty and security.

In 2014, the government swiftly created a set of laws under the Protection of Communities and Exploited Persons Act (PCEPA) that reproduce those same harms, and also aim to eradicate sex work.

2014

Bill C-36 (PCEPA) is introduced with aim of eradicating sex work.

2019 - Despite their promise to review PCEPA and their requirement to do so after 5 years, the Liberal federal government failed to do so until after this challenge was launched.

2020

Sex workers spend 6 years educating and advocating against PCEPA.

By 2020, sex workers and allies had spent 6 years educating and advocating for the government to uphold their Charter rights, respect the *Bedford* decision, review and reform the sex work offences introduced through PCEPA, to no avail.

2022

Standing Committee on Justice and Human Rights conducts review of PCEPA.

In spring 2022 the Standing Committee on Justice and Human Rights held an 8-session discussion that featured anti-sex work prohibitionists as well as sex workers. They released a report in June 2022. In it, the Committee recognized that "the health and safety of those involved in sex work is made more difficult by the framework set out by PCEPA" and acknowledged that "the Act causes serious harm to those engaged in sex work by making the work more dangerous."

However, the Committee failed to call for the repeal of all PCEPA provisions and they also called for more policing of sex work communities. Sex workers continue to live and work in a criminalized context and with the harms that come from that.

There are two ways to change

federal laws like PCEPA: through a Bill proposed by a federal member of parliament or a senator that ultimately passes and becomes law, or through court decisions. As no bill to repeal PCEPA and decriminalize sex work has been proposed, sex workers' only remaining option was to go to court to demonstrate how these laws are unconstitutional. Until government responds, the courts are our only way forward.

More Information

To read more about our legal arguments, [download our Factum here.](#)

On our website you can find the [legal arguments that demonstrate the harms of PCEPA here.](#)

What are the next steps?

We are currently at the first level of court, and in order to "strike down" the sex work criminal offences, we will need to go through Ontario's Appeal Court and the Supreme Court of Canada. This may take many years.

The removal of criminal laws against sex work is a first but important first step to removing some of the criminalization in the lives of our community members. Whether or not these sex work laws are deemed unconstitutional, we know that many sex workers in our community will continue to be criminalized by other laws, because law enforcement target our communities with all of the tools at their disposal. For example:

- The immigration provisions prohibiting migrants from working in the sex industry will continue to discriminate against migrant sex workers and may lead to their detention, arrest, and deportation. If the outcome of the case leads to the full decriminalization of sex work, this will create a strong argument to change discriminatory immigration laws.
- Sex workers who live and work in public space – particularly Black, Indigenous, trans sex workers, sex workers who use drugs and sex workers living with HIV, will continue to be profiled by police and will continue to experience criminalization.

We will also need to continue to educate and work on dismantling the stigma and the resulting discrimination that all sex workers experience. Our goal is a holistic approach to law reform: we also need to continue fighting for affordable housing, adequate health care and supports, VAW services for sex workers, other forms of decriminalization (e.g. drugs, HIV non-disclosure), access to education, affordable child care, and an end to child apprehension.

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