Legal Analysis / L'analyse juridique

Bedford 2.0: Challenging the Constitutionality of Canada's "New" Sex Work Laws

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Keywords: Sex Work Laws, Protection of Communities and Exploited Persons Act, PCEPA, Canada (AG) v. Bedford, Charter of Rights and Freedoms

Mots-clés: Loi sur la protection des collectivités et des personnes victimes d'exploitation, LPCPVE, loi sur le travail du sexe, Canada (AG) v. Bedford, Charte des droits et libertés

Following the 2013 landmark *Bedford* decision, Stephen Harper's Conservative government enacted the *Protection of Communities and Exploited Persons Act* (PCEPA) in 2014. Many scholars claim that the *PCEPA* refashioned the former sex work laws struck down in *Bedford* - reproducing similar harms. In this paper, I consider a hypothetical s.7 *Charter* challenge to the *PCEPA*, specifically the purchasing and material benefit offences. My data includes the social science data cited in *Bedford* and *Anwar*. These factual findings will speak to the impact of sex work laws on sex workers, with the judicial rulings serving as a basis for my legal analysis. Furthermore, I rely on several social science papers, which discuss the effectiveness of the Nordic Model and the impact of the *PCEPA* on sex workers. My paper ultimately finds that both the purchasing offence and material benefit offence violate the right to security of the person and this infringement cannot be saved under s.1 of the *Charter*. In regard to the purchasing offence, the law is arbitrary to its objective as there is no substantial evidence illustrating the success of criminalizing buyers (the Nordic model). As for the material benefit offence, the law is overbroad, as it captures non-exploitative relationships between third parties and sex workers. When comparing the judgement in Bedford to my research, the same issues associated with the laws struck down in Bedford are again brought up with the *PCEPA*. In both, the laws prevent sex workers from protecting themselves or hiring third parties to protect them. As such, the claim that many scholars make, which is that the *PCEPA* refashioned the former sex work laws struck down in *Bedford*, is proving to be true.

Suite à la décision historique de Bedford en 2013, le gouvernement conservateur de Stephen Harper a mis en vigueur la Loi sur la protection des collectivités et des personnes victimes d'exploitation (LPCPVE) en 2014. De nombreux.euses chercheurs.euses affirment que la LPCPVE reconstitue les anciennes lois sur le travail du sexe qui ont été éliminées par

l'arrêt Bedford. Par conséquent, la LPCPVE reproduit les mêmes maux. Dans cette analyse, j'examinerai la possibilité d'une contestation judiciaire contre la LPCPVE à partir de l'article 7 de la Charte canadienne des droits et libertés – notamment sur la question de l'infraction relative à l'achat et de l'infraction visant à interdire l'obtention d'un avantage matériel. J'utilise des données sur les sciences sociales citées dans les arrêts Bedford et Anwar. Ces conclusions de fait expliciteront l'impact de la législation sur le travail du sexe sur ces professionnel.le.s concerné.e.s et les décisions judiciaires fonderont la base de mon analyse juridique. En outre, je m'appuie sur plusieurs articles concernant l'efficacité du modèle nordique et l'impact de la LPCPVE sur les travailleurs.eues du sexe. Dans ce texte, je conclus que l'infraction relative à l'achat et l'infraction visant à interdire l'obtention d'un avantage matériel enfreignent le droit à la sécurité de la personne. Une telle atteinte ne peut pas être protégée par l'article 1 de la Charte. Quant à l'infraction relative à l'achat, la loi est arbitraire par rapport à son objectif puisqu'il n'y a pas de preuve considérable qui démontre le succès de la criminalisation des acheteurs (modèle nordique). En ce qui concerne l'infraction visant à interdire l'obtention d'un avantage matériel, la loi est trop vague, car elle comprend aussi les relations qui ne relèvent pas de l'exploitation entre les travailleurs du sexe et des tierces personnes. En comparant l'arrêt Bedford et ma propre recherche, les mêmes problèmes associés aux lois éliminées dans le cadre de l'arrêt Bedford sont encore présents dans la LPCPVE. Dans les deux cas, les lois empêchent les travailleur.euse.s du sexe de se protéger ou d'engager une tierce personne pour se défendre. Par conséquent, il est peut-être vrai que la LPCPVE refaçonne les lois qui ont été invalidées par l'arrêt Bedford, comme le réclament de nombreux chercheur.euse.s.

Introduction

In 2013, the Supreme Court of Canada (SCC) struck down sex work laws in *Canada v Bedford*. Pro-sex work advocates celebrated the landmark decision as signaling the end of a tumultuous battle. However, the victory was short-lived as then-Minister of Justice, Peter MacKay, introduced *Bedford's* legislative sequel, Bill C-36 - formally known as the *Protection of Communities and Exploited Persons Act* (*PCEPA*). The *PCEPA* received royal assent in 2014. Some scholars, like Chris Bruckert (2015), Andrea Krusi and Brenda Belak (see Red Light Labour 2018) argue that the *PCEPA* refashioned the laws struck down in *Bedford* and reproduces the same harms; however, few scholars have discussed how to challenge this legislation in court (Durisin, van der Meulen, and Bruckert 2018). As such, this paper will examine two provisions of the *PCEPA* regarding the criminalization of buyers and third parties. The research question this paper seeks to answer is: Do sections 286.1 and 286.2 of the *PCEPA* violate section 7 (s.7) of the Canadian *Charter* of Rights and Freedoms (*Charter*)? If so, is it justified under section 1 (s.1)? In this paper, I will argue that these provisions of the *PCEPA* violate s.7 of the *Charter*, and these

infringements cannot be justified as a reasonable limit under s.1. This paper has four objectives; first, to engage in a review of the existing literature. Second, to provide a background discussion on the specific provisions subject to challenge and their legislative objective; third, to outline the methodology of the paper, the methods of analysis, and a limitation to my methodology and; fourth, to engage in the s.7 and s.1 analysis of the *PCEPA* using legal principles and case law.

Literature review

The existing literature on the constitutionality of the *PCEPA* is limited. Many authors undertake social science research to demonstrate the effects of the *PCEPA* on sex workers (see Red Light Labour 2018). However, a small section of the literature discusses the *PCEPA*'s constitutionality. The two authors that have taken up the question are Stewart and Haak. Stewart (2016) argues that the *PCEPA* is unconstitutional because it has two conflicting policy objectives: to discourage sex work on the one hand and to reduce harms to sex workers on the other. Stewart (2016) asserts that these objectives are in tension with one another. As a result, he finds the *PCEPA* to be an incoherent piece of legislation. Thus, Stewart (2016) argues that one way to challenge the constitutionality of the *PCEPA* is to question these inconsistent objectives.

On the contrary, Haak (2017) rejects Stewart's discussion of two objectives. She argues that the *PCEPA*'s goal is to reduce the demand for prostitution, and there is no second purpose of making it safer. She finds it difficult to argue that the legislation is arbitrary or grossly disproportionate to that objective. Haak (2017) points out that the goal of the *PCEPA* is to reduce demand and make prostitution illegal by criminalizing the purchaser. With that goal in mind, to argue that the purchasing offence makes sex work more dangerous is difficult. Ultimately, Haak (2017) concludes that the *PCEPA* will be difficult to render unconstitutional because the legislation is in line with the government's objective.

Furthermore, while Haak and Stewart are some of the only scholars that have engaged in a s.7 legal analysis of the *PCEPA*, other authors have questioned the constitutionality of the *PCEPA* in a much more informal way. For example, Lawrence (2014) argues that any successful challenge to the *PCEPA* will require new data and scholarship. Thus, Lawrence implies that robust empirical evidence may help to render the *PCEPA* unconstitutional. Additionally, Galbally (2016) discusses the legislation from a human rights perspective. Galbally (2016) concludes that the *PCEPA* is inconsistent with its objectives. The *PCEPA* is based on the Nordic model, and as such, according to the government, the new legislation is important to protect women from exploitative and coercive third parties (Galbally, 2016). However, Galbally (2016) argues that the

legislation increases sex workers' risk of violence, which contradicts the purpose of asymmetrical criminalization.[1]

In essence, these scholars do not undertake a comprehensive legal analysis with a definitive conclusion. My research offers a new perspective. Where existing literature looks at either the effect of the legislation on sex workers or briefly mentions the possibility of a s.7 challenge, I will undertake a hypothetical s.7 challenge to the *PCEPA* and offer a conclusion as to the constitutionality of ss. 286.1 and 286.2. Specifically, my paper responds to Haak's arguments by demonstrating that there is a way to successfully challenge the *PCEPA*, even though the legislation aligns with the legislative objective. In addition, my research makes substantive contributions to those embroiled in discussions on the constitutionality of the *PCEPA.* Given that the *PCEPA* is a contentious piece of legislation, this legal analysis is important to prohibitionists who rebuke sex work, pro-sex work advocates, harm reductionists who want to make the industry safer, criminal justice personnel, advocates and Canadians interested in the debate. The aim is that after reading this paper, readers can better understand how the *PCEPA* can be challenged in courts and on what grounds it can be struck down.

Background

The provisions: ss. 286.1 & 286.2

The *PCEPA* is rooted in the idea that prostitution is inherently exploitative (Department of Justice [DOJ] 2017). The Purchasing Offence (s.286.1) is at the core of the *PCEPA* (Canada 2014). The *PCEPA* is based on the Nordic model, which criminalizes buyers and third parties (DOJ 2017). Consequently, s.286.1 makes it so that purchasing or communication for the purpose of purchasing sexual services is illegal (*Protection of Communities and Exploited Persons Act* [*PCEPA*] 2014). On the other hand, the Material Benefit Offence (s.286.2) seeks to criminalize exploitative third parties (Canada 2014). The legislation posits that everyone who "receives a financial or other material benefit" from the provision of sexual services of another person is subject to criminalization (*PCEPA* 2014). Also, s.286.2(4) outlines exceptions, stating that those in a legitimate living arrangement, receiving goods/services out of a moral obligation, offering goods/services available to all Canadians or offering goods for fair value are exempt from criminalization (*PCEPA* 2014). However, s.286.2(5) holds that those exceptions in subsection (4) do not apply in contexts of violence, abuse of authority, provision of drugs or other intoxicating substances, procurement or a commercial enterprise (PCPEA 2014).

[1] Asymmetrical criminalization refers to a legislatively scheme whereby buyers of sexual services are criminalized, instead of directly criminalizing sex workers.

Legislative objective

Since this paper focuses on s.1 and s.7 of the *Charter*, the legislative objective is fundamental to my analyses. Accordingly, I will outline the legislative objective of ss.286.1 and 286.2. The *PCEPA* is modelled after Sweden's sex work laws (commonly referred to as the Nordic or Swedish model), which relies on asymmetrical criminalization (DOJ 2017, 7; Durisin et al. 2018, 6-7). Canada's sex work laws emulate this model as s.286.1 criminalizes buyers and s.286.2 criminalizes third parties. Underlying Canada's sex work laws and asymmetrical criminalization is the notion that sex work is inherently exploitative. As per the DOJ Technical Paper (2017), the *PCEPA* treats prostitution "as a form of sexual exploitation that disproportionately and negatively impacts… women and girls" (2). Missing from the government's discussion is any mention of sex workers who do not identify as women (transgender, two-spirit, gender non-binary or non-conforming, male sex workers) (Burke 2018; Redwood 2018; Page 2018; Lyons et al. 2017). In framing as a violence against women, the experiences of sex workers who do not identify as women are overlooked, even though they are also impacted by the very same laws. Furthermore, underlying the aforementioned objective, the government is making a moral statement about sex work and sex workers. By labelling sex work as exploitative and a violence against women, sex workers are viewed as victims in this legislative framework (DOJ 2017, 3). Ultimately, in recognizing sex work as inherently exploitative, the government, through the *PCEPA*, seeks to prohibit the demand for sex work and the exploitation of sex workers by third parties (DOJ 2017, 3). The government recognizes buyers as those who create the demand for sex work and third parties as those who capitalize on this demand and seek to economically benefit from the provision of someone else's sexual services (DOJ 2017, 3). Thus, the government's objective with ss.286.1 and 286.2 is to reduce demand for the purchase of sexual services by criminalizing buyers and third parties, with the goal of ultimately abolishing the industry because the government views sex work as inherently exploitative and seeks to prevent the commodification of women.

Methodology

To answer my research question, I will draw from case law on s.7 and s.1 and Sharpe and Roach's 2017 book on the *Charter* to interpret and apply the relevant legal principles. Additionally, I will use the Department of Justice's (DOJ) Technical Paper and the Standing Committee on Justice and Human Rights hearings on the *PCEPA*. This information will aid my s.1 analysis, particularly when establishing the government's objective. In addition, I will rely on the *Anwar* and *Bedford* - Ontario Superior Court of Justice (ONSC) and SCC - *cases*. Since there is little case law regarding challenges to the *PCEPA*, I will use the social science evidence cited and findings of fact established in these cases. These findings will speak to the effects of legislation on sex workers' lives, while the judgement will provide a basis for my legal analysis. Moreover,

Anwar is the first and only case that has successfully challenged the *PCEPA*, thus its judgement is highly relevant. Furthermore, I will rely on social science papers that assess the effectiveness of the Nordic model (Levy and Jakobsson), speak to sex workers' experience under the *PCEPA* (Red Light Labour), and Stewart's paper, which discusses the constitutionality of the *PCEPA*.

To test my hypothesis, I will use the aforementioned data sources to analyze the impacts of the *PCEPA* on sex workers. Additionally, counterarguments and potential responses from the federal government are embedded within each section of the analysis. To prove a s.7 violation, I need to demonstrate that the legislation infringes on sex workers' right to life, liberty, and security of the person and that this infringement is contrary to the principles of fundamental justice. Once I prove that the *PCEPA* infringes s.7 of the *Charter*, I need to determine whether this infringement is saved under s.1. My thesis is proven true if the evidence demonstrates that the *PCEPA* exacerbates instances of violence and exploitation to the extent that it infringes sex workers' s.7 right. Additionally, I would have to demonstrate that this infringement is incompatible with the principles of fundamental justice and that the provisions fail the *Oakes* test.[2] On the other hand, my thesis would be refuted if the evidence demonstrates that the *PCEPA* does not exacerbate harms for sex workers, and as a result, does not infringe on s.7 of the *Charter*. My thesis would also be refuted if the evidence proves that the *PCEPA* infringes on s.7 of the *Charter*; however, this infringement is saved under s.1.

Limitations

A limitation of my methodology is the lack of case law on the issue. As the *PCEPA* received royal assent in 2014, it is considered a fairly new piece of legislation. To date, there has been one case that has challenged the *PCEPA* (*Anwar*), which did so successfully, and it was decided in February of 2020. As the case was decided in favour of the defendant, the charges were dropped, and it does not appear that the Crown will appeal (Dubinski, 2020). Ultimately, in the absence of case law, this paper has to fill the gaps using social science evidence and government documents. This is a limitation as I have little case law to draw on to guide my application and interpretation of the *PCEPA*.

[2] Not all legislation that violates the *Charter* has to be struck down. Under s.1 of the *Charter* (the reasonable limits clause), legislation that can be justified as a reasonable limit on an individual's *Charter* right may be saved (not struck down). To determine whether a *Charter* infringement can be justified, the SCC developed the *Oakes* test in *R v Oakes* (1986). The *Oakes* test asks 4 questions; first, whether the objective of the legislation in question is pressing and substantial. Second, whether there is a rational connection between the legislation and its objective. Third, whether the legislation minimally impairs the *Charter* right in question. Fourth, whether the negative and positive effects of the law are proportional to each other. In weighing these four questions, a specific law may be justified as a reasonable limit and saved by s.1.

Analysis

Section 7: legal principles

The "right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" is guaranteed by s.7 of the *Charter*. A claim made under section 7 is subject to a two-part analysis. First, the infringement must violate the right to life, liberty or security of the person (Sharpe and Roach 2017, 246). In *Carter v. Canada (AG)* (2015), the SCC held that the right to life refers to a situation where the legislation or state action increases someone's risk of death or causes death (para. 62). The right to life can be best described as the "right not to die" (Sharpe and Roach 2017, 249). The right to liberty refers to people's ability to make fundamental choices about their personhood without interference, such as abortion and physician-assisted death (Sharpe and Roach 2017, 250). Essentially, this right goes beyond physical restraint (*Blencoe v. British Columbia* 2000, para. 49). Furthermore, the right to security protects people from state-imposed harm (Sharpe and Roach 2017, 252). This right includes harm to one's body, health and psychological stress (Sharpe and Roach 2017, 252). In *Blencoe* (2000), the Court reiterated that "ordinary stresses and anxieties" as a result of state action do not violate one's right to security of the person (para. 81).

During the second stage, the violation must be weighed against the principle of fundamental justice. The phrase "in accordance with the principles of fundamental justice" is an internal limit to s.7 (Sharpe and Roach 2017, 254). This means that in order for a law to violate s.7, it must be demonstrated that the infringement of the right to life, liberty, and security of the person is not in accordance with the principles of fundamental justice.[3] For the purpose of this paper, I will discuss one pre-established principle applied in *Bedford* and *Anwar*: overbreadth. Overbreadth refers to overly broad legislation that deprives more people of their s.7 right than necessary to meet its objective (Sharpe and Roach 2017, 264). For example, in *Bedford* (2013), the SCC struck down the living on the avails of prostitution offence because it was overbroad as it criminalized non-exploitative relationships (para. 140).

[3] As reiterated in *R v Malmo-Levine; R v Caine* (2003), principles of fundamental justice are widely accepted legal principles about the proper and fair operation of the legal system. Under section 7 of the *Charter*, principles of fundamental justice must have "sufficient societal consensus" and "must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty, or security of the person" (2003, para. 113).

Section 7 analysis: s.286.1

Life, liberty, and security of the person: section 286.1

In the 2013 *Bedford* decision, the SCC struck down s.213(1)(c), which prohibited communicating in public for prostitution because it prevented sex workers from enhancing their safety (paras. 71-72). Krusi and Belak (2018) argue that s.286.1 reproduces the same harms caused by the former communications provision (214, 220). As such, applicants advancing this hypothetical *Charter* challenge are likely to argue that s.286.1 infringes on the right to security of the person as it prevents sex workers from taking safety measures to protect themselves. The provision, while criminalizing the buyer, poses great risks and harms for sex workers as the latter are prevented from screening clients and are displaced to isolated areas. A government defending this legislation may argue that the provision only criminalizes buyers, and sex workers are shielded from criminal liability. However, the criminalization of clients also negatively impacts sex workers.

According to Krusi and Belak (2018), sex workers struggle to maintain regular clientele because of the criminalization of buyers and their associated fear of being caught (217). Moreover, since there are fewer clients because the purchase is illegal, sex workers are pushed to the edge of precarity by having to accept clients and provide services they otherwise would not (Krusi and Belak 2018, 217; Levy and Jakobsson 2014, 599-600). In *Bedford v Canada* (2010), Justice Himel accepted expert evidence that stated that maintaining a regular clientele is one way through which indoor-based sex workers can keep themselves safe (para. 420). The targeting of buyers makes it harder to keep this type of consistency.

Additionally, s.286.1 has the effect of displacing sex workers to isolated areas (Sayers 2018, 63). This is largely due to sex workers and their clients wanting to avoid police detection (Sayers, 2018, p. 63; Krusi and Belak 2018, 219). As a result, sex workers are forced to meet clients in isolated areas, away from the busy streets, thus increasing their vulnerability to violence by clients (Sayers 2018, 63; Krusi and Belak 2018, 219). Ultimately, while the legislation is focused on targeting clients, it negatively impacts the security of sex workers by displacing them to unsafe places and forcing them to hurry into the cars of their clients in fear of police harassment and criminalization (Sayers 2018, 63). As demonstrated in this discussion, sex workers are seriously prevented from protecting themselves and taking the necessary measures to enhance their safety as a result of s.286.1. Thus, s.286.1 violates sex workers' right to security of the person.

Principles of fundamental justice: section 286.1

The second stage of the s.7 analysis involves a consideration of the principles of fundamental justice and the objective. See the discussion on pages 4-5 for the legislative objective. The government will argue that the criminalization of buyers achieves their objective of reducing demand for sex work by targeting those who create the demand. However, the applicants will likely argue that s.286.1, while criminalizing buyers, has adverse consequences for sex workers. As such, s.286.1 is overbroad.

As demonstrated in the discussion above, the Purchasing Offence exacerbates harm for sex workers. The government's objective with the Purchasing Offence is to reduce demand for sex work because the government deems sex work exploitative. However, the effects of the legislation go beyond this objective. Ultimately, while s.286.1 is intended to penalize buyers, the risks associated with this law are offloaded onto sex workers. For example, in *R v Anwar* (2020), Atchison, an expert witness, testified that because of the "heightened enforcement of criminal prohibitions against communicating for the purpose of prostitution or by clients" sex workers (especially street-based workers) struggle to properly screen clients and often work in more isolated areas (para. 27). This results in street-based workers being "particularly vulnerable to both predatory and situational violence" (*Anwar* 2020, para. 27). Ultimately, in fear of the clients' potential for criminalization, sex workers often forgo screening their clients and negotiating the terms of their transaction or do not do a thorough check before accompanying them (Sayers 2018, 63; Krusi and Belak 2018, 218). In *Bedford* (2013), the SCC upheld Justice Himel's finding that screening clients is "an essential tool for enhancing [sex workers'] safety" (para. 22). Thus, s.286.1 is overbroad because it goes beyond its objective of reducing demand for sex work and criminalizing buyers to achieve that goal; the effect of s.286.1 is an increased risk of harm for sex workers.

Section 7 analysis: s.286.2

Life, liberty, and security of the person: section 286.2

The Material Benefit Offence focuses on third parties' role in the provision of sexual services. As demonstrated by a close reading of the DOJ Technical Paper, the social science evidence presented in *Anwar* and the works of reputable scholars in the field, s.286.2 reproduces the same harms caused by the former living on the avails offence. Thus, drawing on the legal reasoning emerging from *Bedford* and *Anwar* and the findings from social science evidence, I argue that a Court will find that s.286.2 negatively impacts the security of sex workers.

A government defending this legislation will refer to the DOJ's Technical Paper. The paper acknowledges that the legislation targets exploitative third parties, and that non-exploitative relationships will be exempt as per s.286.2(4) (DOJ 2017, 4-5). With that said, the *PCEPA* does not formally define the difference between exploitative and non-exploitative parties. The Technical Paper holds that all third parties receiving a material benefit from the sexual services of another are exploitative as they capitalize on the demand for sex work and commodify sex workers (DOJ 2017, 2-3). However, there are exceptions to the offence, legislated under s.286.2(4), which are referred to as the non-exploitative relationships (see page 5 for discussion on s.286.2(4)) (DOJ 2017, 4).

The challenge lies with the exceptions to the exceptions codified in s.286.2(5) (see page 5). Specifically, s.286.2(5)(e), which holds that receiving material benefits "in the context of a commercial enterprise that offers sexual services for sale" is subject to criminalization (DOJ 2017, 4). The Technical Paper lists strip clubs, escort agencies and massage parlours as examples of commercial enterprises; however, the DOJ notes that courts may find informal enterprises to be commercial (DOJ 2017, 4-5). With this expansive definition of commercial enterprise, it appears as if sex workers cannot hire assistants, drivers, bodyguards and managers because doing so would be contrary to s.286.2(5)(e). This idea is reiterated by Stewart (2016), who argues that while the DOJ insists that bodyguards and drivers are not criminalized under the *PCEPA*, that assertion is not in line with their explanation of s.286.5(e) and how it should be broadly defined (74). Furthermore, assistants, managers, drivers and bodyguards may be criminalized under s. 286.2(5)(d), which makes it an offence to receive a material benefit as a result of procurement (*PCEPA*, 2017). According to the DOJ (2017), procuring refers to causing or inducing someone to sell their sexual services (5). Under this definition, a driver who knowingly takes a sex worker to their clients or an assistant/manager who books a client for a sex worker is likely to be captured by s.286.2(5)(d). This is problematic because findings of fact in *Bedford v Canada* (2010, para. 420) and *Anwar* (2020, para. 88) reiterate that third parties, such as drivers, bodyguards, managers and assistants, can increase sex workers' safety.

Furthermore, the legislation prevents sex workers from working in fixed, indoor locations. In *Bedford v Canada* (2010), Justice Himel found that indoor sex work is safer than street-based work (para. 300). This was later reaffirmed in *Anwar* (2020, para. 88). While sex workers may rent or purchase a space to work out of, they run the risk of creating their own informal "commercial enterprise," and/or the landlord of a rental property may be caught up in charges related to 286.2(5)(d) (procurement) (Stewart 2016, 78). Ultimately, as illustrated through these examples and evidence, the Material Benefit Offence infringes upon the security of sex workers. By preventing sex workers from enhancing their security by hiring third parties and from working in fixed, indoor locations, s.286.2 negatively impacts the security of sex workers.

Principles of fundamental justice: section 286.1

The second stage involves a discussion on the principles of fundamental justice. The first consideration is the legislative objective; see pages 6-7 for a discussion on the objective. The government realizes its goal through the criminalization of third parties via the Material Benefit Offence. Next, the discussion turns to the principles of fundamental justice. For this legal analysis, a court is likely to find that the provision is overbroad because the law has the effect of assuming that all third parties are parasitic (*Anwar* 2020, para. 202).

In making their arguments, the Crown will point out that the Material Benefit Offence is narrower than its predecessor (the living on the avails offence), and it distinguishes between exploitative and non-exploitative relationships (DOJ 2017, 4). While this is true as s.286.2 is subject to many different subsections and exceptions, the evidence above has demonstrated that the impact of s.286.2 has negatively affected sex workers. The law's effects are the criminalization of non-exploitative relations, such as drivers, bodyguards and managers, those who try to make sex workers safer (Stewart 2016,78). The legislation opens non-exploitative third parties to criminalization through the various exceptions to the exceptions it has legislated under s. 286.2(5). As such, while s.286.2's objective is to prevent the further commodification of women and reduce the demand for sex work by targeting exploitative third parties; this legislation also captures non-coercive relations. For that reason, the provision is overbroad.

Section 1: legal principles

There are parallels between a s.7 and s.1 analysis. The principle of fundamental justice, overbreadth, is similar to the minimal impairment stage of the *Oakes* test (Sharpe and Roach 2017, 265). However, the SCC has maintained the two are distinct (*Bedford* 2013, para. 218). A s.7 analysis is interested in whether the law infringes individual rights, where the onus is on the claimant to prove that it does (*Bedford* 2013, paras. 125, 127). On the other hand, s. 1's focus is broader and the discussion centres on whether the law's negative effects are proportionate to its objective, which is pressing and substantial and in the public interest (*Bedford* 2013, para. 126). Under s.1 the onus is on the government to prove that their legislation is justified (*Bedford* 2013, para. 126). As such, courts will engage in both analyses in their judgements. Furthermore, Sharpe and Roach (2017) emphasize that s.7 rights cannot be easily overridden; it is rare for a s.7 violation to be upheld under s.1 (247).

While s.7 and s.1 are similar, this paper will engage in a full s.1 analysis using the *Oakes* test developed in the 1986 *R v Oakes* case. The *Oakes* test is a two-stage analysis that guides the courts' interpretation of the reasonable limits clause. Once a piece of legislation is determined to infringe upon the *Charter*, the next step of the *Charter* analysis is assessing whether this

violation is a reasonable limit (Sharpe and Roach 2017, 66). The onus is on the government to explain why the infringement is justified (Sharpe and Roach 2017, 92). The first stage in the *Oakes* test is determining if the objective is pressing and substantial. This objective must be of significant importance that it is justified in overriding a *Charter* right/freedom (Sharpe and Roach, 2017). The second stage involves a 3-part proportionality test, which determines whether the *Charter*-infringing legislation is rationally connected to the objective, the law minimally impairs the *Charter* right, and whether there is proportionality between the deleterious effects of the legislation and the government's objective (Sharpe and Roach 2017, 72-73).

Section 1 analysis: s.286.1

Pressing and substantial objective

The government is seeking to reduce the demand for sex work because the industry is exploitative. As such, the objective is pressing and substantial. Additionally, it is important to note that the SCC's decision making has demonstrated that the Court is willing to defer to the government at the pressing and substantial objective and rational connection stages. Thus, the Court would likely accept this objective (Sharpe and Roach 2017, 70).

Rational connection

To demonstrate rational connection, the government is likely to claim that s.286.1 and the criminalization of buyers is directly related to the government's objective of reducing demand for sex work and preventing exploitation. As mentioned in the previous stage, the government is likely to be deferential and agree that the legislation is rationally connected to the objective.

Minimal impairment

At this stage, the government is likely to argue that its legislation is based on a model, the Nordic model, which other governments have introduced or endorsed. Using their research in the 2017 DOJ Technical Paper, the government will point out that Norway and Iceland adopted the Nordic model, while government committees in Ireland and the United Kingdom both recommended the model (7). Additionally, the government will stress that the model is endorsed/recommended by the European Parliament and the United Nations Committee on the Elimination of Discrimination against Women (DOJ 2017, 7). Furthermore, the government will point to studies conducted by the Swedish and Norwegian government, which conclude that the Nordic Model has been "successful in deterring purchasers of sexual services," and decreasing the number of sex workers (DOJ 2017, 8). As such, the government will argue that

since other countries embrace this model, other governments have rendered the criminalization of buyers an approach that minimally impairs sex workers' right. Specifically, the government is likely to point out that Sweden's sex work laws have been in place since 1999 and are still standing (DOJ 2017, 7). Thus, reinforcing the notion that governments, especially Sweden, have held that the criminalization of the purchase of sexual services minimally affects sex workers' rights.

While the government maintains that the Nordic model is successful, the applicants are likely to point to evidence to the contrary. They may argue that the Nordic model has not accomplished its objective of reducing demand for sex work through the criminalization of buyers/clients. The Court will have to look to expert and international evidence that speaks to the effectiveness of the Nordic Model, specifically as it targets buyers.

In a study of the Sexköpslagen (Sweden's sex work laws) by Levy and Jakobsson (2014), they find no convincing evidence that demonstrates that levels of prostitution in Sweden have decreased since its implementation (597). Also, they conclude that the Sexköpslagen has exacerbated the risk of violence and harm to sex workers (598). Levy and Jakobsson (2014) note that while street-based sex work has declined since the law was introduced, there is no data that suggests that indoor or online sex work has decreased (597). The scholars acknowledge that while Swedish governmental officials use this decrease in street-based work to praise the Nordic model, they argue that street-based sex work figures cannot be assumed to be indicative of the overall levels of sex work (597). In addition, they point out that this decline may be due to prostitution being driven underground; this increases sex workers' vulnerabilities to harm (598).

Goodyear and Weitzer (2011) also assess Sweden's sex work laws. They note that three evaluations conducted by Sweden's National Board of Health on the Sexköpslagen find no concrete evidence pointing to its success (23). In fact, the Board of Health's 2007 report indicates a rise in street-based work after an initial decline when the laws were first implemented (Goodyear and Weitzer 2011, 23). Additionally, they assert that the legislation has increased the risk of violence to sex workers by driving the industry underground (23-24). Furthermore, in *Anwar* (2020), Atchison, an expert witness, testified that there is no substantial evidence that proves that Sweden's sex work laws have successfully reduced sex work or deterred clients (para. 37). Justice McKay, in *Anwar* (2020), reaffirmed Atchison's testimony by noting that there is no evidence pointing to whether the Nordic model "reduce[d] the existence of, or demand for, prostitution" (para. 89). Ultimately, the legislation is not minimally impairing as there is no significant evidence demonstrating that the Nordic model has reduced the demand for sex work.

Proportional effect

At this stage, the government may cite a variety of material from international contexts that speak to the success of the Nordic model. Additionally, the government may draw on Haak's argument by asserting that the *PCEPA*'s objective is to reduce demand and deter sex work; thus, any harm experienced by sex workers from the criminalization of the buyer is a result of being party to a crime. The issue is that while the government can cite Swedish reports validating claims that asymmetrical criminalization has been successful, reputable scholars in this field have failed to find concrete evidence to confirm this claim. Moreover, the criminalization of the buyer has had negative impacts on the security of sex workers. Ultimately, the positive impact of reducing demand for sex work and eradicating what the government contends is an inherently exploitative industry is outweighed by the law's negative impact, which exacerbates the risk of harm for sex workers. Any potential benefit from reducing demand by criminalizing buyers is significantly reduced because the law increases sex workers' vulnerabilities to harm.

Section 1 analysis: s.286.2

Pressing and substantial objective

See the discussion on the legislative objective of s.286.2 on pages 6-7. Moreover, as argued by MacKay in the Standing Committee (Canada, 2014), sex workers are vulnerable to physical and emotional violence and pimping by exploitative and coercive third parties. As such, the Court is likely to affirm that the government is pursuing a pressing and substantial objective.

Rational connection

To demonstrate rational connection, the government is likely to argue that its legislation differentiates between exploitative and non-exploitative relations, as illustrated by the exceptions under s.286.2(4) . The Court is likely to accept this argument advanced by the Crown. There is a strong connection between the legislative objective of preventing third parties from capitalizing on others' sexual services and the Material Benefit Offence.

Minimal impairment

At the third stage, similar to the arguments made under the rational connection section, a government defending the legislation may argue that the law is reasonable because it criminalizes parasitic third parties, all while legislating exceptions that allow sex workers to retain third parties. However, a Court is unlikely to accept this argument. At this stage, the court

will evaluate the degree to which s.7 is impaired. As ruled by Justice McKay in *Anwar* (2020) and evidence presented in the s.7 analysis, s.286.2 has had the effect of making sex work more dangerous for sex workers . Even though the government attempts to legislate the distinction between exploitative and non-exploitative parties through ss.286.2(4) and (5), the law negatively impacts non-exploitative third parties. Therefore, the law is not minimally impairing because it captures non-exploitative relationships and increases sex workers' vulnerability to harm.

Proportional effect

In this final step, a government defending the legislation may argue that the specific exceptions captured in ss.286.2(4) and (5) are necessary to identify the complex ways in which exploitative relationships can develop between sex workers and third parties. However, the Court is likely to disagree. The law's deleterious effect of increasing sex workers' vulnerabilities by preventing them from retaining third parties that enhance their security outweigh the law's salutary effect of penalizing third parties who capitalize on sex workers' provision of sexual services.

Conclusion

In essence, after conducting the legal analysis, my thesis was proven true as the evidence demonstrated that ss. 286.1 and 286.2 violate s.7 of the *Charter*, and these infringements were not saved under s.1. To remedy the s.7 *Charter* violation, the Court is likely to strike down ss. 286.1 and 286.2 from the Criminal Code. While the debate surrounding the constitutionality of the *PCEPA* will continue until the SCC hears an appeal on the matter, my legal analysis of a hypothetical *Charter* challenge has provided a glimpse into what the Crown and applicants may argue. The central issue is the security of sex workers. Ss. 286.1 and 286.2 infringe upon sex workers' right to security of the person and are overbroad. In regard to s. 286.1, the law, while criminalizing buyers, exacerbates harm for sex workers. As for s.286.2, the law is overbroad as it captures non-exploitative relationships between third parties and sex workers.

Furthermore, in the future, there needs to be greater research into the effects and constitutionality of the other provisions in the *PCEPA*. As with other scholarship on the *PCEPA*, this paper focused on the Purchasing Offence and Material Benefit Offence; however, the *PCEPA* enacted legislation that re-criminalizes procuring and limits how sex workers can advertise their services (*PCEPA*, 2014). Future research should build on *Anwar's* (2020) decision regarding advertising and procurement, specifically, as the advertising offence criminalizes third-party website hosts and the potential for sex workers providing advice to be criminalized under the offence for procurement (paras. 123, 172).

In sum, the *PCEPA* is a contentious piece of legislation, and all sides (e.g., prohibitionists and pro-sex work advocates) have a vested interest in the outcome of any judicial rulings on its constitutionality. As hypothesized in my thesis and demonstrated in this paper, ss. 286.1 and 286.2 of the *PCEPA* violate s. 7 of the Charter. I argued that both sections violate sex workers' right to security and are overbroad. Specifically, in attempting to criminalize buyers, s. 286.1 increases sex workers' vulnerabilities to harm, and s.286.2 captures non-exploitative third parties and their relationships with sex workers. Ultimately, while many people thought that the legal battle ceased with the landmark *Bedford* decision, that was far from reality. Any future SCC ruling on the constitutionality of the *PCEPA* will have consequences for sex workers all across Canada, third parties, advocates and Canadians who are interested in the debate. If the SCC upholds the *PCEPA*, sex workers will continue to be subject to the harms outlined in this paper. However, suppose the SCC strikes down the legislative scheme. In that case, there are new opportunities for Members of Parliament to engage in discussions about the potential for the criminalization, decriminalization, or legalization of sex work. Nonetheless, the battle regarding sex work legislation in Canada is far from over.

References

Bedford v Canada [2010] ONSC 4264

Blencoe v British Columbia (Human Rights Commission) [2000] 2 SCR 307

Bruckert, Chris. 2015. "Protection of Communities and Exploited Persons Act: Misogynistic Law Making in Action." *Canadian Journal of Law* 30 (1): 1-3. doi:10.1017/cls.2015.2.

Burke, Nora. 2018. "Double punishment: Immigration penalty and migrant trans women who sell sex." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 272-280. Vancouver: UBC Press.

Canada (Attorney General) v Bedford [2013] 3 SCR 1101

Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Evidence*. 2d sess., 41st Parliament, 2014. Meeting no. 32. https://www.ourcommons.ca/DocumentViewer/en/41-2/JUST/meeting-32/evidence.

Canadian Charter of Rights and Freedoms, s 2, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s. 7

Carter v Canada (Attorney General) [2015] 1 SCR 331

Department of Justice. 2017. "Technical paper: Bill C-36, protection of communities and exploited persons act." https://www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html.

Dubinski, Kate. 2020. "Ontario Court Judge Rules Parts of Canada's Prostitution Laws Are Unconstitutional." *CBC*. February 21. https://www.cbc.ca/news/canada/london/ontario-court-judge-rules-parts-of-canada-s-prostitution-laws-are-unconstitutional-1.5471207.

Durisin, Elya M., van der Meulen, Emily, and Bruckert, Chris. 2018. "Contextualizing Sex Work: Challenging Discourses and Confronting Narratives." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 3-24. Vancouver: UBC Press.

Galbally, Pheobe J. 2016. "Playing the Victim: A Critical Analysis of Canada's Bill C-36 From an International Human Rights Perspective." *Melbourne Journal of International Law* 17 (1): 135-169. http://classic.austlii.edu.au/au/journals/MelbJIL/2016/6.html.

Goodyear, Michael, and Weitzer, Ronald. 2011. "International Trends in the Control of Sexual Services."

In *Policing Pleasure: Sex Work, Policy, and the State in Global Perspective*, eds. Susan Dewey and Patty Kelly, 16-30. New York, NY: NYU Press.

Haak, Debra M. 2017. "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws." *UBC Law Review* 50 (3): 657-696. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031586.

Krüsi, Andrea, Belak, Brenda, and SWUAV. 2018. "Harassing the Clients is Exactly the Same as Harassing the Workers: Street-Based Sex Workers in Vancouver." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 213-223. Vancouver: UBC Press.

Lawrence, Sonia. 2014. "Expert-tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36." *Canadian Journal of Law and Society* 30 (1): 5-7. doi: 10.1017/cls.2015.3.

Levy, Jay, and Jakobsson, Pye. 2014. "Sweden's Abolitionist Discourse and Law: Effects on the Dynamics of Swedish sex work and on the Lives of Sweden's Sex Workers." *Criminology & Criminal Justice* 14 (5): 593-607. doi: 10.1177/1748895814528926.

Lyons, Tara, Krüsi, Andrea, Pierre, Leslie, Small, Will, and Shannon, Kate. 2017. "The Impact of Construction and Gentrification on an Outdoor Trans Sex Work Environment: Violence, Displacement and Policing." *Sexualities* 20 (8): 881–903. doi: 10.1177/1363460716676990.

Page, Morgan M. 2018. "Fighting for Homewood: Gentrification and the History of Violent Struggle Over Trans Sex Workers' Strolls in Canada." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 203-212. Vancouver: UBC Press.

Porth, Kerry. 2018. "Sex, Lies, Committee Hearings: Challenging Prostitution Propaganda." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 317-328. Vancouver: UBC Press.

Protection of Communities and Exploited Persons Act [*PCEPA*] SC 2014. c. 25.

Redwood, River. 2018. "Myths and realities of male sex workers: A personal perspective." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 167-180. Vancouver: UBC Press.

R v Anwar [2020] ONCJ 103

R v Malmo-Levine; R v Caine [2003] 3 SCR 571

R v Oakes [1986] 1 SCR 103

Sayers, Naomi. 2018. "Municipal Regulation of Street-Based Prostitution and the Impacts on Indigenous Women: A Necessary Discussion." In *Red Light Labour: Sex Work Regulation, Agency, and Resistance*, eds. Elya M. Durisin, Emily van der Meulen, and Chris Bruckert, 57-65. Vancouver: UBC Press.

Sharpe, Robert J., and Roach, Kent. 2017. "The Charter of Rights and Freedoms" (6th ed.). Toronto: Irwin Law.

Stewart, Hamish. 2016. "The Constitutionality of the New Sex Work Law." *Alberta Law Review* 54 (1): 69-88. doi: 10.29173/alr461.