File Number: 41017

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

B E T W E E N:

MIKHAIL KLOUBAKOV AND HICHAM MOUSTAINE

Appellants

-and-

HIS MAJESTY THE KING

Respondent

-and-

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA

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Continuation of titles on the inside page

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PART I - OVERVIEW

1. In *Bedford*, this Court held that the *Criminal Code* provisions prohibiting sex workers from accessing measures to protect their safety and security were unconstitutional because they exposed sex workers to dangerous conditions and put them at risk of violence and other harms.[1] The *Protection of Communities and Exploited Persons Act* ("***PCEPA***") was enacted by Parliament as a response to *Bedford*.[2] It amends the *Criminal Code* to prohibit persons from, among other things, receiving a "material benefit" from sex work (s. 286.2) and procuring another person to offer sexual services for consideration (s. 286.3) (the "**Impugned Provisions**"). These appeals consider whether the Impugned Provisions infringe the liberty and security interests of sex workers in violation of s. 7 of the *Charter*.

2. The Canadian Civil Liberties Association (the "**CCLA**") offers two overarching submissions to assist the Court's determination. While the CCLA's position is that the criminalization of sex work is harmful and perpetrates ongoing disadvantages faced by sex workers in our society, any scheme that Parliament chooses to enact must be subjected to close scrutiny to ensure that it responds substantively and rigorously to the harms that *Bedford* identified and called to be rectified. The CCLA respectfully submits that:

(a) **Safety and Security of Sex Workers is a Bedrock Objective of *PCEPA***: *Bedford* is the immediate precursor to *PCEPA* and the essential context for its interpretation. This Court in *Bedford* recognized that criminal laws cannot have the effect of impairing the safety and security of sex workers. Following *Bedford*, a safety and security lens must be applied robustly to *any regime governing sex work*—whether based on the Nordic model or some other mode of regulation. In enacting *PCEPA*, Parliament must be taken to have situated sex worker safety and security as a central feature and purpose of the regime—not as a subsidiary or secondary concern. The CCLA cautions against any framing of *PCEPA* that relegates the safety and security of sex workers to 'just another objective'. While *PCEPA* may have multiple objectives, other objectives cannot be construed to diminish or undermine safety and security. This is especially the case where the protection of stigmatized, marginalized communities is concerned. As this Court's s. 7 analysis must compare the impact of *PCEPA*'s Impugned Provisions against their intended purposes, the framing of the purposes is crucial to whether the law will be found to be arbitrary, overbroad, or grossly disproportionate.

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[1] 2013 SCC 72 [*Bedford*].
[2] SC 2014, c 25.

(b) **The *Bedford* Safeguards Must Not Be Illusory or Unattainable**: The appellate courts below have held that *PCEPA* allows sex workers to avail themselves of third-party safety supports and to work cooperatively in fixed indoor locations while sharing leased space and expenses. But that conclusion is not supported by the realities of sex work and the statutory scheme viewed as a whole. The criminalization of sex work itself creates major legal and practical barriers to the availability of critical, potentially life-saving supports. Access to third-party services under a criminal regime that contains lengthy custodial sanctions in a labyrinthine scheme of prohibitions and exceptions may well be a fantasy. The same is true for the fine distinction drawn by the courts below between "cooperatives" and "commercial enterprises" for sex work. Even if sex workers could lawfully lease or operate out of shared premises on a joint, cost-sharing basis, the difficulties of navigating the boundaries of the scheme cannot be ignored or wished away. *PCEPA* must be approached with a clear-eyed recognition of the conditions and constraints faced by sex workers in the real world. As in the pre-*Bedford* regime, the availability of third-party safety supports under *PCEPA* may very well remain illusory.

PART II - STATEMENT OF ARGUMENT

A. Safety and Security of Sex Workers is a Bedrock Objective of *PCEPA*

i. Bedford is the Critical Context for PCEPA

3. The Impugned Provisions must be informed by the legal context in which they arose and the circumstances that prompted their enactment. That begins with a recognition that *PCEPA* was Parliament's direct response to *Bedford*. This is evident in the long title of Bill C-36, which was *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments in other Acts*.

4. Put simply, the nuanced risks, harms, and barriers identified by this Court in *Bedford* are the essential backdrop to *PCEPA*. They are the risks, harms, and barriers that Parliament must be taken, in large part, to have addressed as part of its statutory objectives. Although *PCEPA* enacted a form of the Nordic model aimed at discouraging, deterring, and denouncing the purchase of sex, it did so at all times through the *Bedford* lens and this Court's fundamental, overriding concern about the realities faced by sex workers, the fact that the previous provisions exacerbated the risk of harm, and the need to craft a regime that enhances rather than undermines sex worker safety and security.

5. In *Bedford*, this Court considered three provisions of the *Criminal Code* criminalizing various activities related to prostitution: s. 210, which made it an offence to keep or be in a bawdy-house; s. 212(1)(j) which prohibited a person from "living on the avails" of prostitution;[3] and s. 213(1)(c) which prohibited communication in public for the purpose of prostitution. The Court unanimously held that these provisions violated the s. 7 right to security of the person of sex workers by exposing them to increased risk of violence and other harms. The provisions were hopelessly flawed because they had the effect of endangering lives. And they created unacceptable barriers to safety and security for an already marginalized, stigmatized segment of society, in particular, women who are Indigenous, Black, and racialized, as well as individuals who may be gender-diverse or socio-economically disadvantaged.

6. The identification of, and response to, realistic, evidence-based risks was the lynchpin of this Court's decision. As Chief Justice McLachlin held, "[t]he prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing dangerous conditions on prostitution."[4] Based on the record before it, the *Bedford* Court identified a series of safety and security measures that the law prevented sex workers from implementing, to their detriment and peril:

(a) The bawdy-house provision "prevent[ed] prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations." It "prevent[ed] prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards, and audio room monitoring, which would reduce risks." It also "prevent[ed] resort to safe houses" which could offer protection to "[s]treet prostitutes – … the most vulnerable class of prostitute, and who face an alarming amount of violence." The Court stressed that "[f]or some prostitutes, safe houses … may be critical. For these people, the ability to work in brothels or hire security, even if those activities were lawful, may be illusory." [5]

(b) The "living on the avails" provision "prevent[ed] a prostitute from hiring bodyguards, drivers and receptionists." The Court accepted that "by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their

[3] The word "prostitution" was used in the relevant provisions and this in *Bedford*.

[4] *Bedford* at para 60 (emphasis added).

[5] *Bedford* at para 64.

security of the person." The evidence established that "[h]iring drivers, receptionists, and bodyguards, could increase prostitutes' safety."[6]

(c) The communication provision "prohibit[ed] communication that would allow street prostitutes to increase their safety" by "prevent[ing] [them] from screening clients and setting terms for the use of condoms or safe houses". [7]

7. Read fully and in its proper context, *Bedford* recognized and affirmed that criminal laws cannot have the effect of impairing the safety and security of sex workers—or indeed amplifying the risks and harms they face—without infringing s. 7 of the *Charter*. Safety and security were not a 'nice-to-have', or a secondary aspect of the Court's analysis. They were front and centre in the assessment of the impugned provisions. The CCLA submits that, following *Bedford*, a safety and security lens is bedrock to the constitutionality of *any regime governing sex work*—whether based on the Nordic model or some other mode of regulation.

8. Parliament must therefore have intended sex worker safety and security to be a central feature and purpose of *PCEPA*. This would include addressing, in a robust manner, the constitutional infirmities that had been laid bare in the pre-*Bedford* regime. *Bedford* made clear that any subsequent scheme would have to give pride of place to this objective—not treat it as an afterthought or as a subsidiary objective.

9. The CCLA thus cautions against any framing of *PCEPA* that relegates the safety and security of sex workers to 'just another objective'. Regrettably, the decisions of the Ontario Court of Appeal in *N.S.* and the Alberta Court of Appeal below take that approach. They are premised on a reading of the statutory objectives that implicitly characterizes safety and security as "ancillary", lesser objectives. As the court in *N.S.* observed, the proper role of safety and security in the legislative scheme lie at the heart of the debate on the constitutionality of *PCEPA*:

> The main difference between the parties is how they would describe the PCEPA's purpose in relation to protection or safety. The Crown argues that the PCEPA permits some measures to enhance safety as an "ancillary objective". The respondent and the interveners argue that the application judge correctly described one of the purposes of the PCEPA as to protect sex workers from violence, abuse and exploitation to protect the health and safety of sex workers. As is apparent from my articulation … I disagree with that latter characterization.[8]

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[6] *Bedford* at paras 66-67.
[7] *Bedford* at para 71.
[8] *R v N.S.*, 2022 ONCA 160 at para 60 [*N.S.*].

10. Respectfully, this conclusion is grounded in a problematic, impoverished view of how and why *PCEPA* came to be. Where Parliament enacts a law to rectify a regime found to be unconstitutional *because it exacerbated safety and security risks and exposed a discrete segment of the population to greater danger of violence and other harms*, it stands to reason that the enhancement of safety and security and the protection of that group must be a key focal point for any correcting scheme. In that context, the objective to protect the safety and security of sex workers in *PCEPA* must be given wide scope, with a clear-eyed appraisal of the realities faced by them—especially those who may be most vulnerable to the risk of harm.

11. In any given enactment, Parliament may well have other objectives it wishes to achieve. However, as Chief Justice McLachlin said in *Bedford*, Parliament's powers to pursue other objectives (in that instance, the deterrence of community disruption and public nuisances) cannot be done "at the cost of the health, safety and lives of prostitutes." A law that excludes, exacerbates, or aggravates safety and security concerns will have "lost sight of its purpose."[9]

ii. *Multiple Objectives Do Not Diminish Safety and Security Objective*

12. The Ontario Court of Appeal in *N.S.* (adopted by the Alberta Court of Appeal below) articulated three purposes to *PCEPA*, which it says were drawn from Ministerial statements, the preamble to the legislation, and a technical paper produced by the Department of Justice for presentation to parliamentary committees tasked with reviewing the legislation:

(a) "first, to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it and ultimately abolishing it to the greatest extent possible, in order to protect communities, human dignity and equality";

(b) "second, to prohibit the promotion of prostitution of others, the development of economic interests in the exploitation of prostitution of others, and the institutionalization of prostitution through commercial enterprises in order to protect communities, human dignity and equality"; and

(c) "third, to mitigate some of the dangers associated with the continued, unlawful provision of sexual services for consideration".[10]

13. The CCLA does not endorse this framing of the objectives for several reasons:

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[9] *Bedford* at para 136.
[10] *N.S.* at para 59.

(a) First, the safety and security of sex workers is not ancillary. The legislation should not be interpreted to enact a form of limited protection—or 'safety-lite'—for sex workers, giving Parliament free rein to establish a regime that, in its effects, relieves "some dangers" but nevertheless impairs the security of the person of sex workers;

(b) Second, the statement of objectives embeds flawed value judgments that relegate sex workers who continue to work to a lesser status. This is evident in a comparison of the first two objectives to the third. The first two (demand reduction and prohibition on promoting/developing economic interests in sex work) are explicitly framed as being directed "at protecting communities, human dignity and equality". The third objective, which entails reducing risks and harms to sex workers post-*PCEPA*, has no such language. Yet the third objective is just as much about "communities, human dignity and equality". Everyone in society is "entitled to respect for their person, and to protection against physical force".[11] This Court has consistently recognized that human dignity is "harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."[12] A framing of statutory objectives cannot place the dignity and equality of sex workers beneath the rest of society. The Court of Appeal's statement of objectives appears to suggest that the dignity and equality of sex workers who engage in sex work post-*PCEPA* may be less worthy of the Court's concern, recognition, and respect. It should not; and

(c) Third, an objective, broadly framed, as seeking to "abolish to the greatest extent possible" or otherwise eliminate or eradicate an activity (sex work) that Parliament views as harmful must be approached with great caution. Such an objective—framed in absolutist language—risks swallowing up all other objectives that may have to be balanced against it and read harmoniously with it (e.g., the safety and security of sex workers).

14. Whether or not this Court accepts the specific formulation of *PCEPA*'s objectives in *N.S.* (with which the CCLA disagrees), their *application* to the Impugned Provisions under s. 7 must be approached with care. In determining whether the Impugned Provisions are arbitrary, overbroad, or grossly disproportionate in their effects, the *N.S.* court held that each provision

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[11] *Canadian Foundation for Children, Youth & the Law v Canada (Attorney General)*, 2004 SCC 4 at para 109, Binnie J, dissenting in part.
[12] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53; *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625 at para 74; *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 121.

need only be analyzed in relation to the specific purpose it seeks to advance, to the exclusion of other legislative purposes animating the statute. For instance, in analyzing the procuring offence under s. 286.3, the *N.S.* court found that the *only purpose* relevant to the overbreadth inquiry was "to denounce and prohibit the promotion of prostitution of others in order to protect communities, human dignity and equality".[13] To the extent the offence did not overreach in its pursuit of that purpose, it was held not to violate s. 7.

15. According to the court, other important purposes—e.g., safety and security of sex workers—had no role to play in relation to that provision. Since "[t]he purpose of the procuring offence does not include giving effect to the safety-related objective of the PCEPA with respect to those who continue to sell their sexual services for consideration", it was considered irrelevant to whether the procurement offence is in accordance with the principles of fundamental justice.[14]

16. Statutory interpretation demands a more holistic approach. An isolated review of interlocking statutory provisions against a single legislative purpose, divorced from other purposes within the same statute, is analytically unsound. It risks an incomplete, truncated analysis of the constitutionality of a provision—or in some cases, the scheme as a whole.

17. Although a statutory provision may well focus on one of multiple Parliamentary objectives, its *Charter*-compliance is not to be examined under a microscope by comparing its scope, reach, and effects against the primary objective to which it is directed. The Court must always have regard to the purposes of the statute *in their entirety* to ensure the impugned provision, through its operation on-the-ground, does not undermine or conflict with other significant objectives Parliament has mandated. In other words, any impugned provision in an enactment must be consistent with all of the legislative purposes, properly construed.

18. Slicing and dicing a statute into component provisions and comparing them to select objectives—without a wide-angle lens on how the provisions fit together and whether they collectively advance Parliament's objectives—is a perilous exercise. It risks the court missing the forest from the trees. Indeed, one provision may be up to the task of advancing a key objective of Parliament (deterrence and denunciation), but it may at the same time compromise or eviscerate another equally or even more vital objective (sex workers' safety and security). A

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[13] *N.S.* at para 121.
[14] *N.S.* at para 122.

court reviewing an interlocking scheme like *PCEPA*—with layers of prohibitions, exceptions, and exceptions to those exceptions—must be alive to that risk. It must look at each provision with a full appreciation of Parliament's objectives, and whether they are enhanced or impeded by it. Taking all legislative purposes into account, especially the safety and security of sex workers, may well have led the *N.S.* court to a different conclusion on the procurement offence.

B. The *Bedford* Safeguards Must Not Be Illusory or Unattainable

19. As part of its response to *Bedford*, *PCEPA* revives versions of the "living on the avails" offence from the previous regime. Section 286.2(1) provides that every person who receives a financial benefit or other material benefit, knowing it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1) (i.e., the obtaining of sexual services for consideration) is guilty of an offence.

20. This offence captures all third-party services for sex workers, including safety-enhancing tools outlined in *Bedford*. As a result, section 286.2(4) purports to create exceptions to permit sex workers to hire third-party services where those third parties "did not counsel or encourage [the sex worker] to provide sexual services and the benefit is proportionate to the value of the service or good." Section 286.2(5) creates a series of 'exceptions to the exceptions', which criminalize the receipt of a benefit where it results from threats or intimidation, the abuse of a position of trust, the provision of intoxicating substances to a sex worker, conduct that would constitute procuring, or a benefit received "in the context of commercial enterprise that offers sexual services for consideration."

21. In *N.S.*, the Ontario Court of Appeal held that this framework allows sex workers to avail themselves of third-party safety supports and to work cooperatively in fixed indoor locations where they would be able to share leased space and expenses.[15] However, that conclusion ignores the realities of sex work and the scheme itself.

22. First, the criminalization of sex work creates fundamental legal and practical barriers to the availability of third-party safety supports. The *PCEPA* presumes that such supports will be accessible under a criminal regime with custodial sanctions and a labyrinthine scheme of prohibitions with exceptions, and exceptions to exceptions. That assumption is questionable and

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[15] *N.S.* at para 63.

problematic. Where the underlying commercial transaction is criminalized, it is far from clear that third parties will participate in the provision of security and related services. As in *Bedford*, the promise of third-party safety supports may well remain out of reach.[16]

23. Second, the legal and practical availability of cooperatives is doubtful. In *N.S.*, the Ontario Court of Appeal concluded that, under narrow conditions, the "commercial enterprise" exception would not be triggered by a cooperative arrangement between sex workers. This is:

> an arrangement where sex workers cooperate to obtain premises and services related to their respective sales of sexual services. The cost of the premises and services is shared; each sex worker pays their share out of their earnings from the sale of their sexual services. The cooperative is not engaged in or concerned with profit. It operates on a shared cost basis. …[17]

24. Under such an arrangement, the court held that sex workers would benefit from immunity because any benefit, such as a shared security service, received by them would be derived from their own sexual services since they must pay their share of the cost. [18]

25. This construct may well be fantasy when viewed in the broader context of *PCEPA*. Even if sex workers were able to lawfully lease premises and operate out of them (where their work is criminalized), one can imagine situations in which even sex workers who are working "cooperatively" could find themselves in criminal jeopardy where they derive a benefit from the cooperative for which they have not paid their share. Under the Court of Appeal's construct, they will be exposed to prosecution since the benefit is not derived from their own sexual services.

26. Nor does this construct account for the potentially fine line between cost-sharing and profit-sharing—or the level of organization among sex workers that takes an arrangement from a cooperative into a "commercial enterprise". If a joint bank account is set up by the cooperative into which earnings are deposited and from which joint expenses are paid out, does the

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[16] By prohibiting the sale and purchase of sex, Canada's approach brings criminalization and police surveillance into sex workers' lives. It increases risks to sex workers by pushing sex work underground and reducing the ability of sex workers to negotiate services on their own terms, leading to violence and unsafe working conditions. It also creates an adversarial relationship with police where sex workers are unlikely to report crimes against themselves or others.

[17] *N.S.* at para 74.

[18] *N.S.* at para 82.

distribution of funds once expenses are settled become a "profit" from a "commercial enterprise" to the individual sex worker? The *PCEPA* framework gives no answer to such murky questions—and largely rests them in the hands of good-faith prosecutorial discretion, which this Court has said cannot be a basis to save laws from constitutional scrutiny.[19]

27. Finally, the legal and practical issues are amplified by the lack of a statutory definition of "commercial enterprise" in *PCEPA*. The ordinary meaning of "commercial enterprise" is to be engaged in business or concerned with profit. Given its wide scope, the Court of Appeal in *N.S.* attempted to read in "pejorative connotations" to the term "commercial enterprise" in an effort to limit it. It linked that term to at least three distinct concepts—"profiteering", "exploitation", and "commodification"—each of which has different consequences for the scope of an offence.[20]

28. Courts should be wary of stepping in to remedy deficient legislative drafting to narrow an overbroad offence.[21] Indeed, the uncertain boundaries of the scheme lay bare the difficulties that sex workers face in navigating *PCEPA*.[22] The CCLA respectfully submits that this Court—as it did in *Bedford*—should ground its decision on the conditions and constraints faced by sex workers in the real world to have safety and security in their work.

PART III - ORDER REQUESTED

29. The CCLA does not take any position on the outcome of the appeal. The CCLA does not seek costs and asks that it not be liable for the costs of any party or intervener.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8TH DAY OF JULY, 2024

Zain Naqi / Annecy Pang

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[19] *R v Nur*, 2015 SCC 15 at paras 85-91.
[20] *N.S.* at para 76.
[21] If exploitation or profiteering were intended to limit on the "commercial enterprise" exception, Parliament would have said so. Various *Criminal Code* provisions use the terms "exploit" or "exploitation" to define or qualify illicit conduct: see e.g., ss 153-153.1 (sexual exploitation), s 163(8) (obscene publication), ss 279.01-279.011 (trafficking in persons).
[22] *R v Anwar*, 2020 ONCJ 103 at para 200.

PART IV - TABLE OF AUTHORITIES

Case Law

No.	Authority	Paragraph Reference
1.	*Canada (Attorney General) v Bedford*, 2013 SCC 72	1, 6, 11
2.	*Canadian Foundation for Children, Youth & the Law v Canada (Attorney General),* 2004 SCC 4	13
3.	*Gosselin v Québec (Attorney General),* 2002 SCC 84	13
4.	*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497	13
5.	*R v Anwar*, 2020 ONCJ 103	28
6.	*R v N.S.*, 2022 ONCA 160	9, 12, 14, 15, 21, 23, 24, 27
7.	*R v Nur*, 2015 SCC 15	26
8.	*Winko v. British Columbia (Forensic Psychiatric Institute),* [1999] 2 SCR 625	13

Statute, Regulation, Rule, etc.

No.	Statutory, Regulation, Rule, etc.	Section
1.	*Criminal Code*, RSC 1985, c C-46	s. 153 s.153.1 s.163(8) s.279.01 s.279.011
	Code criminel, LRC 1985, c C-46	s. 153 s.153.1

		s.163(8) s.279.01 s.279.011
2.	*Protection of Communities and Exploited Persons Act*, SC 2014, c 25	Generally
	Loi sur la protection des collectivités et des personnes victimes d'exploitation, LC 2014, c 25	En général