One step forward, two steps back: The Court of Appeal for Ontario clarifies Canada’s sex work laws but ultimately delivers a blow in attempts to challenge the constitutional validity of Canada’s ‘end demand’ model.

*R* v *NS*, 2022 ONCA 160

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NS was charged with six offences relating to prostitution contrary to sections 279.01(1) (trafficking), 279.02(1) (receiving a material benefit from trafficking), 286.1(1) (obtaining sexual services for consideration), 286.2(1) (receiving a material benefit from sexual services) and 286.4 (advertising sexual services) of the Canadian *Criminal Code.* The offences that took place between 12 May 2017 and 31 October 2017 and NS was also charged with an offence under s.286.3(1) (procuring a person to offer or provide sexual services for consideration) for an infraction on 11 May 2017. In 2021, he brought a successful challenge against provisions 286.2, 286.3 and 286.4, which were enacted by the Protection of Communities and Exploited Persons Act 2014 (PCEPA). This was on the basis that the provisions contravened the charter rights under the Canadian Charter of Rights and Freedoms (the Charter), section 7 which sets out the following:

Everyone has 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.

In an earlier decision, the Ontario Superior Court of Justice (ONSC) had found that the provisions infringed section 7 of the Charter, and this was not permitted as a limitation which could be ‘*demonstrably justified in a free and democratic society*’ as per section 1 of the Charter, striking down the impugned provisions and acquitting the appellant (see *R* v *NS*, 2021 ONSC 1628). This case now concerns the appeal to the Ontario Court of Appeal against this decision by the Crown.

As a result of a previous Supreme Court of Canada decision in *Canada (Attorney General)* v *Bedford*, 2013 SCC 72; Canada’s laws relating to the keeping of a bawdy house, living off the avails of prostitution and public communication with respect to a proposed act of prostitution were all found to infringe section 7 of the Canadian Charter of Rights and Freedoms because the provisions, based around the prevention of nuisance and safeguarding public heath and safety, were disproportionate and overbroad (at [144-147]). The Canadian government were given a year to reform the law in this area or risk the provisions being struck down as unconstitutional. The resultant legislation was PCEPA which repealed the bawdy house provisions and introduced, amongst others, sections 286.1(1), 286.2(1) and 286.3(1) to the Criminal Code.

Section 286.1(1) criminalises obtaining for consideration or communicating with anyone for the purpose of obtaining for consideration, in any place, the sexual services of another and is punishable by a fine. This amounts to a sex purchase ban where the person buying or seeking to buy sex is subjected to criminal sanction. Under section 286.2(1) it is an offence for every person who receives a financial or other material benefit, if they know that the benefit derives either directly or indirectly from the purchase of sex. Section 286.3(1) criminalises anyone who procures a person to offer or provide sexual services for consideration or who recruits, harbours, holds or conceals such a person or exercises control, direction or influence over the movements of that person. The latter two of these offences are aimed at those who manage, control and live off the avails of prostitution. Finally, section 286.4 makes it a criminal offence for anyone who knowingly advertises an offer to provide sexual services. Under s.286.5 there is immunity for those who advertise or derive a material benefit from their own sexual services and immunity for those who are an accessory to any offence under ss.286.1 to 286.4 in relation to the offering or provision of their own sexual services.

In his initial appeal in the ONSC, counsel for NS had argued that the PCEPA provisions were unlawful using four hypothetical examples where the law would be acting disproportionately and in contravention of the section 7 Charter Rights. The ONSC, accepted the use of hypothetical examples following the precedent set in *R* v *Nur*, 2015 SCC 15which allows a court to not only consider the case facts at hand but also any other reasonably foreseeable circumstances in which the law in question may apply. The hypotheticals included hypothetical 1 where a professional escort agency run by a husband and wife hired sex workers through transparent and non-exploitative recruitment processes, dealt with day-to-day admin, security, screening, admin, transport and payments relating to the sex work and provided a generous package of holidays and benefits but would prohibit illicit activities in the workplace such as drinking and drug taking. This agency would take 50% cut of all earnings, but the sex worker would keep their 50% plus tips and gifts. (The facts of hypothetical one are very similar to the facts of *R* v *Anwar*, 2020 ONCJ 103 where PCEPA provisions were also found to be unconstitutional (for further discussion of this case, see Leggett, Z ‘The unconstitutional nature of the criminalisation of the purchase of sex in Canada’ *J. Crim. L.* (2020), 84(3), 266). In hypothetical 2, two students decide to take up sex work in order to pay for their tuition. Being inexperienced they consult a more experienced sex worker who offers advice, contacts and assistance in getting started, leading to the students leasing premises together and hiring receptionists and security, and selling sex. Hypothetical 3 involves a male street sex worker in the same circumstances as hypothetical 1 who leaves street sex work in favour of working for the husband-and-wife escort agency and hypothetical 4 where a male student sex worker who leases a room from the students in hypothetical 2 which he uses to both reside and sell sex.

In the ONSC, Justice Sutherland, the application judge, set out the key issues which the court must determine: (a) the purpose of the PCEPA and the impugned sections; (b) whether the impugned sections violate section 7 of the Charter, and if so, whether they can be justified under s.1 of the Charter (R v NS, 2021 ONSC 1628 at para [14]). The ONSC concluded that in enacting PCEPA, the Canadian Parliament intended that the sale of sex by individuals was permittable and that in limited circumstances, sex workers could have assistance of third parties to facilitate health and safety in carrying out sex work, but the purchase of sex, communication, advertising and receiving of a material benefit for anyone other than the individual sex worker, would be illegal (at [65]). On this basis, the application judge found that hypothetical 2 and 4, concerning the student sex workers, would infringe article 7 on the basis that sex workers receiving a material benefit from each other would not qualify for immunity under s.285.5 of the Criminal Code if they were part of a ‘commercial enterprise’ and they would be unable to jointly hire third parties to provide sufficient security. The court also found that the sex worker providing advice and assistance would be committing an offence under s.286.3(1) and as such, the inability for the student sex workers to receive advice, instruction, and direction in order to work safely also infringed their right to security of the person (at [67-70]). The application judge concluding that as the impugned provisions were overbroad and grossly disproportionate and incapable of being saved by s.1 of the Charter because the impact of preventing sex workers from taking adequate safety measures was disproportionate for PCEPA’s aim of protecting sex workers from exploitative relationships and parliament’s intentions to decrease or eliminate commercial sex work (at [71]).

**Held**, **allowing the appeal** and ordering a retrial, that the application judge in the ONSC was wrong to consider the aims of PCEPA collectively and in line with the precedent set in *R* v *Bedford*, 2013 SCC 27 they should have considered the purpose of each particular provision on an individual basis. On a holistic level, Hoy JA disagreed with the application judge’s evaluation of the purposes of PCEPA in any event. Instead, she set out three purposes which, in her view, the legislation set out to achieve. First to reduce demand for prostitution by discouraging and deterring participation and ultimately abolishing it. Secondly to prohibit promotion of prostitution to prevent exploitation and protect communities, human dignity and equality. Thirdly to mitigate the dangers of existing sex work (R v NS, 2022 ONCA 160 at [59]). Justice Hoy considered the hypothetical examples and found that in most cases, because of the immunities set out within the *Criminal Code,* section 7 of the Charter was not engaged. In any event, had section 7 been engaged, any infringement would be permittable because they were not overbroad or grossly disproportionate in those aims under section 1 of the Charter.

**Commentary**

When considering the individual impugned provisions, Hoy JA first considered s. 286.2 relating to receiving a material benefit. Under the hypothetical scenarios regarding the student sex workers, a key question would be whether a sex worker who shares space or expenses with another sex worker would be subject to prosecution under this provision. S. 286.2 refers to a financial ‘or any other material benefit’, however, no further definition of ‘benefit’ is provided. Under s. 286.2(4) the offence does not apply to a person who receives a benefit (a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived; (b) as a result of a legal or moral obligation of the person; (c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or (d) in consideration for a service of good that they do not offer to the public, but provided that this isn’t as a result of counselling or procurement, is proportionate to the value of the service or good. Importantly, however, subsection (4) does not apply to a person who commits an offence under s. 286.2 if that person under s. 286.2(5)(e) received that benefit in the context of a commercial enterprise that offers sexual services for consideration. It was the application Judge’s view in the ONSC that the sex work enterprises of the student sex workers in the hypothetical would come under the definition of ‘commercial enterprises’ which would exclude them from immunity from prosecution as per s. 286.2(5)(e). Justice Hoy again disagreed with the application judge, arguing that, in line with *Re Rizzo & Rizzo Shoes Ltd* [1998] 1 SCR and *R* v *Hutchinson*, 2014 SCC 19; when interpreting a statute, the words of the Act must be read in their entire context and grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament (at [para 69]). The court cited Hansard where Minister MacKay had specified that the material benefit offence ‘does not apply to non-exploitative relationships’ (House of Commons, *Debates (Hansard)*, 41, 2, Vol. 147, No. 101 at [6654]). Similarly, Bob Dechert (Parliamentary Secretary) explained that PCEPA described a commercial enterprise as being something that ‘*offers sexual services for sale, such as a strip club, a massage parlour, or an escort agency in which prostitution takes place. We know those types of businesses are run by criminal organisations, such as gangs and the mafia*’ (House of Commons, Debates (Hansard), 41, 2, Vol. 147, No. 102 at [6756]). In this context, Justice Hoy drew a distinction between two sex workers cooperatively sharing security and a third party who exploits a sex worker through the commodification of their services (at [79]) and therefore, the student sex workers would remain protected by immunity under s. 286.2(4) of the Criminal Code.

In considering s. 286.3, Justice Hoy disagreed with the application judge’s finding that the students and experienced sex worker from hypothetical 2 and 4 would be prosecuted for procuring under this provision by providing advice on setting up, advertising and carrying out commercial sex work. It was suggested by Hoy JA that the application judge had erred in making the presumption that (a) the sex worker’s help had amounted to exercising control, direction or influence over the students and (b) inferring that the requisite *mens rea* would be satisfied by doing this for the purpose of facilitating commercial sex work (at [110]). Justice Hoy referred to the approach set out in *R* v *Gallone* which provides for modes of actus reus under s. 286.3 where the accused either (a) procures a person to offer or provide sexual services for consideration or (b) they recruit, hold, conceal or harbours a person who offers sexual services for consideration, or exercises control, direction or influence over the movements of that person (*R* v *Gallone*, 2019 ONCA 663 at [59]). Under the *Gallone* approach*,* Hoy JA could not reconcile how the applicant judge could justify finding the student sex workers violated s. 286.3 within the second mode of *actus reus* because it was not clear which of the requisite circumstances (harbouring, concealment, control etc) would be satisfied. In the hypothetical the students did not hide or conceal each other, nor did they harbour each other under the definition provided under *R* v *Joseph* which suggests this involves ‘*the provision of shelter, whether secretly or not*’ (*R* v *Joseph*, 2020 ONCA 733 at [86]). In none of the hypotheticals, according to Hoy JA, were the students provided with shelter, but rather they secured their own shelter by obtaining either a joint or individual lease on the room in the scenario. Under *R* v *Gallone*, exercising influence over a person’s movement requires doing anything to affect another person’s movements such as something which can ‘*alter, sway or affect the will or the person*’ (*R* v *Gallone*, 2019 ONCA 663 at [47]) and this would be something for the court to determine by examining the relationships between the different parties and their subsequent influence on the other, something that Justice Hoy could not rule upon based on the limited facts in the hypothetical (at [106]). Even if the *actus reus* for an offence under s. 286.3 could be met, there would still be a requirement that the conduct under s. 286.3 was for the purpose of obtaining for consideration (or communicating for the purpose of obtaining for consideration) the sexual services of another person. This, according to Justice Hoy, narrowed the scope of the *mens rea* from that applied by the application judge who erred in interpreting the *mens rea* as being for the purpose of an offence under s. 286.3 or general intention to facilitate commercial sex work, rather than that of the specific offence under s. 286.1 (at [107-108]). Under this narrower interpretation, she held that no offence would be committed by any of the students or the assisting sex worker in the hypothetical so an infringement of their s.7 Charter rights would not arise.

An additional hypothetical was introduced by counsel for an intervening party (The *Boodhoo hypothetical*) where an existing sex worker reaches out to a young, homeless friend who is stealing to survive. She proposes that this friend engages in the provision of sexual services for consideration, and they rent an apartment together and share expenses and work. The benefit from working in this cooperative for both parties is that the existing sex worker mitigates the risk of losing her apartment due to struggles paying the rent on her own and being forced into riskier sex work and the homeless friend is provided with a safer environment than survival on the street. The homeless friend accepts this offer and begins selling her sexual services for consideration.

In relation to the *Boodhoo hypothetical*, Justice Hoy accepted that an offence would arise under s. 286.3 as the existing sex worker would commit the mode one *actus reus* set out in *R* v *Gallone* of procuring. The sex worker would be found to have caused, induced, or persuaded her friend to provide sexual services for consideration and would do so with the requisite *mens rea* that an offence under s.286(1) be committed (at [115]). With s.7 of the Charter engaged, Hoy JA sought to determine the purpose of s. 286.3 to assess its breadth and proportionality. Again, she disagreed with the finding of the application judge in applying a broad purpose of PCEPA and instead held the purpose of the specific s. 286.3 provision as being to ‘*denounce and prohibit the prostitution of others in order to protect communities, dignity and equality*’ (at [121]). As this aim focuses on prohibiting the promotion of prostitution of others and concerns their safety and not the conduct of a person who sells their own sexual services, Justice Hoy determined that the aim and effect of the legislation were directly and rationally related and thus, not overbroad. In terms of whether the provision is grossly disproportionate, Hoy JA cited and accepted the preamble of PCEPA that sees prostitution as ‘inherently exploitative, entailing risks of violence to those who engage in it, causing social harm by the objectification of the human body and commodification of sexual activity and an affront to human dignity (as per Hoy JA at [126] and set out in the preamble of PCEPA 2014). Based on this analysis, Justice Hoy concluded that combatting this harm was not grossly disproportionate when balanced with the potential result of creating more dangerous circumstances for the sex worker to engage in her illegal activity (at [126]). The reference to illegal activity is a fine point but as Justice Hoy puts it, PCEPA does not legalize commercial sex work, but immunity is provided under s. 286.5 (at [128]).

When it comes to the advertising offence under s. 286.4 of the *Criminal Code*, Justice Hoy drew a distinction between a sex worker’s need to advertise and their ability to communicate in public for the purpose of prostitution. The latter was pertinent to *Bedford* where it was held by the Court of Appeal for Ontario (prior to the case subsequently reaching the Supreme Court of Canada) that face-to-face communication was an essential tool for enhancing street sex workers’ safety and leading to a change in the law (*R* v *Bedford*, 2012 ONCA 186 at [40]). Because of this change in the law, subject to a few exceptions, sex workers are no longer criminalised for public communication and even if they were, they enjoy immunity in relation to advertising the provision of their own sexual services under s. 286.5(2) of the *Criminal Code*. In reviewing the evidence in front of her, Hoy JA summised that the law on advertising had not forced sex workers into more riskier situations such as face to face solicitation, but rather advertising continued but using vaguer language which would likely require follow up communication for more detailed clarification. She suggested that prohibitions on advertising would not prevent frank communication before a personal encounter and therefore the effects of such prohibition would not grossly outweigh its benefits. Justice Hoy described these impairments on security of the person as trivial and in line with *Bedford* such impairments would not engage s.7 of the Charter (at [150]). Even if s.7 of the Charter were engaged, Hoy JA argued that the purpose of s. 286.4 was to ‘*reduce the demand of the provision of sexual services for consideration in order to protect communities, human dignity and equality*’ and as s. 286.4 prevents new clients being sought through advertising, the law meets the purpose of ending demand and, therefore, not overbroad (at [152]).

The decision in *R* v *NS* is the latest decision involving rights-based challenges to Canada’s sex work laws in the Canadian courts. *Bedford* v *Canada*,featured heavily in this judgment, was the landmark case which brought down Canada’s previous set of prostitution laws on the basis that provisions infringed s.7 of the Charter. Hopes that the Canadian’s government response would be a move to decriminalisation similar to the approach introduced in New Zealand in the Prostitution Reform Act 2003 (see for example Maria Powell (2003) ‘Moving beyond the Prostitution Reference: Bedford v Canada’, *UNBLV*, 64, 187), were dashed as instead law makers declared sex work to be exploitative and violent and introduced an ‘end demand’ model through PCEPA (see Minister MacKay, House of Commons Debates (Hansard), 41, 2, Volume 147, Number 101). Under this model, the purchase of commercial sex is criminalised but not the sale of sex, however, claims that sex workers are not criminalised in this model are questionable since they are still subject to material benefit, advertising and procurement offences as already highlighted in the present case.

Since the passing of PCEPA, fresh challenges to Canada’s sex work laws have continued in the courts with mixed results. At provincial court level in the case of *R* v *Anwar*, 2020 ONCJ 103, Justice McKay held that sections 286.2, 286.3 and 286.4 of the *Criminal Code* violated s.7 of the Charter. The court felt that laws which not only criminalised exploitative parties but also criminalised non-exploitative parties such as publishers, social media companies and web designers/administrators under s. 286.4; advisors, administrators and security staff who would be freely available for hire in other industries under s.286.3; and non-coercive third-party managers under s. 286.2, were arbitrary and overbroad. Of additional interest in this case, however, was the treatment of expert evidence. The court refused to follow the previous Superior Court decision in *R* v *Boodhoo*, 2018 ONSC 7205 on the basis that the evidence in front of that court was not nearly as thorough as the evidence in *Anwar* and that *Boodhoo* was rushed through in two days, only considered hypothetical scenarios and only took evidence from *Technical Paper – Bill C-36*, which Justice McKay suggested lacked balance. In *Anwar*, the court felt that Crown experts, in the form of Maddy Coy and Cherry Smiley, were biased and unwilling to take a neutral position in their research processes. When applying the test set out in *White Burgess Langile Inman* v *Abbott and Halliburton Co.*, 2015 SCC 23 their evidence met the low threshold for admissibility, but Justice McKay ruled that their evidence carried no weight whatsoever. Instead, he was swayed by the appellant’s witnesses who he described as contributing ‘*significant evidence-based opinions to the factual underpinnings of this case*’ (*Anwar* at [78]).

In the Superior Courts, the decision in *Anwar* was followed in *R v* NS, 2021 ONSC 1628 (discussed earlier) however the subsequent Superior Court cases of *R* v *MacDonald*, 2021 ONSC 4423, *R* v *Jonathan Williams*, July 2, 2021 (unreported) and *R* v *Maldonado Vallejos*, 2021 ONSC 5809, all held that the impugned provisions did not violate the Charter. All three decisions followed similar arguments to Justice Hoy (in the present case) in concluding that Justice Sutherland had erroneously concluded that Parliament has sought to allow the sale of sexual services, a conclusion which was contradicted by Parliament’s decision to provide an immunity for sex workers committing an offence under the impugned sections, and which undermined Sutherland J’s conclusions. None of these cases considered any expert evidence on the impact of the provisions on sex workers and in *MacDonald*, Justice Gambacorta favoured the evidence in the Government written *Technical Paper* when considering the impact of advertising restrictions over the expert evidence provided in to ONSC in *NS.* At the same time, the Alberta Superior Court, the Alberta Court of Queens Benchfound ss. 286.2 and 286.3 to be unconstitutional (*R* v *Kloubakov*, 2021 ABQB 960). Justice Eidsvik felt that the aims of PCEPA were more complex than Gambacorta J had suggested in *MacDonald* and that they were concerned not only with trying to eliminate sex work but also the defences and immunities were introduced to the *Criminal Code* to address the safety issues highlighted in *Bedford* to help protect sex workers. As she puts it ‘*this part of the lens was necessary to meet the Bedford decision*’ (*Kloubakov* at [para 62]). It was Justice Eidsvik’s view that s. 286.2 failed to protect sex workers because the existing security concerns from *Bedford* are still present. Sex workers are now reluctant to hire third parties for protection in fear that they will be criminalised. Despite exceptions under s. 286.2(4) third parties could still be criminalised under s.286.2(5) if, for example, they provide the sex worker with prescription or non-prescription drugs, alcohol, lives with them or receive compensation at a disproportionate value for their services (at [171]). Justice Eidsvik also held that s. 268.3 was overbroad because it criminalises not only those who exploit sex workers, but also non-exploitative arrangements designed to provide safe haven, give advice to provide safer working arrangements or run a reasonable agency (at [231]).

As part of the *Kloubakov* trial, witness evidence was provided by the two plaintiffs, two law students who were also sex workers (BC and witness D), three clients (witnesses A, B and C), Professor Katrina Roots – a criminologist at Wilfred Lauder University and a police detective. The evidence provided was consistent and highlighted negative impacts of PCEPA on sex workers (for a more detailed discussion on the harms of Canada’s *end demand* model on sex workers see McBride, B *et al.* ‘Harms of third party criminalisation under end demand legislation: undermining sex workers’ safety and rights’, *Culture, Health & Sexuality* (2021), 23(9), 1165). Justice Eidsvik commented on how Professor Roots’ testimony was ‘*reliable, objective and credible*’, described her as a ‘*seasoned expert on the situation of sex workers*’ and her opinion that criminalisation of the sex trade reduced sex worker safety was ‘*based on research and renowned studies*’ (at [146]).

In the present case, Justice Hoy largely ignored the expert evidence provided at trial by Chris Atchison suggesting that most of it, because it was concerned with the impact of criminalisation of s. 286.1 rather than the impugned sections, was not relevant for the appeal. She did consider some of his testimony relating to advertising restrictions under s. 286.4 but again dismissed his concerns relating to the provision’s impact on a sex worker’s ability to effectively screen clients on the basis that further communication avenues would still be available to her. Justice Hoy, however, placed much more stock in the Department of Justice’s *Technical Paper* and the claims of the Canadian Government through their speeches in Parliament (*Hansard)* and the pre-amble of PCEPA in evaluating the intentions and impact of the new legislation and it is argued that perhaps her interpretation of this evidence could have been more critical with less conformity considering the potential bias of these sources. What *NS* does provide is further clarity in the application of the impugned provisions, particularly in relation to the meaning of material benefit and commercial enterprise. The Court also clarified the *mens rea* elements required under the procuring offence which can now be filtered down to the lower courts. However, the decision in *NS* does also provide a precedent in the that the impugned sections are not unconstitutional which may stem future attempts to challenge the harmful end demand model in Canada within the Ontario courts, although challenges in other provinces may be more successful. Ultimately, issues with PCEPA won’t be resolved until the constitutional challenges reach the Supreme Court of Canada but what the few successful challenges in cases such as *Kloubakov*, *Anwar* and *NS* (ONSC) demonstrate is that when qualitative evidence provided by experts is provided to show the negative impacts of the ‘end demand’ model has on sex workers, this has had a tendency to gain traction in the provincial courts and favourable outcomes for those looking to demonstrate the unconstitutional nature of PCEPA. However, when expert evidence is not used or ignored, then such challenges seem destined to fail.

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