

SEX WORK AND THE CHARTER

1. Canadian Law and Your Rights 2. The Canadian Charter of Rights and Freedoms 3. Limits to the Charter 4. Changing Unconstitutional Laws
5. Charter Challenges 6. Winning a Charter Challenge 7. Losing a Charter Challenge 8. Who Can Launch a Charter Challenge? 9. Conclusion

THIS INFOSHEET IS PART OF A SERIES OF 5 PRODUCED BY STELLA IN COLLABORATION WITH ALLIES TO EDUCATE AND MOBILIZE COMMUNITIES AROUND LEGAL ADVOCACY AND DECRIMINALIZATION OF SEX WORK.

1. The Basics: Decriminalization of Sex Work 101
2. Sex Work and the Charter
3. Challenging Prostitution Laws: *Bedford v. Canada*
4. Language Matters: Talking About Sex Work
5. 10 Ways to Be a Great Ally to Sex Workers

1

CANADIAN LAW AND YOUR RIGHTS

THE LAW

Laws are written and passed by governments that citizens are called upon to elect. Some laws, like the *Constitution of Canada*, have existed for over a hundred years – others are made or modified when a new government is in place. Prostitution is regulated by different kinds of law. For example, the Canadian *Criminal Code* regulates prostitution at a federal level, which means that like the *Constitution* it applies to all provinces in Canada. Provinces and municipalities also create laws around sex work, for example laws that regulate zoning or licensing.

HIERARCHY OF LAWS IN CANADA

There is a hierarchy of laws in Canada. The *Constitution* is considered one of the highest laws in Canada. This means that all other federal, provincial and municipal laws must be compatible with the *Constitution*. Therefore, the *Criminal Code* also has to be compatible with the *Constitution*.

The *Canadian Charter of Rights and Freedoms* (Charter) is found within Canada's *Constitution* and is therefore part of the highest law in Canada. This means that the *Criminal Code* has to be compatible with the rights and protections set out in the Charter.

2

CANADIAN CHARTER OF RIGHTS AND FREEDOMS (THE CHARTER)

In 1982, the Canadian Charter was created to protect certain individual rights. The idea is that in Canada every individual is entitled to certain minimum protections. The "rights and freedoms" outlined in this law are called "Charter rights" or "fundamental rights."

Charter rights apply to all people in Canada and are meant to provide people with protections from government laws, actions and policies that violate these Charter rights. Quebec is the only province that has its own Charter. The other provinces and territories have created laws on human rights related to things other than those listed in the Charter. The Charter applies to the federal, provincial and municipal governments.

However, some people and communities cannot access these protections. For example, they may not have the necessary resources; such as financial support, lawyers, community support, and the security and privilege it may take to disclose and "go public" with a Charter violation. In other words, although the Charter is intended to protect everyone – including minorities and marginalized people who experience social and economic disadvantage – the reality is that many people do not have the privilege, money and power that are necessary to launch a Charter challenge.

Of course, dividing people into groups of "minorities" and "majorities" is flawed: more nuanced ways to discuss difference are needed. For example, it disappears the diversity of people within groups, and

people who experience multiple levels of both privilege and disadvantage.

From one perspective, the Charter was created as a means to assess the constitutionality of laws or government actions, and to ensure that they do not violate individuals' basic rights and freedoms. From another perspective it allows for the opposite: By placing limits on our rights and freedoms, vast government powers are ensured and the lack of protection of certain other rights is legitimized.

The Charter protects individuals from certain laws or government actions, but has not been very effective in forcing the government to do certain things. For example, s. 15(1) of the Charter says a government actor cannot discriminate against someone based on "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The dominant and historical understanding of the Charter is that while it protects individuals from Charter violations, it does not obligate the government to provide something. So, although the Charter protects individuals from discrimination in accessing housing, its application has not yet led to an obligation on the government's part to provide housing. For this reason, the Charter's capacity to transform historical and systemic inequalities has been limited. Social and human rights groups, however, have argued that the Charter does obligate the government to provide certain fundamental things, like housing: <http://www.acto.ca/en/cases/right-to-housing.html>

3

LIMITS TO THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

All laws and government practices in Canada must be compatible with the Constitution, which includes the *Charter*. However, the government and the courts still have the power to uphold a law that violates a *Charter* right by using Section 1 of the *Charter*:

Section 1 of the *Charter*: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In other words, proving that a certain law or government action violates a *Charter* right is not enough to force the government to change it, if the court decides that the *Charter* violation in question is "justified in a free and democratic society." So even if the court agrees that a certain law or government action violates a *Charter* right, they still have the power to say that it's "justified" under s. 1, and therefore not unconstitutional.

SOME RIGHTS AND FREEDOM GUARANTEED BY THE CHARTER

FUNDAMENTAL FREEDOMS

Freedom of conscience; freedom of religion; freedom of thought; freedom of opinion; freedom of expression; freedom of association.

DEMOCRATIC RIGHTS

Right to participate in political activities; right to democracy; the right to vote and to be eligible for election.

LEGAL RIGHTS

Right to life, liberty and security of person; protection against unreasonable and arbitrary detention; upon arrest or detention, the right to counsel, the right to be informed of that right, the right to silence; rights in criminal and penal matters, such as the presumption of innocence; the right to an interpreter; the right to equality; right to equal treatment before the law without discrimination (age, gender, race, etc.)

4

CHANGING UNCONSTITUTIONAL LAW

An unconstitutional law can be struck down (meaning it is no longer in force), or changed to make it compatible with the *Constitution* and *Charter*. This process can happen in two ways:

1. The government can initiate this. The legislators (the people who write the laws) can decide to modify the law by passing a Bill. Before doing so, the government can ask the Court for their opinion on the law's constitutionality - this is called a "Reference". Here's an example:

In 1990 the Manitoba government questioned whether the bawdy-house law and communicating law were unconstitutional (sections 193 and 195.1(1)(c) of the *Criminal Code* at the time). They asked the courts for their opinion. First, the Manitoba Court of Appeal, and then the Supreme Court of Canada (SCC). See the SCC decision at: <http://scc.lexum.org/en/1990/1990scr1-1123/1990scr1-1123.html>

Specifically, the government wanted to know whether these laws violated the right to freedom of expression and the right to liberty and security of the person (rights protected by s. 2(b) and s. 7 of the *Charter*).

The majority of the SCC decided that the bawdy-house law did not violate s. 2(b) or s. 7 of the *Charter*. So, in their opinion this law was not unconstitutional and need not be changed. On the other hand, the majority decided that the communicating law did violate s. 2(b) of the *Charter*, but this violation was deemed to be justified under s. 1. So, in their opinion, it also did not need to be changed.

2. People who are not part of the government can also challenge the constitutionality of a law or government practice by launching a *Charter* challenge.

5

CHARTER CHALLENGES

If an individual's or group's protected *Charter* rights or freedoms are being violated by a government law or practice, they can try to initiate a *Charter* challenge. This means taking the government responsible for the law or practice to court.

The individual or group who launches the *Charter* challenge is called the **plaintiff** or **applicant**. The plaintiff(s) has to demonstrate in court how the law or practice in question violates their *Charter* right(s). At the base of every challenge is a specific law(s) or practice that is being contested, and a specific *Charter* right(s) that the plaintiffs say have been violated.

Many individuals and groups have challenged laws and government actions under the *Charter*, including francophone communities, religious groups, a doctor who practices abortion, men opposed to abortion, pilots, swingers, provincial governments, Indigenous people, LGBTQ communities, prisoners, and migrants. Including the current *Bedford v. Canada* case and the *SWUAV v. Canada* case, there have been three cases involving sex work and the *Charter* that have been heard by the Supreme Court of Canada.

Here are two examples of how our allied communities have launched *Charter* challenges:

In a case called *Little Sisters Book and Art Emporium v. Canada* (2000), the plaintiffs claimed that a particular government practice was unconstitutional – the way customs officers treated the erotic material that Little Sisters imported to their store. The plaintiffs claimed that the customs officials delayed, confiscated, destroyed and misclassified materials imported by the plaintiff's bookstore and treated the material differently than erotic material imported by other businesses. They argued that this was due to the LGBTQ content of their material, and therefore violated their right to freedom of expression and freedom from discrimination (protected by s. 2(b) and s. 15 of the *Charter*). Little Sisters can be found at: <http://scc.lexum.org/en/2000/2000scc69/2000scc69.html>

In the "Insite case", the plaintiffs challenged parts of the *Controlled Drugs and Substances Act* that prohibits possession and trafficking of illegal drugs. They argued that these laws violated their right to security of the person and liberty (protected by s. 7 of the *Charter*), by preventing them from operating a supervised injection site. The plaintiffs did not demand that the challenged laws be repealed, but that they should not apply to people in their particular safe injection site. In this case, the SCC agreed with the plaintiffs and decided that the violations were not justified. The plaintiffs won their right to operate a safe injection site. In other words, people using the site can no longer be arrested under the *Controlled Drugs and Substances Act*. The case, *Canada (Attorney General) v. PHS Community Services Society* (2011) can be found at: <http://scc.lexum.org/en/2011/2011scc44/2011scc44.html>

6

WINNING A CHARTER CHALLENGE

When a case goes all the way to the Supreme Court of Canada (SCC), the decision is final. If the SCC decides that a certain law is unconstitutional and cannot be justified, judges are required to do whatever it takes to fix the unconstitutional law. Various things can happen:

First, they can "strike down" the law – meaning that the law is no longer in force and cannot be applied.

Second, they can strike down the law but hold off on making the law invalid, to give Parliament time to change the law.

Third, the court might "read in" or "read down" a law – meaning they change or reinterpret part of the law so that it either no longer violates someone's *Charter* rights, or reduces the violation to a level that the court finds acceptable.

When the courts or Parliament re-write a law, unless they fully grasp the *Charter* violation that they are attempting to repair, the new or changed law could be equally problematic for the plaintiffs.

7

LOSING A CHARTER CHALLENGE

If the court rules against the plaintiff and the plaintiff can no longer appeal the decision – either because their appeal is rejected or because it's the SCC's final decision – the law or practice remains as is ("status quo").

This is damaging for the people and communities who supported the *Charter* challenge. Not only does the law remain in effect but also if the court decides that the contested law or practice is constitutional, it will be very difficult to challenge it again (at least for many years).

The court's decision reinforces the idea that the law or practice is legitimate. This can have harmful social impacts such as reinforcing public perspectives that devalue the plaintiffs and legitimize the discrimination and stigma that they face.

That being said, in exceptional cases Parliament could be persuaded to modify a law due to public pressure, even if the SCC had previously decided the law was constitutional.

WHO CAN LAUNCH A CHARTER CHALLENGE?

Not everyone can launch a *Charter* challenge and sue the government. The plaintiff has to get “standing”. This is the legal right to challenge a law in court – think of the “right to stand in court” or “have a legal leg to stand on”. It’s understandable that there would be some parameters as to who can launch a challenge, but not everyone agrees on what these limits should be.

Basically, there’s **private interest standing** and **public interest standing**, and the plaintiff or applicant has to succeed in convincing the court that it is one of the two to launch a *Charter* challenge.

In *Bedford v. Canada*, Justice Himel decided that all three individual sex workers (“plaintiffs”) had private interest standing and were able to launch their *Charter* challenge.

In *SWUAV v. Canada* (Downtown Eastside Sex Workers United Against Violence Society & Sheri Kiselbach v. Canada), standing was used as a barrier to block sex workers from challenging prostitution laws. The plaintiffs are a collective of sex workers who live in Vancouver’s Downtown Eastside, and Sheri Kiselbach is a former sex worker. They claim that a vast range of the criminal prostitution laws violate their ss. 7, 2(b), 2(d) & 15 *Charter* rights by forcing them to work in dangerous conditions.

The government argued that the plaintiffs could not make this challenge because only an individual who is currently sex working or currently charged with prostitution-related offences could challenge prostitution laws. The first judge agreed with the government. The plaintiffs appealed this decision. From this point the case was no longer about removing the prostitution laws from the *Criminal Code*. It was now about the “public interest standing test” – in other words, whose voices and demands can access the courts.

This case on standing made its way to the SCC, and SWUAV and Sheri Kiselbach made history on January 19, 2012 – the first time in Canadian history that sex workers fought for our rights at the SCC! See: www.pivotlegal.org/pivot_point_winter_2012

On September 21, 2012, the SCC decided that SWUAV and Sheri Kiselbach had public interest standing and the right to challenge sections of the *Criminal Code* that criminalize and harm sex workers. This decision creates a legal example that others can build on to improve access to justice for marginalized individuals and communities.

For more information see: http://www.pivotlegal.org/scc_decision_in_swuav_a_triumph_for_access_to_justice

SWUAV and Sheri Kiselbach are now able to launch their *Charter* challenge. However, they will have to start at the beginning (the first level court); they have not yet had the chance to go to court to challenge the prostitution laws, but rather have been fighting since 2007 for permission to have their case heard by the courts.

CONCLUSION

The *Charter* is an important tool that can educate and inform communities of their rights. Using the *Charter* is one way to advocate for community or individual rights but on its own is not the most effective. Since discourses of morality often inform public opinion about sex work, which in turn informs court opinions, using human rights tools like the *Charter* must be strategic and coupled with education.

The law can be a messy fit with advocacy for marginalized individuals and communities – many of our realities are not represented within the law and the law is often used to “protect” or “save” us in ways that can be harmful to us. Prostitution laws are one example of this – see Stella’s InfoSheet: Challenging Prostitution Laws: *Bedford v. Canada*. The value of using human rights law, such as the *Charter*, to advocate for our rights depends as much on our ability to use it strategically as it does on the norms and values that the *Charter* supports.

Writing and Research Tara Santini

Project Coordinator: Jenn Clamen

Reading and Editing Committee Marie-Claude Charlebois, Sandra Ka Hon Chu (Canadian HIV/AIDS Legal Network); Jenn Clamen; JD Drummond; Katrina Pacey (Pivot Legal Society) & Emilie Laliberté.

Design Marie-Claude Charlebois & Elitza Koroueva

InfoSheet is available in French and may be copied or translated into various languages upon request, but not sold. We ask that Stella be credited as the source.

This series of InfoSheets is made possible thanks to the financial support of the Open Society Foundations (OSF). The opinions expressed here are those of the author and do not necessarily reflect the official position of the foundations.



www.chestella.org

2065 rue Parthenais, suite 404
Montreal QC
H2K 3T1
Office 514.285.1599
Drop-in 514.285.8889

Stella is a community organization created and run by and for sex workers. At Stella we provide support and information to sex workers so that we may live and work in safety and with dignity.

Copyright Stella, 2013