WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18.

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

WARNING

An order restricting publication in this proceeding was made under s. 517 of the *Criminal Code* and continues to be in effect. This section of the *Criminal Code* provides:

> 517(1) If the prosecutor or the accused intends to show cause under section 515, he or she shall so state to the justice and the justice may, and shall on application by the accused, before or at any time during the course of the proceedings under that section, make an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as
>
> (a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or
>
> (b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

Failure to comply

> (2) Everyone who fails without lawful excuse, the proof of which lies on him, to comply with an order made under subsection (1) is guilty of an offence punishable on summary conviction.
>
> (3) [Repealed, 2005, c. 32, s. 17]
>
> R.S., 1985, c. C-46, s. 517; R.S., 1985, c. 27 (1st Supp.), s. 101(E); 2005, c. 32, s. 17.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. N.S., 2022 ONCA 160
DATE: 20220224
DOCKET: C69437

Hoy, Coroza and Sossin JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

N.S.

Respondent

Deborah Krick, Michael Dunn and Jeremy Tatum, for the appellant

Marianne Salih and Carlos Rippell, for the respondent

Michael Rosenberg, Alana Robert and Holly Kallmeyer, for the interveners The Canadian Alliance for Sex Work Law Reform, Monica Forrester, Valerie Scott, Lanna Moon Perrin, Jane X and Alessa Mason

Tara Santini, for the intervener The Canadian Alliance for Sex Work Law Reform

James Lockyer, for the intervener Tiffany Anwar

Matthew Gourlay and Brandon Chung, for the intervener Deshon Boodhoo

Heard: November 19, 2021

On appeal from the acquittals entered by Justice Phillip Sutherland of the Superior Court of Justice, on May 17, 2021.

Hoy J.A.:

I. INTRODUCTION

[1] In 2014, Parliament enacted Bill C-36, *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 to other Acts*, 2nd Sess., 41st Parl., 2014 (assented to 6 November 2014), S.C. 2014, c. 25, in response to the Supreme Court's decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, declaring three *Criminal Code*[1] offences addressing prostitution-related conduct unconstitutional.

[2] The respondent was charged with several offences relating to his sale of the complainant's sexual services. He successfully challenged the constitutionality of three of the new provisions of the *Criminal Code* enacted by Bill C-36 – s. 286.2 (material benefit), s. 286.3 (procuring), and s. 286.4 (advertising) – on the basis that they infringe the rights of a hypothetical person to security of the person and, in some cases, to liberty under s. 7 of the *Canadian Charter of Rights and Freedoms*: *R. v. N.S.*, 2021 ONSC 1628. The application judge found that the infringements were not a justifiable limit under s. 1 and struck down the impugned provisions.

[3] The Crown appeals.

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[1] R.S.C. 1985, c. C-46.

[4] For the following reasons, I would allow the appeal, set aside the respondent's acquittals, and order a new trial.

[5] The Supreme Court's decision in *Bedford* provides important context for the issues on this appeal. Below, I first review *Bedford*. Next, I outline the scheme of Bill C-36 and set out the provisions relevant on this appeal, and then provide a brief overview of the reasons of the judge below. I then consider the purposes of Bill C-36 before addressing, in turn, each of the impugned provisions. I consider the reasons of the application judge in more detail in my analysis. Finally, I address the respondent's arguments – renewed on appeal – that the impugned provisions infringe the right to freedom of expression under s. 2(b) and the right to freedom of association under s. 2(d) of the *Charter* and are not justifiable limits under s. 1.

II. *BEDFORD*

[6] In *Bedford*, the Supreme Court agreed with the application judge that three provisions of the *Criminal Code* violated the security of the person interests under s. 7 of the *Charter* and were unconstitutional: to be an inmate of or found without lawful excuse in, or to be the owner, landlord, lessor, tenant or occupier of a bawdy-house (s. 210); living on the avails of another's prostitution (s. 212(1)(j)); and communicating in public with respect to a proposed act of prostitution (s. 213(1)(c)).

[7] The applicants in *Bedford* were all current or former prostitutes.[2] They filed an extensive record as part of a civil application. They did not rely on hypotheticals. The application judge made extensive findings of fact, including with respect to social and legislative facts, which the court held were entitled to deference: *Bedford*, at para. 49.

[8] The court explained that the first question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*. It concluded that they did: they imposed "dangerous conditions on prostitution: they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks": at para. 60.

[9] The practical effect of the bawdy-house provision was to confine lawful prostitution to two categories: street prostitution and out-calls. The application judge found that the safest form of prostitution was working independently from a fixed indoor location. The bawdy-house prohibition prevented prostitutes from doing so. Working from a fixed indoor location would permit prostitutes to have a regular clientele and set up safeguards.

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[2] The Supreme Court used the term "prostitutes" in *Bedford*. The new legislation refers to someone who provides sexual services for consideration in the body but refers to prostitution in the preamble. The application judge used the term "sex worker". I will use the terms that *Bedford* used when discussing *Bedford*, the terms used in the legislation where appropriate and the terms the application judge used when discussing his reasons.

[10] As interpreted by the courts, the living on the avails provision prevented prostitutes from hiring bodyguards, drivers and receptionists – safeguards that could increase the prostitutes' safety.

[11] The prohibition on communicating in public prevented prostitutes from screening clients and setting terms on the use of condoms or safe houses, thereby significantly increasing the risks they faced.

[12] The court then considered whether the impugned provisions respected the principles of fundamental justice: in particular, the basic values against arbitrariness, overbreadth and gross disproportionality. I provide more detail later in these reasons about what the court said about these principles and how compliance with them is to be assessed.

[13] It found that the objective of the bawdy-house provision, which had been essentially unchanged since the 1953-54 revision to the *Criminal Code*, had long been identified as preventing community harms in the nature of nuisance and that the harms identified by the application judge were grossly disproportionate to that object.

[14] The court had previously determined that the purpose of the living on the avails provision was to target pimps and the parasitic, exploitative conduct in which they engage. It agreed with the courts below that the provision was overbroad, at para. 142:

> The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

[15] The object of the communicating provision had been explained in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*"), at pp. 146-7: to take prostitution off the streets and out of public view in order to prevent the associated nuisances. The court agreed with the application judge that the negative impact on the safety and lives of street prostitutes was grossly disproportionate to the possibility of nuisance caused by street prostitution.

[16] The court noted that the Attorney General had not seriously argued that the laws, if found to infringe s. 7, could be justified under s. 1 of the *Charter*. Therefore, the court found that the impugned laws were not saved by s. 1.

[17] While it declared the impugned provisions unconstitutional, the court carefully added this, at para. 165:

> That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted… The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it

> choose to do so, to devise a new approach, reflecting different elements of the existing regime.

[18] The court suspended its declaration of invalidity for one year.

III. THE PCEPA

[19] Before the one-year suspension elapsed, Parliament enacted Bill C-36. The Act's short tile is the *Protection of Communities and Exploited Persons Act* (the "PCEPA").

[20] The PCEPA amended or repealed the provisions which the Supreme Court had declared unconstitutional in *Bedford* and enacted four new offences in Part VIII of the *Criminal Code* – "Offences Against the Person and Reputation" – under a new heading: "Commodification of Sexual Activity".

[21] At the time of *Bedford*, it was not illegal to exchange sex for money. The PCEPA changed that. While some advocated for the decriminalization and regulation of the sex trade, Parliament adopted a variant of the so-called "Nordic Model", which had been adopted in several other countries. The Nordic Model views the sex trade as a form of sexual exploitation. It targets those who create the demand for prostitution and those who capitalize on it. Parliament did not accept that persons who provide sexual services for consideration should be viewed as "workers" and that prostitution should be legal sex "work": see the comments of Minister of Justice and Attorney General of Canada Peter MacKay in House of Commons, Standing Committee on Justice and Human Rights,

Evidence, 41st Parl., 2nd Sess., No. 32 (7 July 2014), at pp. 9-10. It was concerned that prostitution was linked to human trafficking. As the Minister of Justice put it in debate at second reading, "[D]ecriminalization and legalization [of prostitution] lead to increased human trafficking for the purpose of sexual exploitation"; see also comments of Mr. Royal Galipeau (Ottawa-Orléans), House of Commons, *Debates (Hansard)*, 41st Parl., 2nd Sess., Vol. 147, No. 117 (26 September 2014), at p. 7885.

[22] Section 286.1(1) now provides that everyone who obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of an offence.[3] While buying sex is now a criminal offence, the PCEPA does not criminalize the sale of sexual services. Further, under s. 286.5, set out later in this part of these reasons, the PCEPA provides immunity from prosecution to persons who aid or abet an offence under s. 286.1 in relation to the provision of their own sexual services. The PCEPA views those who provide sexual services for consideration as exploited persons. Whether Parliament could or should have criminalized obtaining sexual services for consideration is not before this court. Section 286.1 is not challenged in this case.[4]

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[3] Section 286.1(2) creates a separate offence, with more severe punishment, in the case of the sexual services of a person under the age of 18 years.

[4] The Canadian Alliance for Sex Work Law Reform (a coalition of 25 sex workers' rights organizations), a number of current and former sex workers, and Tiffany Anwar were granted leave to intervene on this appeal: *R. v. N.S.*, 2021 ONCA 605. Ms. Anwar ran an escort agency and was charged with offences

[23] This appeal concerns the other three offences created by Parliament.

[24] The PCEPA created a new "material benefit" offence in s. 286.2(1).[5] This provision modernizes the living on the avails of prostitution offence which was found unconstitutional in *Bedford*. It provides that every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under s. 286.1(1), is guilty of an offence.

[25] Section 286.2(4) creates exceptions to the general prohibition in s. 286.2(1). Two of those exceptions permit a person who provides sexual services for consideration, on certain terms, to hire bodyguards, drivers and receptionists. The provisions found unconstitutional in *Bedford* did not permit such safeguards. Section 286.2(5), meanwhile, provides exceptions to those exceptions.

> **Material benefit from sexual services**
>
> **286.2 (1)** Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly

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under ss. 286.2(1), 286.3(1), and 286.4 of the *Criminal Code*. She was acquitted in 2020 after McKay J. found the provisions to be unconstitutional: *R. v. Anwar*, 2020 ONCJ 103, 62 C.R. (7th) 402. Although they were represented by different counsel, these interveners delivered a joint factum and Mr. Lockyer and Mr. Rosenberg made oral submissions on behalf of them all. These interveners offer the perspective of a subset of those who provide sexual services for consideration as a freely chosen occupation: sex workers. The heart of their submission is that the premise underlying the PCEPA – that exploitation is inherent in prostitution – is flawed and not supported by the evidence; the Nordic model is not effective; and, by criminalizing prostitution, the PCEPA subjects sex workers to danger and violates their rights under s. 7 of the *Charter*. These are issues for another day.

[5] Section 286.2(2) creates a separate offence, with more severe punishment, in the case of a material benefit derived directly or indirectly from the commission of an offence under s. 286.1(2).

from the commission of an offence under subsection 286.1(1), is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than 10 years; or

(b) an offence punishable on summary conviction.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the 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 from whose sexual services the benefit is derived;

(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 or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived

> for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;
>
> **(d)** engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or
>
> **(e)** received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

[26] The PCEPA also modernized and reformulated the prior procuring offence in s. 212(1) by enacting s. 286.3(1)[6]:

> **Procuring**
>
> **286.3 (1)** Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

[27] And, in s. 286.4, Parliament created an entirely new offence prohibiting the advertising of an offer to provide sexual services:

> **Advertising sexual services**
>
> **286.4** Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of
>
> **(a)** an indictable offence and liable to imprisonment for a term of not more than five years; or
>
> **(b)** an offence punishable on summary conviction.

[6] Section 286.3(2) creates a separate offence, with more severe punishment, for procuring a person under the age of 18 years.

[28] In addition to creating the four new offences, the PCEPA provides immunity from prosecution for persons who provide their own sexual services for consideration in s. 286.5:

> **Immunity — material benefit and advertising**
>
> **286.5 (1)** No person shall be prosecuted for
>
> > **(a)** an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or
> >
> > **(b)** an offence under section 286.4 in relation to the advertisement of their own sexual services.
>
> **Immunity — aiding, abetting, etc.**
>
> **(2)** No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

[29] For ease of reference, a copy of these provisions is set out in Appendix "A" to these reasons.

[30] In response to *Bedford*, Parliament also replaced the communicating offence in s. 213(1)(c) of the *Criminal Code*. Now, except for communications in public places that impede traffic or take place in or next to school grounds, playgrounds or day care centres, communications by a person selling their own sexual services for consideration are no longer criminalized. Section 213 is not at issue on this appeal.

[31] With this framework, I turn to the reasons of the application judge.

IV. AN OVERVIEW OF THE REASONS OF THE APPLICATION JUDGE

[32] The respondent was charged with offences under ss. 286.1(1), 286.2(1), 286.3(1) and 286.4. He did not assert that s. 7 was engaged on the facts of his case. Rather, he challenged the constitutionality of ss. 286.2(1), 286.3(1) and 286.4 based on four "reasonable hypotheticals". The application judge found that two of them would engage the impugned provisions in a manner that infringed s. 7:

> Hypothetical 2: Students Deciding to Do Sex Work
>
> Two or more 21-year old students at the University of Western Ontario are unable to afford their tuition and living expenses at university. They decide to become sex workers, a profession with which they are entirely unfamiliar.
>
> They approach a known sex worker for assistance and advice. She facilitates their plan by helping them set up, including helping them find rental premises out of which to operate, helping them hire security and a receptionist, and arranging for a professional photographer and website designer to facilitate their advertising on the internet. The two or more students then lease premises, hire security, a receptionist and a bookkeeper, and commence to sell sexual services.
>
> Hypothetical 4: Male Sex Worker in Rented Residence
>
> The sex worker is male. He is a student is his final year. He decides to lease premises, a room with the same students in hypothetical two. He uses the premises to conduct his commercial sex work. He makes his own money. He pays rent for the use of the premises for his living residence and where he conducts his commercial sex work.

[33] The application judge directed himself that the first issue to be considered was the purpose of the PCEPA and the impugned provisions.

[34] He found that the purpose of the PCEPA "is to immunise from prosecution any individual sex worker who performs sex work, and to allow the assistance of third parties in limited circumstances, while making all other aspects of commercial sex work illegal": at para. 52.

[35] Next, the application judge determined that the sex workers in the hypotheticals would be caught by the material benefit and procuring provisions, triggering their s. 7 right to liberty. The students, in working cooperatively, would constitute a "commercial enterprise" and therefore could not benefit from the exception to s. 286.2(1). Nor would they benefit from the immunity in s. 286.5. By assisting each other in conducting commercial sex and advertising and in providing accommodation, they would also be guilty of procuring, harbouring or concealing for the purpose of facilitating commercial sex work and directing, controlling, or influencing the movements of someone for the purpose of facilitating commercial sex work. The experienced sex worker who gives the students advice would also be guilty of procuring.

[36] The sex workers' right to security of the person would also be engaged. Because they would be caught by the material benefit and procuring provisions, they would not be able to hire security or take other steps to protect themselves.

They could also not receive advice from the experienced sex worker, because she would be guilty of procuring. Finally, the application judge concluded that while the students would not be caught by the advertising prohibition because of the immunity in s. 286.5, their security of the person was engaged because they could not communicate frankly with their customers.

[37] Assessed against the objectives of the legislation, the application judge found all three provisions to be overbroad. Parliament had indicated that one of the objectives is to protect sex workers from violence, abuse and exploitation to protect the health and safety of sex workers. The impugned provisions limit or prevent some means of protection and safety for some, if not all, sex workers.

[38] Further, their impact is grossly disproportionate. The application judge held that "[t]he objective of eliminating or lessening commercial sex work through the banning of advertising cannot be made at the safety and security of commercial sex workers": at para. 177. Parliament cannot allow sex work to continue and then grossly limit or prevent sex workers' ability to protect their safety.

[39] He concluded that the infringements of s. 7 were not saved by s. 1. As in *Bedford*, the Crown had not seriously addressed the s. 1 issue in its factum. In any event, it would be very difficult to justify an infringement of s. 7 under s. 1.

[40] Having found that s. 7 had been infringed and was not a justifiable limit under s. 1, the application judge declined to address the alleged infringement under

s. 2(d) of the *Charter*. He also found that he was bound by this court's decision in *Bedford*[7] with respect to the advertising provision (s. 286.4), and therefore was compelled to find that it was not an unjustified infringement of s. 2(b) of the *Charter*.

[41] He declared the impugned provisions of no force and effect, with immediate effect: *R. v. N.S.*, 2021 ONSC 2920. This court granted the Crown's application to stay the declaration, pending this appeal: *R. v. N.S.*, 2021 ONCA 694. With the consent of the parties, at the hearing of this appeal, the court extended the stay pending the release of these reasons.

V. SECTION 7 AND THE PURPOSE OF THE PCEPA

[42] Section 7 provides:

> 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.

[43] As explained in *Bedford*, a law's compliance with s. 7 of the *Charter* turns on a proper assessment of the law's objective. When an impugned provision engages s. 7, its purpose must be identified to determine whether the impairment of the s. 7 right is in accordance with the principles of fundamental justice. Does it respect the basic values against arbitrariness, overbreadth and gross disproportionality?

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[7] 2012 ONCA 186, 128 O.R. (3d) 385. In *Bedford*, the Supreme Court did not consider whether it could depart from its s. 2(b) conclusion in the *Prostitution Reference* because it resolved the appeal on s. 7 grounds.

[44] The Supreme Court explained in *Bedford* that the basic values against arbitrariness and overbreadth target the absence of connection between the impugned law's purpose and the s. 7 deprivation. A law is arbitrary if there is no connection between the effect and object of the law. A provision suffers from overbreadth when it is so broad in scope that it includes some conduct that bears no connection to its objective: i.e., the law is rational in some cases, but overreaches in its effect in others. The overbreadth analysis does not evaluate the appropriateness of the objective: *R. v. Moriarity*, 2015 SCC 55, [2015] 3 S.C.R. 485, at paras. 30-31.

[45] A law offends the value against gross disproportionality when it deprives a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The rule against gross disproportionality only applies in extreme cases, where the seriousness of the deprivation is totally out of sync with the objective of the measure: e.g., a law intended to keep streets clean that imposes life imprisonment for spitting on the sidewalk; see *Bedford*, at para. 120.

[46] It is clear from *Bedford* that the s. 7 analysis turns on the purpose of the particular provision that is impugned. In *Bedford*, the purpose of each provision had previously been determined and the court assessed overbreadth and gross disproportionality against those purposes. Here, in the absence of binding authority, the application judge had to assess the purpose of each provision.

[47] The purposes of the PCEPA are relevant in determining the purpose and scope of the impugned provisions. I therefore address the purposes of the PCEPA as a whole before turning to each of the impugned provisions.

[48] A law's purpose can be inferred from explicit legislative statements, the text of the law read in its context, extrinsic evidence such as legislative history and evolution, as well as prior judicial interpretations: *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180, at para. 31; see also Hamish Stewart, *Fundamental Justice: Section 7 of the Charter of Rights and Freedoms*, 2nd ed. (Toronto: Irwin Law, 2019), at p. 157, citing *R. v. Downey*, [1992] 2 S.C.R. 10, at paras. 30-35. Although legislative debates cannot override specific text in legislation, they may still inform the interpretation process: *MediaQMI v. Kamel*, 2021 SCC 23, at para. 37.

[49] The then Minister of Justice, Peter MacKay, described the PCEPA as making prostitution itself illegal and a "fundamental paradigm shift in approach." He stated before the House of Commons Standing Committee on Justice and Human Rights that the goal of the PCEPA "is to reduce the demand for prostitution with a view to discouraging entry into it, deterring participation in it, and ultimately abolishing it to the extent possible." He reiterated this, almost word for word, before the Standing Senate Committee on Legal and Constitutional Affairs, describing prostitution as an "inherently degrading and dangerous activity": *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl., 2nd

Sess., No. 15 (9 September 2014) at p. 12. At the Senate Committee, he explained that the PCEPA would not only help reduce prostitution itself, “but will create the climate in which prostitutes can take certain specific measures, steps to further protect themselves or insulate themselves from violence” (emphasis added): at p. 22. At the debates at the second reading of the PCEPA, Minister MacKay stated that prostitution “disproportionately impacts on society’s most marginalized and vulnerable” and that “[a]n additional objective is to reduce the likelihood of third parties facilitating exploitation through prostitution for their gain, and the key and operative word here is ‘exploitation’”: at p. 6653.

[50] Typically, legislative history comes from parliamentary speeches and debates or statements by ministers or members of Parliament. Other acceptable documentary sources of legislative history include government policy papers such as a white paper, green paper, budget paper and even reports or studies produced outside government which existed at the time of the enactment and were relied on by the government that introduced the legislation: P.W. Hogg and Wade Wright, *Constitutional Law of Canada*, loose-leaf (2021-Rel. 1) 5th ed. (Toronto: Carswell, 2007), at s. 60:1; see also Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), at para. 9.48. For example, the Supreme Court referred to the Technical Paper on the Federal Carbon Pricing Backstop in its review of legislative history to discern the pith and substance of the *Greenhouse*

Gas Pollution Act in *Reference re Greenhouse Gas Pollution Act*, 2021 SCC 11, 455 D.L.R. (4th) 1, *per* Wagner C.J.

[51] In this case, the legislative history includes the Technical Paper produced by the Department of Justice on the new prostitution-related offences, which was tabled before and adverted to at the parliamentary committees tasked with reviewing the legislation. The Technical Paper describes the purpose of the PCEPA as follows:

> [The PCEPA] seeks to denounce and prohibit the demand for prostitution and to continue to denounce and prohibit the exploitation of the prostitution of others by third parties, the development of economic interests in the exploitation of the prostitution of others and the institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place. It also seeks to encourage those who sell their own sexual services to report incidents of violence and leave prostitution.

[52] The Technical Paper goes on to describe the PCEPA's "overall objective" as reducing 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: Technical Paper, at p. 3.

[53] The Technical Paper, at p. 7, describes the PCEPA as seeking "to ensure the safety of <u>all</u> by reducing the demand for prostitution, with a view to deterring it and ultimately abolishing it to the greatest extent possible" (emphasis added). It adds that the PCEPA recognizes that this paradigm shift will take time and

therefore “does not prohibit individuals from taking certain measures to protect themselves when selling their own sexual services” (emphasis added). It describes Parliament as balancing the need to protect those subjected to prostitution from violence and exploitation with “the need to protect communities from prostitution’s harmful effects, including exposure of children; and, the need to protect society itself from the normalization of a gendered and exploitative practice.”

[54] Available intrinsic evidence of parliamentary intent includes the lengthy preamble to the PCEPA:

> Whereas the Parliament of Canada has grave concerns about the exploitation that is inherent in prostitution and the risks of violence posed to those who engage in it;
>
> Whereas the Parliament of Canada recognizes the social harm caused by the objectification of the human body and the commodification of sexual activity;
>
> Whereas it is important to protect human dignity and the equality of all Canadians by discouraging prostitution, which has a disproportionate impact on women and children;
>
> Whereas it is important to denounce and prohibit the purchase of sexual services because it creates a demand for prostitution;
>
> Whereas it is important to continue to denounce and prohibit the procurement of persons for the purpose of prostitution and the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution;
>
> Whereas the Parliament of Canada wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution;

> And whereas the Parliament of Canada is committed to protecting communities from the harms associated with prostitution;

[55] The preamble reflects that Parliament has fundamentally changed the lens through which it views prostitution. Rather than viewing prostitution as a nuisance, it views prostitution as inherently exploitative and something that must be denounced and discouraged.

[56] Available intrinsic evidence also includes the short title of the PCEPA (the *Protection of Communities and Exploited Persons Act)*, which indicates that, as stated in the Technical Paper, Parliament considered the safety of "all" in enacting the legislation. It also includes the heading which prefaces all these offences: "Commodification of Sexual Activity". The preamble describes the commodification of sexual activity as causing social harm.

[57] There is some prior appellate judicial interpretation of the purpose of the PCEPA. In *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225, this court accepted the statement in the Technical Paper that the overall objective of the PCEPA is 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: *Gallone*, at para. 92. And in the context of a Crown appeal from a sentence for purchasing the sexual services of a child, the Manitoba Court of Appeal described the purpose of the PCEPA as "to discourage, denounce and prohibit the demand for prostitution in order to protect communities, human dignity

and equality, and to encourage victims to report violence and leave prostitution": *R. v. Alcorn*, 2021 MBCA 101, at para. 14.

[58] As noted above, the application judge found that the purpose of the PCEPA is "to immunise from prosecution any individual sex worker who performs sex work, and to allow the assistance of third parties in limited circumstances, while making all other aspects of commercial sex work illegal": at para. 52. He found that a second purpose was "to protect sex workers from violence, abuse and exploitation to protect the health and safety [of] sex workers, namely women and girls": at para. 165.

[59] I would describe the purposes of the PCEPA differently from the application judge. In my view, the PCEPA has three purposes: 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; second, to prohibit the promotion of the prostitution of others, the development of economic interests in the exploitation of the prostitution of others, and the institutionalization of prostitution through commercial enterprises in order to protect communities, human dignity and equality; and, third, to mitigate some of the dangers associated with the continued, unlawful provision of sexual services for consideration. In particular, Parliament's latter objective is to ensure that, as much as possible, persons who continue to provide their sexual services for consideration, contrary to law, can avail

themselves of the safety-enhancing measures identified in *Bedford* and report incidents of violence, without fear of prosecution.

[60] 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 of the purposes of the PCEPA, I disagree with that latter characterization.

[61] There is no doubt that Parliament was concerned about the safety of those who engage in the provision of sexual services for consideration. There was express discussion about this issue during the parliamentary debates. The short title of the PCEPA (the *Protection of Communities and Exploited Persons Act*), the recognition in the preamble of "the risks of violence posed to those who engage in [prostitution]", the statements in the Technical Paper and the fact that the PCEPA permits those who provide their sexual services for consideration to employ the safety measures identified in *Bedford* further indicate that the safety of those who provide sexual services for consideration was a concern of Parliament.

[62] The PCEPA, however, was an explicit response to *Bedford*. While Parliament addressed the specific safety issues which were the focus in *Bedford* – working from a fixed indoor location, hiring persons who may enhance safety, and the ability to negotiate conditions for the sale of sexual services in a public place – it also chose to criminalize prostitution by prohibiting the demand and reinforcing the prohibition on the exploitation of others by third parties. As noted above, Minister MacKay was clear that Parliament sought to "create the climate in which prostitutes can take certain specific measures, steps to further protect themselves or insulate themselves from violence." He was also clear, however, that the best way to protect them was to reduce prostitution itself. This is reflected in the scheme of the PCEPA as a whole.

[63] It is for these reasons that I characterize the safety-related purpose of the PCEPA (beyond the protection of communities, human dignity and equality, through its first and second purposes) as being limited to ensuring that persons who continue to provide their sexual services for consideration, contrary to law, can avail themselves of the safety-enhancing measures identified in *Bedford* and report incidents of violence.

[64] With these purposes in mind, I turn to the first of the impugned provisions.

VI. SECTION 286.2 (MATERIAL BENEFIT)

The application judge's reasons

[65] The application judge found that the goal of s. 286.2 is to "denounce and prohibit economic interests and the commercialization of sexual services for consideration": at para. 82. He then considered whether a sex worker who shares space or expenses with other sex workers would be subject to prosecution under s. 286.2.

[66] Neither "benefit" nor "commercial enterprise" is defined in the *Code*. He concluded that, "in the context of commodification of sexual activity, benefit has an ordinary meaning of any profit, advantage or acquired right or privilege and commercial enterprise means any enterprise or business entered into for profit": at para. 105. He in turn concluded that, by sharing expenses, the students in the two hypotheticals received a financial benefit from each other which increases their respective profits, and that their respective sex work enterprises were "commercial enterprises" and thus within the exception to the exception in s. 286.2(5)(e). Further, each sex worker did not qualify for immunity under s. 285.5(1)(a) and (2) "because each sex worker would be receiving a benefit which is not "derived from the provisions of their own sexual services": at para. 110. Because they do not qualify for immunity, their respective rights to liberty are infringed.

[67] Their respective security of the person is also infringed because they would not be able to hire third parties in a cooperative or cost sharing arrangement to assist with their security. The application judge continued, at para. 113,

> as the evidence indicated, not all sex workers make on their own the amounts of money required to fund solely the expenses of third parties to provide goods and services for their protection and health or accommodation where they are not subject to being discharged. For these sex workers who require benefits from a cooperative cost sharing arrangement, the legislative schemes prevent them from doing so.

Analysis

[68] The application judge's finding that s. 286.2 engages s. 7 is rooted in his interpretation of "commercial enterprise" in s. 286.2(5)(e) and his conclusion that the hypothetical sex workers would not enjoy immunity under s. 286.5(1).

[69] The governing modern principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hutchinson*, 2014 SCC 19, [2014] 1 S.C.R. 346, at para. 16.

[70] Applying those principles, I do not agree with the application judge that the cooperative arrangement in the hypotheticals constitutes a "commercial enterprise" within the meaning of s. 286.2(5).[8]

[71] In the hypothetical cooperative arrangement, each person who provides sexual services for consideration derives a benefit: she receives security services that she may not have been able to afford on her own. Although the hypothetical also describes the sharing of other services, I will focus on the sharing of security both as most relevant to the security of the person interest in s. 7 and because this was the aspect that the application judge focused on.

[72] Section 286.2(4) provides that, subject to s. 286.2(5), s. 286.2(1) does not apply to certain persons who receive a benefit. The parties agree, and I accept, that subject to s. 286.2(5), s. 286.2(4)(d) is applicable. The sex workers in the hypothetical cooperative arrangement receive the benefit of the cooperative arrangement "in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived" and "they did not counsel or encourage that person

[8] As discussed below, Deshon Boodhoo was also granted leave to intervene on this appeal and proposed hypotheticals for the court's consideration. One involves persons working in a cooperative arrangement. It does not differ from the respondent's hypothetical in any material respect. Accordingly, I do not address it in these reasons.

to provide the sexual services and the benefit is proportionate to the value of the service or good".

[73] The application judge turned to the *Oxford Canadian Dictionary* for assistance, noting that it defines commercial as "engaged in or concerned with profit and enterprise as a business or businesses collectively". That is a useful starting point, but it is not determinative.

[74] The hypothetical describes a cooperative: 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. It is the opposite of an enterprise concerned with profit. Each individual sex worker, not the cooperative, is concerned with profit.

[75] As the application judge noted, the term "commercial enterprise" is not defined in, or for the purposes of, s. 286.2: at paras. 102-3. As he also noted, the Technical Paper comments on the meaning of "commercial enterprise". It says this, at p. 5:

> Although "commercial enterprise" is not defined, the phrase has been interpreted in sentencing cases under the *Controlled Drugs and Substances Act*. Courts apply a contextual analysis to determine whether a particular enterprise is commercial in nature which provides flexibility to the courts to find different types of

> enterprises, including informal ones, to be "commercial". In the context of [the PCEPA], a "commercial enterprise" necessarily involves third party profiteering. Courts would likely take into account considerations such as the number of persons involved, the duration of the activities and the level of organization surrounding the activities. The only type of enterprise that this phrase cannot capture is one involving individuals who sell their own sexual services, whether independently or cooperatively, from a particular location or from different locations. [The PCEPA] does not allow for prosecution in these circumstances… [Emphasis added.]

[76] The word "profiteering" used in the Technical Paper does not simply mean "profits from". It has a pejorative sense. The *Oxford Canadian Dictionary*, 2nd ed. (Toronto: Oxford University Press, 2006) defines profiteering as "make or seek to make excessive profits, esp. illegally or in black market conditions". In this context, the word correctly captures that a "commercial enterprise" in s. 286.2(5)(e) necessarily involves the making of a profit derived from third party exploitation of the sex worker. In other words, it involves the making of a profit from the commodification of sexual activity by a third party.

[77] This interpretation finds support when the words "commercial enterprise" are considered in the context of s. 286.2 as a whole. In enacting the PCEPA, Parliament carefully crafted exceptions to the offences in ss. 286.2(1) and (2) to ensure that criminal liability would not result where there was not an exploitative relationship. As Minister MacKay said, "Legislated exceptions clarify that the [material benefit] offence does not apply to non-exploitative relationships": House

of Commons, *Debates (Hansard)*, 41st Parl., 2nd Sess., Vol. 147, No. 101 (11 June 2014), at p. 6654. The Technical Paper explains that the exceptions in ss. 286.2(5)(a) through (d) remove the availability of the exceptions in s. 286.2(4) if any exploitative circumstance develops. Section 286.2(5)(e) shares that purpose. It removes the availability of the exceptions if a third party commodifies and commercializes another's sexual activity, e.g., as Minister MacKay explained at p. 6654, when the person received the benefit in the context of a brothel. Similarly, Parliamentary Secretary Bob Dechert said this in reference to s. 286.2(5)(e) in the course of the parliamentary debates:

> The bill would also criminalize where a person procures another person's prostitution or if the benefit is received in the context of a commercial enterprise 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 often run by criminal organizations, such as gangs and the Mafia. That is the kind of behaviour we want to criminalize. It is not what the women who are exploited are doing, but the people who are actually exploiting them. [Emphasis added.] (House of Commons, *Debates (Hansard)*, 41st Parl., 2nd Sess., Vol. 147, No. 102 (12 June 2014), at p. 6756).

[78] This interpretation is also consistent with the scheme of the PCEPA, the objects of the PCEPA and the intention of Parliament.

[79] The cooperative sharing of security in the hypothetical does not involve third party exploitation of the sex workers by the commodification of their sexual services. The sex worker controls the sale of her own sexual services. The third

parties who receive a financial benefit from providing the security services do not exploit the sex workers (assuming that they provide the services in compliance with ss. 286.2(4)(c) or (d) and the exceptions in s. 286.2(5)(a) through (d) do not remove the availability of those exceptions.) And, in the hypothetical, the sex workers do not exploit each other.

[80] My interpretation of "commercial enterprise" is dispositive of the respondent's constitutional challenge to s. 286.2. I conclude that the hypothetical sex worker's right to security of the person under s. 7 is not engaged because – contrary to the application judge's conclusion – she can obtain security services on a shared, cooperative basis. The sex worker's liberty interest is not engaged because she has not committed an offence under s. 286.2.

[81] I will add this regarding the application judge's interpretation of the immunity provision in s. 286.5(1). Section 286.5(1) provides immunity if the benefit is derived from the provision of a person's own sexual services. The application judge concluded that each sex worker did not qualify for immunity under s. 285.5(1)(a) and (2) "because each sex worker would be receiving a benefit which is not 'derived from the provisions of their own sexual services'": at para. 110.

[82] I do not agree. If the cooperative arrangement were a "commercial enterprise" (and in my view it is not), properly construed, s. 286.5(1) would provide immunity to the sex worker who receives security services through a cooperative

arrangement. To receive the benefit – the shared security service – the sex worker must pay her share of the cost. Presumably, the funds to pay for the shared security service are derived from the provision of the sex worker's own sexual services. Thus, the benefit is derived from the provision of the sex worker's own sexual services.

[83] This interpretation is consistent with the purpose of s. 286.5. As Minister MacKay stated, the PCEPA "recognizes the vulnerability of those who sell their own sexual services by immunizing them from prosecution for any part they may play in the purchasing, material benefit, procuring, or advertising offences vis-à-vis their own sexual services": House of Commons, *Debates (Hansard)*, 41st Parl., 2nd Sess., Vol. 147, No. 101 (11 June 2014), at p. 6654. And as the Technical Paper notes, the immunities provided for in s. 286.5 "mean that individuals cannot be prosecuted for selling their own sexual services, whether independently or cooperatively, from fixed indoor or other locations, as long as the only benefit received is derived from the sale of their own sexual services" (emphasis added).

[84] Ms. Nathalie Levman, Counsel in the Criminal Law Policy Section at the Department of Justice, echoed this intention. Answering questions from opposition MPs at the House Standing Committee on Justice and Human Rights, Ms. Levman responded as follows:

> You're talking about working cooperatively together whereby the only benefit received results from the sale of

> one's own sexual services. The answer is that Bill C-36 does not criminalize that scenario.
>
> …
>
> I think we have to be careful to read the bill with all of its component parts. We have a legislative exception that would apply to a person who offers, let's say, protective services. If people were working cooperatively together and they all contributed a portion towards the protective services that were provided, at a fair value, and that person wasn't at all involved in the prostitution other than acting as a body guard, Bill C-36 would not apply to that scenario.
>
> (House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl., 2nd Sess., No. 32 (7 July 2014), at p. 16.)

[85] I turn next to the challenge under s. 7 to the procuring provision.

VII. SECTION 286.3 (PROCURING)

The application judge's reasons

[86] The application judge described the goal of s. 286.3[9] as to "prohibit third parties who make money from commercial sex work from being involved": at para. 159.

[87] He concluded that both the students and the experienced sex worker who provides advice on how to set up, advertise and conduct oneself could be prosecuted under s. 286.3(1). While the hypotheticals do not clearly indicate the

[9] In his reasons, the application judge refers to s. 286.2(3). I have assumed that this is a typo, and his intended reference was to s. 286.3 as the phrase in which the quoted passage appears addresses procuring.

requisite *mens rea*, the application judge inferred that it had been met. The liberty of the students was therefore infringed because they are subject to prosecution for procuring. Their respective security of the person had also been infringed for two reasons: first, because the inability to receive advice from an experienced sex worker who is not acting in an exploitative manner compromises their ability to protect themselves from danger, and; second, because the joint use of an accommodation by multiple sex workers for their own protection and safety is prohibited.

[88] Further, the provision infringed s. 7: it is overbroad and its impact grossly disproportionate. It was overbroad because one of the objectives is to protect sex workers from violence, abuse and exploitation and it limits or prevents some means of protection and safety for some, if not all, sex workers. The application judge concluded that this and the other impugned provisions were disproportionate to the provision's objective because their effect of "preventing sex workers from taking measures that would increase their safety, and possibly save their lives, outweigh[ed] the law's positive effect of protecting sex workers from exploitative relationships and the objective of Parliament to decrease or eliminate commercial sex work": at para. 71.

Mr. Boodhoo's hypotheticals

[89] Deshon Boodhoo was granted leave to intervene on this appeal: *R. v. N.S.* (5 November 2021), M52912. He was convicted under ss. 286.2(2) and 286.3(2). These are largely the same as ss. 286.2(1) and 286.3(1), except that they pertain to persons under the age of 18 years. He was also convicted under s. 286.4. Because of the overlap in the constitutional issues raised, his appeal was to be heard together with this appeal. This appeal was ordered expedited after a stay was entered, however, and Mr. Boodhoo's appeal could not be argued on that expedited timetable.

[90] One of the hypotheticals Mr. Boodhoo proposed involves a person already providing sexual services for consideration "reaching out" to a young friend who is homeless and surviving by panhandling and pick pocketing. She proposes that her young, homeless friend engage in the provision of sexual services for consideration, and that they rent an apartment, share expenses and work together. She is having difficulty paying for her apartment on her own. If she loses it, she will be forced to return to riskier forms of prostitution. The hypothetical also posits that providing sexual services for consideration, living in an apartment and working in a cooperative fashion, is a safer option for the young, homeless friend. The young homeless friend accepts the offer and begins selling her sexual services for consideration.

Whether s. 7 is engaged

[91] I agree with the Crown that the application judge interpreted the scope of the procuring provision too broadly. As I will explain below, properly interpreted, s. 286.3 does not prohibit the students from working cooperatively in the manner described in Hypothetical 2 or leasing a room to the third student in Hypothetical 4. Nor does it prohibit the hypothetical sex worker who was sought out to provide advice from providing advice, without compensation, to students who had already decided to engage in the provision of sexual services for consideration on how best to do so. Thus, the students' liberty and security interests would not be engaged.

[92] I do agree with counsel for Mr. Boodhoo, however, that the conduct in his hypothetical would offend the procuring provision. The liberty interest of the person who proposed that her young homeless friend engage in prostitution is engaged: she is liable to imprisonment, if convicted of procuring.

[93] On this hypothetical, it is not clear that her security of the person interest is also engaged. She cannot afford her apartment because she does not earn enough income. It is not clear that the link between her inability to pay rent and the impugned law prohibiting procuring constitutes a "sufficient causal connection", as required by *Bedford*, at para. 75. Nor is it clear how the provision engages the security of the person interest of the young vulnerable person. As noted above and

as further explored below, there is nothing in the PCEPA that prevents her from joining cooperatively with others selling their own sexual services, or from approaching someone more experienced for advice. I doubt whether the assertion in the hypothetical that she did not believe she had any other options can meet the threshold set out in *Bedford*.

[94] Assuming, however, without determining, that their security of the person is engaged, I reject Mr. Boodhoo's argument, and the application judge's conclusion, that the procuring provision is contrary to the principles of fundamental justice because it is overbroad and its impact grossly disproportionate.

[95] Below, I first address the scope of s. 286.3. Then I explain why the procuring provision does not violate s. 7.

The scope of s. 286.3

[96] As this court explained in *Gallone*, at para. 59, there are two modes of committing the *actus reus* of the procuring offence:

1. The accused person "procures a person to offer or provide sexual services for consideration"; or
2. The accused "recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person."

[97] “Procuring” means to cause, or to induce, or to have a persuasive effect on the conduct that is alleged: *Gallone*, at para. 61.

[98] To prove *mens rea* for the first mode, the Crown must prove that the accused intended to procure a person to offer or provide sexual services for consideration.

[99] For the second mode, the Crown must prove that the accused intended to do anything that satisfies the *actus reus* for this mode in relation to the person who offers or provides sexual services for consideration, and that the accused acted with the purpose of facilitating an offence under s. 286.1(1): *Gallone*, at para. 63.

[100] A “purpose” requirement imposes a “high” “specific intent” *mens rea*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 45-47; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at paras. 32-33; *R. v. Joseph*, 2020 ONCA 733, 153 O.R. (3d) 145, at para. 88. More than knowing facilitation is required: the accused must specifically intend his actions to have the effect of facilitating the offence: *Khawaja*, at para. 46; *R. v. Briscoe*, 2010 SCC 13, [2010] 1 S.C.R. 411, at paras. 16-18; *Joseph*, at para. 88. The intention of the accused must be determined subjectively: *Legare*, at paras. 32, 35.

[101] Turning first to the students in the hypotheticals before the application judge, the application judge found that they committed the second mode of the *actus reus* of the procuring offence: by assisting each other in conducting commercial sex, in assisting in advertising, in obtaining clients and in providing accommodation to

conduct commercial sex work, each concealed, harboured and exercised control, direction and influence. Further, each did so for the purpose of facilitating commercial sex work.

[102] The application judge did not explain how the students' conduct constituted concealing, harbouring or exercising control, direction or influence, within the meaning of those terms in s. 286.3. I do not understand how, on the hypotheticals before him, the students "concealed" one another. On my reading of the hypotheticals, the students did not hide one another.

[103] Nor is it clear that the students harboured each other, within the meaning of that term in s. 286.3. In *R. v. Joseph*, at para. 86, this court clarified that "harbour" includes the provision of shelter, whether secretly or not. In *Joseph*, the accused arranged for the complainants to sell sexual services from his apartment. The court did not consider whether two persons leasing premises together that both will use to sell their sexual services (Hypothetical 2) or leasing a room to a person who provides sexual services for consideration (Hypothetical 4) constitutes "harbouring". Arguably, in Hypothetical 2, each student secured her own shelter by joining in the lease for the apartment. And when, in Hypothetical 4, the third student leased a room in the apartment from them, he similarly secured his own shelter. I note that in *R. v. Y.S.*, 2021 ONSC 4010, at para. 188, LeMay J. held that the accused did not harbour the complainant when he shared a hotel room with her for which she paid with her earnings from selling her sexual services. Further,

given that legitimate rental arrangements are exempted from the material benefits offence, it would make little sense to find that they violated the procuring offence, which provides for a longer maximum term of imprisonment. This, however, is an issue for another day, with the benefit of full argument.

[104] "Exercising influence" over a person's movements has been broadly defined and is less coercive than exercising control or direction. For that reason, I will focus on it. "Exercising influence" over a person's movements means doing anything to affect the person's movements. It includes anything done to induce, alter, sway or affect the will of the person. It is like proposing an idea and persuading the person to adopt it: *Gallone*, at para. 47.

[105] In determining whether what each student did amounted to exercising influence over the movements of another student or students, the application judge was required to consider the nature of the relationship between them and the impact of the alleged influencing student's conduct on the allegedly influenced student: *R. v. Ochrym*, 2021 ONCA 48, 69 C.R. (7th) 285, leave to appeal ref'd, [2021] S.C.C.A. No. 106. He did not do so, and, on these hypotheticals, it is not clear that what each student did amounted to "exercising influence" over the movements of another student.

[106] Further, as noted above in para. 99, exercising influence is only an offence if the accused intended to exercise influence over the movements of the person

who offers or provides sexual services for consideration. The hypotheticals are bereft of facts that support the inference that each of the students intended to exercise influence over the movements of the others.

[107] The scope of all the conduct captured in the second mode of the *actus reus* of the procuring offence is significantly narrowed by their purpose requirement. As discussed above, the conduct captured in the second mode is only an offence if it is done for the purpose of facilitating an offence under s. 286.1. While earlier in his reasons, the application judge correctly identified this as the relevant *mens rea*, he later equated the purpose of "facilitating commercial sex work" with that of facilitating an offence under s. 286.1. Even if the students' conduct constituted "concealing", "harbouring" or "exercising influence", and the students intended that conduct, the application judge erred by equating the purpose of "facilitating commercial sex work" with the purpose of facilitating an offence under s. 286.1. Facilitating an offence under s. 286.1 is narrower than facilitating commercial sex work.

[108] The offence in s. 286.1 is obtaining for consideration or communicating with anyone for the purpose of obtaining for consideration the sexual services of a person. The offence is not providing sexual services for consideration. The purpose requirement in s. 286.3 is therefore tied directly to the asymmetrical scheme of the PCEPA. The Crown must prove that the accused intended to assist the principal in the commission of the offence in s. 286.1: *Briscoe*, at para. 16.

[109] If the students concealed or harboured each other, or exercised influence, the hypotheticals do not support a finding that they subjectively intended to assist a buyer in obtaining for consideration or communicating with anyone for the purpose of obtaining for consideration the sexual services of another of those students. Any concealing, harbouring or exercising influence was for the purpose of facilitating the sale by the student who was concealed, harboured or influenced of their own sexual services for consideration and not for facilitating the obtaining of their sexual services for consideration by others. This may seem like a fine point of logic, but it flows directly from the wording of s. 286.3 and the scheme of the PCEPA.

[110] Turning to the advising sex worker in Hypothetical 2, the application judge concluded that providing advice on safety issues did not offend s. 286.3 because the purpose of the advice was not to facilitate an offence. He concluded, however, that in providing advice on how to set up, advertise and conduct oneself, the advising sex worker exercised control, direction or influence over the movements of the students and inferred that she did so for the purpose of facilitating commercial sex work.

[111] Again, the application judge did not explain why he found that the conduct amounted to the exercise of control, direction or influence, taking into account the nature of the relationship between the students and the advisor. And, again, the

application judge erred by equating facilitating commercial sex work with facilitating an offence under s. 286.1.

[112] Here, if the provision of the advice amounted to the exercise of influence over the movements of the students, and it can be inferred from the nature of the actions and the knowledge of the advisor that she intended to exercise influence over their movements, it was not for the purpose of facilitating an offence under s. 286.1.

[113] The scenario cannot support the inference that the advisor subjectively intended to assist the buyer in obtaining for consideration or communicating with any person for the purpose of obtaining for consideration the sexual services of a person. The advice was provided to the students for the purpose of facilitating the sale by them of their own sexual services for consideration – in particular, in the safest manner possible – and not to facilitate the obtaining of their sexual services for consideration by others.

[114] The criminal law is familiar with asymmetrical offences, and trial judges are adept at inferring which side of the transaction an accused intended to facilitate: *R. v. Greyeyes*, [1997] 2 S.C.R. 825, at para. 8. Depending on the facts in a given case, a person may intend to assist the buyer, the seller or both. Each case will turn on the specific facts from which such an intention could be inferred. For example, consider someone who harbours another person who provides sexual

services for consideration. He rents a hotel room, arranges for both buyer and seller to use it for the sale of sexual services, and expects to derive a financial benefit from the sale of sexual services. While the harbouring person's actions may incidentally benefit the seller, it is chiefly designed to assist the buyer, who is the prospective source of the financial benefit, and the harbouring person would be quite rightly subject to prosecution. The hypotheticals before the application judge do not contain sufficient facts to infer that intention.

[115] Finally, turning to the woman in Mr. Boodhoo's hypothetical who recruits her friend, as indicated above, I agree that she is guilty of procuring. She commits the first mode of the actus reus: she causes, induces or has a persuasive effect on her friend providing her sexual service for consideration. The mens rea for this first mode is also made out. On the hypothetical, she intended to procure her friend to offer or provide sexual services for consideration. Accordingly, I must go on to assess whether the deprivation of her liberty and security of the person violates s. 7.

Section 286.3 does not violate s. 7

[116] As explained above, whether an impugned provision violates s. 7 requires identifying the provision's purpose.

[117] The application judge said this, at para. 159, regarding the purpose of s. 286.3(1):

> [It] denounces and prohibits the procuring and facilitating by third parties in commercial sex work. Its goal is to prohibit third parties' who make money from commercial sex work from being involved.

[118] Having determined the purpose of s. 286.3, however, he appears to have assessed overbreadth and gross disproportionality against what he viewed as one of the purposes of the PCEPA (to protect sex workers from violence, abuse and exploitation to protect the health and safety of sex workers), rather than against the objective of s. 286.3, as he was required to do. The application judge found that the procuring provision was overbroad because it limits or prevents some means of protection and safety for some, if not all sex workers, contrary to the goal of protecting their health and safety. Counsel for Mr. Boodhoo also rests his argument that the procuring provision is overbroad on his view that one of the objectives of the PCEPA is to "protect sex workers".

[119] While the purposes of the broader scheme can inform the purpose of an individual provision, a provision need not conform to each and every purpose of the statute. For example, in *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, although the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, had multiple purposes, the impugned provision was found to have only a single purpose. Similarly, in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 110, the Supreme Court held the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, had two purposes:

public health and public safety. In considering the individual provisions of the Act, however, McLachlin C.J. found that some provisions supported the public health objective, while others supported both public safety and public health. See also *R. v. Meads*, 2018 ONCA 146, at para. 32, in which Sharpe J.A. held that two provisions in the same section of the *Criminal Code* could have different purposes. Moreover, as explained earlier in these reasons, I would not characterize the safety-related objectives of the PCEPA in the same manner as the application judge.

[120] I do not agree with Mr. Boodhoo that *R. v. Michaud*, 2015 ONCA 585, 127 O.R. (3d) 81, leave to appeal ref'd, [2015] S.C.C.A. No. 450, is of assistance here. In *Michaud*, Lauwers J.A. accepted the trial judge's finding that one section of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, had three purposes: reducing greenhouse gas emissions, reducing the severity of collisions, and preventing accidents. The expert evidence in that case established that the section did not, in some instances, prevent accidents, although it met the other two purposes. Lauwers J.A. held that on the reasoning of *Bedford*, the provision was overbroad because it did not fulfill one of its own three purposes. Here, in contrast, we are not dealing with a provision with multiple purposes.

[121] I would characterize the purpose of s. 286.3 slightly differently from the application judge. I would describe its purpose as to denounce and prohibit the promotion of the prostitution of others in order to protect communities, human

dignity and equality. Promoting prostitution encourages an activity that Parliament considers inherently exploitative. Section 286.3 gives effect to this purpose by prohibiting a wide range of conduct intended to procure a person to offer or provide sexual services for consideration and conduct engaged in for the purpose of facilitating an offence under s. 286.1(1).

[122] The 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. This makes sense. The aim of s. 286.3 is to prohibit the promotion of the prostitution of others. Section 286.3 is concerned with their safety by discouraging entry into and deterring participation in an activity that Parliament views as inherently exploitative and exposing risks of violence to those who engage in it.

[123] As discussed above, the safety-related objective of the PCEPA with respect to those who continue to sell their sexual services for consideration is given effect by other provisions: in particular, the exceptions to the material benefit offence, the exceptions to the exceptions, and the provision of immunity from prosecution where the offence relates to the offering or provision of a person's own sexual services. This, as the preamble notes, is "to encourage those who engage in prostitution to report incidents of violence and to leave prostitution." Section 286.3 contains no such exception because it does not target the provision of a person's own sexual services, but targets those who promote the prostitution of others.

[124] The procuring offence is not overbroad. The prohibited conduct – a wide range of conduct intended to procure a person to offer or provide sexual services for consideration or engaged in for the purpose of facilitating an offence under s. 286.1 – is directly and rationally related to the purpose of the provision.

[125] Nor is its impact on Mr. Boodhoo's hypothetical procuring sex worker grossly disproportionate. The specific nature of the right interfered with, and the nature of that interference, are relevant to the gross disproportionality analysis. As to the hypothetical procuring sex worker's liberty interest, as was the case in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, her potential imprisonment falls "within the broad latitude within which the Constitution permits legislative action": at para. 175.

[126] Meanwhile, the security of the person interest advanced in Mr. Boodhoo's hypothetical is that the procuring sex worker continues to engage in an illegal activity, but in a manner more dangerous to her. This harm is not grossly disproportionate to the objective of denouncing and prohibiting the promotion of that illegal activity. Recall that, as the preamble to the PCEPA illustrates, Parliament views 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. Given this, the alleged impact on the procured person's security of the person is even more justified.

[127] The application judge found that s. 286.3 (and the other impugned provisions) were grossly disproportionate because, “Parliament cannot allow sex work to continue and then grossly limit or prevent the sex worker’s ability to protect their security”: at para. 178. He rejected the Crown’s argument that conduct in relation to which a person enjoys immunity under s. 286.5 is unlawful and, therefore, this case is different from *Bedford*. In concluding that in *Bedford* there was a sufficient causal connection between the impugned provisions and the prejudice suffered to engage s. 7, McLachlin C.J. wrote, at para. 89, that, “[t]he impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks.” The application judge characterized conduct in respect of which a person is immune from prosecution under s. 286.5 as “statutorily allowed”. He held, at para. 175, that “the impugned provisions cannot make an allowed activity more dangerous” (emphasis added). In so doing, he equated “allowed” activity to the “lawful” activity in *Bedford*.

[128] It is clear that Parliament views prostitution in a fundamentally different way than it did prior to the enactment of the PCEPA. As this court said in *Gallone*, at para. 94, the immunity provision does not “legalize” the conduct in relation to which a person enjoys immunity under s. 286.5. It simply exempts persons from prosecution in relation to that conduct. Parliament could have, but did not, provide that the conduct that enjoys immunity from prosecution does not constitute an offence: see comments of Minister MacKay and Mr. Donald Piragoff (Senior

Assistant Deputy Minister, Policy Sector, Department of Justice), *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41st Parl., 2nd Sess., No. 15 (9 September 2014), at pp. 12, 15-16, 25-26, and 36-37.

[129] I acknowledge that in *PHS Community Services*, McLachlin C.J., writing for the court, stated at para. 102 that "[t]he morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right." Yet the application judge did not consider whether prostitution was illegal at the initial stage of determining whether the s. 7 rights of the students were engaged. He did so in his analysis of whether the impugned provisions were grossly disproportionate. The fact that an activity is unlawful is relevant in considering the weightiness of a provision's objective and whether an impugned provision deprives a person of the rights protected by s. 7 in a manner that is grossly disproportionate to that objective.

[130] I will add this. The application judge accepted that research indicates individuals who provide sexual services for consideration are not necessarily exploited: while there are situations where sex workers are exploited by third parties, many sex workers reported a conscious decision to provide sexual services in the context of "the socio-economic realities of their lives" (at paras. 30 and 89). The evidence before the application judge stated that some sex workers cited factors such as the need for money, independence, flexibility, and the nature of the work.

[131] Even accepting this evidence, it is clear from the preamble to the PCEPA and Minister MacKay's description of prostitution as "inherently degrading" before the Senate Committee on Legal and Constitutional Affairs (at p. 12), that Parliament views prostitution as inherently exploitative, even where the person providing the sexual services for consideration made a conscious decision to do so.

VIII. SECTION 286.4 (ADVERTISING)

The application judge's reasons

[132] The application judge found that post-PCEPA, the digital world is used more frequently to facilitate contact, communication and the providing of information. Sex workers who advertise in newspapers, online classifieds or on commercial sex work websites are more likely to communicate with potential clients before meeting in person: at paras. 89(j) and (k).

[133] He further found that the effect of the prohibition on advertising in s. 286.4 was that sex workers who attempt to advertise must do so surreptitiously and use coded language. The evidence before him, and in *Bedford*, was that communication is critical to the safety and security of the sex worker. He found that the "security of the students in the hypotheticals would be infringed by the inability of frank and detailed information and communication in their advertisement

of the sexual services offered and expectations for such sexual services": at para. 121.

[134] The application judge held that the provision was overbroad for the same reason as the procuring offence: Parliament had indicated that one of the objectives is to protect sex workers and the impugned provision limits or prevents some means of protection and safety for some, if not all, sex workers.

[135] Further, its impact is grossly disproportionate. At para. 177, the application judge held that "[t]he objective of eliminating or lessening commercial sex work through the banning of advertising cannot be made at the safety and security of commercial sex workers." Parliament cannot allow sex work to continue and then grossly limit or prevent sex workers' ability to protect their safety.

Analysis

[136] First, I review the evidence before the application judge, and what *Bedford* said on the issue of communication. Then I consider whether s. 7 is engaged. Next I consider the purpose of s. 286.4 and whether, having regard to that purpose, s. 286.4 deprives the hypothetical sex worker of security of the person in a manner that is overbroad or grossly disproportionate.[10]

[10] Hypothetical 2 before the application judge involved the students retaining the services of a website designer. Because the hypothetical did not state that the website was jointly used by the students, he concluded that the students would enjoy the immunity under s. 286.5. The respondent takes no issue with that conclusion. Mr. Boodhoo's hypothetical raises the possibility of the two cooperating sex workers

The evidence before the application judge

[137] The respondent relied on the evidence of Chris Atchison.[11] Mr. Atchison has a Master's in Criminology from Simon Fraser University and has published numerous academic articles and research studies on sex work in Canada. He was among those who provided testimony to the House of Commons and Senate standing committees on Bill C-36.[12]

[138] The application judge qualified Mr. Atchison to provide expert evidence on the field of social sciences research, theory and findings on the structure, operation and composition of commercial sex work in Canada and other jurisdictions and the legal regime concerning commercial sex work in Canada and other jurisdictions.

[139] The application judge rejected the Crown's argument that Mr. Atchison was biased. He accepted that Mr. Atchison's evidence was not statistically based but found the evidence of Mr. Atchison "credible and compelling".

[140] Mr. Atchison testified that advertisement was a fundamental initial way for sex workers and people who owned and operated commercial sex establishments

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being caught by the advertising provision for advertising "together", such that they could not benefit from the immunity for advertising their own sexual services. Hypotheticals must contain sufficient details to permit the court to properly analyze the constitutional claim. In the absence of further details, I decline to address this issue further. Simply stating that the sex workers are advertising "together" is not sufficient for this purpose.

[11] Much of Mr. Atchison's evidence addressed the impact of the criminalization of obtaining sexual services for consideration, which is not an issue on this appeal.

[12] Mr. Atchison was among those who opposed the Nordic Model. See House of Commons, Standing Committee on Justice and Human Rights, *Evidence*, 41st Parl., 2nd Sess., No. 39 (9 July 2014) at pp. 2-4 (Chris Atchison).

to clearly relay the boundaries and the services offered to prospective clientele. It sets the stage for the initial interaction between sex workers and prospective clients. The more capacity there is to exchange information, the less likely sex workers or their clients were to report that there was any form of conflict in their actual physical exchanges. Restricted capacity to communicate or unclear communications were frequently associated with higher levels of conflict.

[141] According to Mr. Atchison, following the passage of the PCEPA, advertisement migrated to off-shore locations. Advertisements on third-party sites began using vague language in order not to be flagged or trigger a complaint and be taken down by site administrators: e.g., talking about 2 or 3 roses for a certain kind of date[13], or saying “safe only” to mean that condoms must be used. He testified that there is empirical evidence that a lack of clarity between buyer and seller leads to physical conflict.

[142] Mr. Atchison also agreed that through the ads the sellers make it possible for the buyers to contact them, in some forum – text, email, or phone call. Mr. Atchison testified that the average number of communications before a physical encounter was 4 to 4.2. It is open to the seller to disengage if they are not happy with the communications or are not getting sufficient information.

[13] Mr. Atchison said that three hearts would mean $300. Some of the sample advertisements in the record are less opaque. They refer to 200 or 300 roses, and, in the context, mean $200 or $300.

What *Bedford* said on the subject of communication

[143] Recall that *Bedford* was not about advertising. *Bedford* was about the ability of prostitutes to communicate in public for the purpose of prostitution.

[144] In *Bedford*, the application judge found that face-to-face communication was an "essential tool" in enhancing street prostitutes' safety. Such communication allows prostitutes to screen prospective clients for intoxication or a propensity for violence, which can reduce the risks that they face. The Supreme Court agreed with the application judge, at para. 71, that this evidence engaged security of the person under s. 7:

> By prohibiting communication in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

[145] As indicated above, in response to *Bedford*, Parliament also replaced the communicating offence in s. 213(1)(c) of the *Criminal Code*. Now, except for communications in public places that impede traffic or take place in or next to school grounds, playgrounds or day care centres, communications in public by a sex worker are no longer criminalized.

[146] Further, a provider of her own sexual services for consideration who sends texts or emails to or phones a prospective client in follow up to a response to an

advertisement for the provision of sexual services enjoys immunity from prosecution under s. 286.5(2).

Is s. 7 engaged?

[147] The evidence before the application judge was not, and the application judge did not find, that because advertising is unlawful, persons who previously advertised their provision of sexual services for consideration are instead resorting to attracting new clients by riskier means, such as in-person, street-level solicitations. Rather, the evidence was that they continue to advertise but employ vaguer language, depriving the hypothetical provider of sexual services of security of the person: at para. 121.

[148] *Bedford* instructs that trivial impairments on security of the person do not engage s. 7: at para. 91. While an advertisement which, up-front, clearly sets out the terms and conditions for the provision of sexual services, may reduce the need for, or improve, further communications between the provider and the prospective client, the provider necessarily communicates further with the prospective client before an in-person encounter. The prohibition on advertising does not affect the ability of the provider to communicate frankly and in a detailed manner before an in-person encounter. The provider benefits from immunity from prosecution under s. 286.5.

[149] Mr. Atchison's evidence was that prospective purchasers of sexual services fear arrest, and that fear affects the effectiveness of the communications between the provider of the sexual services and the purchaser. Any vague language in subsequent texts, emails or phone calls between the provider and the prospective client presumably arises because of the prospective client's concern about liability under s. 286.1, and not because of the prohibition on advertising. As stated before, that section is not at issue on this appeal.[14]

[150] In any event, any impairment of security of the person because, as a result of s. 286.4, providers of sexual services for consideration use vaguer language in their advertisements is, on this record, trivial.

[151] While that conclusion is dispositive in relation to the application judge's finding, I will nonetheless address the application judge's characterization of the purpose of s. 286.4 and his findings that the section is overbroad and its impact grossly disproportionate.

The purpose of s. 286.4

[152] The application judge identified the objective, or one of the objectives, of s. 286.4 as eliminating or lessening commercial sex work. In my view, s. 286.4 has

[14] The Alliance also argues that sex workers' ability to consent to sexual activity, and therefore their personal autonomy, is compromised by their need to use vague language in advertisements and clients' use of vague language in communications with the sex worker. The Alliance's argument about the consequences of the use of vague language in the advertisements is addressed above. Its argument that s. 286.1 impairs sex workers' right to consent to sexual activity is for another day.

a single purpose: to reduce the demand for the provision of sexual services for consideration in order to protect communities, human dignity and equality. Other provisions, including those discussed earlier in these reasons, are animated by Parliament's safety-related objective in relation to those who continue to provide their sexual services for consideration.

Section 286.4 is not overbroad nor grossly disproportionate

[153] In my view, s. 286.4 is not overbroad. As noted above, a provision suffers from overbreadth when it is so broad in scope that it includes some conduct that bears no connection to its objective. The purpose of s. 286.4 is to reduce demand for unlawful conduct – the provision of sexual services for consideration. The prohibited conduct – advertising – is directly and rationally connected to this objective. The purpose of advertising is to obtain clients, that is, to increase demand for an unlawful service. Advertising also promotes the objectification of the human body and the commodification of sexual activity: social harms identified by Parliament in the preamble to the PCEPA.

[154] Nor is s. 286.4 grossly disproportionate. This is not one of those "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure": *Bedford*, at para. 120. The effects of s. 286.4 do not grossly outweigh its benefits. On this record, the prohibition on advertising does

not prevent the provider from communicating frankly and in a detailed manner before an in-person encounter.

IX. SECTION 2(B) OF THE *CHARTER*

[155] The application judge rejected the respondent's argument that the advertising prohibition was an unjustified infringement of s. 2(b). He held that he was bound by this court's decision in *Bedford*, which held that the Supreme Court had definitively decided this issue in the *Prostitution Reference* and only that court may revisit it. Because of that decision, and the reasoning in the *Prostitution Reference*, he concluded that s. 286.4 is a reasonable limit, demonstrably justified in a free and democratic society.

[156] The respondent renews his argument that s. 286.4 violates s. 2(b) of the *Charter*. The appellant properly concedes that the advertising provision engages the right to freedom of expression in s. 2(b) of the *Charter*. The issue is whether it is justified under s. 1 of the *Charter*.

[157] The Supreme Court in the *Prostitution Reference* and this court in *Bedford* considered the prohibition on communicating in public in s. 213(1)(c) and not a prohibition on advertising. Further, the prohibition on communicating in public had a different purpose than s. 286.4. I agree with the application judge, however, that s. 286.4 is justified under s. 1 of the *Charter*. That conclusion is more readily compelled in this case than in the *Prostitution Reference*.

[158] Section 1 provides:

> 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.

[159] Reasonable limits on rights will be demonstrably justified when (a) they have a pressing and substantial objective and (b) the means chosen to advance the objective do not disproportionately limit the right. Proportionality requires that the means be rationally connected to the objective, be minimally impairing, and have benefits that outweigh their negative effects: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 94.

[160] The legislative objective of the prohibition on communicating in public accepted by Dickson C.J. in the *Prostitution Reference* and upheld in *Bedford* was to take “solicitation for the purposes of prostitution off the streets and out of public view”. The objective of s. 286.4 is more pressing and substantial. Obtaining sexual services for consideration is now unlawful. The purpose of s. 286.4 is to reduce the demand for an unlawful activity.

[161] Section 286.4 addresses itself precisely to that objective by prohibiting advertising, which increases demand. It is therefore rationally connected to its objective.

[162] The prohibition on advertising is reasonably tailored to the provision’s objective of reducing the demand for the provision of sexual services for

consideration in order to protect communities, human dignity and equality. It does not prevent providers of sexual services from communicating with prospective clients before an in-person encounter by text, email or phone. It cannot be said that the prohibition on advertising is unduly intrusive.

[163] Finally, the provision's harms are not disproportionate to its benefits. As in the *Prostitution Reference*, the prohibited expression is directed at an economic interest. As Dickson C.J. stated in the *Prostitution Reference*, "It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression." And the record does not establish serious harms: providers of sexual services for consideration continue to advertise and communicate with clients, and are protected by the immunity provisions. Meanwhile, Parliament has identified an array of serious social harms caused by prostitution, including harms to the community and exposure to children, which s. 286.4 aims to curb. There is no disproportionality here.

X. SECTION 2(D) OF THE *CHARTER*

[164] The respondent renews his position on appeal that the material benefit, procuring and advertising provisions violate the right to freedom of association under s. 2(d). He relies on *Health Services and Support - Facilities Subsector*

Bargaining Assn v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 35:

> Government measures that substantially interfere with the ability of individuals to associate with a view to promoting work-related interests violate the guarantee of freedom of association under s. 2(d) of the *Charter.*

[165] He argues that by criminalizing cooperative arrangements and the retention of third party advisors, the material benefit and procuring provisions substantially interfere with the ability of those who provide sexual services for consideration to associate with others with a view to promoting their work-related interests – in particular, the pursuit of improved personal and workplace health and safety. He further argues that s. 286.4 prevents persons who provide sexual services for consideration from associating with those who assist with advertising, which could ensure clear communications with prospective clients.

[166] I reject these arguments.

[167] This case is very different from *Health Services*. *Health Services* held that s. 2(d) protects collective bargaining rights. Accordingly, provisions in the British Columbia law that gave health care employers greater flexibility to organize their relationships with their employees in a way that invalidated provisions of a collective bargaining agreement and precluded meaningful collective bargaining on a number of issues violated s. 2(d).

[168] This case is not about unionized employees and the impact on collective bargaining; nor is it about persons engaging in lawful work. It is about persons who are providing sexual service for consideration, contrary to law. In adopting a variant of the Nordic model, Parliament rejected an approach that would characterize persons who provide sexual services for consideration as “workers” and prostitution as legal sex “work”.

[169] Moreover, s. 2(d) will only be infringed where the state precludes activity because of its associational nature: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 125. Only the associational aspect of the activity is protected. The PCEPA does not prevent individuals from joining or forming an association in the pursuit of a collective goal. Rather, it precludes both individuals and groups from undertaking certain activities, subject to the exceptions and immunities already described in these reasons.

XI. DISPOSITION

[170] For these reasons, I would allow the appeal, set aside the respondent’s acquittals, and order a new trial.

Released: February 24, 2022 “A.H.”

“Alexandra Hoy J.A.”
“I agree. S. Coroza J.A.”
“I agree. Sossin J.A.”

APPENDIX A

Commodification of Sexual Activity

Obtaining sexual services for consideration

286.1 (1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,

(i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,

(A) for a first offence, a fine of $2,000, and

(B) for each subsequent offence, a fine of $4,000, or

(ii) in any other case,

(A) for a first offence, a fine of $1,000, and

(B) for each subsequent offence, a fine of $2,000; or

(b) an offence punishable on summary conviction and liable to a fine of not more than $5,000 or to imprisonment for a term of not more than two years less a day, or to both, and to a minimum punishment of,

(i) in the case referred to in subparagraph (a)(i),

(A) for a first offence, a fine of $1,000, and

(B) for each subsequent offence, a fine of $2,000, or

(ii) in any other case,

(A) for a first offence, a fine of $500, and

(B) for each subsequent offence, a fine of $1,000.

Obtaining sexual services for consideration from person under 18 years

(2) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of

(a) for a first offence, six months; and

(b) for each subsequent offence, one year.

Subsequent offences

(3) In determining, for the purpose of subsection (2), whether a convicted person has committed a subsequent offence, if the person was earlier convicted of any of the following offences, that offence is to be considered as an earlier offence:

(a) an offence under that subsection; or

(b) an offence under subsection 212(4) of this Act, as it read from time to time before the day on which this subsection comes into force.

Sequence of convictions only

(4) In determining, for the purposes of this section, whether a convicted person has committed a subsequent offence, the only question to be considered is the sequence of convictions and no consideration shall be given to the sequence of commission of offences, whether any offence occurred before or after any conviction or whether offences were prosecuted by indictment or by way of summary conviction proceedings.

Definitions of place and public place

(5) For the purposes of this section, place and public place have the same meaning as in subsection 197(1).

Material benefit from sexual services

286.2 (1) Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), is guilty of

> **(a)** an indictable offence and liable to imprisonment for a term of not more than 10 years; or
>
> **(b)** an offence punishable on summary conviction.

Presumption

(3) For the purposes of subsections (1) and (2), evidence that a person lives with or is habitually in the company of a person who offers or provides sexual services for consideration is, in the absence of evidence to the contrary, proof that the person received a financial or other material benefit from those services.

Exception

(4) Subject to subsection (5), subsections (1) and (2) do not apply to a person who receives the 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 from whose sexual services the benefit is derived;
>
> **(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 or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual

services and the benefit is proportionate to the value of the service or good.

No exception

(5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person

(a) used, threatened to use or attempted to use violence, intimidation or coercion in relation to the person from whose sexual services the benefit is derived;

(b) abused a position of trust, power or authority in relation to the person from whose sexual services the benefit is derived;

(c) provided a drug, alcohol or any other intoxicating substance to the person from whose sexual services the benefit is derived for the purpose of aiding or abetting that person to offer or provide sexual services for consideration;

(d) engaged in conduct, in relation to any person, that would constitute an offence under section 286.3; or

(e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

Procuring

286.3 (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.

Advertising sexual services

286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) an offence punishable on summary conviction.

Immunity — material benefit and advertising

286.5 (1) No person shall be prosecuted for

(a) an offence under section 286.2 if the benefit is derived from the provision of their own sexual services; or

(b) an offence under section 286.4 in relation to the advertisement of their own sexual services.

Immunity — aiding, abetting, etc.

(2) No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 or being an accessory after the fact or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.