In the Court of Appeal of Alberta

Citation: R v Kloubakov, 2023 ABCA 287
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Docket/Dossier: 2201-0025A
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Registry/Greffe: Calgary

Docket/Dossier: 2201-0025A

Between/Entre:

His Majesty the King/Sa Majesté le Roi

Appellant/Appelant

- and -

Hicham Moustaine

Respondent/Intimé

Docket/Dossier: 2201-0026A

And Between/Et entre:

His Majesty the King/Sa Majesté le Roi

Appellant/Appelant

- and -

Mikhail Kloubakov

Respondent/Intimé

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victims or the witnesses must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published

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The Court/La Cour:

The Hon. Justice Patricia Rowbotham
The Hon. Justice Elizabeth Hughes
The Hon. Justice Jolaine Antonio

L'honorable juge Patricia Rowbotham
L'honorable juge Elizabeth Hughes
L'honorable juge Jolaine Antonio

Memorandum of Judgment

Appeal from the Decision of
The Honourable Justice K.M. Eidsvik
Dated the 2nd day of December, 2021
(2021 ABQB 960, Docket: 190856203Q1)
Dated the 10th day of January, 2022
(2022 ABQB 21, Docket: 190856203Q1)

Motifs du jugement

Appel de la décision de
l'honorable juge K.M. Eidsvik
en date du 2e décember 2021
(2021 ABQB 960, dossier: 190856203Q1)
en date du 10 janvier 2022
(2022 ABQB 21, dossier: 190856203Q1)

Memorandum of Judgment

The Court:

I. Introduction

[1] In response to the Supreme Court's decision in *Canada (Attorney General) v Bedford*, 2013 SCC 72 which declared certain prostitution related offences to be unconstitutional, Parliament enacted Bill C-36, *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 (*PCEPA*) and amended the *Criminal Code*, RSC 1985, c C-46.[1]

[2] Mikhail Kloubakov and Hicham Moustaine were convicted of two of the new offences: (1) obtaining a material benefit from the provision of sexual services contrary to subsection 286.2(1); and (2) procuring a person to offer or provide sexual services for compensation contrary to subsection 286.3(1), not as principals but as parties under section 21 of the *Criminal Code* by assisting others in committing the offence. They challenged the constitutionality of these provisions and sought a declaration that subsections 286.2(1), (4), (5), and 286.3(1) were invalid. The trial judge held that the impugned provisions infringed section 7 of the *Charter*, could not be justified under section 1, and were therefore invalid. The trial judge suspended the declaration of invalidity for 30 days and ordered a stay of proceedings.

[3] The Crown appeals, primarily on the basis that by mischaracterizing the purpose of subsections 286.2(1), (4), (5), and 286.3(1), the trial judge erred in concluding that these provisions were contrary to section 7 of the *Charter*.

[4] For the reasons that follow, we allow the appeal.

[5] In order to better understand the context of this appeal, we set out the history of sections 286.2 and 286.3, including a review of *Bedford* and the scheme of the new legislation. This is followed by a summary of the background facts and the trial judge's decision. It is important to note that since the trial judgment was issued, the Ontario Court of Appeal rendered its decision in *R v NS*, 2022 ONCA 160, leave to appeal to SCC dismissed, 40324 (12 January 2023) (*NSCA*). The court found the impugned provisions to be constitutional. While there are a number of trial decisions which have considered the constitutionality of these provisions, *NSCA* is the first appellate decision to have done so. We discuss it in our analysis.

[1] The Supreme Court used the term "prostitutes" in *Bedford*, and the preamble to *PCEPA* refers to "prostitution". This court will use those terms as needed to accurately reflect the language in *Bedford*, the preamble to *PCEPA*, and any other decisions that also use those terms.

II. History of Sections 286.2 and 286.3

A. Bedford

[6] The applicants in *Bedford*, who were current and former prostitutes, sought declarations that former section 210 and subsections 212(1)(j) and 213(1)(c) of the *Criminal Code* were unconstitutional. At the time, section 210 made it an offence to keep a common bawdy-house, to be an inmate of a common bawdy-house, to be found in a common bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a common bawdy-house. A "common bawdy-house" was defined under section 197 of the *Criminal Code* as a place that is kept or occupied or resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency. Subsection 212(1)(j) made it an offence to live on the avails of another's prostitution, and subsection 213(1)(c) made it an offence to stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

[7] The applicants argued that these provisions infringed section 7 of the *Charter* by preventing prostitutes from utilizing certain safety measures that could protect them from violent clients, such as hiring security guards or screening potential clients.

[8] In a unanimous decision, the Supreme Court held that section 7 of the *Charter* was engaged because the impugned provisions placed limits on security of the person. The court noted that the prohibitions at issue prevented people who were participating in a risky but legal activity from taking steps to protect themselves from the risks.

[9] Having found that section 210 and subsections 212(1)(j) and 213(1)(c) engaged section 7 of the *Charter* and deprived prostitutes of security of the person, the Supreme Court turned to whether that deprivation was in accordance with the principles of fundamental justice. With respect to each provision, the Supreme Court held as follows:

(a) Section 210 was grossly disproportionate to its objective of combatting neighbourhood disruption or disorder and to safeguard public health and safety. The evidence was that nuisance complaints arising from indoor prostitution establishments were rare, and moving indoors to a bawdy-house improved the safety of prostitutes by providing proximity to others, familiarity with surroundings, and security. Although Parliament can regulate against nuisances, it cannot do so at the cost of the health, safety, and lives of prostitutes.

(b) Subsection 212(1)(j) was overbroad as it included some conduct that had no relation to its purpose of preventing the exploitation of prostitutes. The provision punished everyone who lived on the avails of prostitution and did not distinguish between those who exploit prostitutes from those who could improve their safety and

security, such as legitimate drivers, managers, or bodyguards. It also included anyone involved in business with a prostitute, such as accountants or receptionists.

(c) Given the application judge's finding that communication was a key tool that could decrease the risk to prostitutes, subsection 213(1)(c) was grossly disproportionate to the objective of removing prostitution from public view to prevent the nuisances that prostitution can cause.

[10] The Supreme Court determined that section 210 and subsections 212(1)(j) and 213(1)(c) were not saved by section 1 of the *Charter*, and they were declared invalid. The declaration of invalidity was suspended for one year. In concluding remarks, the Supreme Court stated at paragraph 165: "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".

B. Protection of Communities and Exploited Persons Act

[11] In response to *Bedford*, Parliament passed *PCEPA*, which came into force in December 2014. It created new offences, removed or amended the provisions found to be unconstitutional in *Bedford*, and moved the offences from Part VII Disorderly Houses, Gaming and Betting of the *Criminal Code* to Part VIII Offences Against the Person and Reputation under the new heading "Commodification of Sexual Activity".

[12] In enacting *PCEPA*, Parliament did not decriminalize or regulate the sex trade; rather, it adopted a version of the "Nordic Model". This model considers the sex trade to be a form of sexual exploitation and targets those who create the demand for prostitution and those who capitalize on it. Prostitution is no longer viewed as a nuisance, but as something inherently exploitative that must be denounced and discouraged: *NSCA* at paras 21, 55.

[13] For the first time in Canadian law, Parliament made it an offence to purchase sex, or to communicate in any place for that purpose. Subsection 286.1(1) states:

> 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.

[14] Section 286.2 updated the previous offence of living on the avails of prostitution that was held to be unconstitutional in *Bedford*. It is now an offence to receive financial or other material benefit, knowing that it is obtained by or derived from the commission of the purchasing offence under subsection 286.1(1); however, a person who receives a benefit from the sale of their own sexual services is immune from criminal liability under section 286.5. Subsection 286.2(4) carves out specific exemptions to the prohibition under subsection 286.2(1), for example when a person receives the benefit in consideration for a service or good that they offer, on the same terms and conditions, to the general public. Subsection 286.2(5) then creates exceptions to those exemptions, such as when the person receives the benefit in the context of a commercial enterprise that offers sexual services for consideration.

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.

Material benefit from sexual services provided by person under 18 years

(2) Everyone 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(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of two years.

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.

…

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.

[15] Subsection 286.3(1) amended the previous procuring offence. It now provides:

> 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.

[16] *PCEPA* also created a new offence for advertising sexual services (section 286.4). This provision is not at issue in this appeal.

III. Background Facts

[17] On December 20, 2019, Mr Kloubakov and Mr Moustaine were charged with several offences, including trafficking in persons, obtaining a material benefit from trafficking in persons, obtaining a material benefit from the provision of sexual services, procuring, and advertising sexual services. The charges stemmed from their involvement in an escort business; they were drivers for sex workers, including for ML and CT.

[18] ML and CT testified at trial. A detailed review of their evidence is found in the trial judge's reasons for conviction, *R v Kloubakov*, 2021 ABQB 817 at paras 7-120. For the purposes of the appeal, a short summary is sufficient.

[19] ML was a sex worker for an escort business in Québec that was operated by Vincent Marcheterre and Antoni Proietti. In 2015, Mr Marcheterre and Mr Proietti decided that ML should move to Calgary as the rates for her services were higher than in Québec. In May 2017, CT also moved from Québec to Calgary to work as a sex worker for Mr Marcheterre and Mr Proietti. Both ML and CT testified that Mr Marcheterre and Mr Proietti set the prices for their services and received all the money they earned. Mr Marcheterre and Mr Proietti paid for their housing, food, and other expenses. ML and CT further testified that Mr Kloubakov and Mr Moustaine worked for Mr Marcheterre and Mr Proietti as drivers. They would drive them to their client meetings or "out-calls". ML and CT believed that Mr Marcheterre and Mr Proietti paid Mr Kloubakov and Mr Moustaine $100 per day and covered their housing and food expenses.

[20] In addition to the evidence of ML and CT, a police officer involved in the investigation and a police officer who was qualified as an expert in human trafficking testified. An agreed statement of facts for three clients who had paid for the services of ML and other escorts was also admitted into evidence.

[21] The trial judge found Mr Kloubakov and Mr Moustaine guilty of obtaining a material benefit from the provision of sexual services contrary to subsection 286.2(1) of the *Criminal Code*. They were also found guilty of procuring contrary to subsection 286.3(1), not as principals but under section 21 of the *Criminal Code* for their role in assisting Mr Marcheterre and Mr Proietti. Mr Kloubakov and Mr Moustaine were found not guilty of the remaining charges.

IV. Constitutional Challenge

[22] After the convictions were entered, the trial judge heard the constitutional challenge to subsections 286.2(1), (4), (5), and 286.3(1) of the *Criminal Code*.

A. Evidence

[23] In addition to the trial evidence, the trial judge heard testimony from two sex workers (BC and D) and Professor Roots, an expert in human trafficking.

[24] BC is a former sex worker who had worked in massage parlors. She believed it was safer to work indoors in a massage parlor than outdoors. She described the business arrangement she had with the massage parlors, noting that they set the fees and took a portion of her revenue. In terms of safety measures, there was a "bad client" list posted, there were cameras to observe clients as they entered, and there was a rule that there had to be at least two people working at the same time. BC further testified that she could have worked independently if she had been able to hire a driver and security, but she was concerned about the people providing those services being held criminally liable.

[25] D is currently a sex worker. At one time she was an employee of an agency, but she is now an independent escort. D explained that the agency would book appointments, provide transportation, and handle advertisements and marketing. A driver would receive the agency's fee and she would keep the remainder. D explained that in addition to the drivers offering security, the receptionists who scheduled the appointments knew where the escorts were working.

[26] Dr Katrin Roots is an assistant professor in the Department of Criminology at Wilfrid Laurier University, and she has been researching human trafficking legislation in Canada for the last 10 years. In addition to her testimony, she authored a report. Dr Roots' opinion was that protectionist anti-trafficking legislation prevented safe working conditions. She explained that although the current legislation is aimed at protecting those who are exploited, the practical effect is that sex workers[2] are prevented from accessing services that may enhance their safety, such as drivers, security services and the ability to screen clients. Dr Roots also testified that while in

[2] While we are aware that sex workers may identify as male or non-binary, for consistency with the trial judge's approach, we will use the feminine conjugation when referring to sex workers generally. See *R v Kloubakov*, 2021 ABQB 960 at para 30.

theory the legislation allows sex workers to hire third parties, the exceptions to the exceptions, including the "commercial enterprise" exception, remove many of the anticipated benefits.

[27] The respondents also submitted a reasonable hypothetical based on the facts of *R v Anwar*, 2020 ONCJ 103. It was relied upon by the applicant in *R v NS*, 2021 ONSC 1628 (*NS*), rev'd *NSCA*. While section 7 challenges are often based exclusively or primarily on hypothetical situations, this case is different. The trial judge's reasons were based primarily on the evidence, with limited reference to the hypothetical. Accordingly, we neither reproduce nor discuss the hypothetical.

B. Reasons for Decision: R v Kloubakov, 2021 ABQB 960

[28] The trial judge first addressed the purpose of *PCEPA*. She considered Bill-C36's title, the preamble, and the fact that the amendments were in specific response to *Bedford*. She also reviewed: excerpts from Hansard; the *Technical Paper: 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* authored by the Department of Justice Canada in 2014 (Technical Paper); and other jurisprudence that discussed the purpose of *PCEPA*.[3] In her view, *PCEPA* had at least two main purposes: to criminalize the sex trade to reduce or eliminate it and to protect sex workers while recognizing that some would continue to engage in such work: at para 33.

[29] After reviewing the evidence and the legal framework applicable on a section 7 challenge, the trial judge considered whether the impugned provisions violated section 7 of the *Charter*.

[30] With respect to the material benefit offence and subsections 286.2(1), (4), and (5) of the *Criminal Code*, the trial judge held at paragraphs 185 and 202:

> Accordingly, this section undermines the security rights of sex workers protected by section 7. The breadth of the exceptions to the exceptions found in subparagraph (5), and the uncertainties created by the wording in the section, have the effect that the problems raised in ***Bedford***, which the Bill was intended to remedy, have not been corrected. The effect demonstrated by the evidence is that this provision continues to criminalize third parties who may be providing [security] services to sex workers in non-exploitative situations. In addition, the evidence shows that one effect of the section to improve their safety was the power to report instances of violence or other safety issues to the police – but again this effect has not occurred.

[3] *NS*; *R v MacDonald*, 2021 ONSC 4423 citing *R v Gallone*, 2019 ONCA 663; *R v Williams* (24 June 2021) Docket No 18-00000980 (Ont SC) (unreported); *R v Maldonado Vallejos*, 2021 ONSC 5809.

…

> …The exceptions to the exemptions found in s. 286.2(5), in particular, 5(c) and (e), make the defence created by Parliament "illusory" in practice because sex workers cannot, or are afraid to, hire or obtain [security] services from third parties, and cannot work in non-exploitative situations, such as in the agencies mentioned, without the risk of those third parties being found guilty.

[31] The trial judge then considered whether subsections 286.2(1), (4), and (5) violated the principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality. She held that the subsections were not arbitrary but were overbroad because they capture individuals who receive a material benefit from sex work who may otherwise support the safety of sex workers in non-exploitative situations. She found that the evidence demonstrated that the objective of allowing sex workers to retain the services of others to enhance their safety was not being met by section 286.2. Given her finding on overbreadth, the trial judge did not consider gross disproportionality.

[32] In respect of section 286.3, the offence of procuring, the trial judge concluded at paragraph 229:

> It is clear that some of the objectives in ***Bedford*** are different from the objectives of the impugned sections (that of reducing nuisance in the community), but one of the objectives of this section is the same as in ***Bedford***: to protect sex workers from exploitation. Clearly this provision continues to undermine the latter objective. Also, in the examples mentioned where the sex worker wants to give advice or third parties want to assist with safety in situations where no exploitation is found, this section does not serve any purpose in reducing exploitation. Indeed, the legislator did not intend to address cases where no exploitation is found. Nonetheless, the effect of this section, which has no exceptions as in s. 286.2, is to target third parties who may provide [security] services to sex workers.

[33] In considering whether section 286.3 was in accordance with the principles of fundamental justice, the trial judge held that it was overbroad as it criminalized individuals who assist sex workers in a non-exploitative manner.

[34] In separate reasons, *R v Kloubakov*, 2022 ABQB 21, the trial judge found that the impugned provisions did not impose reasonable limits on the rights guaranteed by section 7 of the *Charter* that can be justified in a reasonable and democratic society, and therefore they were not saved by section 1 of the *Charter*.

[35] Given her findings on section 7, the trial judge did not address the respondents' section 2(b) and (d) *Charter* arguments.

V. Grounds of Appeal and Standards of Review

[36] The Crown argues that the trial judge erred in finding that sections 286.2 and 286.3 of the *Criminal Code* violated section 7 of the *Charter*. More specifically, it contends that: (1) the trial judge failed to properly determine the objective of each provision, relying instead on a partial view of the general purposes of *PCEPA*; and (2) the trial judge failed to properly interpret the scope of the provisions and based her finding of overbreadth on conduct that is not captured by the offences.

[37] Alternatively, the Crown submits that the trial judge erred in not finding that any such infringement was saved by section 1 of the *Charter*.

[38] The parties agree that the constitutional validity of legislation is a question of law reviewed for correctness, and that findings of fact, whether adjudicative, social or legislative, are reviewed for palpable and overriding error: *R v Canfield*, 2020 ABCA 383 at paras 13-14, leave to appeal to SCC dismissed, 39376 (11 March 2021).

VI. Discussion

A. Section 7 Analytical Framework

[39] Section 7 of the *Charter* provides that "[e]veryone 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".

[40] The analysis under section 7 proceeds in two steps. First, the claimant must establish that section 7 is engaged by showing that the law interferes with the life, liberty or security of the person. Second, the claimant must show that the deprivation in question is inconsistent with the principles of fundamental justice: *R v Ndhlovu*, 2022 SCC 38 at para 49 citing *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 55.

[41] An overbroad law is one that "is so broad in scope that it includes some conduct that bears no relation to its purpose, making it arbitrary in part": *Ndhlovu* at para 77 citing *Bedford* at para 112; see also, *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 141. Put another way, "[o]verbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective": *Bedford* at para 117. A law is overbroad even if it overreaches in only a single case: *Ndhlovu* at para 78 citing *Bedford* at paras 113 and 123.

[42] The overbreadth standard is not easily met; it is to be determined on a case-by-case basis, and ultimately the question is whether the law is "inherently bad" because there is no connection, in whole or in part, between a law's effects and its purposes: *Bedford* at para 119.

[43] The first step in the overbreadth inquiry is to determine the purpose of the impugned provisions: *Ndhlovu* at para 59. This is the most crucial step in a section 7 analysis as it is often determinative of the constitutional question: *R v Sharma*, 2022 SCC 39 at para 87. The statement of purpose must be maintained and not changed throughout the analysis: *Sharma* at para 91.

[44] Where legislation has more than one purpose, the impugned provision need not conform to each and every purpose of the statute: *NSCA* at para 119 citing *R v Appulonappa*, 2015 SCC 59 and *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

[45] In *Ndhlovu*, the Supreme Court summarized the governing principles that assist a court in properly characterizing a law's purpose, at paragraphs 61-64:

> The focus is on the purpose of the challenged provisions, not of the entire act in which they appear, although a correspondence between those purposes may sometimes occur (*Moriarity*, at paras. 29 and 48; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 144).
>
> The law's purpose should be succinct, precise, and characterized at the appropriate level of generality, which "resides between the statement of an 'animating social value' — which is too general — and a narrow articulation" that amounts to a virtual repetition of the challenged provision, divorced from its context *(Safarzadeh-Markhali*, at para. 27, quoting *Moriarity*, at para. 28).
>
> A law's purpose is distinct from the means used to achieve that purpose *(Safarzadeh-Markhali*, at para. 26; *Moriarity*, at para. 27).
>
> To determine an impugned law's purpose, courts may consider: statements of purpose in the legislation, if any; the text, context, and scheme of the legislation; and extrinsic evidence such as legislative history and evolution *(Safarzadeh-Markhali*, at para. 31; *Moriarity*, at para. 31).

[46] On the last point, the Supreme Court subsequently cautioned against over-reliance on extrinsic evidence such as Hansard, legislative history, government publications, and the evolution of the impugned provisions because that evidence may be imprecise and not reflective of Parliament's intent: *Sharma* at paras 89-90. The most significant and reliable indicator of legislative purpose is a statement of purpose within the subject law: *Sharma* at para 88; see also, *Canadian Council for Refugees* at para 130. Noting its caution against relying on extrinsic evidence, the Supreme Court acknowledges that the following stages of the legislative process may be of particular assistance: the Minister's second reading speech when introducing the legislation, the second reading speech by the Senator who introduces the legislation, and the explanations by departmental officials at committee hearings: *Sharma* at para 90.

B. Purpose of the Impugned Provisions

[47] We begin by addressing the purposes of *PCEPA* as these are relevant in determining the purpose and scope of the challenged provisions. Much is gleaned from the preamble:

> 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;
>
> …

[48] In *NSCA*, after reviewing *Bedford* and the legislative history of *PCEPA*, including the Technical Paper and Hansard, the court articulated *PCEPA*'s purposes at paragraphs 59 and 63:

> 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.
>
> …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.

[49] In arriving at this conclusion, the court rejected the application judge's statement of the purposes as "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": *NS* at para 52.

[50] The respondents urge us not to adopt the articulation of the purposes from *NSCA*. They emphasize that the impugned sections do not specifically mention exploitation, while the provision of the *Criminal Code* dealing with trafficking in persons, subsection 279.01(1), specifically states that it is an offence to recruit, transport, transfer, receive, hold, conceal or harbour a person, or exercise control, direction or influence over the movements of a person "for the purpose of exploiting them or facilitating their exploitation". The respondents say that Parliament's silence in enacting the offences dealing with the commodification of sexual activity can be taken as reducing the importance of exploitation as a purpose.

[51] In our view this is answered by the preamble to *PCEPA*, reproduced at paragraph 47 of these reasons, which speaks to Parliament's grave concerns about the exploitation that is inherent in prostitution and the importance of denouncing and prohibiting the development of economic interests in the exploitation of the prostitution of others as well as the commercialization and institutionalization of prostitution.

[52] The respondents also challenge the underlying rationale that sex work is inherently exploitative and should be discouraged. They propose a competing theory underlying sex work: that individuals have the free will to choose to engage in sex work. These were referred to as competing "feminist" theories although we acknowledge that there are men involved in sex work as well.

[53] Our review of Hansard indicates that there were references to these theories but no substantive comment.[4] The Senate heard from the Canadian Association of Sexual Assault Centres, "the first feminist women's group in Canada that has clearly stated that prostitution is a form of violence against women and we have to address that issue from coast to coast".[5] Edward Herold, Professor Emeritus, University of Guelph provided an overview of the different feminist theories.[6]

[54] In the end, Parliament chose a modified Nordic Model with its focus on penalizing clients and its purpose of reducing sexual exploitation and victimization. The role of the court is to analyze the impugned provisions to determine whether they are constitutional. It is not our role to second guess the choice of the model to address prostitution. That is the job of Parliament. See, *Canadian Alliance for Sex Work Law Reform v Attorney General*, 2023 ONSC 5197 at para 40.

[55] In sum, we agree with and adopt the Ontario Court of Appeal's articulation in *NSCA* of the objectives of *PCEPA*.

[56] With that background we turn to discuss the impugned provisions and the Crown's grounds of appeal.

C. Material Benefit Offence under Section 286.2 of the Criminal Code

[57] Section 286.2 criminalizes the receipt of financial or other material benefits from the purchase of sexual services. This is in keeping with the Supreme Court's recognition that conduct exploiting sex workers can be legitimately criminalized: see *R v Albashir*, 2021 SCC 48 at para 73.

[58] The scope of the offence is narrowed in two ways to protect those who sell their own sexual services. The exemptions in subsection 286.2(4) permit sellers to enter into non-exploitative family

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[4] "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", 3rd reading, *House of Commons Debates*, 41-2, No 122 (3 October 2014).

[5] Senate, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 15 (September 10, 2014) (Dianne Matte, Coordinator, speaking). https://sencanada.ca/en/Content/Sen/Committee/412/LCJC/15EV-51558-E; Senate, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 15 (September 11, 2014) (Lisa Steacy, Representative, speaking; Michèle Léveillé, member Gatineau, speaking). https://sencanada.ca/en/Content/SEN/Committee/412/lcjc/15ev-51559-e

[6] Senate, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 41-2, No 19 (October 29, 2014) (Edward Herold, Professor Emeritus, University of Guelph, speaking). https://sencanada.ca/en/Content/Sen/Committee/412/LCJC/19EV-51683-E

and business relationships. Further, subsection 286.5(1)(a) provides immunity from prosecution for those who receive a benefit from the sale of their own sexual services.

[59] The Crown submits that the trial judge erred in her determination of the purpose of section 286.2 and in her assessment of its effect.

Purpose of Section 286.2

[60] As regards the purpose, the trial judge found that it was to "criminalize those who receive a material benefit from sexual services under s. 286.1 in exploitative situations" and to provide sex workers and "some of the people that they hire, with a limited defence to hire people for [security] services where these are not related to an exploitative situation": 2021 ABQB 960 at para 164.

[61] At the time of her decision there was no appellate authority considering the impugned provisions. The trial judge had regard to a number of trial decisions including *Anwar*, *MacDonald*, *Williams*, *Maldonado Vallejos*, and *NS* (see citations at paragraph 27 and footnote 3). She placed particular reliance on *NS*, where at paragraph 52 the application judge found the purpose to be "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".

[62] The Crown submits that the trial judge's identification of the purposes was too narrow. Indeed, apart from a brief reference to the other purposes in her discussion of arbitrariness (2021 ABQB 960 at para 208), the trial judge's focus throughout her analysis of the various scenarios was on the ancillary purpose of security and risk mitigation.

[63] The purpose of the material benefit provision must be informed by all three of *PCEPA*'s purposes articulated in *NSCA*. By narrowing her analysis solely to the purpose of mitigating some of the dangers associated with the provision of sexual services, the trial judge ignored the other objectives: to reduce the demand for prostitution with a view to discouraging entry into it and to prohibit the economic interest in the exploitation of the prostitution of others, in order to protect communities, human dignity and equality. As we discuss next, this diminution of the other objectives undermined the trial judge's finding of overbreadth.

Effects of Section 286.2

[64] A finding of overbreadth requires an assessment of the effects of the impugned provision. The trial judge's conclusion that these provisions were overbroad was based on three main reasons: (1) sex workers were uncertain about the provisions and therefore reluctant to seek protection, thereby undermining the purpose as she had found it; (2) the "commercial enterprise" exception in subsection 286.2(5)(e) could include any business entered into for profit and did not require

third party profiteering; and (3) the exception in subsection 286.2(5)(c) (provision of a drug) could encompass buying Tylenol for a sex worker: 2021 ABQB 960 at paras 169-185 and 211-213.

[65] One must look at the entire section and its purpose. The aim of Parliament as set out in its Technical Paper was to criminalize the conduct of exploitative third parties. Parliament also recognized that the Supreme Court in *Bedford* was concerned that the old offences prevented those who sell sexual services from hiring people who might enhance their safety. The aim of the legislation was to balance the safety concern with the need to ensure that conduct of exploitative third parties was criminalized.

[66] Seen through the lens of all three purposes, and with the assistance of the decision in *NSCA*, we conclude that the trial judge erred in her interpretation of the effects of the two exceptions found in subsection 286.2(5).

Commercial enterprise: subsection 286.2(5)(e)

[67] For ease of reference we repeat the provision:

> (5) Subsection (4) does not apply to a person who commits an offence under subsection (1) or (2) if that person
>
> …
>
> (e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration.

[68] There is no definition of commercial enterprise in the legislation. The trial judge adopted the definition used by the application judge in *NS*, "any enterprise or business entered into for profit": 2021 ABQB 960 at paras 174-175. This definition was derived from the dictionary. The trial judge concluded that Parliament could have put in the qualification that the business must include exploitation or excessive profits, but it did not. Thus, a commercial enterprise could include circumstances even when there was no exploitation. This led her to conclude that third parties who provide security services to sex workers, without exploitation, would be criminalized because they did so in the course of a commercial enterprise.

[69] The Ontario Court of Appeal in *NSCA* found that the definition articulated by the application judge failed to situate the term "commercial enterprise" within the context of *PCEPA* as a whole and Parliament's intention. "[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": *NSCA* at para 76. On the hypotheticals at issue in *NS*, which involved a cooperative sharing of security, there was no exploitation assuming the security services were provided in compliance

with subsections 286.2(4)(c) or (d) and the exceptions in subsections 286.2(5)(a) through (d) did not apply.

[70] In the instant appeal, the trial judge's definition of "commercial enterprise" did not take into account the requirement that there be third party profiteering. This error was one of the bases for her conclusion that section 286.2 was overbroad.

Provision of a drug for the purpose of aiding or abetting to offer sexual services: subsection 286.2(5)(c)

[71] Subsection 286.2(5)(c) creates another exception to the exemptions found in subsection 286.2(4). It states:

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

[72] The trial judge found that if a sex worker wanted to hire a third party for her security and that person provided "any drugs (even a Tylenol tablet for a headache that might prevent him or her from working) or alcohol" this section would apply: 2021 ABQB 960 at para 171. She concluded that prohibiting this conduct did not advance the objectives of allowing sex workers to obtain services to enhance their safety.

[73] In our view, the trial judge's interpretation does not accord with the principles of statutory interpretation. "[T]he meaning of a term may be revealed by its association with other terms where the latter may not be read in isolation": *R v Daoust*, 2004 SCC 6 at para 51. Subsection 286.2(5)(c) refers to the provision of a "drug, alcohol *or any other intoxicating substance*" (emphasis added). The use of "other intoxicating substance" clarifies that the provision of drugs captures intoxicating drugs, not medicinal drugs.

[74] Moreover, restricting the subsection to the provision of *intoxicating* substances is consistent with the purpose of the section as a whole. The other subsections speak of the use or threat of violence, intimidation or coercion and the abuse of a position of trust or power. In this context the provision of drugs for the purpose of aiding or abetting a person to provide sexual services is meant to address the notion of exploitation. It goes hand in hand with the other exceptions set out in subsection 286.2(5).

[75] In conclusion on the constitutionality of subsections 286.2(1), (4), and (5), the trial judge mischaracterized the purpose of these provisions and their effects. She erred in her interpretation of "commercial enterprise" and her interpretation of the breadth of subsection 286.2(5)(c).

D. Procuring Offence under Section 286.3 of the Criminal Code

[76] Subsection 286.3(1) provides:

> 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. (emphasis added)

[77] The trial judge accepted that it was safer for sex workers to work indoors and in a group setting, like the agency in the hypothetical or where BC and D worked; however, in the trial judge's view the owners of such agencies would be guilty of procuring contrary to section 286.3 because they harbour sex workers and assist them in bringing in clients. The trial judge considered a number of examples where non-exploitative conduct could result in criminal liability, including renting a room from another sex worker on occasion, providing a spa as a safe location for the sex worker to work, and a sex worker giving advice to another about how to work safely. She found that the effect of the section "which has no exceptions as in s. 286.2, is to target third parties who may provide [security] services to sex workers": 2021 ABQB 960 at para 229. She concluded that the section was overbroad.

[78] There are two means of committing the offence in subsection 286.3(1). The first is by procuring a person to offer or provide sexual services for consideration. The second mode is by recruiting, holding, concealing, or harbouring a person who offers or provides sexual services for consideration or by exercising control, direction or influence over the movements of that person *for the purpose of facilitating an offence under section 286.1*: *R v Gallone*, 2019 ONCA 663 at paras 59-63.

[79] To be convicted under the second mode of the offence the Crown must prove that the accused committed one of the enumerated acts for the purpose of facilitating an offence under subsection 286.1(1). The offences under subsection 286.1(1) are the purchase of sexual services or communicating for the purpose of purchasing sexual services.

[80] The court in *NSCA* described the scope of the conduct captured in the second mode of committing the offence in subsection 286.3(1) at paragraphs 107 and 108:

> 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.
>
> 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. (emphasis in the original)

[81] In the instant appeal the trial judge fell into the same error as did the application judge in *NS*. To commit an offence under the second mode contemplated by subsection 286.3(1) the conduct must be for the purpose of facilitating an offence under subsection 286.1(1).

[82] The mere giving of advice or even providing a room, without more, is not conduct that is caught by the offence.

[83] In contrast, a commercial agency that recruits, provides rooms for the transactions, makes appointments, and collects fees has engaged in the conduct prohibited by subsection 286.3(1). This is the conduct that Parliament intended to curtail to achieve its objective of deterring the procurement of persons for the purpose of prostitution. The offence in subsection 286.3(1) is aimed at prohibiting the recruitment of vulnerable people into the sex trade. This was Parliament's choice.

[84] It follows that the trial judge erred in her interpretation of subsection 286.3(1), which led to her conclusion that the section was overbroad, and therefore violated section 7.

VII. Conclusion

[85] Given our conclusion that the impugned provisions do not violate section 7, it is unnecessary to consider section 1 of the *Charter*.

[86] We allow the appeal, set aside the declarations of invalidity and the stays of proceedings, and enter convictions against Mr Kloubakov and Mr Moustaine on counts 3 and 4. We direct the matter to the Court of King's Bench to sentence Mr Kloubakov and Mr Moustaine.

Appeal heard on February 7, 2023

Memorandum filed at Calgary, Alberta
this 10th day of October, 2023

Rowbotham J.A.

Authorized to sign for: Hughes J.A.

Authorized to sign for: Antonio J.A.

Appearances:

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