

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

BETWEEN:

MICHAEL KLOUBAKOV AND HICHAM MOUSTAINE

Appellants
(Respondents)

– and –

HIS MAJESTY THE KING

Respondent
(Appellant)

– and –

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and ATTORNEY GENERAL OF BRITISH COLUMBIA

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Style of Cause Continued on Next Page

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

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PART I – OVERVIEW

1. Statutory purpose lies at the heart of this Court’s section 7 jurisprudence. The instrumental rationality of any law turns on the relationship between what it does and what it is supposed to do. This appeal offers this Court an opportunity to clarify two important issues related to the role of statutory purpose in the section 7 analysis.

2. First, when determining the statutory purpose of an individual provision within a broader and more complex legislative scheme, courts should rely on the purpose of the legislative scheme as a whole. They should avoid assigning statutory purposes to specific provisions taken in isolation. A proper understanding of a statutory framework and a proper application of this Court’s approach to section 7 means seeing the forest *and* the trees.

3. Second, this Court has long recognized a principle of fundamental justice that guards against “illusory defences”, i.e. that where Parliament has prescribed a defence to a criminal offence, the defence must play a meaningful role. However, this Court has never considered how the principle against “illusory defences” fits into the legal framework for section 7 overbreadth and arbitrariness. The “illusory defences” doctrine should be aligned with the modern approach to fundamental justice and treated as a species of instrumental rationality. A defence should be held to be illusory when it fails to carry out the purposes of the legislative regime to which it belongs.

4. By providing clarity on the first issue, this Court would ensure that the interpretation of individual provisions does not become artificially sealed off from their broader statutory context. By doing so with respect to the second issue—the principle that a defence must not be illusory—this Court would bring an underdeveloped principle of fundamental justice into conformity with modern jurisprudence.

5. Applied to the statutory provisions at issue in this appeal, the above framework should lead to the conclusion that the defences to the material benefit offence in s. 286.2(4)(c) and (d) are rendered illusory by subsection (5)(e), which precludes the application of the defences in the context of a “commercial enterprise” (absent a restrictive interpretation of the latter). The combination of these provisions makes it impossible for sex workers to avail themselves of the safety measures discussed by this Court in *Bedford*.

PART II – QUESTION IN ISSUE

6. The David Asper Centre for Constitutional Rights (the “Asper Centre”) intervenes on the first and second questions raised by the Appellant in relation to s. 286.2 of the *Criminal Code*. Does it breach section 7 of the *Charter*? Did the Court of Appeal err in its approach to determining the provision’s purpose?

PART III – ARGUMENT

A. Individual Provisions Must Be Read in Light of the Broader Purposes of the Legislative Scheme to which They Belong

i. The Case Law Supports a Holistic Approach to Determining Legislative Purpose

7. Individual provisions within complex, multi-purpose legislative schemes must be interpreted in a manner consistent with the scheme as a whole. Courts must “avoid fixating on one objective to the exclusion of others.”¹ Parliament is presumed to intend that the provisions of its enactments be read harmoniously, and to be interpreted and applied so they fit together in a way that respects their multiple objectives and gives purpose and meaning to each provision.² That means ensuring that the purpose ascribed to an individual provision does not ignore, let alone contradict, the broader purposes of the statutory framework to which the provision belongs.

8. The court below did not attend sufficiently to this principle. Instead, it held that the purpose of the impugned provisions was to reduce the demand for sex work, a putative purpose that contradicts the other purpose of the legislative scheme to promote the safety of sex workers. This was an error. It is true that “[w]here legislation has more than one purpose, the impugned provision need not conform to each and every purpose of the statute.”³ It is not always possible for each provision to advance or otherwise embody every purpose contemplated by a complex statutory scheme. That does not mean, however, that the objective of a provision may be characterized in a manner that is *incompatible* with the objectives disclosed by the scheme as a whole.

¹ *R. v. Rafilovich*, [2019 SCC 51](#) at para. [30](#).

² *Ibid.* at para. [20](#).

³ *R. v. Kloubakov*, [2023 ABCA 287](#) at para. [44](#), citing *R. v. N.S.*, [2022 ONCA 160](#) at para. [119](#).

9. The case law supports this approach to defining statutory purpose in a section 7 analysis. In *Appulonappa*, this Court determined the purpose of s. 117 of the *Immigration and Refugee Protection Act* (the “*IRPA*”) by reference to the *IRPA*’s broader purposes, not that of s. 117 alone. The Crown argued that the purpose of s. 117 was to prevent the assistance of unauthorized entry in any form, elevating the security purposes of *IRPA* above its other purposes.⁴ This Court, however, emphasized that *IRPA* has both security and humanitarian goals, and stressed that “[b]oth broad aims must be respected” in characterizing the purpose of a given provision.⁵ It therefore held that s. 117’s purpose is “to combat people smuggling,”⁶ not just to secure the border.

10. In *PHS*, this Court accepted that the *Controlled Drugs and Substances Act* (the “*CDSA*”) has dual purposes—public health and public safety—and that certain of its provisions may advance only one of those purposes.⁷ The *CDSA*’s provisions permitting ministerial exemptions from criminal liability clearly advanced the public health objective. Importantly, however, the Court did not read these exemption provisions as being inconsistent with the *CDSA*’s other purpose: public safety. Further, in the arbitrariness analysis under section 7, this Court assessed the Minister’s decision against both the public safety and public health objectives viewed together, rather than just one of the two objectives in isolation.⁸

ii. First Principles Support a Holistic Approach to Determining Legislative Purpose

11. Individual provisions should also be interpreted consistently with broader legislative objectives for two principled reasons. First, permitting courts to evaluate provisions in light of only one purpose frustrates legislative intent by allowing judges to emphasize some legislative purposes while minimizing others.

12. Second, and relatedly, if courts are permitted to characterize the purpose of a particular provision in a manner that is inconsistent with the overall objective of the scheme, some provisions will be artificially shielded from section 7 scrutiny for instrumental rationality—whether under

⁴ *R. v. Appulonappa*, [2015 SCC 59](#) at para. [32](#).

⁵ *Ibid.* at para. [34](#).

⁶ *Ibid.* at para. [34](#).

⁷ *Canada (Attorney General) v. PHS Community Services Society*, [2011 SCC 44](#) at para. [110](#).

⁸ *Ibid.* at para. [131](#).

arbitrariness or overbreadth. Some provisions are only arbitrary or overbroad as they relate to one—but not all—of the objectives of the statutory scheme. An approach that allowed courts to focus only on the objective of a specific provision, to the exclusion of the other objectives of the statutory scheme, would immunize large swaths of legislation from meaningful section 7 scrutiny.

13. *Appulonappa* is an example of this: had the humanitarian aims of the *IRPA* as a whole been excluded from consideration, s. 117 would have been shielded from the overbreadth analysis. The impugned provision transgressed only the humanitarian and not the security purpose. But that was enough for the provision to be declared unconstitutional in the Court’s view. It stands to reason that in order for a statutory provision to withstand section 7 scrutiny for instrumental rationality, the provision must not be arbitrary or overbroad in relation to the statutory purposes of the overall scheme, viewed and understood holistically.

14. A framework that is attentive to all purposes is especially important where, as here, an Act has multiple competing purposes. The proper characterization of a provision’s statutory purpose must consider all of the law’s purposes, or it will distort the relationship between Parliament’s aim and the means it has chosen of achieving it.

15. Even if it is not possible for each provision to advance *every* statutory objective in a wide-ranging scheme, each provision must still be interpreted as consistently as possible with the scheme’s broader objectives. Individual provisions must not be read as detached from the broader statutory context in which they are embedded.

iii. Each PCEPA Provision Has a Safety Purpose

16. A characterization of the statutory purpose in this case—in the context of *PCEPA*—that focuses only on the imperative of reducing demand for sex work risks precisely this detachment. Such an approach emphasizes *PCEPA*’s aim of sex work demand reduction to the detriment of its other aim of promoting the safety of sex workers. Both are central goals of the legislation. Ignoring the latter distorts the section 7 analysis.

17. On its face, the statutory text itself demonstrates that sex workers’ safety is one of *PCEPA*’s main objectives. The exceptions to the “material benefit” offence contained in s. 286.2(4) aim at allowing sex workers to access safety-enhancing services, such as security guards and drivers, that

were previously prohibited under the “living on the avails” offence invalidated in *Bedford*.⁹ The exceptions cannot be described as aimed at anything other than sex worker safety.¹⁰

18. The context in which *PCEPA* was enacted, i.e. in response to this Court’s decision in *Bedford*, provides further support for the safety-centric conception of *PCEPA*. *Bedford* invalidated earlier legislation in large part because it restricted the ability of sex workers to take essential safety measures to protect themselves. Parliament then enacted *PCEPA*, which aims to make it possible to take those measures. This context makes it clear that *PCEPA*’s purpose is, *at least in part*, to ensure that sex workers can preserve their own safety.

B. The Framework for Determining Whether a Defence is Illusory

19. Decades ago, in *R. v. Morgentaler*, Chief Justice Dickson and Justice Lamer (as the latter then was) articulated a principle of fundamental justice under section 7 of the *Charter*: statutory defences to criminal offences must not be illusory.¹¹ Since then, majority opinions issued by this Court have confirmed that the principle against illusoriness is a principle of fundamental justice.¹² But they say little about how courts should analyze whether a given defence is illusory. Because the impugned provisions place the question of illusoriness squarely in issue, this appeal presents the Court with the opportunity to set out, in explicit terms, what makes a defence illusory.

20. The Asper Centre makes two submissions on this issue.

21. First, illusoriness should be understood as related to the instrumental rationality of a statutory defence, relative to its purpose: does the defence accomplish Parliament’s chosen ends by exempting the conduct from criminal liability? If not, the defence is illusory. This brings illusoriness into doctrinal coherence with overbreadth, arbitrariness, and gross disproportionality, all of which address “failures of instrumental rationality.”¹³

⁹ See *Bedford v. Canada (Attorney General)*, [2013 SCC 72](#) at paras. [139–45](#).

¹⁰ See also *N.S.*, at paras. [49](#), [60–62](#) for its reading of the Hansard evidence to fortify this point.

¹¹ *R. v. Morgentaler*, [\[1988\] 1 SCR 30](#) at [70](#).

¹² *R. v. St-Onge Lamoureux*, [2012 SCC 57](#) at paras. [77–79](#); *R. v. Gubbins*, [2018 SCC 44](#) at para. [58](#).

¹³ *Bedford v. Canada (Attorney General)*, [2013 SCC 72](#) at para. [107](#).

22. Second, applying this concept of illusoriness to the impugned provisions in this appeal should lead to the conclusion that ss. 286.2(4)(c) and (d) create an illusory defence absent a restrictive interpretation of the “commercial enterprise” provision in s. 286.2(5)(e). An illusory defence results in a deprivation of the rights to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. The provisions, and the offence provisions to which they attach, would therefore be unconstitutional.

i. The Anti-Illusoriness Principle of Fundamental Justice Should Be Understood in Terms of Instrumental Rationality

23. The principle against illusory defences should be understood to require that statutory defences limit criminal liability to the extent necessary to give effect to their role in the legislation’s purpose. A failure to do so can occur in two ways. The defence could be drafted too narrowly, so that it fails to apply in circumstances where its non-application frustrates the purpose of the legislation. Alternatively, practical exigencies unforeseen by the legislator could prevent individuals from availing themselves of the defence.¹⁴ In either case, the purpose of the defence is frustrated because it fails to execute the legislative intent animating it.

24. So understood, the principle against illusory defences is a counterpart of overbreadth. It is triggered when a defence fails to capture conduct that should come within its statutory purpose. Overbreadth, conversely, examines whether a provision captures conduct that bears no relation to its statutory purpose.¹⁵ On this conception of illusoriness, the two principles of fundamental justice mirror one another. Illusoriness arises when a defence *does not* capture conduct which *does* go to its purpose, and overbreadth arises when a provision *does* capture conduct which *does not* go to its purpose.

23. This interpretation brings the two principles of fundamental justice into theoretical conformity. Each guards against “failures of instrumental rationality” by ensuring that Parliament’s chosen means of achieving its aims remains coupled to those aims. The principle against overbreadth is breached when Parliament’s chosen means go further than necessary to

¹⁴ As in *Morgentaler*, at [70–72](#), per Chief Justice Dickson and Justice Lamer.

¹⁵ *Bedford*, at para. [142](#).

achieve them. The principle against illusoriness is breached when Parliament's chosen means fall short of what is necessary to give effect to its purpose.

24. Underbreadth of a defence is no better than overbreadth of an offence provision. If the absence of a connection between a statutory purpose and the deprivation of a section 7-protected interest breaches fundamental justice when the law sweeps too broadly, it must also breach fundamental justice when the law falls so far short of what is necessary to achieve Parliament's ends that it frustrates Parliament's purpose. Canadians are entitled to instrumental rationality when their life, liberty, or security of the person is at stake. That entitlement should offer no less protection from laws which fall short of their objectives than laws which overshoot them. In either case, the law is disconnected from what it sets out to do. This instrumental irrationality breaches fundamental justice, whether it takes the form of underbreadth or overbreadth.

25. The principle against illusory defences therefore responds to the same "evil" as overbreadth, according to this Court's characterization of the latter in *Bedford*: "the absence of a connection between the infringement of rights and what the law seeks to achieve."¹⁶ If a defence does not apply in circumstances where the purpose of a statutory scheme requires its application, individuals are deprived of their life, liberty, or security of the person for reasons unconnected to the scheme's purpose. This Court should recognize that when this happens, the defence is illusory, and fundamental justice is breached. This explains why the framework applies only to statutory defences and not to offences: when an offence is underbroad, no one is deprived of a section 7-protected interest for reasons unconnected to the offence's purpose. Instead, some individuals who *should* be deprived of a section 7-protected interest are *not*. As a result, section 7 is never engaged in this scenario (i.e., where an *offence* provision is underbroad).

26. Besides harmonizing the principle against illusory defences with the other instrumental rationality-oriented principles of fundamental justice, the conception of illusoriness we propose would provide a normative basis for the principle against illusory defences. In *Morgentaler*, Chief Justice Dickson and Justice Lamer wrote that the inaccessibility of a statutory defence renders a scheme "manifestly unfair."¹⁷ The rationale advanced here explains why: such a scheme fails to

¹⁶ *Bedford*, at para. 108.

¹⁷ *Morgentaler*, at 72.

accomplish its own purpose, and in doing so deprives individuals of their life, liberty, or security of the person in an instrumentally irrational fashion.

27. For these reasons, this Court should recognize that the principle of fundamental justice against illusory defences is breached when a statutory defence fails to eliminate criminal liability to the extent necessary to give effect to its purpose. A finding that a statutory defence is illusory should result in the invalidation of the offence provision to which it is attached, given the latter's role in depriving the affected individual of their section 7-protected interest.

ii. If Interpreted to Cover Non-Exploitative Conduct, the Impugned Provisions Create an Illusory Defence by Failing to Give Effect to PCEPA's Safety Purpose

28. Section 286.2(5)(e) provides an exception to the exception to the "material benefit" offence in s. 286.2(1) and (2). The exception is set out in s. 286.2(4), which lists four circumstances in which criminal liability will not attach to one's receipt of a material benefit from sexual services. These circumstances include:

- a benefit received in consideration for a service or good that the person offers, on the same terms and conditions, to the general public (s. 286.2(4)(c)); and
- a benefit received in consideration for a service or good that the person does not offer to the general public but that the person offers or provides to the person from whose sexual services the benefit is derived, if the person receiving the benefit did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good (s. 286.2(4)(d)).

29. Section 286.2(5)(e), however, stipulates that the exceptions in subsection (4) are unavailable where the benefit was received "in the context of a commercial enterprise that offers sexual services for consideration". In other words, s. 286.2(5)(e) negates the applicability of the exceptions to criminal liability. Whether the defences in ss. 286.2(4)(c) and (d) are illusory may depend on the manner in which the counter-exception in s. 286.2(5)(e) is interpreted.

30. The court below agreed with the Ontario Court of Appeal's interpretation of s. 286.2(5)(e) in *R. v. N.S.* that "commercial enterprise" refers only to profits derived from a third party's

exploitation of a sex worker.¹⁸ On this interpretation, there must be case-specific evidence of exploitation and exploitation cannot be assumed from the mere existence of a commercial enterprise which profits from offering sexual services for consideration. The Asper Centre takes no position on the meaning of “commercial enterprise” as a matter of statutory interpretation. But the *N.S.* reading of the provision is not without difficulty. If, as the Ontario Court of Appeal itself noted, *PCEPA* is predicated on the assumption that sex work is inherently exploitative,¹⁹ it may be confusing to distinguish between exploitative and non-exploitative commercial enterprises offering sexual services for consideration.

31. If this Court were to adopt an interpretation of “commercial enterprise” that includes non-exploitative conduct—*i.e.*, conduct that is not harmful to sex worker safety—the defences in ss. 286.2(4)(c) and (d) would be rendered underbroad and therefore illusory. Section 286.2(5)(e) would preclude the application of the exceptions in subsection (4) to commercial enterprise participants who increase the safety and security of sex workers, such as drivers and bodyguards. This would make it impossible for sex workers to avail themselves of (for example) the safety measures whose unavailability resulted in the invalidation of the “living on the avails” provision at issue in *Bedford*.²⁰ The defences in subsection (4) would fail to capture conduct that *must* be captured to give effect to *PCEPA*’s sex worker safety purpose.

32. On this interpretation of the “commercial enterprise” counter-exception in ss. 286.2(5)(e)—in which the Crown would not be required to lead case-specific evidence of exploitation and harm to sex worker safety to trigger its application—the defences in s. 286.2(4)(c) and (d) would be limited to one-off interactions between sex workers and providers of goods or services. For example, s. 286.2(4)(c) would still apply to someone who delivered food to a sex worker. But it would not apply to someone who received a benefit for their ongoing role in a commercial enterprise that offers sexual services for consideration. This, in turn, would preclude subsection (4) from applying to persons offering safety-enhancing services to a persistently existing operation capable of employing managers, receptionists, and security.

¹⁸ *Kloubakov*, at para. [69](#), citing *N.S.*, at para. [76](#).

¹⁹ *N.S.*, at paras. [55](#), [59](#).

²⁰ See *Bedford*, at para. [142](#).

33. In these circumstances, the defences in ss. 286.2(4)(c) and (d) would be illusory because they would not apply to a broad range of commercial relationships that go to the heart of *PCEPA*'s safety purpose. If *PCEPA*'s statutory defences denied sex workers access to the safety enhancements that accompany sophisticated commercial arrangements, they would substantially frustrate the achievement of the scheme's legislative purpose.

34. The immunity provisions in s. 286.5 do not alter this conclusion. They only provide immunity from prosecution for offences related to the sale of one's *own* sexual services, but third-party participation is key to the full achievement of *PCEPA*'s safety purposes. Because they would not immunize commercial enterprise participants, the immunity provisions in s. 286.5 would not make the defences in 286.2(4) any less illusory.

PART IV – SUBMISSIONS ON COSTS

35. The Asper Centre does not seek costs, and asks that no costs be ordered against it.

PART V – ORDER

30. The Asper Centre takes no position on the outcome of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of July 2024.

Per:



Gerald Chan / Stephen Aylward
Counsel for the Intervener,
David Asper Centre of Constitutional Rights

PART VII – AUTHORITIES

Caselaw

No.	Authority	Paragraph Reference
1.	<i>Bedford v. Canada (Attorney General)</i> , 2013 SCC 72	17, 21, 24, 25, 31
2.	<i>Canada (Attorney General) v. PHS Community Services Society</i> , 2011 SCC 44	10
3.	<i>R. v. Appulonappa</i> , 2015 SCC 59	9
4.	<i>R. v. Gubbins</i> , 2018 SCC 44	19
5.	<i>R. v. Kloubakov</i> , 2023 ABCA 287	8, 30
6.	<i>R. v. Morgentaler</i> , [1988] 1 SCR 30	19, 23, 26
7.	<i>R. v. N.S.</i> , 2022 ONCA 160	7, 17, 30
8.	<i>R. v. St-Onge Lamoureux</i> , 2012 SCC 57	19,
9.	<i>R. v. Rafilovich</i> , 2019 SCC 51	7

Statutes, Regulations, Rules, etc.

No.	Statute, Regulation, Rule, etc.	Section, Rule, Etc.
1.	<i>Immigration and Refugee Protection Act</i> , S.C. 2001, c. 27	s. 117
	<i>Loi sur l'immigration et la protection des réfugiés</i> , LC 2001, c 27	s.117
2.	<i>Criminal Code</i> , RSC 1985, c C-46	s.286.2(4)(5) s.286.3
	<i>Code criminel</i> , LRC 1985, c C-46	s.286.2(4)(5) s.286.3