

Canadian Human Trafficking Prosecutions and Principles of Fundamental Justice: A Contradiction in Terms?

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Abstract

This report continues our ongoing longitudinal work (2014-2020) empirically examining the charging and prosecution of Canadian trafficking in persons offences. In addition to documenting the complex legal issues and challenges that arise in enforcing anti-trafficking laws, we focus our attention on the application and interpretation of law. Our findings solidify scholarly concerns about the effects of ongoing confluences of sex work and human trafficking, and the expansion of criminalization and other forms of legal regulation related to the commercial sex sector. Besides affirming the known list of harmful effects of legislative expansionism for the persons subjected to criminal and immigration law enforcement actions, our findings suggest that the criminalization of sex work via anti-trafficking law raises other potentially vexed legal issues. In this report, we outline several findings that expose concerns about the judicial interpretation of the elements of trafficking offences, the inherent difficulties with witness credibility and victim treatment in courts, problematic evidentiary requirements specific to anti-trafficking laws, and the use of expert opinion evidence in trials. We also argue that Canadian anti-trafficking laws potentially infringe fundamental principles of justice such as the rule of law and the principle of res judicata. These findings demonstrate a troubling trend towards increasing barriers to justice for sex workers and lay bare the intersecting effects of crimmigration, the stigmatization of commercial sex, and inequality in labour rights. To reduce labour exploitation, action must be taken to address the structural causes for precarious working conditions across all forms of labour.

Key words: Anti-trafficking laws and enforcement; confluences of law; legislative expansionism; principles of fundamental justice; arbitrary state action; *res judicata*; systemic racism and discrimination; reproduction of harmful stereotypes and stigma; access to equality and justice; human rights; labour rights; expert evidence; sex work law reform.

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Foreword

In this report, Dr. Hayli Millar and Dr. Tamara O'Doherty critically evaluate the state of anti-trafficking laws and enforcement in Canada. *Canadian Human Trafficking Prosecutions and Principles of Fundamental Justice: A Contradiction in Terms* delivers a much-needed scholarly perspective into the effectiveness of Canada's legal response to trafficking. As the findings show, the evidentiary basis underlying Canada's anti-trafficking framework is severely lacking.

From providing a statistical analysis of anti-trafficking enforcement, including the 92 prosecuted immigration and criminal trafficking cases, to examining the judicial interpretation of the trafficking in persons offences, from exploring legislative expansionism to discussing the potential infringement of fundamental principles of justice such as the rule of law and the principle of *res judicata*, the report produces compelling evidence of the inadequacies of the legal response to trafficking in Canada today.

Of particular interest to SWAN Vancouver Society (SWAN), a community-based organization supporting im/migrant sex workers, is the discussion of the legal framework's reproduction of harmful and outdated stereotypes about commercial sex work. Day-to-day on the front-line, SWAN witnesses the effects of ill-conceived anti-trafficking laws and enforcement, which make little to no distinction between trafficking, sex work and migration. Anecdotes of harm carry little weight in addressing the systemic vulnerability to human trafficking created by the laws and enforcement analyzed in this report. This ground-breaking study provides the evidence to support SWAN's assertion that Canada's anti-trafficking legal framework is more responsive to political imperatives than im/migrant sex workers' actual experiences.

This report is timely, emerging one year after Canada implemented a new National Strategy to Combat Human Trafficking (2019-2024). The report lays bare the shortcomings of the approaches outlined in the National Strategy and highlights the areas that require attention if the legal response to trafficking is to be effective. I urge legislators, policymakers and criminal justice personnel to carefully consider the report's findings to ensure that anti-trafficking laws and enforcement do no further harm.

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We extend our immense gratitude to colleagues, practitioners and activists who continue to inform, challenge, and show us how to do better.

Disclaimer: *The views and opinions expressed in this report are those of the authors and do not necessarily reflect the opinions of their affiliated universities.*

Executive Summary

Human trafficking is a grave human rights violation and a serious crime. It is internationally recognized and defined as a process involving some form of forced, fraudulent, or coerced movement or recruitment (and in the Canadian context exercising control, direction, or influence over someone's movements) with the express purpose of exploiting or facilitating the exploitation of that persons' labour or services.¹ Human trafficking should be internationally and domestically condemned, criminalized and punished. However, as critical legal scholars, we argue that application of the law, and particularly the application of laws that have serious consequences for the liberty and equality interests of those against whom the law is applied, ought to be guided by evidence-informed practices that respect basic human dignity and give primacy to human rights, consistent with the Office of the High Commissioner for Human Rights *Recommended Principles and Guidelines on Human Rights and Human Trafficking*.² We take exception to the conflation of human trafficking with commercial sex work, and migration, and the use of mainstream antitrafficking discourses as a pretext to over and under-police oppressed and racialized communities and to further restrict the mobility rights of women and girls.

With this report, we offer what we think is an important contribution in view of the Committee on the Elimination of Discrimination against Women's (CEDAW) current efforts to draft a *General Recommendation on Trafficking of Women and Girls in the Context of Global Migration*³ and considering some of the known adverse and heightened impacts of the COVID-19 pandemic for racialized and migrant communities and those working in precarious employment, including sex work.⁴ Specifically, we

¹ Adapted from the Article 3 of the *United Nations (UN) General Assembly Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (hereinafter the *UN Trafficking Protocol* or *Protocol*), 15 November 2000. Online: <<https://www.refworld.org/docid/4720706c0.html>> and the section 279.01 and section 279.04 human trafficking offence and exploitation definitions of the *Canadian Criminal Code*, RSC, 1985, c. C-46. Online: <<https://laws-lois.justice.gc.ca/eng/acts/c-46/>>

² Online: <<https://www.ohchr.org/Documents/Publications/Traffickingen.pdf>>.

³ Online: <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx>>. See, e.g., various NGO submissions on the Draft General Recommendation, especially those provided by the Canadian Alliance for Sex Work Law Reform; English Collective of Prostitutes; Global Alliance against Traffic in Women (GAATW); Global Network of Sex Work Projects (NSWP); Human Rights Watch; International Committee on the Rights of Sex Workers in Europe; Pivot Legal Society and the Coalition Against Trans Antagonism; Sex Work Research Hub; La Strada International; Scarlet Alliance, Australian Sex Workers Association. Online: <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx>>

⁴ See, e.g., GAATW, "A Feast in Time of COVID-19: The anti-trafficking movement needs to take a step back." (31 March 2020). Online: *GAATW News* <<https://www.gaatw.org/events-and-news/68-gaatw-news/1024-a-feast-in-time-of-covid-19-the-anti-trafficking-movement-needs-to-take-a-step-back>>; NSWP, Global Network of Sex Work Projects and UNAIDS joint statement: Sex workers must not be left behind in the response to COVID-19, 2020. Online: NSWP <<https://www.nswp.org/page/covid-19>>; International Committee on the Rights of Sex Workers in Europe, *Policy Demands: The Impact of Covid-19 on Sex Workers in Europe And Central Asia And Recommendations for Policy Makers*, 2020. Online: ICRSE <http://redlightcovid19.eu/wp-content/uploads/2020/04/Policy_brief_ICRSE_COVID19.pdf>; Living in

update our 2015 report findings⁵ by extending our longitudinal analysis of police-reported charges and prosecuted trafficking cases across now two datasets (2006-2014) and (2015-2018) of 92 prosecuted trafficking in persons cases. We provide a more in-depth examination of some of the legal issues emerging from these cases. Additionally, we discuss the implications of these data and list recommendations for consideration by various audiences in different realms, including those who create and enforce criminal and immigration laws, the mainstream media, and the public, non-profit and private sectors. Given longstanding systemic racism in the USA and Canada disproportionately targeting Black, Indigenous and other People of Colour that has become highly visible and impossible to ignore during the pandemic and because our data offer some qualified empirical support that anti-trafficking and anti-prostitution laws are being enforced and publicized along racialized, gendered, and sensationalistic lines in a context of over-surveilling some populations while under-protecting other groups (particularly Indigenous, Black and other racialized persons, im/migrants, same-sex and gender non-binary sex workers), in making our recommendations we recognize we are at a watershed moment and join various other critical race and feminist scholars, activists, and legal and human rights entities in calling for transformational change to end systemic racism and ensure a fully equitable and just Canadian society and criminal justice system.

We organize the report to firstly provide a basic descriptive statistical analysis of the enforcement of anti-trafficking laws in Canada. In this section, we provide a descriptive analysis of the government-reported data on police charging practices and our two datasets of 92 prosecuted immigration and criminal trafficking cases. We secondly provide a legal analysis of the judicial interpretation of the trafficking in persons offences, including a discussion of important evidential issues, constitutional challenges, and appeals emerging from the cases. We thirdly provide a preliminary analysis of what we perceive as potential legal implications of the current state of the law as they relate to core principles such as the rule of law, arbitrary state action, and *res judicata*, alongside the reproduction of harmful and outdated stereotypes about commercial sex work.

Throughout the report we highlight the problematic effects of conflating trafficking with prostitution and commodification offences—through law itself, judicial pronouncements, police-led campaigns, and

Community, COVID 19 and Sex Work, 2020. Online: *Summer 2020 Newsletter* <<https://livingincommunity.ca/>>; Migration Data Portal. Online: <<https://migrationdataportal.org/themes/migration-data-relevant-covid-19-pandemic>>; Roberta K. Timothy, “Coronavirus is not the ‘great equalizer’ – race matters: U of T expert”, (8 April 2020). Online: *U of T News* <<https://www.utoronto.ca/news/coronavirus-not-great-equalizer-race-matters-u-t-expert>>

⁵ Hayli Millar & Tamara O’Doherty (in collaboration with the SWAN Vancouver Society), *Key Findings: The Palermo Protocol & Canada: the evolution and human rights impacts of antitrafficking laws in Canada (2002–2015)*, (International Centre for Criminal Law Reform and Criminal Justice Policy, 2015). Online: ICCLR <<https://icclr.law.ubc.ca/wp-content/uploads/2017/06/Palermo-Project-Key-Findings-Report-15-October-2015-with-copyright-2.pdf>>

media coverage. Here we are attentive to the changed post-*PCEPA* (*Protection of Communities and Exploited Persons Act*, 2014) legal landscape and the fact that in both anti-commodification and anti-trafficking cases the courts are now bound by the *PCEPA* legislative objectives and its preambular claims that prostitution is inherently exploitive and violent and causes social harm by objectifying the human body and commodifying sexual activity.⁶ These findings, together with our previous research on what appears to be the racialized and gendered enforcement of Canadian anti-trafficking laws around an overly simplistic villain-victim-rescuer narrative,⁷ demonstrate a troubling trend towards increasing barriers to justice for migrant communities and sex workers based on carceral protectionism⁸ and lay bare the intersecting effects of crimmigration, the stigmatization of commercial sex, and inequality in labour rights. If reducing labour exploitation is a legislative goal, we must address the structural causes for precarious working conditions while working to improve access to equality and justice for sex workers, im/migrants, asylum seekers, and refugees.

⁶ *Protection of Communities and Exploited Persons Act*. S.C. 2014, c. 25. Assented to 2014-11-06, preamble paras 1 and 2.

⁷ Hayli Millar & Tamara O'Doherty, "Racialized, Gendered, and Sensationalized: An Examination of Canadian Anti-Trafficking Laws, their Enforcement, and their (Re)Presentation" (2020). 35:1 CJLS 23, DOI: <10.1017/cls.2020.2>

⁸ Jennifer Musto, *Control and Protect: Collaboration, Carceral Protection, and Domestic Sex Trafficking in the United States*, (Berkeley and Los Angeles: University of California Press, 2016).

Introduction

In 2015, together with SWAN Vancouver Society an im/migrant sex worker support agency in Vancouver, British Columbia, we conducted a critical analysis of the creation and enforcement of Canadian immigration and criminal anti-trafficking laws.⁹ The project employed a tripartite methodology: focus groups with SWAN staff, qualitative interviews with selected criminal justice policymakers and practitioners, and a legislative and case law analysis of verified trafficking in persons prosecutions from 2001-2014. Among our key findings, we documented concerns about inadequate empirical evidence for the creation and amendment of these laws; the conflation of human trafficking with commercial sex work where sex work is viewed as inherently violent and exploitive; the misrepresentation, especially exaggerated claims, of human trafficking cases by the media, government agencies and non-government organizations (NGOs); the gendered nature of prosecuted defendants; and the apparent sensationalized and racialized media coverage of human trafficking arrests and prosecutions. We also identified several complex legal and extra-legal issues that warranted further exploration. In observing there had been few trafficking prosecutions and convictions, we contextualized our original study as being in the early stages (first 10 years) of the enforcement of Canadian anti-trafficking laws, which despite anti-trafficking prohibitions coming into force in 2002 (immigration) and 2005 (criminal), did not produce charges and prosecutions until 2005 and 2006 respectively.¹⁰

We have now undertaken to verify subsequent prosecuted trafficking in persons cases, where a prosecution commenced or a verdict resulted, from 2015 to 2018, and to more systematically examine the aggregate 92 prosecuted cases from 2006 to 2018.¹¹ Where relevant, we reference some post-2018 prosecutions that are additional to these 92 cases. Also, we incorporate Statistics Canada police-reported crime statistics (2006-2018) to illustrate the changing dimensions of police charging practices for trafficking, prostitution, and commodification offences.

For this report, we consider anti-trafficking, anti-commodification, and anti-prostitution¹² laws together since Canadian laws and law enforcement efforts follow a largely reductive (and moralistic)

⁹ Millar & O'Doherty, *supra* note 5.

¹⁰ See our 2015 report for a discussion of the legislative development of these immigration and criminal anti-trafficking laws and their comparison to the *UN Trafficking Protocol* definition. See also Appendix C of this report for an updated summary of the 2005-2019 legislative amendments to the *Criminal Code* anti-trafficking provisions.

¹¹ The case data are current as of 30 April 2020. See Appendix A for a summary of our methods in categorizing cases, and a list of named defendants for the two datasets of 92 cases.

¹² We use the terms “human trafficking”, “trafficking in persons” and “trafficking” interchangeably. Given the associated stigma, we reluctantly use the terms “prostitute” and “prostitution” to align with dominant legal, political, and media discourses. Where

narrative erroneously conflating sex work with trafficking in persons irrespective of agency or consent.¹³ Importantly, our data were collected at a vital moment for criminal law reform given the 2013 Supreme Court of Canada decision in *Bedford* unanimously upholding the safety and security rights of sex workers by striking down the criminal prohibitions against publicly selling sexual services, operating a brothel, and living on the avails of prostitution as violations of personal security rights.¹⁴ This landmark decision was then quickly supplanted by the Conservative government's enactment of an asymmetric system of law criminalizing the purchase of sexual services, third party involvement in, and advertising another person's commercial sex work, among other prohibitions (*PCEPA*).¹⁵

These highly controversial laws, which came into effect in December 2014, have significantly changed the legal landscape of commercial sex.¹⁶ The *PCEPA* represents the entrenchment of a particular ideological stance on commercial sex: that sex work is inherently violence that disproportionately affects women and girls who are assumed to be passive “victims” in need of benevolent state protection. *PCEPA* thus seeks to assist the state in abolishing sex work by increasing the severity of the new and re-enacted laws, along with their corollary minimum and maximum penalties, and by adding subsidiary human trafficking offences and increasing the severity of their related penalties. There is now a troubling prospect for over-charging and multiple convictions for essentially the same offence given the significant overlap between the phrasing and key elements of some of the new commodification offences—especially procuring and financially or materially benefiting from sexual services—and the criminal trafficking in persons offences. Unsurprisingly, the courts are now beginning to recognize the “double

possible, we use the alternatives sex worker and sex work. We refer to trafficked persons as complainants or victims and to the alleged and convicted perpetrators as the accused or defendants.

¹³ This conflation is manifested in a multiplicity of ways, including the formulation and amendment of Canadian criminal anti-trafficking laws and in the jurisprudence interpreting and applying these laws; federal anti-trafficking policies, especially the *National Action Plan to Combat Human Trafficking* and the recently released \$75 million *National Strategy to Combat Human Trafficking 2019–2024*, and the Protecting Workers from Abuse and Exploitation (PWAE) immigration regulations; national government consultations and reports on trafficking in persons; anti-trafficking law enforcement units that originally were embedded in vice and counter-exploitation units; government and NGO anti-trafficking campaigns; and the mainstream media portrayal of trafficking in persons cases.

¹⁴ *Canada (Attorney General) v Bedford*, 2013 SCC 72.

¹⁵ See Appendix B for a summary of the *PCEPA* asymmetric criminalization model and its anti-commodification offences.

¹⁶ For various critiques, see, e.g., Brenda Belak & Darcie Bennett, *Evaluating Canada's Sex Work Laws: The case for repeal* (Vancouver: Pivot Legal Society, 2016). Online: PIVOT <http://www.pivotlegal.org/evaluating_canada_s_sex_work_laws_the_case_for_repeal>; Chris Bruckert, “Protection of Communities and Exploited Persons Act: Misogynistic law making in action” (2015) 30:1 CJLS 1, DOI: <<https://doi.org/10.1017/cls.2015.2>>; Jacqueline M. Davies, “The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis” (2015) 24:2 CJHS 78, DOI: <10.3138/cjhs.242-A9>; Elya M. Durisin, Emily van der Meulen, & Chris Bruckert (eds.), *Red Light Labour: Sex work regulation, agency, and resistance* (Vancouver: UBC Press, 2018); Phoebe J. Galbally, “Playing the Victim: A critical analysis of Canada's Bill C-36 from an international human rights perspective” (2016) 17:1 Melb. J. Int'l L135.

jeopardy” at play by applying the *Kienapple* principles¹⁷ and staying convictions in some cases for what is essentially the same crime.

The legislative conflation and expansion of criminal laws to regulate the commercial sex sector and sex trafficking stand in addition to 2012-introduced immigration regulations that are designed to prevent the migration of and/or to deport foreign nationals, especially young women and girls between the ages of 15 and 21, who are suspected to be traveling to Canada to work in the commercial sex sector, broadly defined, on the pretext of “protecting” them from exploitation. Some preliminary data suggest that, in addition to being gender biased, this regulation is being used to racially profile women wishing to migrate to Canada.¹⁸ This legislative expansionism and convergence of criminal and immigration laws and their enforcement (so-called “crimmigration”) to regulate commercial sex work are reinforced and augmented by a variety of other laws (family laws, municipal bylaws, residential tenancy laws, and taxation laws) that are also being used to punitively regulate those who work in the commercial sex sector.¹⁹ Chuang, for example, asserts that such exploitation creep and legislative expansionism is accompanied by increased surveillance of “at-risk” communities through preventive policing—especially police enforcement-based and protectionist undercover sting operations and workplace “raid and rescue” campaigns.²⁰ Scholars and activists note there is questionable empirical evidence about the effectiveness of these campaigns and frequently adverse consequences for members of the communities subject to intensified and unwarranted legal intervention.²¹

¹⁷ In *Kieneapple v R* (1974), [1975] 1 S.C.R. 729 at 744-745, the Supreme Court of Canada ruled that multiple convictions on the same cause invoke the *res judicata* defence, which essentially prohibits multiple convictions for a single act.

¹⁸ Rachele Daly, “*Canada’s Relationship with Women Migrant Sex Workers: Producing “vulnerable migrant workers” through “protecting workers from abuse and exploitation”* (Master’s thesis, Wilfred Laurier University, 2017).

¹⁹ See, e.g., Sandra Ka Hon Chu, Jen Clamen, & Tara Santini, *The Perils of “Protection:” Sex workers’ experiences of law enforcement in Ontario*. Canadian HIV/AIDS Legal Network, 2019. Online: <<http://www.aidslaw.ca/site/the-perils-of-protection/?lang=en>>; NSWP, *Policy Brief: The impact of anti-trafficking legislation and initiatives on sex workers*. (Edinburgh: Global Network of Sex Work Projects, 2018). Online: <https://www.nswp.org/sites/nswp.org/files/impact_of_anti-trafficking_laws_pb_nswp_-_2018.pdf>

²⁰ Janie A. Chuang, “Exploitation Creep and the Unmaking of Human Trafficking Law” (2014) 108:4 AJIL 609.

²¹ For detailed critiques, see Butterfly Asian and Migrant Sex Workers Support Network. *Brief to the House of Commons Standing Committee on Justice and Human Rights on Human Trafficking in Canada: How migrant sex workers are harmed by anti-trafficking initiatives and policies*. Ottawa: House of Commons Standing Committee on Justice and Human Rights, National Consultation on Human Trafficking in Canada, 2018; Canadian Alliance for Sex Work Law Reform (CASWLR) and Pivot Legal Society. *Joint Submission for Canada’s Review before the UN Committee on the Elimination of All Forms of Discrimination against Women*, 65th Session. Geneva: Committee on the Elimination of All Forms of Discrimination against Women, 2016. Online: <https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/CAN/INT_CEDAW_NGO_CAN_25385_E.pdf>; Canadian HIV/AIDS Legal Network. *Brief to the House of Commons Standing Committee on Justice and Human Rights on Human Trafficking in Canada*. Ottawa: House of Commons Standing Committee on Justice and Human Rights, National Consultation on Human Trafficking in Canada, 2018. Online: <<https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10002954/br-external/CanadianHIVAIDSLegalNetwork->

Reflecting this evolving legal and policy context, our intent in longitudinally examining trafficking in persons prosecutions is to continue contributing to the empirical record in order to increase access to equity and justice for oppressed and marginalized communities, namely, sex workers, im/migrants, asylum seekers and refugees. Our specific research goals were twofold: to continue documenting the patterns of anti-trafficking law enforcement in Canada and to provide a preliminary legal analysis of the state of the law.

To meet the objectives of our first goal, we examined anti-trafficking prosecutions pre- and post-*PCEPA* across a larger body of case law with the aim of updating our previous findings critically assessing Canada's implementation of the *UN Trafficking Protocol*. This comprises examining pre- and post-*PCEPA* sentencing trends, including victim access to restitution. Twenty years after its adoption, there continue to be many critiques of the *Protocol* and its impact at the national level given its preferencing of criminalization over human rights, its definitional inclusion of the phrasing "exploitation of the prostitution of others" that seems to invite the conflation of trafficking and sex work, and a growing body of experiential and empirical evidence about the adverse consequences of increased crime control and tightened border controls for already racialized and marginalized communities.²² Despite providing an internationally agreed definition, the *Protocol* has not resolved polarized definitional debates and there continues to be disagreement about what constitutes trafficking in persons. Few countries, including

[e.pdf](#)>; NSW, *Policy Brief: The impact of anti-trafficking legislation and initiatives on sex workers*. Edinburgh: Global Network of Sex Work Projects, 2018. Online: <https://www.nswp.org/sites/nswp.org/files/impact_of_anti-trafficking_laws_pb_nswp_-_2018.pdf>; Heidi Hoefinger, Jennifer Musto, P.G. Maciotti, Anne E. Fehrenbacher, Nicola Mai, Calum Bennachie & Calogero Giametta, "Community-Based Responses to Negative Health Impacts of Sexual Humanitarian Anti-Trafficking Policies and the Criminalization of Sex Work and Migration in the US" (2020) 9:1 Social Sciences 1; Andrea Krüsi, Katrina E. Pacey, Lorna Bird, Jill Chettiar, Sarah Allan, Darcie Bennett, Julio Montaner, Thomas Kerr, & Kate Shannon, "Criminalisation of Clients: Reproducing Vulnerabilities for violence and poor health among street-based sex workers in Canada—A qualitative study" (2014) 4:6 BMJ Open 1; Kimberly Mackenzie & Alison Clancey, *Im/Migrant Sex Workers, Myths & Misconceptions: Realities of the Anti-Trafficked, 2nd Edition*. SWAN Vancouver, 2020. Online: SWAN <https://3ef32e5e-964e-4a01-a2dc-2292a5000739.filesusr.com/ugd/3a120f_8cf163d66eb345d385b254eb91d72cd2.pdf>; Lucy Platt, Pippa Grenfell, Rebecca Meiksin, Jocelyn Elmes, Susan G. Sherman, Teela Sanders, Peninah Mwangi, & Anna-Louise Crago, "Associations between Sex Work Laws and Sex Workers' Health: A systematic review and meta-analysis of quantitative and qualitative studies". (2018) *PLOS Med* 15:12, Online: <<https://doi.org/10.1371/journal.pmed.1002680>>

²² See, e.g., Laura Agustín, "Snake Oil" (2020), 6:2 *Journal of Human Trafficking* 221, DOI: <10.1080/23322705.2020.1691811>; Elżbieta M. Goździak & Kathleen M. Vogel, "Palermo at 20: A Retrospective and Prospective" (2020), 6:2 *Journal of Human Trafficking* 109, DOI: <10.1080/23322705.2020.1690117>; GAATW. *Collateral damage: The impact of antitrafficking measures on human rights around the world*. (Bangkok, Thailand: GAATW, 2007); Julie Kaye. *Responding to Human Trafficking: Dispossession, colonial violence, and resistance among Indigenous and racialized women*. (Toronto: University of Toronto Press, 2017); Julie Kaye, Hayli Millar & Tamara O'Doherty, "Exploring Human Rights in the Context of Enforcement-Based Anti-Trafficking in Persons Responses" in John Winterdyk and Jackie Jones (eds.) *The Palgrave International Handbook of Human Trafficking*, (Palgrave International, 2019).

Canada, have enacted domestic laws that fully comply with the more rigorous three-part definition the *Protocol* provides.²³

In many countries, national implementation of the *UN Trafficking Protocol* has resulted in a binary enforcement regime of sex trafficking versus labour trafficking where national anti-trafficking laws are mainly used to police domestic commercial sex work, especially cases involving procuring (pimping and living on the avails) and the commercial sexual exploitation of female persons under the age of eighteen years.²⁴ Indeed, it has been argued that the USA has used the *Protocol* to pursue a global policy agenda to abolish commercial sex work under the guise of combating trafficking in persons;²⁵ clearly, Canada has not been immune from these American efforts as evidenced by the enactment of the *PCEPA*. Because of the *Protocol's* emphasis on trafficking in women and girls, most national enforcement regimes are gendered and protectionist with governments adopting various measures to prevent women and girls, who are assumed to lack agency and to be passive victims in need of being “rescued” by benevolent state and non-state actors, from engaging in commercial sex work. In some cases, this has meant gendered legal and policy restrictions on mobility rights. Again, Canada is not immune from these gender-biased travel restrictions given the stated objectives of the *PCEPA*, the *National Action Plan to Combat Human Trafficking*, and immigration regulations preventing workers (specifically, women and girls) from abuse and exploitation; in other words, preventing persons from migrating to Canada as a temporary foreign worker, international student, or visitor based on a suspicion that individual intends to work in the commercial sex sector, broadly defined, and facilitating the arrest and removal (deportation) of im/migrant sex workers.²⁶

There are mounting questions about the effectiveness of the *UN Trafficking Protocol*, too. Globally, few trafficking victims have been identified and some identified victims have been forcibly detained by government and non-government authorities, including as material witnesses.²⁷ Other victims have been

²³ Jean Allain, “No effective trafficking definition exists: Domestic implementation of the Palermo Protocol” (2014) 7:111 Alb. Gov't L. Rev.; Anne T. Gallagher, “Two cheers for the Trafficking Protocol” (2015) 4:14 Anti-Trafficking Review, DOI: <<https://doi.org/10.14197/atr.20121542>>.

²⁴ See, e.g., Elya M. Durisin & Emily van der Meulen, “Sexualized Nationalism and Federal Human Trafficking Consultations: Shifting Discourses on Sex Trafficking in Canada”(2020) *Journal of Human Trafficking*, DOI: <10.1080/23322705.2020.1743604>; Kaye, *supra* note 22; Katrin Roots, “Trafficking or Pimping? An analysis of Canada’s human trafficking legislation and its the implications” (2013) 28:1 CJLS 21.

²⁵ See, e.g., Janie Chuang, “The United States as Global Sheriff: Using unilateral sanctions to combat human trafficking” (2006) 27:2 Mich J. Int. Law 437.

²⁶ See, e.g., CASWLR, *Migrant Sex Workers and Sex Work-Related Laws*, 2015. online: CASWLR <<http://sexworklawreform.com/wp-content/uploads/2017/05/Migrant-Sex-Workers.pdf>>

²⁷ See, e.g., Melissa Ditmore & Thula Thakri, “Accountability and the Use of Raids to Fight Trafficking” (2012) 1 Anti-Trafficking Review 134, DOI <<https://doi.org/10.14197/atr.201218>>; Henry Wu, *Prosecution at Any Cost: The Impact of*

afforded temporary or permanent residence only when willing to cooperate with authorities in legal proceedings. And, some victims have been criminally prosecuted and/or deported back to their country of origin without adequate consideration for their rights, safety, or wellbeing. In addition, there is limited evidence to suggest that trafficking victims are being afforded their right to an effective remedy, including reparations.²⁸ Moreover, in some of the prosecuted cases, international legal scholars like Gallagher have noted significant political pressure to prosecute, resulting in violations of the rights of criminal suspects, including wrongful prosecutions, unfair trials, and inappropriate sentencing.²⁹ As our findings in this report suggest, many of these concerns seem to apply to anti-trafficking law enforcement efforts and prosecutions in Canada.

To meet the objectives of our second goal, we provide a more in-depth examination of some of the legal issues highlighted in our original report. These include: how the Canadian courts are interpreting the trafficking in persons offence, in particular the judicial analysis of the *actus reus* (conduct) and *mens rea* (purpose of exploitation) elements of the offence, especially in cases where there is an absence of overt physical force and/or where a complainant has previously or subsequently worked in the sex industry on a consensual basis; evidential issues in trafficking cases and circumstances that strengthen or weaken the prosecution of a case, including the credibility and reliability of complainant, defendant or witness testimony and the availability of corroborating, especially digital, evidence; emerging constitutional and legal challenges; and appellate jurisprudence on these and other legal issues. We also identify potential infringements of the rule of law through arbitrary state action, violations of the long-standing rule of *res judicata* (known as “double-jeopardy” in criminal law), and significant adverse impacts on sex workers, as well as certain groups such as migrant communities, who are already at risk of over-surveillance, over-incarceration (and/or deportation), and under-protection in Canadian law.

Taken together, our data demonstrate that rather than offering victims of trafficking “protection”, the ways that the criminal and immigration laws work together, as well as disjunctively, exacerbate existing access to justice and equity issues in Canada. We call for a reconsideration of the means chosen by the various government agencies involved in these processes to ostensibly address victimization in precarious labour markets. The systems in place at present do not meet the needs of victims of exploitation and/or violence; instead, they disproportionately cause harm, resulting in further marginalization and

Material Witness Warrants in Federal Trafficking Cases. Washington, DC: The Human Trafficking Legal Centre, 2020. Online: <https://www.htlegalcenter.org/wp-content/uploads/Material-Witness-Report-FINAL-FOR-PUBLICATION_April-2020.pdf>

²⁸ See, e.g., *Anti-Trafficking Review* Special Issue —Fifteen Years of the UN Trafficking Protocol. Online: <https://gaatw.org/ATR/AntiTraffickingReview_Issue4.pdf>; GAATW, *supra* note 22.

²⁹ Anne T. Gallagher, “Editorial: the problems and prospects of trafficking prosecutions: Ending impunity and securing justice” (2016) 6:1 *Anti-Trafficking Review* 1, DOI: <10.14197/atr.20121661>.

vulnerability. We recommend that the government agencies involved take several immediate actions in addition to beginning the complex work of addressing the root structural causes of exploitation and inequity.

Methods

As we did with our first study, we continue to examine prosecuted immigration and criminal cases involving one or more accused who are alleged to have engaged in trafficking in persons contrary to s.118 of the *Immigration and Refugee Protection Act (IRPA)* or ss. 279.01 to 279.04 of the *Criminal Code*. We used legal research methods like those in our first study to identify prosecuted cases. We searched legal research databases (CanLII and Quick Law and selected provincial court databases) for “human trafficking” and “trafficking in persons.” We used various search engines to locate mainstream (mainly print) news media reports about human trafficking convictions and relied on a variety of other grey literature and scholarly research sources to identify cases. We then attempted to confirm each case by locating some form of primary court documentation via legal databases. We were able to verify a second dataset of 57 trafficking in persons cases where a prosecution was initiated but not necessarily completed between January 2015 and December 2018. In addition, we include the first dataset of 35 cases prosecuted from 2006-2014.³⁰ For the combined 92 trafficking cases, we have primary court documentation confirming charges, verdicts, sentences and/or appeals for 87 cases and media reported information for the remaining five cases. Both datasets include cases with varying legal outcomes ranging from a trafficking offence conviction to a full acquittal on all charges to a verdict being overturned on appeal and a new trial ordered (see Appendix A for a list of the prosecuted case names for each dataset).

³⁰ In our 2015 report, we examined a first dataset of 33 cases, but subsequently found two additional cases where a prosecution was initiated, and a verdict reached between 2001 and 2014. We were able to obtain primary court documentation (transcribed court proceedings or official correspondence with the courts) for 34 of these 35 cases. For our second dataset where a prosecution was initiated and ideally a verdict obtained between 2015 and 2018, we obtained some form of primary court documentation for 53 cases and rely on media-reported convictions for the remaining four cases. Appendix A provides additional details of our case categorization methods and a list of case names for the two datasets.

Table 1: Legal Outcomes of Prosecuted Cases, Case Datasets (2015-2018; 2006-2014)

| Legal Outcomes | 2015-2018 | 2006-2014 | Total |
|--|-----------|-----------|-------|
| Trafficking Specific Conviction | 28 | 17 | 45 |
| Full Acquittal | 05 | 03 | 08 |
| Partial Acquittal | 10 | 10 | 20 |
| Other Legal Outcome | 04 | 03 | 07 |
| Ongoing / Unknown | 10 | 02 | 12 |
| Total | 57 | 35 | 92 |

Like our original report, we analyzed both sets of cases based on a primary defendant: one individual who is the primary person (although not necessarily the lead perpetrator) named in immigration enforcement or criminal court proceedings. This includes cases where there may be one or more co-accused who were jointly or separately prosecuted.³¹ We sought to more systematically examine all 92 cases across various dimensions: basic descriptive data about the type of charges, the nature of legal proceedings and legal outcomes, alongside summary information about the defendants and the complainants, alongside a more in-depth exploration of the many complex legal issues involved in the cases. By having two case datasets (2006-2014) and (2015-2018), we offer some observations about pre- and post-*PCEPA* prosecution legal developments, especially sentencing practices.

Additionally, we obtained police-reported crime data on trafficking in persons incidents and charges from 2006 to 2018, representing the first and most recent years for which such data are available.³² For the police-reported crime statistics publicly accessible via Statistics Canada (CANSIM), we requisitioned gender-disaggregated data for charged adults and youths to gain a sense of the gendered dimensions of police charging practices in relation to trafficking, prostitution and commodification offences (2006-2017

³¹ This contrasts with other studies like Katrin Roots, *The Human Trafficking Matrix: Law, Policy and Anti-Trafficking Practices in the Canadian Criminal Justice System* (PhD dissertation, York University, 2018) analysis of Ontario human trafficking prosecutions where she tracked individual defendants ($n=123$ defendants), which we would classify as a much smaller number of cases based on a primary defendant for each case.

³² Derived from Statistics Canada, CANSIM, Table 35-10-0177-01 Incident-based crime statistics, by detailed violations (2 May 2020), online: Government of Canada <<https://www150.statcan.gc.ca/t1/tb11/en/tv.action?pid=3510017701>>. Some of the data in these CANSIM tables vary from the data we previously derived from CANSIM for other reports; in this report, as in our previous reports, we use the most recent data Statistics Canada provides.

only). We also integrate and compare our findings with Statistics Canada publications documenting statistical trends in trafficking in persons offences³³ and prostitution offences.³⁴

We wish to acknowledge several limitations associated with our case documentation and analysis, including ongoing constraints accessing information.³⁵ For example, we know from media reporting on trafficking charges and the discrepancy between police-reported charges and the prosecuted cases we have been able to validate, the police and Crown prosecutors lay trafficking in persons charges in many cases that do not proceed to court or do not proceed to court on the trafficking charges. We rely heavily on publicly reported cases, which we readily acknowledge are not exhaustive or representative of all prosecuted cases. We recognize the limits of analyzing “ex situ” prosecuted cases as an empirically reliable and valid source of information about human trafficking, both in the sense of relying on post-arrest testimonials of alleged trafficking perpetrators and victims and what are likely to be the most extreme trafficking cases. The prosecuted cases we examined are extraordinarily complex and include situations where alleged trafficking victims have testified against criminal defendants to avoid being themselves prosecuted. Additionally, they include situations where the accused have exerted considerable pressure or intimidation to dissuade victims from testifying and/or situations where victims have recanted or contradicted previous statements to the police. Many of the cases are so-called *he said/she said* or “*W.D.* cases” where courts must carefully weigh the reliability and credibility of testimony where a defendant (who is not obliged to and often does not testify) asserts they were simply helping someone to

³³ Dyna Ibrahim, *Trafficking in Persons in Canada, 2016. Juristat Bulletin – Quick Fact*. Ottawa: Canadian Centre for Justice Statistics, 2018; Maisie Karam, *Trafficking in persons in Canada, 2014, Juristat*. Ottawa: Canadian Centre for Justice Statistics, 2016.

³⁴ Cristine Rotenberg, *Prostitution offences in Canada: Statistical trends. Juristat*, Ottawa: Canadian Centre for Justice Statistics, 2016.

³⁵ See e.g., Hayli Millar, Tamara O’Doherty & Katrin Roots, “A Formidable Task: Reflections on Obtaining Legal Empirical Evidence on Human Trafficking in Canada” (2017) 8 *Anti-Trafficking Review* 34, DOI <<https://doi.org/10.14197/atr.20121783>>. Unlike many other countries, Canada does not publish race/ethnicity disaggregated police-reported crime data. Other data such as the Integrated Criminal Court Survey and gender-disaggregated police-reported crime data for trafficking in persons offences are not publicly accessible, although they may be available for purchase from Statistics Canada. Immigration data either do not exist or are not publicly available. This includes police-reported immigration offence data other than those contrary to sections 117 (organizing entry) and 118 (trafficking in persons) of the *Immigration and Refugee Protection Act*, data on the number of persons prevented from temporarily migrating to Canada based on a suspicion they may be exploited in the commercial sex sector, and disaggregated data (by employment sector) on the number of persons removed from Canada for illegally working in the commercial sex sector. Moreover, the available government data are often inconsistent and contradictory, as acknowledged by the Housefather (2018) Parliamentary Standing Committee on Justice and Human Rights, whose (controversial) recommendations led to the establishment of a national hotline as a data gathering and information-sharing strategy rather than acting on a 2010 Statistics Canada proposed national framework for data collection on trafficking in persons.

voluntarily engage in commercial sex work versus a complainant who testifies their participation was non-voluntary and/or they were being exploited.³⁶

As our case findings also demonstrate, Canadian prosecutions appear to be heavily influenced by a dominant narrative that conflates human trafficking with domestic commercial sex work, especially what is being referred to by Crown and defence counsel and the courts as “pimping” or “pimping plus” some element of exploitation³⁷ and the commercial sexual exploitation of children (CSEC).³⁸ As we have observed elsewhere, this conflation serves to invisibilize the many other forms of exploitation and trafficking, including same-sex and gender non-binary sex trafficking, and a range of other labour and human rights violations that occur in many other labour sectors.³⁹

Finally, we recognize the type of published (reported) court proceedings we use are highly variant in the information provided about the criminal offences, defendants and complainants, ranging from pretrial proceedings through to appeals that vary in length from a few to more than 100 pages for a single judgment. For some cases, we have multiple pre-trial, trial, sentencing, and appellate proceedings, while for others we have only one type of proceeding. Most cases are multi-year proceedings, often involving significant periods of pre-trial custody for the accused including those fully or partially acquitted of trafficking offences. Legal proceedings, including appeals, were ongoing at the time of writing for some cases. Moreover, the court proceedings increasingly redact information about complainants to protect

³⁶ *R v S. (W.D.)* [1994] 3 SCR 521.

³⁷ See *R v D'Souza*, 2016 ONSC 2749, para 39.

³⁸ The prosecution of so-called “domestic minor sex trafficking” is not specific to Canada. See, e.g., Elżbieta M. Goździak, “Low Hanging Fruit: How Domestic Minor Sex Trafficking Erased Foreign-born Victims of Child Trafficking from Anti-trafficking Efforts in the United States” (2020) 6:2 *Journal of Human Trafficking* 226, DOI: <10.1080/23322705.2020.1691821>. See especially the scholarship of American anthropologist Jennifer Musto who observes these “carceral protective” shifts in the USA. Jennifer Musto, “Domestic minor sex trafficking and the detention to-protection pipeline” (2013), 37 *Dialectical Anthropology* 257, DOI <10.1007/s10624-013-9295-0>; Musto, *supra* note 8; Jennifer Musto, “Beyond Trafficking and Slavery: Domestic sex trafficking and the punitive side of anti-trafficking protection. (27 January 2015) *Open Democracy*. Online: <<https://www.opendemocracy.net/en/beyond-trafficking-and-slavery/domestic-sex-trafficking-and-punitive-side-of-antitrafficking-protectio/>>. See also Kathleen G. Williamson & Anthony Marcus, “Black Pimps Matter: Racially selective identification and prosecution of sex trafficking in the United States”, In *Third Party Sex Work and Pimps in the Age of Anti-Trafficking*, ed. Amber Horning and Anthony Marcus, (Switzerland: Springer International Publishing, 2017).

³⁹ *Millar & O'Doherty, supra* note 7. See especially Tamara O'Doherty & Ian Waters, “Gender, Victimization, and Commercial Sex: A comparative study” (2019) 40:1 *Atlantis* 18 regarding the differential gender-based impacts of criminalization on sex workers generally, and Nora Butler Burke, “Double Punishment: Immigration penalty and migrant trans women who sell sex”, in Elya Durisin, Emily van der Meulen, & Chris Bruckert, eds, *Red Light Labour: Sex Work Regulation, Agency and Resistance*, (Vancouver: UBC Press, 2018) 203 on the intersecting effects of citizenship, gender, and sex work. For comparative research on the intersectionality of exclusion from trafficking protection, see also Anne E. Fehrenbacher, Jennifer Musto, Heidi Hoefinger, Nicola Mai, P.G. Macioti, Calogero Giametta & Calum Bennachie, “Transgender People and Human Trafficking: Intersectional Exclusion of Transgender Migrants and People of Color from Anti-trafficking Protection in the United States”(2020), 6:2 *Journal of Human Trafficking* 182, DOI: <10.1080/23322705.2020.1690116>.

their identities and more recently are starting to anonymize the defendant by initials only for the same reason, which makes tracking and triangulating cases exceptionally challenging. Although highly variant, it remains our preference to analyze the reported cases as a primary data source that typically provides more richly detailed and arguably more accurate information than some of the mainstream news media, especially about offence dynamics, the defendants and the complainants, and that speaks to some of the enormous legal and other complexities in investigating, adjudicating and sentencing (alleged) human trafficking cases.

Key Findings

We structure our report to discuss the patterns of enforcement first, and then provide a more in-depth examination of the legal issues. We acknowledge the post-*PCEPA* commodification and prostitution offences are in their early years of enforcement and it is difficult to establish any definitive patterns since we can only assess about five years of available national statistical data for the new and re-enacted offences. The “Patterns of Enforcement” section provides a brief overview of trends in police-reported crime statistics on trafficking in persons, prostitution, and commodification offences before and after the enactment of the *PCEPA*. We then describe and analyze the prosecuted trafficking in persons cases. This section includes some brief descriptive data about the nature of the charges, legal proceedings and outcomes, the criminal defendants, and the complainants across the combined 92 cases. To complete this section, we provide a descriptive analysis of sentencing patterns. The “Legal Analysis” section of the report focuses first on how the courts are interpreting the elements of the offences before turning to a discussion of the common evidentiary issues on which many of the cases center. We then discuss the various appeal cases, before concluding the section by outlining the basis on which accused have asserted their *Charter* rights have been violated by the enforcement of criminal and immigration laws.

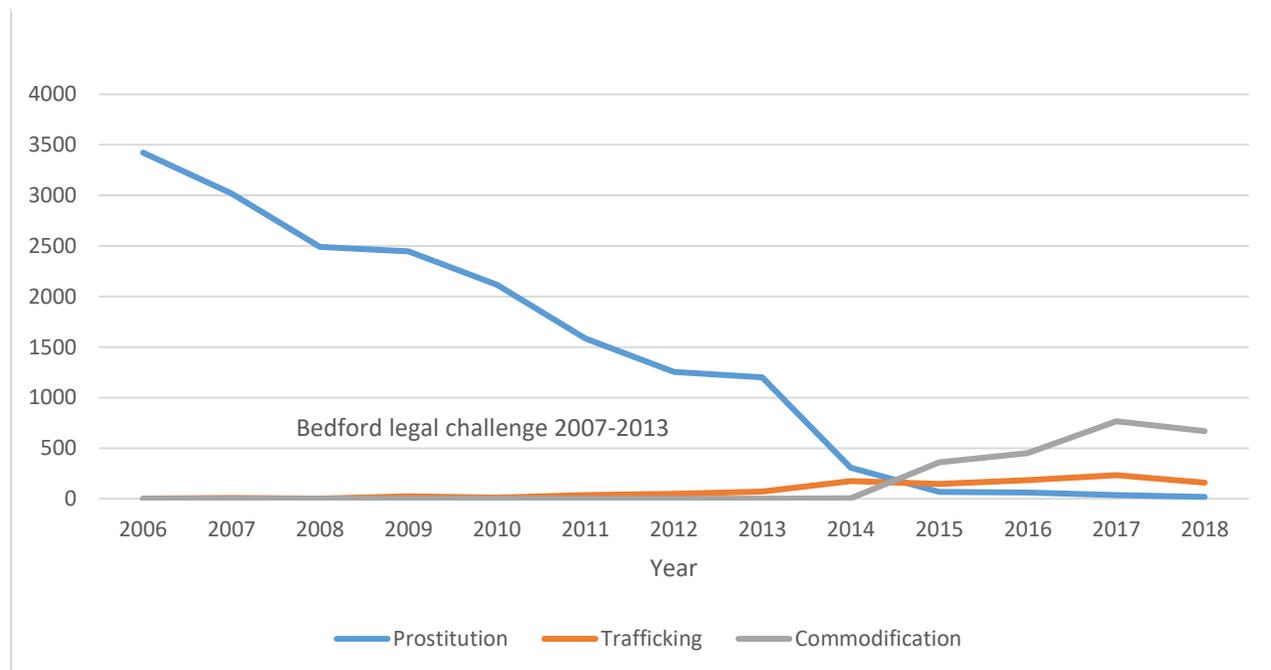
PATTERNS OF ENFORCEMENT OF CANADA’S ANTI-TRAFFICKING LAWS

Police-Reported Crime Data

Paralleling Canada’s changed legal landscape for regulating commercial sex, we found that police-reported prostitution offence charges against persons under the constitutionally impugned provisions of the *Criminal Code* sharply declined, coinciding with the *Bedford* (2007-2013) legal challenge, but are gradually being replaced by trafficking in persons and the new commodification and re-enacted prostitution offences, where the number of persons charged have progressively increased. As Figure 1 illustrates, the pre-*PCEPA* prostitution incidents and persons charged started declining at least as early as

2007 and by 2013 about one-third as many persons were being charged with prostitution-related offences as were being charged in 2006. There was then another sharp reduction in 2014 coinciding with the SCC *Bedford* decision in late-2013 ruling three sections of the *Criminal Code* as unconstitutional.

Figure 1: Longitudinal Analysis of Trafficking, Prostitution, Commodification Offences, Total Persons Charged (2006-2018)



For trafficking offences, police-reported charges reveal that 1,096 persons were charged in relation to 1,416 actual incidents of trafficking in persons between 2006 and 2018, with the vast majority (82%) of these persons being charged in the last five years (2014-2018).⁴⁰ Most of the charged persons were adults (1,035 or 94% of persons charged) and most of the persons charged (82% of 937 persons charged between 2006 and 2017) were male. Even though police-reported trafficking incidents and the number of persons charged have steadily increased since 2010, it is important to contextualize that trafficking in persons continues to account for a small proportion of criminal activity in Canada; for example, 0.02% of criminal incidents reported to the police in 2016.⁴¹ According to Statistics Canada, about one-third (32%) of police-reported trafficking in persons incidents between 2009 and 2016 were cross-border offences

⁴⁰ See also *Karam, supra* note 33 at 3 who observes the rate of police-reported trafficking violations almost doubled between 2013 and 2014.

⁴¹ See *Ibrahim, supra* note 33 at 3.

involving violations of the *IRPA*.⁴² However, our two datasets of prosecuted cases suggest limited evidence of cross-border trafficking (only 7, or 8%, of 92 prosecuted cases).

As Table 2 below illustrates, persons charged with trafficking were geographically concentrated in certain provinces, especially Ontario (771 persons or 70%) and Quebec (162 persons or 15%).⁴³ They were also highly concentrated in certain cities, a pattern observed by Statistics Canada as well.⁴⁴ In Ontario, most persons charged were in major cities such as Toronto and Ottawa. Likewise, in Quebec, most charged persons were in Montreal and Quebec City. These geographic variations have been attributed in government and popular discourse to some cities, especially those in Ontario, with busy international border crossings experiencing a greater amount of trafficking.⁴⁵ However, the variations are equally likely to reflect differing policing and prosecutorial priorities and the amount and type of resources dedicated to counter-trafficking in some provinces, especially Ontario.⁴⁶

⁴² *Ibid* at 4.

⁴³ Provinces and territories are listed east to west and south to north. We excluded Newfoundland/Labrador, Prince Edward Island, and the Yukon Territory from this table since there were no police-reported trafficking incidents or persons charged (2006-2018).

⁴⁴ *Ibrahim, supra* note 33 at 6.

⁴⁵ *Ibid* at 7.

⁴⁶ *Ibid* at 7 identifying criminal justice training and public awareness campaigns. In 2016 Ontario launched a Strategy to End Human Trafficking investing as much as \$72 million to increase awareness, improve services for victims, and enhance justice system capacity and coordination <https://news.ontario.ca/owd/en/2016/06/ontario-taking-steps-to-end-human-trafficking.html>. Some Ontario police departments have dedicated specialized counter-trafficking units like the Toronto Police Service Human Trafficking Enforcement Team, which is referenced in several of the prosecuted trafficking cases we examined. In contrast, there are comparatively few trafficking, commodification, and prostitution-related charges against persons in the province of British Columbia (BC), likely attributable in part to the Vancouver Police Department's 2013 Sex Work Enforcement Guidelines instructing police officers to give primacy to alternative measures and assistance when dealing with sex workers. Online: <<https://vancouver.ca/files/cov/sex-work-response-guidelines.pdf>>. Prosecutors in BC have encountered various legal challenges and controversies in prosecuting federal immigration trafficking cases (*Ng; Ladha; Orr*) and provincial criminal trafficking cases (*Moazami; Mohsenipour*) where there are ongoing investigations into the conduct of the lead Detective and other members of the Vancouver Police Department Counter Exploitation Unit involved in investigating these cases.

Table 2: Trafficking in Persons Offences, Total Persons Charged by Province and Territory (2006-2018)

| | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | Total |
|---|------|------|------|------|------|------|------|------|------|------|------|------|------|-------|
| Actual incidents | 3 | 10 | 11 | 41 | 23 | 60 | 60 | 78 | 143 | 239 | 249 | 271 | 228 | 1416 |
| Persons charged by province / territory | 1 | 7 | 1 | 23 | 11 | 36 | 50 | 72 | 175 | 145 | 183 | 233 | 159 | 1096 |
| Nova Scotia | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 2 | 10 | 0 | 3 | 2 | 19 |
| New Brunswick | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 3 |
| Quebec | 0 | 0 | 1 | 2 | 2 | 8 | 5 | 14 | 16 | 12 | 35 | 33 | 34 | 162 |
| Ontario | 0 | 6 | 0 | 15 | 9 | 22 | 38 | 38 | 145 | 94 | 125 | 173 | 106 | 771 |
| Manitoba | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 3 | 3 | 8 | 6 | 1 | 7 | 28 |
| Saskatchewan | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 2 | 2 | 0 | 5 |
| Alberta | 0 | 0 | 0 | 5 | 0 | 1 | 0 | 12 | 6 | 15 | 12 | 11 | 5 | 67 |
| BC | 1 | 0 | 0 | 0 | 0 | 5 | 7 | 2 | 3 | 3 | 3 | 5 | 5 | 34 |
| NWT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 5 | 0 | 5 |
| Nunavut | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 2 |

These geographic charging practices are difficult to reconcile with government and popular claims about Indigenous women and girls being trafficked in view of the negligible number of trafficking in persons charges in the Prairie provinces and in the territories. Likewise, if trafficking in persons charges are largely limited to two provinces, Ontario and Quebec, which account for 85% of all persons charged, the geographic distribution of charges are difficult to reconcile with claims about the involvement of organized crime and criminal gangs since presumably organized and criminal networks operate in most if not all provinces and territories. One might also expect higher rates of human trafficking linked to certain employment sectors—like domestic work, health care, construction, agriculture, and restaurants—and resource extraction industries, especially the oil and gas sectors in Alberta and the territories, which often rely on temporary migrant labour.

Compared with persons charged with a trafficking offence, a much larger number of persons (18,027) were charged with prostitution offences between 2006 and 2018 in relation to 28,956 actual incidents.⁴⁷ These charges were concentrated in certain regions (central Canada and the Prairies) and provinces with Ontario, Alberta, Quebec, Saskatchewan accounting for 82% of all persons charged, again suggesting the politicized nature of police charging practices across differing types of offences.

⁴⁷ For the period 2006-2017, 17,877 (99.3%) of 18,009 persons charged were adults and 132 (0.07%) were youths, while 7,985 (44.3%) were females and 10,024 (55.7%) were males.

Table 3: Prostitution-Related Offences, Total Persons Charged by Province and Territory (2006-2018)

| | 2006 | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 | 2018 | Total |
|--|------|------|------|------|------|------|------|------|------|------|------|------|------------------|-------|
| Total offences by province / territory ⁴⁸ | 3423 | 3020 | 2490 | 2448 | 2117 | 1583 | 1254 | 1202 | 306 | 69 | 60 | 37 | 18 ⁴⁹ | 18027 |
| NL | 2 | 0 | 1 | 14 | 1 | 1 | 0 | 2 | 0 | 0 | 0 | 0 | 0 | 21 |
| PE | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 |
| NB | 29 | 56 | 60 | 29 | 38 | 7 | 3 | 4 | 2 | 27 | 0 | 0 | 1 | 255 |
| NB | 50 | 69 | 29 | 32 | 29 | 22 | 37 | 31 | 1 | 1 | 0 | 0 | 0 | 301 |
| QC | 883 | 623 | 380 | 403 | 332 | 291 | 220 | 156 | 16 | 6 | 7 | 2 | 5 | 3324 |
| ON | 1301 | 1170 | 866 | 1057 | 795 | 415 | 344 | 244 | 39 | 15 | 14 | 5 | 2 | 6267 |
| MB | 114 | 139 | 171 | 97 | 87 | 151 | 142 | 98 | 49 | 0 | 2 | 1 | 0 | 1051 |
| SK | 167 | 179 | 184 | 224 | 182 | 200 | 192 | 248 | 69 | 13 | 3 | 3 | 2 | 1666 |
| AB | 516 | 477 | 618 | 461 | 486 | 319 | 200 | 350 | 114 | 4 | 34 | 20 | 2 | 3601 |
| BC | 360 | 306 | 181 | 131 | 166 | 176 | 116 | 69 | 15 | 3 | 0 | 6 | 6 | 1535 |
| YT | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 |
| NT | 0 | 1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 2 |
| NU | 1 | 0 | 0 | 0 | 0 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 2 |

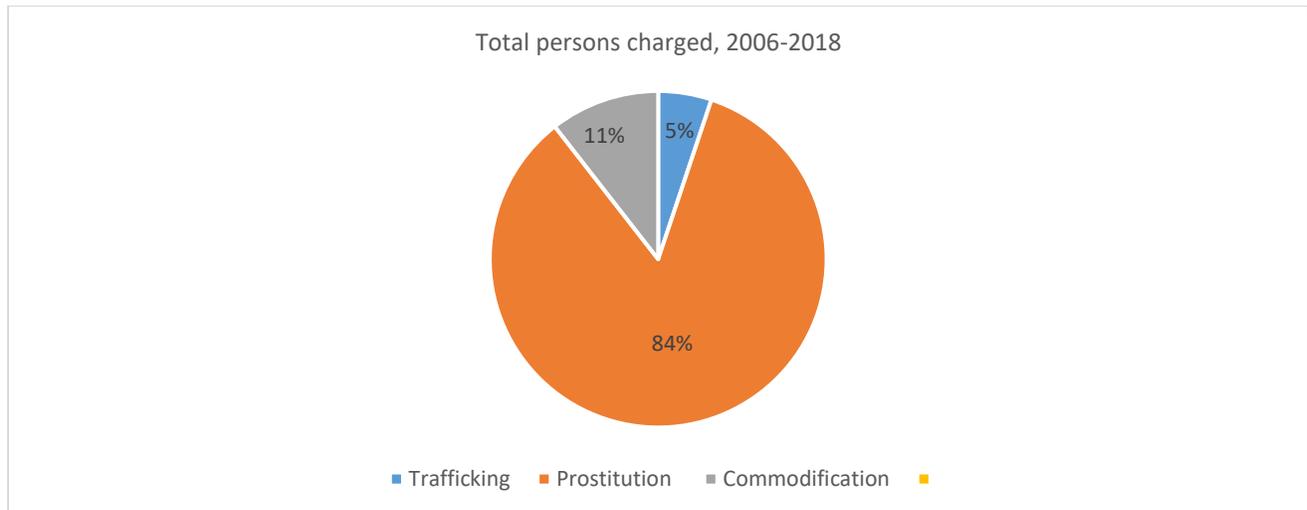
Comparable to trafficking in persons, prostitution offences have historically accounted for a small fraction of all criminal activity, about 0.1% of all criminal offences between 2009 and 2014 according to Statistics Canada.⁵⁰ Before the *PCEPA* changes came into force in December 2014, most (82%) prostitution charges were for publicly communicating to provide or obtain sexual services and almost half of those charged (43%) were female, with Saskatchewan having the highest average police-reported rate from 2009 to 2014. Figure 2 compares the overall distribution (aggregate or total number) of persons charged with trafficking, prostitution, and commodification offences between 2006 and 2018.

⁴⁸ See Appendix G: List of Provincial/Territorial Acronyms.

⁴⁹ To illustrate how the post-*PCEPA* revised prostitution offences are being charged, in 2018 these offences included one person who was charged for procuring, 8 persons who were charged with communicating to provide sexual services, and 9 persons who were charged with stopping or impeding traffic.

⁵⁰ *Rotenberg*, *supra* note 34 at 3.

Figure 2: Aggregate Analysis of Trafficking, Prostitution, and Commodification Offences, Total Persons Charged (2006-2018)



From December 2014 when the new *PCEPA* offences came into force to the end of 2018, a total of 2,250 persons were charged with commodification offences in relation to 3,537 actual incidents.⁵¹ As one would expect since the *PCEPA* is an end-demand or asymmetric criminalization model aimed at criminalizing those who purchase sexual services and third parties who benefit from another person selling sexual services, most persons were charged for obtaining sexual services for consideration from an adult or minor (1,855 or 82% of persons charged) or procuring an adult or minor to provide sexual services for consideration (307 or 14% of persons charged). Comparatively few persons were charged with receiving a material benefit (79 persons) or advertising sexual services (9 persons). Consistent with its gender binary and heteronormative assumptions, the *PCEPA* certainly appears to have changed the gendered dimensions of who is being charged from roughly half females (who were being charged with providing sexual services and where there was a very high-repeat charge rate according to Statistics Canada)⁵² pre-*PCEPA* to almost all (96%) males who are mainly being charged for purchasing sexual services post-*PCEPA*.⁵³

⁵¹ For the period 2006-2017, 1,541 (97.5%) of those charged with commodification offences were adults and 40 (2.5%) were youths, while 66 (4.2%) were females and 1515 (95.8%) were males in relation to 2,510 incidents, which is again consistent with an asymmetric criminalization model that is based on gender binary and heteronormative assumptions about sex work.

⁵² Rotenberg, *supra* note 34 at 3.

⁵³ These gender disaggregated data are current to 2017 only.

Table 4: Commodification Offences, Total Persons Charged by Type of Offence (2014-2018)

| Commodification offences | 2014 | 2015 | 2016 | 2017 | 2018 | Total |
|--|------|------|------|------|------|-------|
| Total commodification Canada | 3 | 360 | 452 | 766 | 669 | 2250 |
| Obtaining sexual services for consideration | 1 | 290 | 315 | 649 | 514 | 1769 |
| Obtaining sexual services for consideration < 18 | 0 | 14 | 25 | 17 | 30 | 86 |
| Receiving Material Benefit | 0 | 8 | 8 | 12 | 12 | 40 |
| Receiving Material Benefit < 18 | 0 | 9 | 6 | 16 | 8 | 39 |
| Procuring | 2 | 27 | 61 | 43 | 64 | 197 |
| Procuring < 18 | 0 | 10 | 34 | 27 | 39 | 110 |
| Advertising sexual services | 0 | 2 | 3 | 2 | 2 | 9 |

The significant increase in commodification charges—which more than doubled between 2015 and 2017 while slowing slightly in 2018—is concerning and additional longitudinal data are needed to assess whether this is part of a longer-term trend where the new commodification offences will simply replace the previous prostitution-related offences in terms of large numbers of persons being charged.

Additionally, like the trafficking and prostitution offences, there are important geographic variations where most persons charged with commodification offences were in the Prairie provinces of Alberta, Manitoba, and Saskatchewan (representing 1,528 or 68% of persons charged) and central Canada (Ontario and Quebec representing 602 or 27% of persons charged).

Table 5: Commodification Offences, Total Persons Charged by Province and Territory (2014-2018)

| Commodification offences by year | 2014 | 2015 | 2016 | 2017 | 2018 | Total |
|---|------|------|------|------|------|-------|
| Total persons charged by province / territory⁵⁴ | 3 | 360 | 452 | 766 | 669 | 2250 |
| Newfoundland/Labrador | 0 | 0 | 1 | 1 | 0 | 2 |
| Prince Edward Island | 0 | 0 | 1 | 1 | 0 | 2 |
| Nova Scotia | 0 | 4 | 5 | 2 | 17 | 28 |
| New Brunswick | 0 | 0 | 12 | 14 | 19 | 45 |
| Quebec | 0 | 9 | 55 | 98 | 75 | 237 |
| Ontario | 0 | 60 | 71 | 115 | 119 | 365 |
| Manitoba | 0 | 67 | 65 | 122 | 144 | 398 |
| Saskatchewan | 0 | 97 | 107 | 93 | 83 | 380 |
| Alberta | 2 | 119 | 124 | 309 | 196 | 750 |
| British Columbia | 1 | 4 | 10 | 11 | 15 | 41 |
| Nunavut | 0 | 0 | 1 | 0 | 1 | 2 |

⁵⁴ Yukon Territory and the Northwest Territories were excluded from this table since no persons were charged.

It is difficult to draw any firm conclusions about police-reported charging practices for the new commodification offences because there are just five years of publicly available statistical data. For all three groups of offences—trafficking in persons, the new commodification, and the revised prostitution offences—it will be useful to continue to track these police-reported incidents and charging practices longitudinally as there have been some fluctuations (slight decreases in the number of reported commodification incidents and persons charged in 2018).

In relation to the changed post-*PCEPA* law enforcement landscape, the police—and other law enforcement agencies including border enforcement and bylaw authorities—have changed their policing tactics by implementing proactive (preventive) suppression campaigns, including undercover sting operations and workplace raids,⁵⁵ that are strategically packaged for and by the media through press conferences as “rescuing” vulnerable young women and girls from exploitation (being forced into the sex trade or perceived to be at risk of being trafficked). These operations have included the RCMP’s Canada-wide multi-agency “Northern Spotlight”,⁵⁶ York Regional Police’s “Project Raphael” that is associated with several cases involving alleged police entrapment,⁵⁷ and Peel Regional Police’s “Rescue Innocence” where the media evidently reported the statistics and information provided to them by the police, irrespective of the accuracy of that information.⁵⁸ A number of these and other operations have specifically targeted sex purchasers through police sting operations, such as Cape Breton Regional Police’s “Operation John Be Gone”⁵⁹ and various other police undercover (sting) operations in cities like Montreal, London, Toronto, York, Edmonton, and Vancouver where in some instances the media have published the names, ages and community of residence of the alleged purchasers in an effort to publicly shame and deter them and other potential purchasers.⁶⁰

⁵⁵ See, e.g., Canadian HIV/AIDS Legal Network, *Brief to the House of Commons Standing Committee on Justice and Human Rights on Human Trafficking in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2018), online: *Canadian HIV/AIDS Legal Network* <<http://www.aidslaw.ca/site/brief-to-the-house-of-commons-standing-committee-on-justice-and-human-rights-on-human-trafficking-in-canada/?lang=en>>; *Chu, Clamen and Santini, supra* note 19.

⁵⁶ Royal Canadian Mounted Police, Operation Northern Spotlight VII: Canadian police services continue to work together to stop human trafficking” (24 October 2018), online: *RCMP News Release* <<https://www.rcmp-grc.gc.ca/en/news/2018/operation-northern-spotlight-vii-canadian-police-services-continue-work-together-stop>>. See also SWAN Vancouver’s response to this campaign: <<https://www.swanvancouver.ca/northern-spotlight>>

⁵⁷ Examples include: *R v C.D.R.*, 2019 ONSC 6894; *R v Faroughi*, 2020 ONSC 407; *R v Haniffa*, 2017 ONCJ 780.

⁵⁸ *R v Joseph*, 2018 ONSC 464.

⁵⁹ Cape Breton Post, “Exclusive: Cape Breton police complete second prostitution sting” (8 August 2018), online: *Cape Breton Post* <<https://www.capebretonpost.com/news/local/exclusive-cape-breton-police-complete-second-prostitution-sting-232367/>>

⁶⁰ See, e.g., Amy Judd, “Former Vancouver Private School Teacher, School Trustee among 27 Men Arrested in VPD Sex Sting” (23 January 2019), online: *Global News* <<https://globalnews.ca/news/4879364/47-men-arrested-vancouver-sexual-services-youth/>>.

These police tactics raise complex legal questions about the defence of entrapment and a suspect's right to a fair trial, particularly in cases involving significant adverse, and in some cases inaccurate or misleading, publicity. A number of these police operations and their associated press conferences have been actively opposed by sex workers and sex worker rights organizations who question the efficacy of the campaigns, along with their negative impacts.⁶¹ Equally important, in addition to adversely affecting the right of sex workers to seek a livelihood—it is generally not illegal for an adult to consensually sell sex in Canada unless doing so publicly in a manner that impedes traffic or is in close proximity to a place where children are likely to be present—these campaigns jeopardize the health, safety, and wellbeing of sex workers, including migrant sex workers who have been detained and summarily deported.⁶²

With respect to these enforcement campaigns, police agencies now frequently publish their own data via the mainstream and social media at the initial point of arrest, rather than with reference to which cases are ultimately pursued by Crown prosecutors. In fact, when these police-generated media data are carefully examined, they typically indicate that few minors or exploited persons are actually “rescued” despite often hundreds of sex workers being interviewed by the police. While police agencies often note an unwillingness on the part of most interviewed sex workers to cooperate with the police, they fail to recognize the many complex reasons why this may be so. The reality is that sex workers generally do not trust the police and the criminal justice system. Sex workers often face stigma in their interactions with various criminal justice personnel; they are too frequently treated as non-ideal victims and are disbelieved when reporting crimes to the police.⁶³ Further, sex workers often perceive or experience individual and structural violence directed by the police and other law enforcement agencies.⁶⁴ These experiences and

⁶¹ Justin Ling, “Governments have failed sex workers—and they’re running out of patience” (6 September 2018), online: *Macleans* <<https://www.macleans.ca/news/canada/governments-have-failed-canadas-sex-workers-and-theyre-running-out-of-patience/>>; Pivot Legal Society. Open Letter to BC Police Forces: End participation in Operation Northern Spotlight. Vancouver: Pivot Legal Society, 2017. Online: *Pivot Legal Society* <http://www.pivotlegal.org/open_letter_to_bc_police_forces_end_participation_in_operation_northern_spotlight>. See also SWAN Vancouver’s response to this campaign: <<https://www.swanvancouver.ca/northern-spotlight>>

⁶² See *Burke*, *supra* note 39; *Chu, Clamen, & Santini*, *supra* note 19; Elene Lam. *Behind the Rescue: How Anti-Trafficking Investigations and Policies Harm Migrant Sex Workers*, (Toronto: Butterfly Asian and Migrant Sex Workers Support Network, 2018).

⁶³ *Chu, Clamen, & Santini*, *supra* note 19; Andrew Krüsi, Thomas Kerr, Christina Taylor, Tim Rhodes, & Kate Shannon, “They Won’t Change It Back in Their Heads that We’re Trash”: The intersection of sex work related stigma and evolving policing strategies. (2016) 38: 7 *Sociology of Health and Illness* 1137; Robyn Maynard, “Do Black Sex Workers’ Lives Matter?” in Elya Durisin, Emily van der Meulen, & Chris Bruckert, *Red Light Labour: Sex work regulation, agency and resistance*, (Vancouver: UBC Press, 2018) 281.

⁶⁴ See Adina Landsberg, Kate Shannon, Andrea Krusi, Kota DeBeck, MJ Milloy, Ekatarina Nosova, Thomas Kerr, & Kanna Hayashi, “Criminalizing Sex Work Clients and Rushed Negotiations among Sex Workers Who Use Drugs in a Canadian Setting” (2017) 94:4 *Journal of Urban Health* 563; Tamara O’Doherty, *Victimization in the Canadian Off-street Sex Industry* (PhD Dissertation, Simon Fraser University, 2015).

perceptions are amplified for racialized and marginalized communities including sex workers, migrants, asylum seekers and refugees.⁶⁵ Indeed, there is emerging empirical evidence that racialized stereotypes and implicit bias, when combined with the partial criminalization of commercial sex work, contribute to greater fear and vulnerability for racialized sex workers who are forced to take fewer precautions in negotiating with clients. For instance, Sterling and van der Meulen found that, to avoid their own detection, sex purchasers will avoid certain groups of racialized sex workers and sex work establishments that the media and the police consistently portray to be associated with human trafficking and therefore are perceived to be infiltrated by or under constant surveillance of the police.⁶⁶ Importantly, these law enforcement campaigns are complemented by online or techno-surveillance and data mining tools, ostensibly to combat child sex trafficking, operated by the private and non-profit sectors in countries like the USA.⁶⁷

Descriptive Analysis of the Prosecuted Cases

Compared to the 1,096 charged persons reported through police data, we were able to verify 92 trafficking in persons cases for roughly the same period where legal proceedings were commenced (2006-2018) involving adult and youth accused who were actually prosecuted under section 118 (trafficking in persons immigration offence) of the *Immigration and Refugee Protection Act (IRPA)* or section 279.01-279.04 (exploitation and trafficking in persons offences) of the *Canadian Criminal Code*.⁶⁸ As reflected in Table 1 above, just under half ($n=45$ or 49%) of these cases resulted in one or more trafficking-specific convictions. A significant proportion ($n=35$ or 38%) of the prosecuted cases resulted in full acquittals on all charges, partial acquittals where the defendant was acquitted of the trafficking-specific charge(s) but convicted of other offences, or the withdrawal or staying of the trafficking (and other) charges at a preliminary inquiry or at trial. The remaining ($n=12$) cases reflected legal proceedings that were

⁶⁵ See *Burke*, *supra* note 39; Elene Lam, “Inspection, Policing and Racism: How municipal by-laws endanger the lives of Chinese sex workers in Toronto” (2016) 75 *Canadian Review of Social Policy* 87; Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Halifax: Fernwood Publishing, 2017); Menaka Raguparan, “*So it’s Not Always the Sappy Story*”: *Women of colour and Indigenous women in the indoor sectors of the Canadian sex industry speak out* (PhD dissertation, Carleton University, 2019).

⁶⁶ Andrea Sterling & Emily van der Meulen, “We Are Not Criminals”: Sex work clients in Canada and the constitution of risk knowledge” (2018) 33:3 *CJLS* 291–308.

⁶⁷ See, e.g., Jennifer Lynne Musto & danah boyd, “The Trafficking-Technology Nexus” (2014) 21:3 *Social Politics* 461.

⁶⁸ We continue to track sentences and appeals for cases prosecuted between 2015 and 2018 and regularly update our case data to reflect these ongoing legal developments. These 2015-2018 case data are current as of 30 April 2020. The 2015-2018 timeframe reflects cases where a prosecution was initiated and ideally a verdict obtained, which is why some of the reported proceedings reflect 2019 and 2020 publication dates.

incomplete—a verdict had not yet been reached—or where we were unable to substantiate a legal outcome, especially in cases where the accused is identified by initials only. These findings vary from a Statistics Canada analysis of 306 completed adult criminal court cases involving at least one trafficking in persons charge between 2008/2009 and 2015/2016.⁶⁹ Of their 306 cases, 84 involved human trafficking as the most serious charge, 60% of which resulted in a stay or withdrawal, while 30% resulted in a finding of guilt.

Although several of the prosecuted cases involved inter-provincial movement—often between Ontario and Quebec and sometimes between or involving other provinces like Nova Scotia, Alberta, and British Columbia—most ($n=67$ or 73%) of the legal proceedings took place in Ontario, which is consistent with the regional distribution of police-reported charges against persons. As we discuss below, inter-provincial movement can be legally contentious concerning whether a court in one province has jurisdiction to try a case where a trafficking offence was committed “exclusively” in another province.⁷⁰ The remaining proceedings, in order of frequency, took place in Quebec, Nova Scotia, BC, Alberta, Saskatchewan, and Nunavut. The regional and urban concentration of the prosecuted cases is comparable to other jurisdictions like the USA,⁷¹ again suggesting the politicized nature of anti-trafficking investigations and prosecutions that seem to be contingent on police agency priorities and dedicated government resources such as specialized anti-trafficking investigation and prosecution units.

⁶⁹ See *Ibrahim*, *supra* note 33 at 7. These Statistics Canada data are derived from the Integrated Criminal Court Survey. We were unable to independently verify these data since they are not publicly available via the Statistics Canada CANSIM online search platforms in relation to trafficking in persons offences.

⁷⁰ *R v Ibeagha*, 2019 QCCA 1534.

⁷¹ See, e.g., Kyleigh Feehs Richmond & John Cotton, *Federal Human Trafficking Report 2017*, (Human Trafficking Institute, 2018) at 42-47, 80-87. online: *Federal Human Trafficking Report 2017* <https://www.traffickingmatters.com/wp-content/uploads/2018/05/2017-Federal-Human-Trafficking-Report_hi-res.pdf>; Mark Motivans & Howard N. Sneider, *Federal Prosecution of Human-Trafficking Cases, 2015*, (U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics 2018) at 4. Online: Government of the United States <<https://www.bjs.gov/content/pub/pdf/fphtc15.pdf>>.

Table 6: Geographic Location of Legal Proceedings, Case Datasets (2015-2018; 2006-2014)

| Province/Territory | 2015-2018 | 2006-2014 | Total |
|--------------------|-----------|-----------|-------|
| Nova Scotia | 05 | ----- | 05 |
| Quebec | 03 | 06 | 09 |
| Ontario | 44 | 23 | 67 |
| Saskatchewan | 01 | ----- | 01 |
| Alberta | 03 | 01 | 04 |
| British Columbia | 01 | 04 | 05 |
| Nunavut | ----- | 01 | 01 |
| Total | 57 | 35 | 92 |

Virtually all the prosecuted cases involved multi-count indictments and a significant proportion (at least 62 or 67%) involved more than one human trafficking charge, encompassing not only those cases involving section 270.01-279.03 primary and subsidiary offence infractions frequently in the form of combined trafficking in persons and material benefit charges, but also those concerning more than one accused charged with trafficking and/or more than one complainant alleged to have been trafficked. For subsidiary trafficking offence charges, at least 40 cases included receiving a material benefit from trafficking charge, while relatively few ($n=7$ cases) involved withholding or destroying travel or identity documents.⁷² It is also increasingly common for s. 286.2 material benefit charges to be additionally or alternatively prosecuted in the post-*PCEPA* cases. As we discuss below, when the accused are dually charged for s. 279.02 material benefit from trafficking and s. 286.02 material benefit from sexual services violations it raises potential legal questions about *res judicata* (double jeopardy) and being charged twice for what is essentially similar or the same conduct arising from the same offence.

⁷² As the appellate court in *R v A.A.*[2], 2015 ONCA 558, para 88 and a provincial superior court in *D'Souza*, 2016 ONSC 2749, para 165 have articulated, and other courts have affirmed in several cases, when Parliament created the criminal trafficking offence in 2005 its objective was to criminalize a wide range of intentional conduct pertaining to the exploitation of vulnerable persons, including receiving a financial or material benefit knowing that it resulted from trafficking and withholding or destroying identity documents to facilitate trafficking. Across the 92 prosecuted cases, 40 cases involved s. 279.02 material benefit co-charges (in 39 sex trafficking cases and 1 labour trafficking case) and 7 cases involved s. 279.03 withholding documents co-charges (in five sex trafficking and two labour trafficking cases). While the number of withholding documents co-charges remains comparatively few (increasing from two cases pre-*PCEPA* to five cases post-*PCEPA*), the proportion of trafficking cases involving material benefit co-charges has perceptibly increased from less than one-third ($n=10/35$) of the cases pre-*PCEPA* to half of the cases ($n=30/57$) post-*PCEPA*. Indeed, the s. 279.02 material benefit trafficking charges underrepresent the totality of criminal material benefit charges across the cases since many cases involved *additional* or *alternative* material benefit charges in relation to prostitution and/or commodification (pre-*PCEPA* s. 212(1)(h) for gain, controlling someone's movements and s. 212 living on the avails of adult and youth prostitution) and post-*PCEPA* s. 286.2 offences for materially benefitting from sexual services.

In view of the severity of the charges and the lengthy indictments in most cases, predictably most proceedings took place before a superior court ($n=58$ cases or 63%), with the remaining ($n=34$) cases processed by provincial and youth courts ($n=04$ of the 34 cases). At the time of writing, 25 of the 92 cases had produced appeals, in addition to these and other cases generating a range of constitutional and other legal challenges, and civil claims in some cases as we discuss below.

A large proportion ($n=$ at least 71 or 77%) of the cases involved co-charges for prostitution and/or commodification offences mainly in relation to indoor sex work, especially exotic dancing, in-call and out-call escorting, brothels, and massage parlours. For these cases, the co-charges typically pertained to procuring (pimping) and materially benefitting (formerly living on the avails) from the commodification of another persons' sexual services, again illustrating the ongoing legal conflation of trafficking and procuring offences. As noted earlier, the Canadian criminal trafficking in persons has been jurisprudentially characterized as “pimping” or as “pimping plus” some form of exploitation in several cases.⁷³ Further, and similar to the problematic use of the material benefits sections (s.279.02 and s. 286.02), there is significant offence overlap between the trafficking in persons and the s. 286.3 procuring offence.⁷⁴ Once again, this is a potential contravention of *res judicata*.⁷⁵

Like co-charges for prostitution/commodification, a similar proportion of cases ($n=70$ or 76%) involved co-charges for other physical and sexual violence, including sexual exploitation of a minor. At least 27 (29%) cases involved co-charges for unlawful or forcible confinement, suggesting the prosecuted cases likely represent the most serious offences coming to the attention of the criminal justice system. Alarming in terms of victim and witness safety in legal proceedings, several cases involved co- or subsequent allegations or charges in relation to the accused attempting to obstruct justice and/or intimidating a complainant by threatening or using violence, harassing, contacting when there was a no-contact order, or attempting to bribe the victim or someone known to them to prevent them from testifying or to alter their testimony.⁷⁶

⁷³ Selected case examples include: *D'Souza*, 2016 ONSC 2749; *R v A.E.*, 2018 ONSC 471; *R v Finestone*, 2017 ONCJ 22; *R v Gray*, 2018 NSPC 10; *R v Lopez*, 2018 ONSC 4749; *R v G.K.S.*, 2014 ONCJ 542; *R v (R.R.)S.*, 2016 ONSC 2939.

⁷⁴ *R v Alexander*, 2016 ONCJ 882, para 50.

⁷⁵ *Kieneapple v R*, [1975] 1 S.C.R. 729.

⁷⁶ Selected case examples include: *R v Burton*, 2018 ONCJ 153; *R v Gashi*, 2014 ABPC 72; *R v H.H.*, 2016 ONCJ 890; *Lopez*, 2018 ONSC 4749; *R v McCall*, 2013 ONSC 4157; *R v Moazami*, 2016 BCSC 99; *R v Mohsenipour* [2020] B.C.J. No. 608; *R v Webber*, 2019 NSSC 147. According to media sources, Owen Gibson-Skeir was also sentenced to an additional year imprisonment for threatening and contacting the victim in his case after he had been convicted. See: Blair Rhodes, “Human trafficker gets additional year for threatening his victim”. (25 October 2017), online: *CBC News* <<https://www.cbc.ca/news/canada/nova-scotia/owen-gibson-skeir-human-trafficking-threatening-victim-sentence-1.4370962>>

Interestingly, many of the cases involved co-charges for illicit drug possession and/or trafficking under the *Controlled Drugs and Substances Act* and for prohibited weapons (firearms) signifying potentially important intersections between participation in the (now partially criminalized) commercial sex sector and illicit drug economies. Additionally, some of the (especially adult) complainants' were described as having active addictions and as engaging in commercial sex work to support those addictions, with the accused in some cases using illicit drugs and/or alcohol dependencies to induce or leverage the complainant's initial or ongoing agreement to engage in commercial sex work, which is relevant to the judicial assessment of a victim's vulnerability as an aggravating factor in sentencing.⁷⁷

The fact that the prosecuted cases are often a particular constellation of charges—human trafficking combined with prostitution/commodification, violence, and/or illicit drugs—rather than solely human trafficking charges likely is figurative in many of these cases coming to the attention of the police and being prosecuted.⁷⁸ This observation is consistent with the United Nations Office on Drugs and Crime (UNODC) assessment of prosecuted cases in several countries, including Canada, and a 'mosaic of evidence' that assists police and prosecutors in building a trafficking in persons case.⁷⁹ In particular, the UNODC have identified a broad array of evidentiary circumstances that contribute to trafficking convictions including many that are relevant to the Canadian definition of trafficking in persons, such as the use or threats of violence or force; deception; subtle means of coercion including emotional abuse; victim vulnerabilities such as addictions, problematic family histories, romantic relationships; restrictions on freedom of movement; social isolation including controlling a complainant's ability to communicate with others; signs of ownership and objectification of the victim.⁸⁰ However, it is equally conceivable that police and prosecutors are simply laying multiple charges in these cases as a plea negotiation strategy and/or with the intent of increasing the likelihood of obtaining convictions for some offences.

As we found with our original study (2015) and other Canadian scholars⁸¹ have similarly determined—and given that human trafficking is an economically motivated crime—there continues to be

⁷⁷ See, e.g., *R v Urizar*, File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), 13 August 2010, *Canada and Urizar v R*, No. 500-10-004763-106, Court of Appeal, Quebec, 16 January 2013 and UNODC's. *Evidential Issues in Trafficking in Persons Cases Case Digest*. Vienna: UNODC, 2017 at p. 74 analysis of the use of cocaine in this case.

⁷⁸ Across the 92 cases, the trafficking offences came to the attention of the police in various ways, but often because of other criminal offences being committed by the accused or complainant, frequently pertaining to a pattern of escalating domestic or sexual violence or another triggering offence such as shoplifting or using a fraudulent credit card to pay for hotels, or in relation to police suppression campaigns targeting the commercial sex work sector.

⁷⁹ UNODC, *supra* note 77 at 53.

⁸⁰ *Ibid*, pp. 53-104.

⁸¹ See, e.g., *Roots*, *supra* note 31.

negligible evidence of either transnational or domestic organized criminal involvement, notwithstanding racialized and mediatized depictions of local gangs like North Preston's Finest being involved in some cases.⁸² Despite several ($n=10$ or 11%) of the 92 prosecuted cases involving three or more accused, only two cases have so far involved formal co-charges under section 467.1 of the *Criminal Code* pertaining to criminal organizations and only one of those cases resulted in a conviction on those charges. However, in at least three post-2015 cases there have been judicial findings that the trafficking offences were committed as part of a joint or common enterprise as an aggravating factor in sentencing. And in one of the pre-2015 cases, the accused was subsequently found to have engaged in a common enterprise in attempting to obstruct justice by trying to alter the testimony of a complainant.⁸³

Table 7: Trafficking Offence Characteristics, Case Datasets (2015-2018; 2006-2014)

| Offence | 2015-2018 | 2006-2014 | Total |
|--|-----------|-----------|-------|
| Singular trafficking offence | 13 | 12 | 25 |
| More than one trafficking offence | 41 | 21 | 62 |
| Unknown | 03 | 02 | 05 |
| Total | 57 | 35 | 92 |
| Co-Charges | | | |
| Commodification | 44 | 27 | 71 |
| Violence co-charges | 45 | 25 | 70 |
| Forcible confinement co-charges | 16 | 11 | 27 |
| Organized crime co-charges | 01 | 01 | 02 |
| Total | 57 | 35 | 92 |

As for simple binary distinctions that are often drawn between domestic versus international (cross-border) trafficking⁸⁴ and sex versus (non-sexual) labour trafficking, the prosecuted cases overwhelmingly reflect domestic sex trafficking charges ($n=85$ cases or 92%). Still, it is important to contextualize that the “domestic sex trafficking” label is misleading in some cases where the case facts suggest predominantly sexual and/or intimate partner violence given patterns of deliberately targeted (revenge) or widespread sexual violence involving multiple victims, or escalating physical violence, domination and control

⁸² For a critique see, especially, Katrin Roots, “Human Trafficking in Canada as a Historical Continuation of the 1980s and 1990s Panics over Youth in Sex Trade” in John Winterdyk and Jackie Jones, eds, *The Palgrave International Handbook of Human Trafficking*, (Palgrave Macmillan, 2020).

⁸³ *Moazami*, 2016 BCSC 99, para 73.

⁸⁴ See *Kaye*, *supra* note 22 for an important critique of this domestic-international trafficking distinction in view of settler colonialism in Canada.

against an intimately involved partner.⁸⁵ Judicial (and jury) recognition of these distinctions is reflected by decisions acquitting defendants of the trafficking-specific charges in several cases.⁸⁶

Contrary to Statistics Canada⁸⁷ data that one-third of police-reported human trafficking incidences (2009-2016) are cross-border offences involving violations of the *IRPA*, we found that only six (6.5%) of the prosecuted cases involved alleged international trafficking: one case comprising alleged sex trafficking⁸⁸ and five cases concerning alleged labour trafficking in the construction⁸⁹ and domestic work sectors.⁹⁰ Only four of these six cases were federally prosecuted as immigration offences contrary to section 118 of the *IRPA* and only one of the six cases⁹¹ resulted in trafficking-specific convictions under the *Criminal Code* offence provisions, with all other cases resulting in either a full acquittal of all charges, a partial acquittal or a withdrawal of the trafficking-specific charges, or in one case an undetermined legal outcome. One additional case⁹² involved an arranged transnational marriage and a child custody dispute; the trafficking charge was dismissed in this seventh case.

In view of the presumed primary intent of the *UN Trafficking Protocol*, which is tied to a parent convention to prevent and suppress transnational and organized crime by encouraging international legal cooperation—and while we recognize the many extraordinary complexities involved with the cross-border cases—it remains deeply concerning that Canada has prosecuted so few transnational cases and so few cases involving organized crime. And while the emphasis on prosecuting domestic sex trafficking is not specific to Canada, it is equally disconcerting that Canada has prosecuted so few non-sexual labour trafficking cases given emerging evidence within Canada⁹³ and from other jurisdictions⁹⁴ that exploitation and violence, including sexual violence, frequently occur in a wide variety of other precarious—but non-

⁸⁵ See *Roots*, *supra* note 24 who makes this same observation.

⁸⁶ Selected examples include: *R v Campbell-Ball*, 2019 SKCA 41; *R v Downey*, 2010 ONSC 1531; *R v P.N.W.*, 2017 ONSC 5698.

⁸⁷ *Ibrahim*, *supra* note 33 at 4.

⁸⁸ *R v Ng*, 2007 BCPC 0204; *R v Ng*, 2008 BCCA 535.

⁸⁹ *R v Domotor*, 2012 O.J. No. 3630.

⁹⁰ *R v Ladha*, 2013 BCSC 2437; *R v Orr*, 2015 BCCA 88; *R v Rasool*, 2015 (unreported); *R v T.Y.W.*, 2016 ONCJ 601.

⁹¹ *Domotor*, 2012 O.J. No. 3630.

⁹² *R v H.P.*, 2016 ONSC 2342.

⁹³ Recent news media reports include Muriel Draaisma, “Mexicans trapped in ‘modern-day slavery’ as pay from their cleaning work was controlled by traffickers: OPP”. (11 February 2019) online: *CBC News* <<https://www.cbc.ca/news/canada/toronto/human-trafficking-bust-barrie-1.5014269>>; Kathy Tomlinson, “False promises: Foreign workers are falling prey to a sprawling web of labour trafficking in Canada” (5 April 2019) online: *The Globe and Mail* <<https://www.theglobeandmail.com/canada/article-false-promises-how-foreign-workers-fall-prey-to-bait-and-switch/>>

⁹⁴ See, e.g., *Feehs & Cotton*, *supra* note 71.

criminalized—labour sectors such as domestic work (including house cleaning, child and elder care), restaurant/food services, agriculture, construction, retail, manufacturing, hotels, and janitorial services. In brief, a reductive narrative of human trafficking as domestic sex trafficking means that victimization in these and other labour sectors remains invisible and unaddressed.

Table 8: Type of Trafficking Offence, Case Datasets (2015-2018; 2006-2014)

| Domestic versus International | 2015-2018 | 2002-2014 | Total |
|---------------------------------|-----------|-----------|-------|
| Domestic | 54 | 31 | 85 |
| International | 03 | 04 | 07 |
| Total | 57 | 35 | 92 |
| Type of trafficking | | | |
| Sex (domestic) | 53 | 31 | 84 |
| Sex (international) | ---- | 01 | 01 |
| Labour (international) | 02 | 03 | 05 |
| Marriage (international) | 01 | ---- | 01 |
| Unknown | 01 | ---- | 01 |
| Total | 57 | 35 | 92 |

The 92 cases represent *approximately* 144 accused. This figure should be interpreted with significant caution due to the complexities of establishing which perpetrators are actually involved in a particular case and given that co-defendants are not always charged with or convicted of a trafficking-specific offence.⁹⁵ Of the 92 cases, as one might expect given a dominant heteronormative and gender binary narrative about human trafficking, most of the primary defendants were adults ($n=87$ cases or 95%) and male ($n=79$ cases or 86%). These proportions are relatively consistent with the distribution of police-reported charges against persons for trafficking offences discussed above. Three cases⁹⁶ involved solely youths and a fourth case⁹⁷ involved three youths and one adult-co-accused. In three of these four cases, the youths were allegedly exploiting other youths and in the fourth case an adult in the commercial sex sector.

⁹⁵ In many of the multiple accused cases that were *not* jointly prosecuted, it is often difficult to ascertain or validate the exact charges and/or legal outcomes against the co-accused without corresponding directly with the courts to obtain the informations (list of charges) and a transcribed judgment, if available and the courts are willing to provide this information, for these cases.

⁹⁶ A.A.[2], 2015 ONCA 558; H.H., 2016 ONCJ 890; R v K.O.-M., 2014 ONCJ 277; R v K.O.-M., 2017 ONCA 106.

⁹⁷ R v K.O., 2018 ABPC 171.

Resembling the findings of studies in other jurisdictions like the USA⁹⁸ and the United Kingdom (UK)⁹⁹ indicating an increasing proportion of prosecuted trafficking cases involve female perpetrators, 13 (14%) of the 92 cases involved a primary female defendant and several (n =at least 7) cases involved a female co-defendant. Although small in number, these findings—that both youths and females are involved as alleged lead or co-traffickers—are important in challenging a dominant ageist and gendered narrative that human trafficking is the exclusive domain of villainous male adult perpetrators who solely target young women.¹⁰⁰ These offence dynamics raise equally complex questions about young women working together in the commercial sex sector as a safety and security measure and then being charged with human trafficking.

Most (n =65 or 71%) of the 92 cases involved a single accused while more than one-quarter (n =27 or 29%) of the cases involved two or more accused. Of the 27 multi-defendant cases, most (n =17 cases) were restricted to two perpetrators. *Domotor (and Kolompar)* remains the largest multi-defendant trafficking case in Canada with an alleged 22 accused according to various media reports,¹⁰¹ although only some individuals were charged and/or convicted of labour trafficking-specific charges.¹⁰² The 92 cases involved an *approximate* 168 complainants including 142 victims in alleged sex trafficking and 26 victims in alleged labour trafficking contexts, although these figures should again be interpreted very cautiously, especially in cases involving multiple complainants where there may be considerable variation in the charges relating to each victim, some of whom were allegedly trafficked while others were not. For example, the *Moazami* case,¹⁰³ currently under appeal, involved a 36-count indictment concerning 11 complainants, most of whom were minors. Only two of the 36 counts were for trafficking in persons and only one of those charges resulted in a trafficking-specific conviction for an adult complaint. In the *PNW* case,¹⁰⁴ involving a 45-count indictment in relation to 15 victims, only one count was for materially benefitting from human trafficking and the accused was acquitted of this charge.

⁹⁸ *Feehs & Cotton, supra* note 71; *Motivans & Sneider, supra* note 71.

⁹⁹ Rose Broad, “A Vile and Violent Thing’: Female Traffickers and The Criminal Justice Response”. (2015) 55:6 *British journal of Criminology* 1058 (Advance Access publication 20 July 2015).

¹⁰⁰ *Ibid.*

¹⁰¹ Adam Carter, “20 Hamilton human trafficking ring members deported” (22 July 2014) online: *CBC News* <https://www.cbc.ca/news/canada/hamilton/news/20-hamilton-human-trafficking-ring-members-deported-1.2714261>.

¹⁰² See *Roots, supra* note 31 at 118, 370 for a summary of the charges and legal outcomes for 15 of the main defendants in this case.

¹⁰³ 2014 BCSC 1727.

¹⁰⁴ 2017 ONSC 5698.

Although the relationship is not known in all cases, in more than half ($n=49$ or 53%) of the cases the complainants were involved in a non-romantic relationship with the accused, which is potentially significant in relation to the transactional involvement of third parties as a safety and security measure in alleged trafficking cases related to commercial sex work.¹⁰⁵ Conversely, a romantic relationship between a complainant and an accused in at least 36 or 39% of the cases is relevant as an aggravating factor in view of known recruitment tactics in sex trafficking cases where some accused use an intimate partner relationship to exploit the (sexual or other labour of the) complainant.¹⁰⁶

Table 9: Trafficking Offence Complainants, Case Datasets (2015-2018; 2006-2014)

| Complainants | 2015-2018 | 2001-2014 | Total |
|-----------------------------------|------------|--|------------------------------|
| Solo | 41 | 21 | 62 |
| Multi | 15 | 13 | 28 ($n = 106$ complainants) |
| Unknown | 01 | 01 | 02 |
| Total | 57 | 35 | 92 |
| Adult | 32 | 17 | 49 |
| Minor | 17 | 13 | 30 |
| Mixed adult and minor | 04 | 04 | 08 |
| Unknown/contested | 04 | 01 | 05 |
| Total | 57 | 35 | 92 |
| Gender | All female | All female except <i>Domotor</i> (19 males) | (149 females; 19 males) |
| Relationship | | | |
| Romantic/intimate partners | 21 | 15 | 36 |
| Transactional/other | 36 | 13 | 49 |
| Unknown | ---- | 07 | 07 |
| Total | 57 | 35 | 93 |

¹⁰⁵ On the role of third parties and safety and security issues in commercial sex work in Canada, see especially: *R v Anwar*, 2020 ONCJ 103; *Bedford v Canada*, 2010 ONSC 4264; *Canada (Attorney General) v Bedford* [2013] 3 SCR 1101; Chris Bruckert and Colette Parent, eds. *Getting Past 'the Pimp': Management in the Sex Industry* (Toronto: University of Toronto Press, 2018); Chris Bruckert & Tuulia Law, *Beyond Pimps, Procurers and Parasites: Mapping Third Parties in The Incall/Outcall Sex Industry*. Report based on research supported by the Social Sciences and Humanities Research Council (SSHRC), 2013. Online: Ottawa: Rethinking Management in the Adult and Sex Industry Project <https://www.nswp.org/sites/nswp.org/files/ManagementResearch%20%284%29.pdf>. For the United States see: *Horning & Marcus*, *supra* note 38.

¹⁰⁶ See, e.g., *Urizar*, File No. 505-1-084654-090, L-017.10, Court of Québec, District of Longueuil, Criminal Division (J.C.Q.), (2010-08-13), 13 August 2010, *Canada and Urizar*, No. 500-10-004763-106, Court of Appeal, Quebec, 16 January 2013 and *UNODC's*, *supra* note 77 analysis of exploiting a romantic relationship in this case at 78-79.

Many ($n=37$ or 44%) of the 85 prosecuted sex trafficking cases involved one or more minor complainants commensurate with other scholarly research on the enforcement of anti-trafficking laws in Canada¹⁰⁷ and the USA¹⁰⁸ being conflated with the commercial sexual exploitation of children. Predictably, many of the trafficking cases pertaining to minors, especially those involving third-party advertising of sexual services post-*PCEPA*, also resulted in co-charges for making, distributing, possessing, or accessing child pornography contrary to section 163.1 of the *Criminal Code*. In contrast to the minor victims in sex trafficking cases, all the alleged labour trafficking cases, except *TYW* (2016) where the age of the complainant was unknown or disputed,¹⁰⁹ involved adult victims. The alleged trafficking complainants were female in all cases apart from the 19 male labour trafficking victims in the *Domotor-Kolompar* case. Most ($n=62$ or 67%) of the 92 cases involved a single complainant. In the 28 multiple complainant cases, the number of victims ranged from two to 19 persons; however, most ($n=19$ or 68%) of the multiple complainant cases involved two complainants.

We surmise these patterns among the prosecuted cases—predominantly domestic sex trafficking cases involving multi-count indictments, multiple accused and multiple and/or minor victims—are less a reflection of actual trafficking in persons offences occurring in Canada than of those cases that are most visible to the criminal justice system and easiest to prosecute. For example, multiple complainant cases may be easier to prosecute if the courts are willing to accept similar fact evidence. Specifically, a Crown prosecutor may seek the admissibility of similar fact evidence to establish a pattern in proving the *actus reus* elements of the offence, although defence counsel usually contest these applications on various grounds, such as potential collusion between the complainants and the prejudicial versus probative effects of the evidence.¹¹⁰

Likewise, the overrepresentation of minors (persons under 18 years of age) in the prosecuted sex trafficking cases is expected since minors cannot consensually engage in commercial sex work as a form of labour and are automatically considered to be exploited across a range of *Criminal Code* offences including trafficking, procuring, sexual interference, and sexual exploitation (and child pornography in cases involving third party advertising of a minor's sexual services). It is also important to emphasize that it is not just adults who allegedly exploit minors. In three of four youth cases, youth accused were

¹⁰⁷ *Durisin & van der Meulen*, *supra* note 24.; *Roots*, *supra* note 24.

¹⁰⁸ *Goździak*, *supra* note 8; *Musto*, *supra* note 8 and note 38; *Williamson and Marcus*, *supra* note 38.

¹⁰⁹ 2016 ONCJ 601.

¹¹⁰ Similar fact evidence applications were made in several cases including but not limited to: *A.E.*, 2017 ONSC 4028; *R v Johnson*, 2011 ONSC 195; *R v Lucas-Johnson*, 2018 ONSC 3953; *R v M.M.*, 2018 ONSC 1022; *R v McPherson*, 2011 ONSC 7719; *P.N.W.*, 2017 ONSC 5698.

allegedly exploiting other minors, although only one of those cases¹¹¹ appears to have produced convictions against three youth co-accused on the trafficking-specific charges.

While the overrepresentation of minor complainants in alleged sex trafficking cases ($n=38$ of 92 cases) is a significant concern, it is one that calls for nuanced understanding. As the Canadian Alliance for Sex Work Law Reform (CASWLR) observe, the assumption that all minors involved in commercial sex are exploited victims “... negates the complex realities that many youths live, including youth who have fled families, group homes or other institutions and are often seeking to create communities for support and survival.”¹¹² In this regard, as summarized by the court in *D’Souza*, the defence counsel (unsuccessfully) argued that sections 279.01, 279.011 and 279.02 of the *Criminal Code* exceeded their legislative objectives by targeting “... situations with little or no threat of victimization (contrary to the whole aim of the legislation) and regardless of choice on the part of the complainant” and that “some persons under 18 years of age choose to be involved in prostitution, whether we like it or not. The legislation simply fails to recognize that reality.”¹¹³

Indeed, if there is one key theme to emerge about victim “vulnerability” across the 92 cases it is that many of the alleged trafficking victims—especially minors, some of whom had their own dependent children—were living precariously.¹¹⁴ Many of the youth had fled less desirable family, group home, or state foster care living situations and some *deliberately sought* out others (including their “trafficker”), either as part of a romantic or as a transactional business relationship to assist them in engaging in sex work as a means of income generation *and* to provide access to housing. These relationships then allegedly became exploitative and/or violent.

In terms of other demographic data, we did not try to establish an average age of the accused or complainants because this information was not consistently available for all cases. For the 92 cases, the age of the accused at the time of the trafficking offence varied widely and while many accused were proximate in age to those they allegedly trafficked, this certainly did not hold true for all cases—

¹¹¹ *R v K-OM*, 2014 ONCJ 277. In view of the challenges in tracking cases with only initials, the legal outcomes are unknown for two cases and the remaining case resulted in an acquittal on the human trafficking charges.

¹¹² CASWLR, *Moving Backwards in the Fight Against Human Trafficking in Canada: An analysis of and response to the report of the Standing Committee on Justice and Human Rights*, Response Paper (February 2019) at p. 3. online: CASWLR <<http://sexworklawreform.com/wp-content/uploads/2019/02/CASWLR-Human-Trafficking-Response.pdf>>

¹¹³ 2016 ONSC 2749, para 68.

¹¹⁴ As one of many examples, see, e.g., *R v Sinclair*, 2020 ONCA 61, paras 4-7, 23 where this vulnerability is noted by the Ontario Court of Appeal and was relevant to the objective assessment of fear for safety at trial. In this case, the complainant testified she was afraid of the defendant, who had previously assaulted her but mainly emotionally abused her including by reminding her that her children were in state care, and only stayed with the defendant because she had no where else to go. See also *R v Gallone*, 2019 ONCA 663.

especially alleged non-sexual labour trafficking—where the accused were considerably older (e.g., in their 30s, 40s or 50s) than their complainants who typically—in the domestic sex trafficking cases—were young female adults under 25 years of age and/or minors ranging from 12 to 17 years of age. In fact, we think that any Canadian data on the ages or other profile attributes of alleged traffickers and victims should be treated with considerable caution because these calculations are frequently based on sources about charges rather than convictions and given the likelihood of trafficking incidents that rarely come to the attention of the police or criminal justice system. These calculations are also extraordinarily complex in multiple accused and multiple complainant cases and likely should be restricted to cases in which individuals are legally convicted of a trafficking-specific offence in relation to specific victims.¹¹⁵

Concerning race/ethnicity, in addition to some of the prosecuted cases that identified the race/ethnicity of the accused and/or complainants, we were able to search the mainstream news media for photos or other visual representations of the accused in cases where we knew full names. As we explore more extensively in our separate critical intersectional analysis¹¹⁶ we were struck by the apparent racialized overrepresentation of accused People of Colour—at least 41 of 92 cases involved Indigenous, Black, Caribbean, or Southeast Asian accused. Most ($n=36$) of these cases involved Black or Caribbean suspects who were also highly overrepresented among the conviction cases ($n=20$ of 45 cases involving at least one Black or Caribbean accused or co-accused). Accused with racialized Arab/Muslim names ($n=$ at least 13 cases) were also disproportionately represented among those accused of trafficking. The disproportionate representation of racialized accused in the 92 cases suggest the possibility of racial bias or profiling by the police and those with prosecutorial discretion. These findings, while tentative, accord with other empirical research on anti-trafficking law enforcement in Ontario¹¹⁷ and in the United States¹¹⁸ suggesting the racially selective identification and prosecution of sex trafficking cases through a heteronormative and gender binary lens. These findings are significant as well given that most ($n=76$) of the 92 prosecuted cases were from Ontario and Quebec where recent investigations and judgments have

¹¹⁵ For instance, based on police-reported trafficking in persons incidents from 2009-2015, Statistics Canada reported that most trafficking victims are under 25 years of age and about one-quarter of all victims are minors, whereas a majority (two-thirds) of traffickers are between 18 and 34 years of age. See *Ibrahim*, *supra* note 33 at 5-6. Likewise, Roots analysis of trafficking prosecutions determined the average age of both male and female traffickers in Ontario to be 27 years of age, but this calculation includes individuals who were not convicted of trafficking offences and several members of the *Domotor-Kolompar* labour trafficking criminal enterprise who were considerably older and, as Roots observes, likely skew the age calculation upwards. See *Roots*, *supra* note 31 at 219-220.

¹¹⁶ *Millar and O'Doherty*, *supra* note 7. There are slight variations in findings since this report includes updated and additional reported case information that we did not have access to when we wrote the racialization article.

¹¹⁷ *Roots*, *supra* note 31, especially at 222-257.

¹¹⁸ *Williamson and Marcus*, *supra* note 38.

ascertained the existence of racial profiling, systemic racism, and structural violence within the criminal justice system.¹¹⁹ Our findings also accord with the global attention that is now focused on eliminating longstanding systemic racism directed against Black, Indigenous and People of Colour.

On the contrary, racialized, queer and gender non-binary complainants were poorly represented in the prosecutions.¹²⁰ Despite repeated claims by the police and others that trafficking is strongly linked to violence against Indigenous women and girls, Indigenous victims were judicially identified in only 3 cases representing a total of 3 victims across the 92 cases. Further, judicial proceedings rarely identified Black female complainants (only 2-3 cases). Due to many factors, including low reporting rates and a justifiable lack of confidence in the Canadian colonial state, these data once again demonstrate the invisibility of the violence done to Indigenous and Black women and girls and other women and girls of colour.¹²¹ Likewise, none of the prosecutions involved the identification of same sex or gender non-binary

¹¹⁹ Selected examples include: Victor Armony, Mariam Hassaoui, & Massimiliano Mulone, *Les interpellations policières à la lumière des identités racisées des personnes interpellées Analyse des données du Service de Police de la Ville de Montréal (SPVM) et élaboration d'indicateurs de suivi en matière de profilage racial Rapport final remis au SPVM*. Université du Québec à Montréal / Centre de recherche interdisciplinaire sur la diversité et la démocratie, Université TELUQ École de criminologie, Université de Montréal / Centre international de criminologie compare, 2019; *R v Le* 2019 SCC 34 ; Ontario Human Rights Commission (OHRC), *Under Suspicion: Research and Consultation Report on Racial Profiling in Ontario* (Toronto: Ontario Human Rights Commission, 2019), online: OHRC

<http://ohrc.on.ca/sites/default/files/Under%20suspicion_research%20and%20consultation%20report%20on%20racial%20profiling%20in%20Ontario_2017.pdf>; OHRC, *A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service* (Toronto: OHRC, 2018), online: OHRC

<http://ohrc.on.ca/sites/default/files/TPS%20Inquiry_Interim%20Report%20EN%20FINAL%20DESIGNED%20for%20remed_3_0.pdf#overlay-context=en/news_centre/ohrc-interim-report-toronto-police-service-inquiry-shows-disturbing-results>; Michael H. Tulloch (The Honourable), *Report of the Independent Street Checks Review*. (Queens Printer for Ontario, 2018). online:

Government of Canada <https://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/StreetChecks.pdf>. See especially Scot Wortley, *Halifax, Nova Scotia: Street Checks Report*. Online: Nova Scotia Human Rights Commission.

,https://humanrights.novascotia.ca/sites/default/files/editor-uploads/hali_fax_street_checks_report_march_2019_0.pdf> at 154 who speaks to the deep divides in the racial profiling debate in Canada and highlights the importance of examining how policing is experienced. See also Ruth Montgomery, Curt Taylor Griffiths, Nahanni Pollard, Josh Murphy, & Angela Ripley, Pyxis Consulting Group Inc. *Vancouver Police Board: Street Checks Review*, 2019. Online: BCCLA <<https://bccla.org/wp-content/uploads/2020/02/VPD-Street-Checks-Final-Report-17-Dec-2019.pdf>> at 236-237 who were unable to conclude whether Vancouver police street checks are racially biased or constitute racial profiling.

¹²⁰ Other than judicial references in some cases, the trafficking cases rarely provided information about the racial or ethnic identity of the complainants unless it was a transnational case, which involved complainants from Hungary, Mainland China, Tanzania, the Philippines via Hong Kong, Indonesia, and Afghanistan. In one or two other cases the victims came to Canada from the USA or a Caribbean country. However, we consider these latter cases as domestic rather than cross-border trafficking since the victims were already residing in Canada voluntarily and were not brought into the country by their alleged trafficker.

¹²¹ See, especially, Sarah Hunt. "Representing Colonial Violence: Trafficking, Sex Work, and the Violence of Law" (2015) 2:1 *Atlantis* 25; Kaye, *supra* note 22; Maynard, *supra* note 65; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*. (Government of Canada, 2019), online: Government of Canada <<https://www.mmiwg-ffada.ca/final-report/>>; Raguparan, *supra* note 65.; UN Committee on the Elimination of Racial Discrimination. *Concluding Observations on the Combined Twenty-First to Twenty-Third Periodic Reports of Canada*. CERD/C/CAN/CO/21-23 (13 September 2017); UN Special Rapporteur on the Rights of Indigenous Peoples, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya. Addendum: The situation of indigenous peoples in Canada*, (Human Rights Council, /HRC/27/52/Add.2 (4 July

complainants suggesting the under-protection of some trafficking victims, especially same sex and trans victims of colour given deeply entrenched notions of “ideal victims”¹²² and intersecting victim hierarchies determining who is deserving of state protection.¹²³

Finally, notwithstanding a popular narrative about traffickers and their victims, the 92 alleged cases, and 45 proven trafficking cases where convictions were obtained, make clear there is *no prototypical* human trafficking defendant or complainant, each of whom represent *highly varied* personal backgrounds and current circumstances. Some of the alleged traffickers had extensive criminal histories while others had a moderate or no previous criminal record. Likewise, while some of the accused experienced exceptionally adverse childhood experiences and low levels of educational and employment achievement resulting in being deeply embedded in a criminalized lifestyle as adults, other accused were raised in exceptionally caring environments, were highly educated and gainfully employed or operated their own business. These differences are especially evident when comparing sexual versus non-sexual labour trafficking cases and are important as potential aggravating and mitigating factors in sentencing convicted accused.

In many of the 92 cases, the accused and their alleged victims were involved in interpersonal or business relationships of varying duration—ranging from several hours to several years—and in a number of cases the accused and their victims were married and/or had children together. Moreover, in the cases we examined, there was not always a clear demarcation between an accused and a complainant since some of the accused and the complainants—especially a number of the alleged female co-defendants in the domestic sex trafficking cases and complainants who were initially charged as co-accused but whose charges were dropped or amended—were sex workers working with or for the primary defendant. These individuals assumed a new or different role in co-recruiting and co-managing with their “pimp” (usually their boyfriend) other sex workers who it is then alleged were trafficked.¹²⁴

2014); UN Working Group on Persons of African Descent, 2016/2017, *Report of the Working Group of Experts on People of African Descent on its Mission to Canada Note by the Secretariat*. UN General Assembly A/HRC/36/60/Add.1 (16 August 2017).

¹²² See, e.g., Nils Christie, “The Ideal Victim” In Fattah E.A., eds, *From Crime Policy to Victim Policy*, (Palgrave Macmillan, London, 1986), 17; Marie Duggan (ed.), *Revisiting the 'Ideal Victim': Developments in Critical Victimology*, (Policy Press, 2018).

¹²³ On victim hierarchies, see, e.g., Wendy Chan & Dorothy Chunn, *Racialization, Crime, and Criminal Justice in Canada*, (Toronto: University of Toronto Press, 2014). On the under-protection of same sex and trans persons in relation to the criminalization of sex work and/or anti-trafficking, especially same sex and trans People of Colour and migrants, see, e.g., *Burke*, *supra* note 39.; *Fehrenbacher et al.*, *supra* note 39; *O'Doherty & Waters*, *supra* note 39.

¹²⁴ Selected case examples include: *Finestone*, 2017 ONCJ 22 who was convicted of trafficking and his co-accused escort-girlfriend *R v Robitaille*, 2017 ONCJ 768 who pleaded guilty to material benefit offences in relation to two minor females; *R v Majdalani*, 2017 ONCJ 145 and his co-accused escort-girlfriend Schmidt-Fabian who were both convicted of trafficking and

Table 10: Summary of the Prosecuted Trafficking Cases (2006-2018)

| | Cases | Defendants | Complainants |
|---|-------|---|--|
| Domestic Sex Trafficking | 85 | 122 | 142 |
| Only adult victims | 44 | | |
| Only child victims | 29 | | |
| Child and adult victims | 8 | | |
| Unknown or disputed victim age | 4 | | |
| Domestic Labour Trafficking | ---- | | |
| Transnational Sex Trafficking | 01 | 01 | 02 |
| Transnational Labour Trafficking | 05 | 20 (includes 15 accused in the Domotor- Kolompar, 2012 case) | 23 (includes 19 victims in Domotor-Kolompar, 2012 case) |
| Transnational Arranged Marriage | 01 | 01 | 01 |
| Total All Cases | 92 | 144 | 168 |

Sentencing in Trafficking Cases

Like the immigration offence, the penalties for criminally trafficking are significant, currently ranging from minimum penalties of one to five years imprisonment to maximum penalties of five years to 14 years imprisonment in non-aggravated cases. In aggravated cases, involving physical and/or sexual violence or the death of a complainant, the minimum penalties are five years and six years imprisonment, respectively, depending on whether the trafficked complainant is an adult or minor, and the maximum penalty is life imprisonment (see table 11 below). As we have previously commented, the criminal offence of trafficking in persons has received, in our view, an unjustified amount of political attention considering how small a proportion of criminal activity it represents. The criminal offence has been amended four times in 2010, 2012, 2014, and 2015 with subsequent efforts in 2018 and 2019 to bring the three proposed 2015 amendments into force. Two of the 2015-enacted amendments came into force in 2019: a proceeds of crime reverse onus and a controversial rebuttable presumption of exploitation that, if enforced, is likely to be constitutionally challenged as violating a defendants' section 11(d) *Charter* right to presumption of innocence (see Appendix B).

procuring an adult female; *R v Moradi*, 2016 ONCJ 842 and his co-accused escort-girlfriend Najafi who were acquitted of trafficking an adult female; *R v Rocker*, 2018 ONSC 3415 who was acquitted of trafficking and his minor co-accused escort-girlfriend "Jessica" who were alleged to have trafficked another minor. See also *R v Crosdale*, 2018 ONCJ 800; 2019 ONCJ 3 where the adult complainant was also charged with criminal offences and was alleged to be involved in recruiting and managing the other minor complainant.

In view of so few prosecuted cases, especially when the amendments were made, the empirical basis for making many of these amendments remains questionable. Their net effect has been to expand the number of trafficking in persons offences from three to six—one main and two subsidiary offences that now all distinguish between trafficking adults versus minors. Other than the 2019 amendments hybridizing the material benefit and withholding documents for trafficking an adult, which allows prosecutors to proceed summarily (subject to a maximum sentence of two years less a day imprisonment) or by indictment, the amendments have increased most of the trafficking offence penalties, especially by introducing mandatory minimum sentences for trafficking a minor, enacted in 2010, and three other offences in 2014. Mandatory minimum sentences were enacted via *PCEPA* in late-2014 for trafficking an adult and for materially benefitting and withholding documents for trafficking a minor. The *PCEPA* amendments also increased the maximum penalties for offences involving minors. These legislative shifts, especially those enacted by the *PCEPA*, have been figurative in the courts adopting a more punitive criminal law policy approach to sentencing trafficking cases post-2014.

Table 11: Minimum and Maximum Imprisonment Sentences Pre- and Post-PCEPA

| Offence | Pre-PCEPA | Post-PCEPA |
|---|-----------------------------------|--|
| Trafficking in persons | | |
| 279.01(a) Aggravated trafficking adult | Maximum life | Maximum life; Minimum 5 years |
| 279.01(b) Non-aggravated trafficking adult | Maximum 14 years | Maximum 14 years; Minimum 4 years |
| 279.011(a) Aggravated trafficking minor (offence and penalties added in 2010) | Maximum life; Minimum 6 years | Maximum life; Minimum 6 years |
| 279.011(b) Non-aggravated trafficking minor (offence and penalties added in 2010) | Maximum 14 years; Minimum 5 years | Maximum 14 years; Minimum 5 years |
| Material benefit trafficking in persons | | |
| 279.02(1) Material benefit trafficking adult (offence amended in 2019 to allow Crown prosecutors to elect to proceed summarily or by indictment) | Maximum 10 years | Maximum 2 years less one day if Crown proceeds summarily Maximum 10 years if Crown proceeds by indictment |
| 279.02(2) Material benefit trafficking minor (offence added in 2014) | Not applicable | Maximum 14 years; Minimum 2 years |
| Withholding documents trafficking in persons | | |
| 279.03(1) Withholding documents trafficking adult (offence amended in 2019 to allow Crown prosecutors to elect to proceed summarily or by indictment) | Maximum 5 years | Maximum 2 years less one day if Crown proceeds summarily Maximum 5 years if Crown proceeds by indictment |
| 279.03(2) Withholding documents trafficking minor (offence added in 2014) | Not applicable | Maximum 10 years; Minimum 1 year |

We have sentencing data for 41 of the 45 cases involving trafficking-specific convictions ($n=16$ of the 17 pre-PCEPA convictions and 25 of 28 of the post-PCEPA conviction cases) (see Appendix D, which lists the global sentences for these 41 cases). All these cases, except *Domotor*,¹²⁵ involved domestic sex

¹²⁵ 2012 O.J. No. 3630. In the *Domotor-Kolompar* case involving transnational labour trafficking of 19 victims, in addition to several other accused who were convicted and sentenced, Ferenc Domotor (Senior) and his son Ferenc Domotor (Junior) each pleaded guilty to one criminal count of conspiring to traffic persons, to one criminal count of participating in the activities of a criminal organization, and to one immigration count of counseling misrepresentation. These convictions resulted in a global sentence of seven years, a 10-year firearms prohibition, a DNA order, and a \$4363 restitution order for Domotor (Senior) and a sentence of three years imprisonment and a DNA order for Domotor (Junior). Kolompar (the wife/mother) pled guilty to fraud exceeding \$5,000 and was sentenced to time served and restitution in the amount of \$24,865.14. The guilty pleas in this case reduced what would have otherwise been more severe global sentences of imprisonment for both Domotor Senior and Junior, which were effectively discounted by 24 months (i.e., had they not pleaded guilty Domotor Senior would have been sentenced to 9 years and Domotor Junior to 5 years).

trafficking and resulted in sentences of imprisonment, differing from a Statistics Canada¹²⁶ finding that defendants were sentenced to custody in roughly two-thirds of human trafficking cases with a guilty finding.

In the pre-2015 sex trafficking conviction cases, global sentences ranged from a low of 24 months imprisonment less a day in *Vilutis* to a high of 23 years imprisonment in the *Moazami* case.¹²⁷ However, the *Moazami* case is judicially recognized as “extraordinary and unique” in view of a multiplicity of factors including the large number of complainants (11 vulnerable young women and predominantly minors who ranged in age from 14 to 19 years) and the multiple prostitution-related and sexual offences that took place over a roughly two-and-a-half year period.¹²⁸ In this case, *Moazami* was sentenced to two years concurrent for his sole trafficking an adult (279.01(1)(b)) conviction.¹²⁹ *Moazami* was also subsequently convicted and sentenced to an additional three years imprisonment consecutive for attempting to obstruct justice and breaching an order not to communicate with a witness for trying to bribe one of the complainants not to testify against him at his trial.¹³⁰ *Moazami* is currently appealing the convictions in both cases arguing his right to a fair trial was jeopardized by alleged police misconduct.¹³¹ In the *Moazami* case, the lead police investigator, also a key Crown witness, was subsequently convicted of breach of trust for sexually interfering with one of the 11 minor complainants’ who was also a Crown prosecution witness.¹³²

Other pre-2015 verdict cases attracting lengthy global sentences include *Burton* who was convicted at trial and sentenced to 10.5 years imprisonment for exercising control, trafficking, material benefit, and withholding documents concerning two adult victims, in addition to obstructing justice,¹³³ and *McFarlane* who pleaded guilty to two counts of kidnapping using a firearm and human trafficking in relation to two

¹²⁶ *Ibrahim*, *supra* note 33 at 7.

¹²⁷ 2014 BCSC 1727; 2015 BCSC 2055.

¹²⁸ 2015 BCSC 2055, paras 1, 21.

¹²⁹ *Ibid*, paras 106-107.

¹³⁰ 2016 BCSC 99.

¹³¹ 2019 BCCA 226.

¹³² *R v Fisher*, 2019 BCCA 33, para 31. Former Detective Fisher was also convicted for breach of trust and sexual exploitation in relation to sexually interfering with a minor complainant and prosecution witness in the *R v Bannon*, 2017 BCSC 511 procuring case. Fisher was also the lead detective in an obstruct justice charge and interacted with three complainants in the *Mohsenipour* case that is also currently under appeal. *Mohsenipour* 2020 BCCA 112, paras 95-100.

¹³³ In *Burton*, 2018 ONCJ 153, the Crown unsuccessfully applied for Burton to be designated a dangerous offender, although Burton was designated a long-term offender. Importantly, in this case the Crown also sought to have the offence of trafficking in persons always meet the definition of a serious personal injury offence, which Justice Greene declined to do. See also *Burton*, 2016 ONCJ 103, para 35.

adult victims, and dangerous operation of a motor vehicle, and was sentenced to eight years and nine months imprisonment.¹³⁴ The mandatory minimum sentence for the 2010-introduced offence of trafficking a minor was applied in at least one case where a global sentence of 6 years was imposed for 9 counts including two counts of trafficking a minor and materially benefitting from trafficking.¹³⁵ In the sole case involving three youth accused, *KO-M* was convicted at trial for multiple offences including trafficking three (of five) minor youths who were forced into prostitution. *KO-M* was sentenced as an adult to 6.5 years imprisonment in view of her role as the judicially described “ringleader” of an “organized and vicious human trafficking enterprise.”¹³⁶ *KO-M* unsuccessfully appealed her adult disposition on two grounds including that the maximum three-year youth sentence would have been sufficient and the sentencing judge erred in not imposing this lesser disposition.¹³⁷ Leave to appeal her sentence was granted but the appeal was dismissed.

It is exceptionally difficult to quantify and compare pre- and post-*PCEPA* sentences because the cases are so highly variant in terms of the number and types of convictions and the unique offence, offender, and victim circumstances of each case. Nevertheless, post-*PCEPA*, the courts have recognized a paradigmatic shift and an “... upward movement in the range of sentences for human trafficking since the enactment of Bill C-36 and the introduction of the mandatory minimum sentence for s. 279.01 in 2014.”¹³⁸ Specifically, in *Lopez*, Justice Campbell remarked on this discernible shift in criminal law policy from regarding prostitution-related offences as a nuisance to a form of sexual exploitation that disproportionately affects women and girls, commenting further that the “... sentencing of pimps who commit the sexual exploitation offence of “human trafficking” must reflect this Parliamentary paradigm shift.”¹³⁹ Likewise, in the case of *AE* (2018), Justice Boswell stated:

Having canvassed the authorities provided to me by counsel, I conclude that it is, as I noted, extremely difficult to define a usual range for the offence of human trafficking. Again, this is largely due to the variety of circumstances in which the offence may be committed. The yardsticks are far from settled, particularly in view of the imposition in 2014 of mandatory minimum sentences. It would appear that prior to 2014, the range was probably two or three years at the bottom end to six or seven years at the top end, depending of course on the aggravating and mitigating circumstances of the case. Since 2014, the floor has been elevated and I would say, provisionally, that the usual range

¹³⁴ 2012 O.J. No. 6566.

¹³⁵ *R v Byron*, 2014 ONSC 990.

¹³⁶ 2017 ONCA 106, para 1.

¹³⁷ *Ibid*, paras 2-3.

¹³⁸ *Crosdale*, 2019 ONCJ 3, para 29.

¹³⁹ 2018 ONSC 4749, para 54.

appears now to be roughly four to eight years, again depending on the aggravating and mitigating circumstances present.¹⁴⁰

Keeping these judicial benchmarks in mind, post-*PCEPA* global sentences in trafficking-specific conviction cases have ranged from a low of 11 months imprisonment in *Ngoto*¹⁴¹ and 18 months imprisonment in *NA* (2017)¹⁴² to a high of 13 years in *AS* (2017).¹⁴³ However, it is important to contextualize that *AS* was an exceptionally aggravated case involving an array of convictions in relation to procuring and trafficking an Indigenous victim who was exploited over a period of six years (2008-2014).¹⁴⁴ The victim was subject to extreme sexual and physical violence including choking, assault with a weapon, and aggravated assault causing permanent injury by an older multiple repeat offender who was at large in another province for two years before being arrested.¹⁴⁵ Still, global 13-year sentences of imprisonment were contemplated in two other cases but were reduced to 10 years in recognition of *Gladue* factors¹⁴⁶ and based on disproportionality.¹⁴⁷

¹⁴⁰ 2018 ONSC 471, para 65.

¹⁴¹ 2018 ONSC 3731; *R v Ahmed et al.*, 2019 ONSC 482, para 1. *Ngoto* and *Ahmed*, who were working as dancers and escorts themselves, were found guilty of recruiting two minors, contrary to section 279.011 of the *Criminal Code*, with *Ahmed* also being found guilty of advertising sexual services contrary to section 286.4. *Ngoto* was sentenced to 11 months and *Ahmed* to 18 months imprisonment. *Ahmed* was credited for the equivalent of four years pre-trial custody, while *Ngoto* was credited for 6 months. As we discuss below, this case involved a successful constitutional challenge of the 5-year mandatory minimum penalty for s. 279.011. Justice Labrosse concluded that “the s. 279.011 offence is not necessarily a serious criminal offence in all circumstances and certainly less serious in the circumstances of these offenders” (para 85), noting various extenuating circumstances including that both accused are mothers and that *Ngoto* faced collateral immigration consequences of deportation for any sentence of more than 6 months (paras 88-89). The case was judicially distinguished as involving *preparatory conduct* by *Ngoto* and *Ahmed* grooming the two complainants as escorts to “... provide labour in circumstances in which the complainants would believe that their safety would be threatened if they failed to provide the labour” (para 13). The sentence generated considerable media controversy and it may be appealed. See, e.g., Gary Dimmock, “Pimps spared prison, judge strikes down mandatory minimum sentence for trafficking minors.” (1 November 2019), online: *Ottawa Citizen* <<https://ottawacitizen.com/news/local-news/pimps-spared-prison-judge-strikes-down-mandatory-minimum-sentence-for-trafficking-minors/>>

¹⁴² In *R v N.A.*, 2017 ONCJ 665 who was convicted of simple assault, human trafficking and materially benefitting from trafficking an adult contrary to sections 266, 279.01 and 279.02 of the *Criminal Code* (at 2), the circumstances of the case were also distinguished as being at the low end of the exploitation spectrum of degree of exploitation, including that the offence did not involve prostitution but dancing (at 20). The complainant was NA’s girlfriend and NA did not force but strongly encouraged her to engage in dancing (at 4). *Inter alia*, N.A. had no previous criminal record and faced collateral immigration consequences (deportation) for any sentence of imprisonment exceeding 6 months (at 21-22). Following his sentence of imprisonment, N.A. was sentenced to 12 months probation.

¹⁴³ 2017 ONSC 802, para 1.

¹⁴⁴ *Ibid*, paras 2-12.

¹⁴⁵ *Ibid*.

¹⁴⁶ *R v Brown*, 2018 ABQB 469, para 33.

¹⁴⁷ *A.E.*, 2018 ONSC 471, para 106.

Mandatory minimum sentences for trafficking offences have been applied (and legally challenged) in many of the post-2015 cases and the global sentences in these cases have been significant as the following examples illustrate:

- *DA*: 3.5 years for offences that included trafficking an adult;¹⁴⁸
- *Albashir and Mohsenipour*: 10 and 9 years respectively for offences that included trafficking two adults and a minor;¹⁴⁹
- *Alexis-McLymont, Elgin and Hird*: 6, 7, and 9 years respectively for offences that included trafficking and receiving a material benefit from trafficking a minor;¹⁵⁰
- *NC*, also referred to as *Cain*: 5.5 years for offences that included trafficking and receiving a material benefit from trafficking an adult;¹⁵¹
- *Crosdale*: 6 years for offences that included trafficking and withholding documents in relation to trafficking an adult and a minor;¹⁵²
- *Deiaco*, also referred to as *MCD*: 8 years for offences that included trafficking and materially benefiting from trafficking an adult;¹⁵³
- *Gibson-Skeir*: 7 years for offences that included trafficking and material benefiting from trafficking a minor;¹⁵⁴
- *Gray*: 2.5 years for offences that included materially benefiting from trafficking an adult;¹⁵⁵
- *Jordan*: 9 years for offences that included trafficking an adult;¹⁵⁶
- *Leung*: 8.5 years for offences that included trafficking an adult;¹⁵⁷

¹⁴⁸ 2017 ONSC 3722, para 33.

¹⁴⁹ *Mohsenipour*, 2020 BCCA 11, para 1.

¹⁵⁰ *R v Alexis-McLymont and Elgin and Hird*, 2018 ONSC 1152; 2018 ONSC 1389, paras 12, 89.

¹⁵¹ 2019 ONCA 484, para 1.

¹⁵² 2019 ONCJ 3, pp. 13-15.

¹⁵³ 2017 ONSC 3174, para 62-64.

¹⁵⁴ Based on media sources as we do not have a court transcript for this case. See, e.g., *Rhodes*, *supra* note 76., para 3. As noted, *Gibson-Skeir* was sentenced to an additional year for threatening the victim in this case.

¹⁵⁵ 2018 NSPC 10, paras 88-90. In view of credit for time served in pre-sentence custody, Gray's net sentence of 16 months was accompanied by a 24-month probation order with various conditions.

¹⁵⁶ 2019 ONCA 607, para 1.

¹⁵⁷ 2018 ONCA 298, para 1.

- *Lopez*: 5 years for offences that included trafficking and materially benefitting from trafficking an adult;¹⁵⁸
- *McGee*: 8 years for offences that included trafficking a minor;¹⁵⁹
- *Murenzi*: 5 years for offences that included trafficking an adult;¹⁶⁰
- *Oliver*: 9 years for offences that included trafficking and materially benefitting from trafficking two minors;¹⁶¹
- *RS*, also referred to as *S* and *RRS*: 5 years for offences that included trafficking, materially benefitting from, and withholding documents to facilitate trafficking an adult;¹⁶²
- *Salmon*: 6 years for offences that included trafficking and materially benefitting from trafficking an adult;¹⁶³
- *Sinclair*: 2.5 years for offences that included trafficking an adult.¹⁶⁴

Post-*PCEPA*, ancillary court orders—usually some combination of authorization to take a DNA sample, to be included in the sex offender registry (SOIRA), a weapons prohibition, no contact orders, forfeiture of technology or monies seized by the police in their investigations, and prohibitions on the use of technology¹⁶⁵—have been applied in many cases, as have mandatory victim fine surcharges in several cases before being constitutionally invalidated by the Supreme Court of Canada in *Boudreault*.¹⁶⁶ On the other hand, the courts have rarely ordered restitution notwithstanding the stated legislative intent of the 2005-introduced *Bill C-49 (Trafficking in Persons) Criminal Code* offence enactment to expand the

¹⁵⁸ 2018 ONSC 4749, paras 9, 65, 73. In view of credit for time served in pre-sentence custody, *Lopez*' net sentence of 1 year was followed by a 3-year sentence of probation with various conditions.

¹⁵⁹ Based on media sources as we do not have a court transcript for this case. See, e.g., Meghan Grant. "Amanda McGee sentenced to 8 years for human trafficking, sexual assault". (22 January 2016) *CBC News*. Online: <<https://www.cbc.ca/news/canada/calgary/amanda-mcgee-human-trafficking-sexual-assault-plea-1.3416535>>

¹⁶⁰ 2018 QCCQ 795, para 96.

¹⁶¹ 2018 NSSC 230, paras 8-11.

¹⁶² ONSC 2939, para 41; *R. v. R.S.*, 2017 ONCA 141, para 1.

¹⁶³ 2019 ONSC 1574, para 45.

¹⁶⁴ 2020 ONCA 61, para 30.

¹⁶⁵ See, especially *Alexis-McLymont and Elgin and Hird*, 2018 ONSC 1389; 2018 ONSC 1152 where the court imposed life-time prohibitions on contacting or being in the vicinity of the victim; a life-time prohibition on paid or voluntary work with and communications or contact with persons under 16 years of age; and, 30-year restrictions on using cell phones and the Internet.

¹⁶⁶ *R v Boudreault* [2018] 3 SCR 599. The victim fine surcharge scheme was legislatively re-enacted in 2019 by Bill C-75 (*An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*) as a discretionary rather than mandatory provision.

ability of the courts to order restitution for trafficked persons subjected to bodily *or* psychological harm¹⁶⁷ and affirmed by the Canadian Victims Bill of Rights.¹⁶⁸ Notable exceptions are *Domotor-Kolompar* who were ordered by the court to pay restitution as part of their respective sentences¹⁶⁹ and *Crosdale* where the Crown requested and the court subsequently directed that the forfeiture of certain funds from the accused be repaid to one of the victim's pursuant to s. 491.1(2)(a) of the *Criminal Code*.¹⁷⁰ In *Orr*, who was originally convicted of trafficking but whose trafficking conviction was set aside on appeal, Crown sought restitution in the amount of \$37,463 for wages allegedly not paid to the complainant. Defence counsel opposed the request arguing the amount could not be readily ascertained and the court declined to make the restitution order for this reason.¹⁷¹ In two of the alleged labour trafficking cases, *Rasool*¹⁷² and *Orr*,¹⁷³ the complainants apparently pursued civil suits against their former employer, although the outcome of these suits is unknown. And, as we documented in our 2015 report, there have been human rights tribunal judgments awarding non-citizens compensation for unpaid wages and damages in non-criminal labour exploitation cases.¹⁷⁴ Notably, in 2017, the province of Ontario amended its laws to make it easier for individuals to civilly sue their traffickers.¹⁷⁵

In addition to imprisonment, the courts have imposed probation orders in a small number of cases, especially for those offenders where credit for time served significantly reduced the remaining term of

¹⁶⁷ See Laura Barnett, *Legislative Summary: An Act to Amend the Criminal Code (Trafficking in Persons)*, (Ottawa: Library of Parliament, Parliamentary Information and Research Service, 2005, revised 12 January 2006) at 2, 11. For a critical analysis of the limitations of the *Criminal Code* (s. 737.1) restitution provisions, see Sasha Baglay, "Access to Compensation for Trafficked Persons in Canada" (2020) *Journal of Human Trafficking* 9. DOI: <10.1080/23322705.2020.1738144>. These limitations include that damages or losses must be "readily ascertainable", which as we note may be particularly difficult to assess in trafficking cases, and that the restitution provisions are discretionary rather than obligatory for courts.

¹⁶⁸ *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2, ss. 16-17.

¹⁶⁹ See note 125 above on restitution in the *Domotor-Kolompar* case. See also Baglay, *supra* note 167 at 9-10 who discusses three other immigration cases involving restitution, while noting that none of these three cases involved trafficking specific convictions.

¹⁷⁰ 2019 ONCJ 3, paras 34, 65. See also: *R v Leduc*, 2019 ONSC 6794, paras 101, 109. In this post-2018 case, the Crown sought a \$45,000 restitution order to be paid to one of the complainants for the monies she earned that were spent by the defendant. While the court declined to order the restitution since the complainant had not sought it, like *Crosdale*, monies seized by police were ordered to be paid to this complainant.

¹⁷¹ 2016 BCSC 2064, paras 4-5, 43-47.

¹⁷² CBC News, "Zainab 'Gina' Rasool still faces civil lawsuit by former employee" (28 January 2015), online: *CBC News* <https://www.cbc.ca/news/canada/sudbury/zainab-gina-rasool-still-faces-civil-lawsuit-by-former-employee-1.2935346>

¹⁷³ 2016, BCSC 2064, para 47.

¹⁷⁴ *PN v FR and another* (No. 2), 2015 BCHRT 60. See also Baglay, *supra* note 167 at 12-13.

¹⁷⁵ *Anti-Human Trafficking Act*, 2017, S.O. 2017, c. 12 - Bill 96, part III Tort of Human Trafficking, sections 16-17.

imprisonment to be served.¹⁷⁶ This finding—4 of 45 or about 9% of trafficking convictions cases involving a sentence of probation following imprisonment—differs from a Statistics Canada description of the Integrated Criminal Court Survey¹⁷⁷ data that probation is imposed in about one-third (32%) of trafficking cases where there is a finding of guilt. We acknowledge, however, these discrepancies between our datasets and the Statistics Canada Integrated Criminal Court Survey data may reflect our varying methodologies and our significant reliance on published trafficking cases despite our best efforts to triangulate by searching for media-reported human trafficking convictions.

It is important to note that the laws used to regulate commercial sex work are increasingly expansive and include municipal licencing and zoning bylaws, employment standards laws, as well as health and safety laws, in relation to the regulation of legitimate businesses like massage parlours and exotic dancing establishments; residential tenancy laws (since residential premises generally cannot be used for illegal purposes such as advertising sexual services), divorce and family laws (in relation to child custody arrangements, as well as child and parental rights), and income tax law. These laws can be used to augment the penalty of criminal anti-trafficking and anti-commodification offences. For example, in at least one of the prosecuted trafficking cases where charges were still pending before the court, a residential tenancy agreement was terminated and the accused was evicted based on evidence presented at provincial *Residential Tenancy Act* proceedings that the premises were used in relation to advertising sexual services.¹⁷⁸ As well, several of the prosecuted cases involved defendant or complainant parents whose parental and/or child custody rights were potentially at risk, especially for permanent resident and non-citizen defendants who face the “collateral consequences” of deportation following a sentence of more than 6 months imprisonment.¹⁷⁹

For both trafficking and commodification offences, the courts are guided by legislatively prescribed aggravating factors¹⁸⁰ as well as case precedents. There now are a significant number of sentencing

¹⁷⁶ These four cases include: *R v St. Vil*, 2008 O.J. No. 6023; *N.A.*, 2017 ONCJ 665.; *Gray*, 2018 NSPC 10; *Lopez*, 2018, ONSC 4749.

¹⁷⁷ *Ibrahim*, *supra* note 33 at 7.

¹⁷⁸ See, e.g., *TSL-92244-18 (Re)*, 2018 CanLII 120925 (ON LTB), which, given the similarity in case facts, we believe pertains to *R v Bright*, 2017 ONSC 377. In residential tenancy proceedings the names of tenants are anonymized and identified by initial only, which makes it difficult to triangulate with the prosecuted cases.

¹⁷⁹ See, e.g., *R v Ahmed et al.*, 2019 ONSC 4822, paras 67-74, 88 where Ngoto, who was born in Belgium to parents from the Congo, faces deportation to the Congo, if the Congo will accept her. Ngoto is the primary caregiver for four children, who had been apprehended by child welfare authorities and returned to her care. The court considered the collateral consequences of Ngoto’s potential deportation and her desire to care for her children as a mitigating factor in sentencing.

¹⁸⁰ Specifically, the *IRPA* s. 121 aggravating factors discussed below in relation to interpretation of the offence; ss. 279.01(1)(a) and 279.011(1)(a) aggravated trafficking offences; and s. 286.2(5) where aggravating factors (such as using violence, being in a position of trust, providing drugs or alcohol to a person providing sexual services from whom a material benefit is derived)

precedents to guide the courts on the principles governing sentencing, aggravating and mitigating factors, and the range of sentences to be imposed in trafficking cases. Many cases rely on “pimping” (procuring and living on the avails) jurisprudence in determining trafficking sentences, again demonstrating the conflation in law.¹⁸¹ In terms of guiding principles, deterrence and denunciation have been articulated as key principles since the creation and enforcement of the criminal trafficking offences; the preamble to *PCEPA* affirms these principles. As described by Justice Campbell in *Lopez*: “This general approach to the sentencing of pimps in their parasitic exploitation of prostitutes has, not surprisingly, continued to have application under the “human trafficking” provisions of the *Criminal Code*.”¹⁸²

This conflation or blending of procuring and trafficking jurisprudence is particularly observable in the application and adaptation of the so-called additional *Tang* (1997) and *Miller* (1997) factors that were developed to assess the culpability of a pimp living on the avails of prostitution by a minor,¹⁸³ and the seriousness of a bawdy house operation.¹⁸⁴ These more than 20-year old decisions involve now repealed sections 210 and 212 *Criminal Code* prostitution offences and appear to have become the main aggravating factors considered in domestic sex trafficking cases. As summarized in *Lopez* these 15 factors include:

- 1) the degree of coercion or control imposed by the pimp on the prostitute's activities;
- 2) the amount of money received by the pimp and the extent to which the pimp allowed the prostitutes to retain their earnings;
- 3) the age of the prostitutes and their numbers;
- 4) any special vulnerability of the prostitutes;
- 5) the working conditions in which the prostitutes were expected or encouraged to operate, including their physical surroundings in terms of soliciting and servicing customers, and safety concerns, in addition to whether appropriate health safeguards were taken;
- 6) the degree of planning and sophistication, including whether the pimp was working in concert with others;

prevent the entitlement to a legislative exception for this offence, and s. 286.2(6) where receiving a material benefit in the context of a commercial enterprise is an aggravating factor.

¹⁸¹ This interchangeability originated with the first sex trafficking case prosecutions where the courts relied on “pimping” jurisprudence in the absence of human trafficking jurisprudence can be legislatively attributed to the direct importation of s.212(1)(h) ‘exercising control’ phrasing as part of the new (then 2005) criminal trafficking offence phrasing.

¹⁸² 2018 ONSC 4749, para 54.

¹⁸³ *R v Tang*, 1997 ABCA 174, para 11,

¹⁸⁴ *R v Miller* [1997] O.J. No. 3911 as cited in *R v Antoine*, 2020 ONSC 181, para 37.

- 7) the size of the pimp's operations, including the numbers of customers the prostitutes, were expected to service;
- 8) the duration of the pimp's exploitative conduct;
- 9) the degree of violence, if any, apart from that inherent in the pimp's parasitic activities;
- 10) the extent to which inducements such as drugs or alcohol were employed by the pimp;
- 11) the effect on the prostitutes of the pimp's exploitation;
- 12) the extent to which the pimp demanded or compelled sexual favours for himself from the prostitutes;
- 13) the age of the customers attracted to the services of the prostitute;
- 14) any steps taken by the pimp to avoid detection by the authorities;
- 15) any attempts by the accused to prevent the prostitute from leaving his employ.¹⁸⁵

The reality that these factors and some of the former bawdy house and procuring sentencing jurisprudence and authorities Canadian courts continue to rely on are so dated;¹⁸⁶ use highly stigmatizing (demeaning and dehumanizing) language to describe complainants;¹⁸⁷ are based on constitutionally impugned and now repealed criminal offences; and, are distinguishable from the charges, offences, penalties, and circumstances in many trafficking cases seems to rarely be challenged by defence counsel, Crown prosecutors, or the courts.¹⁸⁸ Importantly, some judges have opined that the *Miller* factors are no longer appropriate:

I am not inclined to draw much if any guidance from the *Miller* decision as far as deciding a fit and appropriate sentence in the present case is concerned, for reasons that include the following: [1] The decision is now more than 20 years old, and involves different charges; [2] No children or mandatory minimums were involved; [3] The case clearly involved very different circumstances than the one before me, at least insofar as

¹⁸⁵ 2018, ONSC 4749, para 53.

¹⁸⁶ See, e.g., *Gray*, 2018 NSPC 10, para 45 on the courts relying on a guideline from Dr. D.A. Thomas from his *Principles of Sentencing* (2nd ed. (1970) which is based on *pre-1970 English* case law. Dr. Thomas is cited as an authority in many of the prosecuted trafficking cases. Other frequently cited cases that are now quite dated include: *R v Downey* [1992] 2 SCR 10 in relation to living on the avails and *R v Perreault* (1996), 6 C.R. (5th) 132, [1996] J.Q. No. 3825 (C.A.) on exercising control.

¹⁸⁷ The courts are starting to criticize this language more openly. See, especially *Sinclair*, 2020 ONCA 61, para 31. See also *R v Strickland-Prescod*, 2019 ONCJ 755, para 25 referring to "sex-service related offences".

¹⁸⁸ For example, in *A.S.*, 2017 ONSC 802, para 40 the court observed that *Miller* was "decided twenty years ago in a very different environment of applicable offences" However, in most of the trafficking cases the courts endorse and apply these factors with the proviso that the quantum penalties have increased since the 1990s. See, e.g., *Antoine*, 2020 ONSC 181, para 31; *Gray*, 2018 NSPC 10, paras 45-48.

the court expressly found that no coercion was involved, in terms of the victims becoming or remaining prostitutes.¹⁸⁹

In terms of legal challenges to the sentencing provisions, as might be expected, mandatory minimum penalties in cases involving trafficking minors have now been successfully constitutionally challenged as being grossly disproportionate and violating the s.12 *Charter* right not to be subjected to cruel and unusual treatment or punishment and found not to apply in 4 of the 92 prosecuted cases:

- 1) in *Abara and Kulafowski* the Ontario Court of Justice found the 4-year mandatory minimum sentences imposed for trafficking two minors to be unconstitutional and as not applying to the two defendants in this case;¹⁹⁰
- 2) in *Finestone* the Ontario Court of Justice found the 5-year mandatory minimum sentence imposed by section 279.011(1) for trafficking a minor to be unconstitutional based on reasonable hypotheticals and as not applying in this case;¹⁹¹
- 3) in *Ngoto and Ahmed* the Ontario Superior Court of Justice found the 5-year mandatory minimum sentence imposed by section 279.011(1) for recruiting two minors to work as escorts to be unconstitutional and to be of no force and effect under s. 52 of the *Constitution Act, 1982*;¹⁹²
- 4) in *Webber* the Nova Scotia Superior Court found the 5-year mandatory minimum sentence imposed by section 279.011(1)(b) for trafficking a minor and the 2-year mandatory minimum sentence imposed by section 279.02(2) for materially benefitting from trafficking a minor to be unconstitutional.¹⁹³

In a fifth case, *Lopez*, the defence challenged the constitutional validity of the s.279.01(1)(b) prescribed mandatory minimum sentence of 4 years imprisonment as amounting to a violation of s. 12 of the *Charter*. However, it was agreed that the constitutional validity of the mandatory minimum sentence had become a “moot and academic” exercise because the accused had already served the equivalent of four years imprisonment in pre-sentence custody.¹⁹⁴ More recently, and beyond our two datasets of 92 cases,

¹⁸⁹ *Alexis-McLymont and Elgin and Hird*, 2018 ONSC 1389, para 52.

¹⁹⁰ A third co-accused *Sohrabzadeh*, described as the lead perpetrator, did not contest the mandatory minimum sentence, and was sentenced to 4 years. We have no primary court documentation for this case and rely on the media for this sentence, which speaks to a 4 (rather than 5) year mandatory minimum sentence being found unconstitutional. See, e.g. Kate Dubinski, “Judge rejects mandatory minimum sentence, gives human traffickers less time” (20 December 2018), online: *CBC News* <https://www.cbc.ca/news/canada/london/human-trafficking-mandatory-minimum-sentence-london-1.4954200>.

¹⁹¹ 2017 ONCJ 22, para 93. Finestone’s co-accused girlfriend, Robitaille pleaded guilty to “two counts of receiving a material benefit from the sexual services of two minors pursuant to section 286.2(2) of the Criminal Code” and successfully challenged a prescribed minimum sentence of 2 years, receiving a sentence of eight months concurrent for both counts followed by 2 years probation. *R v Robitaille*, 2017 ONCJ 768, paras 1, 126-127.

¹⁹² 2019 ONSC 4822, paras 112-113, 122.

¹⁹³ 2019 NSSC 147, para 9.

¹⁹⁴ 2018 ONSC 4749 para 6.

both the Ontario Court of Justice¹⁹⁵ and the Ontario Superior Court have found the mandatory minimum penalty for s. 279.01(1) trafficking an adult to be unconstitutional, with the latter court declaring the provision to be of no force or effect.¹⁹⁶ In addition to these constitutional challenges, for cases in our datasets involving prostitution / commodification offence co-charges, there have been successful constitutional challenges of the mandatory minimum sentences for the new section 286 commodification and the now repealed section 212 offences.¹⁹⁷

Appellate courts will only interfere with a sentence imposed by a trial court in limited circumstances such as when the sentence imposed is demonstrably unfit.¹⁹⁸ The 45 convictions cases reflect this deference to trial courts where trafficking sentences have been unsuccessfully appealed and/or upheld in seven cases:

- *AA[1]* where the Ontario Court of Appeal dismissed AA's appeal against a 27 month less one day sentence;¹⁹⁹
- *KO-M* where the Ontario Court of Appeal allowed and then dismissed KO-Ms appeal against an adult sentence of 6.5 years imprisonment;²⁰⁰
- *Deiaco* who argued his sentence was excessive and harsh and that he was not properly credited for time served in view of harsh conditions in pre-trial detention (so-called *Duncan* credits), where the Ontario Court of Appeal dismissed Deiaco's leave to appeal his global sentence of eight years;²⁰¹
- *Jordan* who argued the trial court erred in using a higher sentencing range as a starting point for determining a fit sentence, where the Ontario Court of Appeal allowed and then dismissed the appeal;²⁰²
- *Leung* where the Ontario Court of Appeal allowed and then dismissed Leung's appeal against a global 8.5 year sentence, emphasizing that given the case circumstances "... it was appropriate to

¹⁹⁵ *R v Kassongo* [2019] O.J. No. 6689, para 72; *Strickland-Prescod*, 2019 ONCJ 755, para 64.

¹⁹⁶ *R v Reginald Louis Jean*, 2020 ONSC 624, para 36.

¹⁹⁷ For example, in *Joseph*, 2018 ONSC 4646, para 94 where the court found the 2 year mandatory minimum sentence prescribed by s. 286.2(2) of the *Criminal Code* to be unconstitutional and of no force and effect, along with the s. 163.1(2) and (4) making and distributing child pornography minimum penalties. In *Mohsenipour*, 2020, op. cit., para 81 there was a successful constitutional challenge to a 5-year mandatory minimum sentence provided for in the now repealed s. 212(2.1) of the *Criminal Code* pertaining to living on the avails of a prostitute under 18 years of age.

¹⁹⁸ *R v Proulx*, 2000 1 SCR 61.

¹⁹⁹ 2013 ONCA 466, paras 1, 9.

²⁰⁰ 2017 ONCA 106, paras 4, 33, 38-39.

²⁰¹ 2019 ONCA 12, paras 3, 7.

²⁰² 2019 ONCA 607, paras 2, 6.

emphasize denunciation, deterrence, and protection of the public” and that while the sentence was high it was not demonstrably unfit;²⁰³

- *RS* where the Ontario Court of Appeal granted *RS* 1033 days of pre-trial credit, while affirming *RS*’ global sentence of five years imprisonment.²⁰⁴ The fact that the *RS*’ global sentence was upheld has been cited as a precedent in subsequent trafficking sentencing cases.
- *Sinclair* where the Ontario Court of Appeal allowed the sentence appeal and granted Sinclair an additional 21 days of pre-trial credit.²⁰⁵

Ng, who was not convicted of trafficking, is an exception where the BC Court of Appeal allowed a Crown appeal against sentence and increased *Ng*’s global sentence for immigration and criminal charges from 15 to 27 months.²⁰⁶ In two additional cases, the accused sought an extension to their appeal periods in relation to their convictions and sentences. In *Hosseini* the Quebec Court of Appeal (QCCA) rejected *Hosseini*’s request for an extension to the sentencing appeal deadline in relation to his global 5-year sentence.²⁰⁷ In *Murenzi* the QCCA granted the application for an extension but the outcome of the appeal is unknown.²⁰⁸

In brief, the sentences imposed by the courts across the 45 convictions cases highlight the complexities of each trafficking case and the importance of the courts imposing individualized dispositions. The cases point to an envisioned post-*PCEPA* paradigmatic shift of increased sentencing severity and broader tensions in Canadian criminal law policy between the disproportionate effects of mandatory minimum sentences and other constitutionally guaranteed rights, such as the right not to be subjected to cruel and unusual punishment.²⁰⁹ The appellate sentencing cases also affirm the deference given to sentences imposed by trial courts and a general reluctance to interfere with those dispositions, even when acknowledged to be high.

Simultaneously, the sentencing cases highlight a troubling conflation of trafficking and prostitution / commodification jurisprudence that is tied to a deeply entrenched narrative of a “parasitic and exploitive

²⁰³ 2018 ONCA 298, paras 1, 8-9.

²⁰⁴ 2017 ONCA 141, para 18.

²⁰⁵ 2020 ONCA 61, paras 30, 34.

²⁰⁶ 2008 BCCA 535, para 32.

²⁰⁷ 2014 QCCA 1187, para 8.

²⁰⁸ 2018 QCCA 1863.

²⁰⁹ See, e.g., Sarah Chester. “Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada”. (2018) 23 *Appeal* 89.

nature of the relationship between pimp and prostitute.”²¹⁰ Arguably, this narrative is based on moralistic sentiments²¹¹ and sentencing precedents and authorities from 20-50 years ago rather than contemporary social science evidence about the nuances and complexities of sexual commerce, including the role of third parties and other measures designed to promote sex worker health, safety and security, especially in a (partially) criminalized economy.²¹² In fact, the courts now routinely consider *both* human trafficking *and* prostitution/commodification case precedents when sentencing trafficking offenders, even when noting some of the questionable aspects of the practice.²¹³ While this reliance on “pimping” jurisprudence may be more understandable in cases involving *both* trafficking *and* prostitution / commodification offence convictions, the rationale is less clear when applied to cases involving *only* human trafficking convictions²¹⁴ or conversely where sex trafficking jurisprudence is applied to cases involving *only* prostitution/commodification convictions²¹⁵ since it infers these offences are interdependent and indivisible. It also remains unclear what the implications are of relying on ‘pimping’ jurisprudence—rather than developing uniquely Canadian human trafficking case law precedents—for the prosecution of non-sexual labour trafficking cases. As we explore in more depth in the sections that follow, this practice also clearly reflects legislative and jurisprudential expansionism and the use of anti-trafficking laws to (almost exclusively) police and prosecute commercial sex work. In view of some of the direct similarities in the power and control dynamics between trafficking and intimate partner and sexual violence offences

²¹⁰ *Gray*, 2018, NCPC 10, para 33.

²¹¹ See *Millar & O’Doherty*, *supra* note 7 for an in-depth discussion about the heteronormative, racialized and gendered assumptions underlying the jurisprudence and enforcement patterns.

²¹² See, especially, *Anwar*, 2020 ONCJ 103.

²¹³ See, especially, AA[1] [2012] O.J. No. 6256, para 39 where Justice Wein acknowledges: “In assessing the range in this case, the Crown and defence both recommend that I rely on the list of factors as set out by the Alberta Court of Appeal in *R v Tang*, [1997] O.J. No. 460 as referred to and augmented by the decision of Justice Hill in *R v Miller*, [1997] O.J. No. 3911. While I expect that exploitation cases will eventually develop their own list of factors once the legislation on procuring and human exploitation matures, I agree that that list provides an appropriate way to assess the factors in this case.”

²¹⁴ See, e.g., *N.A.*, 2017 ONCJ 665 who was convicted of various offences including trafficking and receiving a material benefit from trafficking but where the “prostitution type” offences were withdrawn by Crown (at 2)]. In addition to trafficking precedents, the court recognized “There are a number of other sentencing cases referred to by the Crown They are not human trafficking cases, they are largely prostitution cases, and I will simply briefly turn to those and summarize them” (at 13)] ... while also noting “... that the factors considered in the prostitution cases are appropriate to be considered in human trafficking cases as modified for human trafficking cases” (at 14)].

²¹⁵ See, e.g., *R v Badali*, 2016 ONSC 788 who was convicted of living on the avails of prostitution of a female minor, procuring a female minor to prostitution, and obtaining sexual services from a female minor. In this case, the Crown submitted sentencing authorities that included trafficking cases [paras 55-56]. See also *R v Brissett and Francis*, 2018 ONSC 4957, who were both convicted of living off the avails of juvenile prostitution contrary to section 212(2) of the *Criminal Code*, and exercising control, direction or influence over the movements of the victim to aid, abet or compel her to engage in or carry on prostitution where the court considered *N.A.*, 2017 ONCJ 665 as a sentencing precedent [paras 76-77].

in the convictions and sentencing cases it is perplexing why this other jurisprudence does not appear to be given similar emphasis.

LEGAL ANALYSIS OF THE PROSECUTED CASES

As one would expect, numerous complex legal issues and challenges arise in the trafficking cases. In addition to the sentencing decisions and the sentencing appeals discussed above, these include interpretation of the trafficking offence, evidential issues, constitutional challenges, appeals against conviction, and legal challenges relating to alleged police abuse of power, selective prosecutions, and media sensationalism in some cases, and in relation to the introduction of third party records. We argue that not only is the law itself problematic, but the interpretation and application of the law are developing in inappropriate and harmful ways that may serve to exacerbate a lack of access to equality and justice for marginalized populations in Canada.

Interpretation of the Trafficking in Persons Offence

As we documented in our 2015 analysis, Canada's immigration and criminal trafficking offences differ from one another and depart from the *UN Trafficking Protocol* definition in important ways. In brief, both offences are more broadly defined than the *Protocol* definition as each requires only two of three internationally-agreed offence elements—act, means, and purpose—to delineate the process of trafficking. The section 118 immigration offence is specific to international or cross-border trafficking and makes it an offence to “knowingly organize” (defined as recruiting, transporting, receiving or harbouring) the entry of one or more persons into Canada by means of actual or threatened abduction, force, fraud, deception or coercion. Exploitation, as the intended purpose of trafficking, is not a required offence element, although the aggravating factor provisions (s.121) anticipate some abusive and exploitative situations arising from the commission of the offence, specifically persons being subject to humiliating or degrading work conditions and/or sexual exploitation. The penalties for the immigration offence are substantial and include a \$1,000,000 fine and/or life imprisonment (s.120), which may partly explain why there have been so few immigration prosecutions and, as yet, no s.118 convictions across the 92 cases we examined.

The few prosecuted criminal and immigration cross-border cases (especially *Domotor-Kolompar*, *Ladha*, *Ng*, *Orr*, and *Rasool*) so far suggest these cases are enormously complex. *Inter alia*, these cases are time-consuming, resource-intensive, and expensive to prosecute, as compared with domestic sex trafficking, and involve a complex array of international cooperation in criminal matters, practical, linguistic, and cultural dynamics that can effectively undermine the investigations and prosecutions. It is

also important to point out that other immigration offence provisions (ss.117, 122, 123, 124-128) have produced convictions in some of these alleged immigration trafficking cases, specifically *Ng*²¹⁶ and *Orr*.²¹⁷

In contrast to the immigration offence, the criminal trafficking in persons offence, and its subsidiary offences of materially benefiting (profiting) from trafficking and withholding travel or identity documents to facilitate trafficking, apply to both cross-border and domestic trafficking and to individuals and criminal organizations.²¹⁸ In fact, the provincial appellate courts have ruled that forced (migratory and cross-border) movement is *not* a required element of the criminal trafficking offence.²¹⁹ Nevertheless, in the prosecuted sex trafficking cases, the courts have referenced both intra and inter-provincial movement of a complainant, such as arranging and paying or actually transporting a complainant from one city or province to another, or moving a complainant from one hotel to another, or driving (transporting) a complainant to and from work, as evidence of trafficking.²²⁰ This is in spite of contemporary social science evidence that those involved in commercial sex work regularly move between cities and provinces for various reasons including to increase business, referred to as “touring”,²²¹ that they may move between venues or work (both in-person and online) in several different venues or types of sex work at the same time, or that sex workers hire receptionists, drivers and bodyguards as a personal safety and security measure.²²²

From its inception, the *actus reus* or conduct element of the criminal offence (recruiting, transporting, transferring, receiving, holding, concealing, or harbouring) has directly conflated trafficking in persons with commercial sex work by borrowing wording from the now repealed s. 212(1)(h) procuring and living on the avails provision of the *Criminal Code* concerning “exercising control, direction or influence over the movements of a person.”²²³ This legislative conflation is repeated with the revised s. 286.3(1) and (2)

²¹⁶ 2007 BCPC 0204, paras 123, 129.

²¹⁷ 2016 BCSC 2064, para 1.

²¹⁸ See, e.g., *A.A.*[2], 2015 ONCA 558, para 73.

²¹⁹ See, e.g., *Urizar*, 2013 QCCA 46, paras 34, 65, 68, 73. See also *D'Souza*, 2016 ONSC 2749, paras 61, 73, 76-77, 80.

²²⁰ Selected examples include: *Crosdale*, 2019 ONCJ 3, para 32; *D'Souza*, 2016 ONSC 2749, para 133; *H.H.*, 2015 ONCJ 392, paras 28, 30; *R v Nakpangi*, [2008] O.J. No. 6022, para 5; *Majdalani*, 2017 ONCJ 145, paras 154, 161. On cases involving inter-city and inter-provincial movement, see, especially, *A.A.*[2], 2015 ONCA 558; *Ibeagha*, 2019 QCCA 1534; *Moazami*, 2014 BCSC 1727; *R.S.*, 2017 ONCA 141; *Sinclair*, 2020 ONCA 61.

²²¹ *Bedford*, 2013, SCC 72, paras 63-67, 142; *Anwar*, 2020 ONCJ 103, paras 88, 180, 184, 186, 201.

²²² See *O'Doherty*, *supra* note 64.

²²³ The now repealed s. 212(1)(h) procuring provision reads: “for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or

PCEPA procuring offences, which use the same phrasing. Not surprisingly then, in interpreting this offence element the courts use pre- and post-*PCEPA* procuring *and* trafficking jurisprudence interchangeably.²²⁴

For the criminal trafficking offence, the inclusion of this additional phrasing (exercising control, direction or influence) contributes to the uniqueness of the Canadian offence²²⁵ and expands the various ways in which the conduct element can be established as evidence of the offence.²²⁶ This unique phrasing also seems to be a main reason why the criminal trafficking offence is used overwhelmingly to prosecute domestic sex trafficking rather than non-sexual labour trafficking.²²⁷ In practice, across the 85 sex trafficking cases, the addition of this phrasing has created what has largely become a two-part interpretation of the conduct element (the *actus reus*) of sex trafficking where a Crown prosecutor will either seek to establish that the accused recruited and/or transported, transferred, received, held, concealed, harboured *or* more typically that the accused controlled, directed or influenced the movements of a complainant.²²⁸ This additional phrasing also subtly shifts the essence of human trafficking from unlawfully recruiting or moving a person, as seems to have been intended by the *UN Protocol* definition, to simply controlling (or directing or influencing) a person and their movements.

The inclusion of this phrasing and the similarity of offence elements means that the trafficking offence is virtually indistinguishable from the corollary procuring offence both pre- and post-*PCEPA*. This duplication is problematic across the prosecuted cases where the accused are convicted for both offences (trafficking and procuring) and their corresponding material benefit charges, since this practice

carry on prostitution with any person or generally.” Online: <<https://laws-lois.justice.gc.ca/eng/acts/C-46/section-212-20051101.html>>.

²²⁴ See, e.g., *Gray-Lewis*, 2018 ONCJ 560 where Gray-Lewis and Johnson were jointly charged with occupying a hotel room and knowingly allowing two minors to use the hotel room for prohibited sexual activity (obtaining sexual services for consideration) contrary to s. 171 of the *Criminal Code*. Gray-Lewis was also charged with exercising influence over the movements of the two complainants in relation to facilitating them to engage in prostitution, contrary to s.286.3(2), receiving a material benefit from the provision of their sexual services contrary to s.286.2(2), and advertising sexual services contrary to s.286.4 of the *Criminal Code*, along with illicit drug possession. Although Gray-Lewis was not charged with any criminal trafficking offences, the court relied on procuring *and* trafficking appellate jurisprudence, including AA[2] (2015) and *Urizar* (2013), in interpreting whether the accused exercised influence over the movements of the two minor complainants. See also: *R v Boodhoo, and others*, 2018 ONSC 7205, para 32.

²²⁵ *UNODC*, *supra* note 77 at 58.

²²⁶ A.A.[2], 2015, ONCA 558, para 80. See also *Gallone*, 2019 ONCA 663, paras 29-41 on the disjunctive interpretation of the conduct requirement.

²²⁷ Jesse Beatson, Jill Hanley, & Alexandra Ricard-Guay, “The Intersection of Exploitation and Coercion in Cases of Canadian Labour Trafficking” (2017) 26: 7 *JLSP* 136, at 142-143. See also Julie Kae & Bethany Hastie, “The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and Within the Law.” (2015) 3:1 *Social Inclusion* 88.

²²⁸ *Urizar*, 2013 QCCA 46, paras 74-77; *Gallone*, 2019 ONCA 663, para 33.

appears to directly conflict with the *Kienapple* principles barring multiple convictions for the same criminal act. In this regard, we note as a positive development that in some recent cases, the courts have started to apply the *Kienapple* principles to judicially stay some of these multiple convictions for remarkably similar crimes.²²⁹

We are equally concerned that the 2019 Bill C-75 addition of a rebuttable presumption of exploitation to the trafficking in persons offence, emulating the now repealed language of s. 212(3) and the s. 286(2)(3) material benefit presumption of the *Criminal Code*, will only serve to further conflate trafficking with commercial sex work and will likely expand the capacity of Crown to obtain convictions without having to prove the *actus reus* of the offence. As articulated by the Canadian Bar Association in commenting on this proposed amendment in 2014:

Crown would only need to prove that the alleged victim was exploited by someone, and that the accused lived with, or was habitually in the company of the victim. In other words, the Crown would not have to prove that the accused actually exercised control, direction or influence over the movements of the alleged victim, or that the accused did so for the purpose of exploiting them or facilitating their exploitation. It would then be up to the accused to provide evidence that there was no exercise of control, direction or influence over the movements of the alleged victim, or that any exercise of control was not for the purpose of exploiting the victim or facilitating the victim's exploitation.²³⁰

The Canadian Bar Association has anticipated that when prosecuted this rebuttal presumption of exploitation will almost certainly be constitutionally challenged as a violation of a defendant's section s.11(d) *Charter* right to be presumed innocent.²³¹ A comparison of the criminal trafficking and procuring offence elements, penalties, and exceptions is provided as Appendix E.

Concerning the *actus reus* element of the trafficking offence, superior and appellate courts have dealt extensively with the meaning of the various acts enumerated by s. 279.01 and 279.011 (recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of an adult person or a person under the age of 18 years) in relation to alleged sex trafficking offences. There is now constitutional²³² and appellate²³³ jurisprudence on the

²²⁹ See *Lopez*, 2018 ONSC 4749, para 5; *Salmon*, 2019 ONSC 1574, para 32; *Webber*, 2019 NSSC 147, para 22.

²³⁰ The Canadian Bar Association (CBA), *Letter to The Honourable Senator Bob Runciman Chair, Senate Committee on Legal and Constitutional Affairs Re: Bill C-452, An Act to amend the Criminal Code (exploitation and trafficking in persons)*, (8 December 2014) at 2. Online: CBA <<https://www.cba.org/CMSPages/GetFile.aspx?guid=147388e2-0bf9-4607-a7c0-3022690f28b7>>.

²³¹ *Ibid*, at 3.

²³² *D'Souza*, 2016 ONSC 2749, paras 145-146.

²³³ A.A.[2], 2015 ONCA 558, para 88; *Urizar*, 2013 QCCA 46, paras 72-77, 89; *Gallone*, 2019, ONCA 663, paras 42-51.

meaning of these individual terms, in addition to 1996 appellate jurisprudence on the section 212(1)(h) offence of exercising control, direction or influence over a person's movements that the courts continue to rely on in interpreting this element of the trafficking (and procuring) offence.²³⁴ Of particular note, the appellate courts have defined controlling, directing or influencing a person's movements in increasingly expansive terms to recognize varying degrees of coercion.²³⁵ For example, in *Gallone*, the Ontario Court of Appeal decided:

Exercising influence over a person's movements means doing anything to affect the person's movements. Influence can be exerted while still allowing scope for the person's free will to operate. This would include anything done to induce, alter, sway, or affect the will of the complainant. Thus, if exercising control is like giving an order that the person has little choice but to obey, and exercising direction is like imposing a rule that the person should follow, then *exercising influence is like proposing an idea and persuading the person to adopt it*" (para 47) [emphasis added]. According to the court, this would include a "... scenario in which a person, by virtue of her or his relationship with the complainant, has some power – whether physical, psychological, moral or otherwise – over the complainant and his or her movements".²³⁶

In determining whether any of the s. 279.01 and s.279.011 enumerated acts are committed for the purpose of exploiting or facilitating a complainant's exploitation in the context of commercial sex work, as described in *Crosdale*,²³⁷ the courts are legislatively guided by the 2012 addition of section 279.04 (evidentiary aid) factors relating to the presence of physical violence and threats of violence, coercion, deception, or abuse of a position of trust, power or authority,²³⁸ and a range of other factors pertaining to a victim's vulnerability and an accused's exercise of control over a complainant's bodily integrity, personal, social and work life, and their finances. These factors are consistent with those identified by the

²³⁴ *Perreault v. R.*, [QCCA] 1996. See, e.g., *Gallone*, 2019, ONCA 663, paras 45-47.

²³⁵ See *Gallone*, 2019, ONCA 663, paras 42-51, largely affirming the QCCA *Urizar* (2013) decision on the distinctions between influencing versus directing movements, affirming that 'influence is less coercive than direction'. In *Gallone*, the court also noted that exercising control, direction, or influence "generally suggests a situation that results from a series of acts rather than an isolated act" (para 48).

²³⁶ 2019 ONCA 663, para 50.

²³⁷ 2018 ONCJ 800, para 149.

²³⁸ As we commented in our 2015 report, the Canadian criminal trafficking offence is legislatively unique in several respects, including that it has a standalone definition of exploitation, which reads: "279.04 (1) For the purposes of sections 279.01 to 279.03, a person exploits another person if they cause them to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service." In 2012, to assist the courts in determining whether exploitation has occurred, the 279.04 definition was legislatively expanded to include additional factors the Court can consider. This provision reads: "(2) In determining whether an accused exploits another person under subsection (1), the Court may consider, among other factors, whether the accused: (a) used or threatened to use force or another form of coercion; (b) used deception; or (c) abused a position of trust, power or authority.

UNODC in their 'mosaic of evidence' suggesting a broad array of evidential circumstances that contribute to convictions in sexual and non-sexual labour trafficking in persons cases.²³⁹ As itemized by the court in *Crosdale*,²⁴⁰ and recently affirmed by the Ontario Court of Appeal in *Sinclair*²⁴¹ in relation to the 'fear for safety test', these non-exhaustive factors or circumstances include:

- Whether the victim is vulnerable due to age, or personal circumstances such as social or economic disadvantage and prior victimization;
- Isolation of a complainant from family or friends, and restrictions on social contacts outside of the sex trade industry;
- The presence of an ongoing relationship, versus a time limited relationship;
- Imposition of rules or behaviours;
- Control over work and rest hours, location of work, and services provided;
- Control over advertising of services;
- Limitations on freedom of movement, including tracking of movements, and driving to and from work;
- Monitoring a victim's contact and communications with others, including checking text messages and call logs;
- Frequency of contact between an accused and victim including frequency of inquiries or required notification regarding whereabouts, activities and conduct;
- Exercise of control over a victim's money and finances;
- Financial benefit to the accused [which can also be charged as a subsidiary offence];
- Use of daily or monthly earning quotas and number of clients serviced;
- Exercise of control over identification and travel documents [which can also be charged as a subsidiary offence];
- Branding or tattooing as a mark of ownership and control;
- Use of social media identifiers to identify ownership and control over a victim;
- Use of sexual intimacy or sexual violence as a means of control or coercion.

²³⁹ UNODC, *supra* note 77 at 53-104.

²⁴⁰ 2018 ONCJ 800, para 149.

²⁴¹ 2020 ONCA 61, para 15.

The case of *Evans* (also referred to as *AE*) illustrates some of the testimonial evidence used to prove the *actus reus*. With respect to the first adult complainant, KJ, who was involved in a romantic and business relationship with the accused, the court accepted much of her testimony that:

- a) He took her to La Senza and purchased trade-specific clothing for her;
- b) He directed her to work in hotels;
- c) He selected the hotels she would work in;
- d) He took photographs of her and created an advertisement on backpage.com;
- e) He gave her directions/rules for her services and set the fees she charged;
- f) He dictated her hours of work;
- g) He instituted a minimum income per month that she was expected to make;
- h) He took all of her earnings, thereby engendering a dependence upon him;
- i) For the most part he drove her and picked her up from work;
- j) He kept tabs on what she was doing and earning by way of regular text messaging;
- k) He later insisted that she work in massage parlours and arranged for her employment at Utopia;
- l) He later insisted that she work in strip clubs and arranged for her to work at Club P[...]; and,
- m) He arranged for the lease of a condominium in Mississauga in her name.²⁴²

Likewise, with the second adult complainant, AB, the judge accepted and relied on her evidence that:

- a) He directed her to work in strip clubs;
- b) He took her to La Senza to purchase trade-specific clothing;
- c) He took her to two strip clubs to observe the culture;
- d) He arranged for her to work at Midway, then later Club P[...];
- e) He explained the rules to her and described “extras”;
- f) He drove her to and from work;
- g) To some extent he dictated her hours of work;
- h) He kept tabs on her work hours and earnings through text messages; and,
- i) He took all of her earnings, thereby engendering a dependence upon him.²⁴³

Many of these same factors were also taken in aggravation of Evans’ sentence where the court emphasized that the defendant controlled the two complainants using various methods, including violence.²⁴⁴

In terms of the *mens rea* or purpose requirement, the criminal offence departs from the *UN Protocol* definition by not directly requiring coercion as a core offence element, which we and other scholars and

²⁴² 2017 ONSC 4028, para 149.

²⁴³ *Ibid*, para 150.

²⁴⁴ *A.E.*, 2018 ONSC 471, para 79.

practitioners view as a serious shortcoming since the coercive means by which trafficking is accomplished arguably is the *raison d'être* for criminalizing the conduct and distinguishing it from human smuggling.²⁴⁵ In this regard, as noted above, a 2012 legislative amendment now instructs courts to consider evidence of whether the defendant used or threatened force or coercion, used deception, or abused a position of trust (279.04(2)).²⁴⁶

The *mens rea* element of the criminal trafficking offence requires a heightened *mens rea* consisting of both the *intentional* conduct (recruiting, transporting, transferring, receiving, holding, concealing, harbouring *or* controlling the movements of the complainant) and the *ulterior* purpose of exploiting or facilitating someone's exploitation irrespective of the actual consequences.²⁴⁷ It also requires objective assessment of whether the accused's conduct would reasonably *cause* a victim to fear for their safety or the safety of others, which is another unique aspect of the Canadian criminal definition.²⁴⁸ Essentially, the Crown prosecutor must establish that the accused engaged in conduct that "...in all the circumstances, could reasonably be expected to cause the other person to believe that their safety or the safety of a person known to them would be threatened if they failed to provide, or offer to provide, the labour or service".²⁴⁹ As affirmed by the Ontario Court of Appeal in *Gallone*, the focus is on the accused's state of mind (their intended purpose in engaging in the prohibited conduct) rather than the actual consequences of the conduct for the complainant.²⁵⁰ With the *mens rea* requirement, the appellate courts have consistently emphasized that proof of whether the complainant actually feared for their safety or were exploited is not required.²⁵¹ They have also consistently indicated that safety includes protection from harm that is both

²⁴⁵ See e.g., *Ng*, 2006, 140 C.R.R. (2d) 224, paras 8, 10, 24 and *D'Souza*, 2016 ONSC 2749, paras 71-74, 130 where defence counsel (unsuccessfully) advanced this argument as part of their separate constitutional challenges on force being a defining element of the immigration and criminal trafficking offences, respectively.

²⁴⁶ In *D'Souza*, 2016 ONSC 2749, para 149 the court offered the following interpretation of the s.279.04 exploitation terminology: "And, again, the language used in section 279.04 is fairly straightforward. "Threatened", in subsection 279.04(1), means put at risk. In subsection 279.04(2)(a), it means that the accused gave a sign or a warning of using force or coercion. "Force" and "coercion" have similar ordinary meanings, although the former is normally restricted to something physical while the latter is more broadly defined. "Coercion", very simply put, means persuasion by power. "Deception" means the act of misleading or making someone believe a falsity. "Position of trust, power or authority" is an expression well known in our criminal law and which appears elsewhere in the CCC."

²⁴⁷ See, e.g., *AA[2]*, 2015 ONCA 558; *A.E.*, 2018 ONSC 471; *Stone and Beckford*, 2013 O.J. No. 371, 2013 ONSC 653; *Finestone*, 2017 ONCJ 22.

²⁴⁸ *Sinclair*, 2020 ONCA 61, para 14. In an earlier *D'Souza*, 2016 ONSC 2749, para 167 constitutional challenge the court was clear that *cause* has a more expansive meaning ("to produce an effect, or bring about something, or encourage something") and is not the same as *force or compulsion*.

²⁴⁹ *Sinclair*, 2020 ONCA 61, para 14.

²⁵⁰ *Gallone*, 2019 ONCA 663, para 54. See also *Crosdale*, 2018 ONCJ 800, para 144.

²⁵¹ See, e.g., *Gallone*, 2019 ONCA 663, para 54; *Sinclair*, 2020 ONCA 61, para 14.

physical and psychological²⁵² enumerating an array of possible circumstances that are relevant to assessing fear for safety in the context of sex trafficking.²⁵³

As applied in *Evans*: “In my view, Mr. Evans’ *ultimate* purpose in terms of his relationship with each of KJ and AB was to make money from their efforts stripping and/or providing sexual services for money. The mischief that s. 279.01(1) is aimed at – at least in terms of prostitution – is to criminalize the behaviour of individuals who make money from other people (usually women) by engaging in conduct that compels them to provide sexual services for money out of fear that their safety – physical or psychological – will be compromised if they do not provide those services.”²⁵⁴ Similarly, as applied in the case of *Crosdale*:

There is an abundance of evidence that Mr. Crosdale recruited T.T. to work in the sex trade and that he did so for the purpose of exploiting T.T. I have no doubt that although he had not yet come into physical possession of her money, that ... he was acting as her pimp and had every intention of taking the money that she made in the sex trade. I have no doubt that he would have taken her money but for the intervention of the police. Whether or not T.T. actually feared for her safety, or was in fact exploited, (and I find that she did fear for her safety and was exploited), I have no doubt that Mr. Crosdale’s conduct could reasonably be expected to cause T.T. to fear for her safety and to cause her to continue providing sexual services for money. I find that it was Mr. Crosdale’s intention and purpose to use deception, threats of violence, violence and coercion to cause T.T. to comply with his control and direction over her so that he could make money from her work in the sex trade.²⁵⁵

In summary, across the 92 cases and especially the 85 criminally prosecuted sex trafficking cases, the courts commonly look for two offence elements. First, the Crown must prove the conduct element of unlawful recruitment (or transporting, transferring, receiving, holding, concealing, harbouring) *or* exercising control, direction, or influence over a person’s movements. Second, the Crown must establish

²⁵² *Ibid.*

²⁵³ As described by the Ontario Court of Appeal in *Sinclair*, 2020 ONCA 61, para 15 circumstances relevant to assessing fear for safety, include: “[a] the presence or absence of violence or threats, [b] coercion, including physical, emotional or psychological, [c] deception, [d] abuse of trust, power, or authority, [e] vulnerability due to age or personal circumstances, such as social or economic disadvantage and victimization from other sources; [f] isolation of the complainant; [g] the nature of the relationship between the accused and the complainant; [g] directive behaviour; [h] influence exercised over the nature and location services provided; [i] control over advertising of services [also a separate offence]; [j] limitations on the complainant’s movement; [k] control of finances; [l] financial benefit to the accused [also a separate offence], and [m] use of social media to assert control or monitor communications with others”.

²⁵⁴ 2017 ONSC 4028, para 161. For a more in-depth analysis of this case and the s. 279.04 exploitation provision from the perspective of Crown counsel, see Veronica Puls and Paul A. Renwick. “Understanding Exploitation: Section 279.04 of the Criminal Code”. (2019) *Crown’s Newsletter*, 10:15. CanLII.

²⁵⁵ 2018 ONCJ 800, para 151.

specific intention, or the ulterior purpose of exploiting the complainant or facilitating their exploitation, including that the accused caused the complainant to provide or offer a service and did so by engaging in conduct that could reasonably be expected to cause the complainant to fear for their safety (or that of someone they know) should they not provide the labour or service.²⁵⁶ In the case of a minor, the Crown must also prove the complainant was under 18 years of age at the time of the offence. Notably, the Canadian 279.04 exploitation provision and its inclusion of a unique fear for safety test, adapted from the criminal harassment provision of the *Criminal Code*, have been criticized by various scholars, including those who argue that this exploitation standard is stricter than the *UN Protocol* definition and an impediment to prosecuting labour trafficking cases.²⁵⁷ Practitioners have also been critical of the convoluted nature of the Canadian criminal trafficking offence.²⁵⁸

Evidential Issues in Trafficking Prosecutions

In their comparative international analysis of prosecuted human trafficking cases, the UNODC have identified testimonial, documentary, and real evidence as the three main types of evidence in such cases.²⁵⁹ They also identify numerous factors that can strengthen the prosecution of a case—such as documentary evidence that can add to or corroborate victim testimony and a mosaic of evidence or circumstances pertaining to the act, means and purpose of trafficking that contribute to convictions—or weaken a trafficking in persons case—such as evidence of a victim’s freedom of movement and victim behaviour during the trafficking process including returning to an abusive employer, previously engaging in voluntary prostitution, and illegal acts committed by a complainant in the course of trafficking.²⁶⁰

Across the 92 cases we examined, testimonial evidence—from victims, the defendant, law enforcement officials, and eye or character witnesses including neighbours, clients, family members and friends, social workers, and sometimes hotel staff—was the main form of evidence used by both defence and Crown counsel. Almost without exception, the prosecuted trafficking cases relied extensively on the testimony of the complainant or complainants. Many of the cases were so-called “credibility” cases

²⁵⁶ *Sinclair*, 2020 ONCA 61, paras 11-14.

²⁵⁷ *Beatson, Hanley, & Ricard-Guay*, *supra* note 227 at 142-143. See also Julie Kaye and Bethany Hastie. “The Canadian Criminal Code Offence of Trafficking in Persons: Challenges from the Field and Within the Law. (2015) *Social Inclusion* 3(1):88.

²⁵⁸ See, e.g., *Gallone*, 2019 ONCA 663, para 27 on the trial judges’ instructions to the jury. See also *Masoudi*, 2016 ONCJ 476, para 65.

²⁵⁹ *UNODC*, *supra* note 77, at 11-49.

²⁶⁰ *Ibid*, at 53-140.

where, ideally, prosecutors relied on corroborating evidence outside of the complainant's testimony and their statements to the police during their investigation or at a preliminary inquiry. As the appellate decisions discussed below illustrate, challenging the credibility and reliability of a victim's testimony is a primary defence strategy in sexual violence cases generally, including sex trafficking cases.²⁶¹ This strategy is often done alongside defence applications for disclosure of various types of third party records (such as police, medical, psychiatric, therapeutic, video statements, children in protective care, and prosecutorial disclosure of evidence) to challenge a victim's credibility,²⁶² in spite of the 'rape shield' laws (ss.276-276.5 and ss.278.1-278.9).²⁶³ These issues, especially a negative judicial assessment of the credibility and reliability of a complainant's testimony and a lack of corroborating third party documentary or other testimonial evidence, have proven to be central in many of the trafficking cases resulting in a defendant's full or partial acquittal.

For example, in *Dagg*, where the defendant and complainant were involved in a business relationship with another third party in the commercial sex sector, the main testimony provided by the complainant—who was described by the court as a self-admitted alcoholic and drug addict at the time of trial—had significant discrepancies and essentially exonerated the defendant of the human trafficking and material benefit, among other, charges. The alleged victim's own evidence suggested that she had considerable freedom of movement and opportunities to contact the police and seek safety on more than one occasion and did not do so. The complainant also professed that she did not fear for her safety from this particular defendant but rather from another third party.²⁶⁴ Likewise, in *MM*, the case rested almost entirely on the testimony of two complainants and the defendant, all three of whose credibility was found to be lacking.

²⁶¹ Heather Donkers, "An Analysis of Third Party Record Applications Under the Mills Scheme, 2012-2017: The Right to Full Answer and Defence versus Rights to Privacy and Equality" (2018) 41:4 *Manit. Law J* 245, online: CanLIIDocs 192 <<http://www.canlii.org/t/2btc>>. Many of the prosecuted trafficking cases involve opposing theories by Crown counsel and testimony by the complainant alleging they were exploited versus the defence theory and argument, and sometimes testimony by the defendant, that the complainant was consensually engaging in sex work and the defendant was merely assisting the complainant or complainants in this endeavor. See, e.g., *Sinclair*, 2020 ONCA 61, paras 4-8 for a clear illustration of these opposing theories and arguments.

²⁶² Selected examples include: *A.A.*[3], 2017 ONSC 2678; *Beckford*, [2012] ONSC 7365; *Brown*, 2017 ABQB 708; *R v Jordan*, 2018 ONSC 1290; *R v Kruzik*, 2018 ONCJ 20; *Moazami*, 2020 BCCA 3; *R v J.W.*, 2017 ONSC 4343; *R v R.W.*, 2018 ONSC 1806; *T.Y.W.*, 2016 ONCJ 601. Crown prosecutors may also seek the admission of third-party records, for example a defendant's youth court records that can then be taken in aggravation of sentence. See, e.g., *Evans*, 2017 ONSC 7285.

²⁶³ Sections 276-276.5 of the *Criminal Code* bar the admission of a victim's prior sexual activity except in specific circumstances; sections 278.1-278.9 require judges to consider the probative value of allowing the defence access to a victim's third-party records where necessary for the accused to make full answer and defence to criminal charges.

²⁶⁴ 2015 ONSC 2463, especially paras 3, 8, 86-90, 99, 103-104.

The court concluded there was insufficient evidence of trafficking a minor or materially benefiting from trafficking a minor and *MM* was fully acquitted of these and other charges in the case.²⁶⁵

In the case of *AD*, while four police officers, the complainant's mother and a jailhouse informant testified, the Crown's case rested almost exclusively on the testimony of the complainant—who the court found to be neither credible nor reliable. In assessing the evidence on the seven trafficking and prostitution-related offences, the court found that the complainant: (1) had access to her own earnings and used them for her own personal benefit; (2) provided some monies to the accused but to purchase a house and not for material benefit; (3) was not deprived of her identity documents; (4) had use of her cell phone and was able to regularly communicate with family and friends; (5) was free from physical and psychological constraints and had freedom of movement; (6) was unable to provide any corroborating evidence of alleged threats; (7) changed her statements to police to avoid herself being in conflict with the law; and (8) according to police testimony, was willingly and voluntarily engaging in prostitution independently from the accused.²⁶⁶ In the words of the court, and notwithstanding the complainants' reduced intellectual capacity:

Based on the totality of the evidence, I find that the complainant voluntarily provided sexual services for money... She was not motivated to do so through threats of harm made by or fear of Ms. A.D., rather she enjoyed her independence and enjoyed living with Ms. A.D. and Ms. S.M. and earning money to help support herself and her children. This is not to say she may not have been conflicted by her choice of lifestyle and the impact it might have on her relationship with her mother and siblings and her ability to one day gain custody of her children; however, she enjoyed carrying on a common business venture with her two friends and enjoyed the benefits of working.²⁶⁷

In the prosecuted cases, defence counsel have challenged victim credibility on numerous grounds, including the complainant being an unwilling witness and/or recanting previous statements; having limited or contradictory recall of specific events; having active addictions and/or being intoxicated at the time of the alleged offence or during criminal proceedings; having a previous criminal history; and/or being untruthful, lying to the authorities, fabricating or exaggerating criminal events. These grounds also include the complainant having ulterior motives such as jealousy or revenge towards a defendant or having some element of personal gain; for example, to avoid or reduce criminal charges against themselves in exchange for testifying against an accused, to avoid their own removal from Canada or to secure refugee or some form of temporary or permanent residency status, to gain or retain child custody

²⁶⁵ 2018 ONSC 1022, especially paras 160-234, 269-278.

²⁶⁶ 2018 ONSC 3405, paras 99-105.

²⁶⁷ *Ibid*, para 103.

or avoid having their children removed by the state. At the same time, it is important to acknowledge that favorable judicial assessments of a complainants' credibility and reliability have been pivotal in securing trafficking-specific convictions in several cases.

Moreover, even in cases where the Crown prosecutor can produce additional witnesses to try to corroborate a complainants' testimony, this strategy does not always work to the prosecutor's advantage as observed by the UNODC.²⁶⁸ In the case of *Ladha*, who was charged with four immigration offences relating to the alleged cross-border trafficking (domestic servitude) of a Tanzanian complainant, the testimonial evidence of three witnesses (a neighbor, a delivery driver and handyman) did not support the complainant's story. In addition to the court's finding the complainant's testimony lacked credibility and was inconsistent, this lack of corroborating testimony, alongside other contradictory testimonial and documentary evidence, was used as evidence to acquit *Ladha* of all charges.²⁶⁹ Additionally, an absence of corroborating evidence apart from a complainant's testimony, especially when there are deficits in a complainant's testimony such as a lack of recall or a state of intoxication during alleged criminal events, has led the court to find reasonable doubt and acquit the defendant on trafficking specific charges. For example, and although the court accepted the complainant's testimony as reliable for some offences, in *Rocker*, the court asked the Crown to list its evidence that the defendant exercised control over the complainant, exercised direction over the complainant's movements, and exploited the complainant in relation to the fear for safety standard. The Crown's lack of corroborating evidence was central to the court's findings that these offence elements were not proven beyond a reasonable doubt; the defendant was acquitted of trafficking and materially benefitting from trafficking and advertising sexual services, while being found guilty of other sexual and physical violence offences.²⁷⁰ A lack of victim cooperation at trial has also contributed to trafficking acquittals in some cases.

At the same time, the trafficking prosecutions appear to be increasingly more sophisticated and documentary evidence—especially *digital evidence* derived from laptop computers, recorded telephone conversations, cell phone and social media records (photographs, images and text messages) like Facebook and Snapchat along with evidence of advertising from Backpage (before its closure) together with police statements, video interviews, surveillance videos, photographs of police searches—are used

²⁶⁸ UNODC, *supra* note 77 at 17, 29, 30, 40.

²⁶⁹ 2013 BCSC 2437, especially paras 17-27, 38, 39, 52, 54, 65.

²⁷⁰ 2018 ONSC 3415, paras 10-44. On the issue of control the Crown listed an alleged assault at a night club and comments by the defendant about loyalty; on direction the Crown listed movement from one hotel to another; and, on exploitations the Crown listed an alleged night club assault and statements by the defendant that he had previously been imprisoned for shooting someone and that if the complainant's earnings were insufficient she would be out on the street.

with increasing frequency in these cases.²⁷¹ Text and Facebook (and other social media applications such as Snap Chat and Instagram) messages, in particular, have been important as corroborating evidence of a victims' testimony in securing convictions in several cases, although defence counsel often seek to challenge the admissibility of this type of evidence. In other cases, defence counsel has sought to use text messages as exculpatory evidence, although not always successfully.²⁷²

Other documentary evidence includes medical records and/or police or cell phone photos of injuries which can be used as evidence in cases where the defendant allegedly injured the complainant.²⁷³ Records of financial transactions (banks records; receipts from massage parlours and exotic dancing in some limited cases; bona fide and fraudulent credit card transaction records; hotel invoices; advertising invoices, and transportation records pertaining to flights, trains, local transit, taxis and ride hailing services) can likewise be beneficial to the case. However, in many of the prosecuted cases there is a lack of documentary evidence on how much money a complainant made and gave to a defendant because many facets of the sex trade operate as a cash economy (and by means of prepaid and fraudulent credit cards) and there may be no financial records or receipts. In these cases, the courts have had to rely almost exclusively on (often uncorroborated) complainant testimony on their earnings and have made approximations of the proceeds likely given to a defendant. As noted above, the inability of complainants to corroborate their (lost) earnings is an impediment to courts ordering victim restitution since the legal requirement is that the amount of restitution be 'readily ascertainable'.²⁷⁴

The receipt of material benefit co-charged prosecutions are likewise difficult because commercial sex work is partially criminalized and largely unregulated leaving it to the courts to determine what fees charged by third parties for various services, such as providing accommodation, protection and transportation, are reasonable or financially exploitative. While financial exploitation may be clearer in cases where all earnings are provided to the third party—although even this may be difficult to assess in the context of an intimate partner relationship and a shared household, which is why the new section 286.2 commodification offences provide for some legislative exceptions as was the case in *Lucas-*

²⁷¹ Selected case examples include: *Bright*, 2017 ONSC 377; *Byron*, 2013 ONSC 6427; *N.C.*, 2019 ONCA 484; *Crosdale*, 2018 ONCJ 800; *Deiaco*, 2017 ONSC 3174; *A.E.*, 2018 ONSC 471; *H.H.*, 2016 ONCJ 392; *Hosseini*, Court of Quebec, Case File No. 500-01-040700-103; *R v Leblanc*, 2018 QCCQ 6481; *Leung*, 2018 ONCA 298; *Moazami*, 2014 BCSC 1727; *R v Purcell*, 2018 ONSC 6520; *R.S.*, 2017 ONCA 141; *R v Surendran*, 2015 ONCJ 833; *Urizar*, Court of Quebec, File No: 505-01-084654-090; *P.N.W.*, 2017 ONSC 5698; *Webber*, 2019 NSSC 342.

²⁷² See, e.g., *Leung*, 2018 ONCA 298; *Sinclair*, 2020 ONCA 61.

²⁷³ Selected case examples include *Hosseini*, Court of Quebec, Case File No. 500-01-040700-103; *A.S.*, 2016 ONSC 6965; *Murenzi*, 2018 QCCQ 2707; *Urizar*, 2013 QCCA 46; *P.N.W.*, 2017 ONSC 5698.

²⁷⁴ Section 738(1) *Criminal Code*, RSC, 1985, C-46.

*Johnson*²⁷⁵—it may be less clear in cases where there is a pre-agreed business arrangement to provide a certain percentage (for example, 30, 40 or 50% of earnings) in exchange for specific services. Moreover, where they exist, bank records equally may be used as evidence to challenge a victim's testimony, as was the case in *Orr* where there were records of the remittances the complainant sent to the Philippines.²⁷⁶ Similarly, in *AD*, as previously noted, the complainant's control over her own finances (having access to her own bank account and being the only person knowing the PIN) was important as part of the evidence in fully acquitting the defendant.²⁷⁷

Other evidential challenges identified by the UNODC²⁷⁸ and illustrated by the prosecuted cases include that a victim was free to come and go: this has been successfully argued as exculpatory evidence by defence counsel in several cases.²⁷⁹ Likewise, victim behaviour in the trafficking process, including returning to a previously abusive employer (or intimate partner as was the case in *Vilutis*) and previous or subsequent voluntary sex work has been argued in some cases with varying legal outcomes. In particular, while a minor's consent to engage in commercial sex work is not a defence²⁸⁰ and neither adults nor youths can consent to the act of being trafficked (s. 279.01(2), 279.011(2)), in looking at the totality of circumstances, the courts have wrestled with the extent to which a complainant's engagement in commercial sex work is voluntary. In some cases, evidence of an adult complainant's previous, simultaneous, and/or subsequent consensual engagement in commercial sex work has been figurative in the defence and acquittal or the dismissal of charges against a defendant for trafficking.²⁸¹ In other cases, as one might expect, the courts have found that a complainant's initial consensual engagement in commercial sex work can subsequently become exploitative.²⁸² Importantly, even if there is evidence that a complainant is a willing participant and is not necessarily fearful and may not have been threatened, a prosecution can still proceed.²⁸³ In the words of the court in *D'Souza*: "The more germane question is

²⁷⁵ *Lucas-Johnson*, 2018 ONSC 4325 who was convicted of two counts of procuring the sexual services of a minor contrary to s. 286.3(1) of the *Criminal Code*. The court stated: "I found the monetary benefit Mr. Lucas-Johnson received was not consideration from the sex trade because the relationship with ML met the exception of being a "legitimate living arrangement" as part of the rationale for imposing a sentence at the low-end of the range "for sex-trade related offences" (para 44).

²⁷⁶ 2013 BCSC 1883, paras 39-40; *UNODC*, *supra* note 77 at 42.

²⁷⁷ 2018 ONSC 3405, paras 84, 95.

²⁷⁸ *UNODC*, *supra* note 77 at 53, 80-87.

²⁷⁹ See for example: *M.M.*, 2018 ONSC 1022, paras 204, 270; *H.P.*, 2016 ONSC 2342, paras 56, 72.

²⁸⁰ *Crosdale*, 2019 ONCJ 800, para 166; *D'Souza*, 2016 ONSC 2749, paras 69, 178.

²⁸¹ See for example: *A.D.*, 2018 ONSC 3405; *Dagg*, 2015 ONSC 2463; *Masoudi*, 2016 ONCJ 476, para 68; *Moradi*, 2016 ONCJ 842, paras 11-15.

²⁸² See for example: *Evans*, 2017 ONSC 4028, paras 181-182; *Lopez*, 2018 ONSC 4749, paras 11-17; *Sinclair*, 2020 ONCA 61.

²⁸³ *D'Souza*, 2016 ONSC 2749, para 132.

whether, in all of the circumstances, the conduct of the accused could reasonably be expected to have led her to feeling threatened if she did not participate in prostitution.”²⁸⁴

In terms of the role of third parties, the courts have taken varying approaches. In *Masoudi*, the court affirmed the existence of a “pimp-prostitute” relationship cannot be equated with exploitation.²⁸⁵ In other cases, while acknowledging that commercial sex work can sometimes be consensual, the courts have essentially concluded that sex work involving third parties (so-called pimps) is inherently coercive and/or exploitative.²⁸⁶ Moreover, previous engagement in sex work with a third party who is *not* the defendant, especially if the former third party was considered to be violent or exploitive, can be taken as an aggravating factor in sentencing.²⁸⁷

Expert opinion evidence has been sought in only a handful of cases. In *McPherson*, the Crown sought the qualification of a university law professor (Associate Professor Benjamin Perrin, UBC Allard School of Law) as an expert on sex trafficking but this application was dismissed on several grounds, including that the professor lacked the appearance of objectivity as a career advocate for sex trafficking victims who publicly opposed the decriminalization of sex work.²⁸⁸ In *Ng*, a case that rested largely on the credibility of the complainants, a university criminology professor (Associate Professor Yvon Dandurand, School of Criminology and Criminal Justice, UFV) was qualified as an expert on victimology and transnational crime in relation to human trafficking and prepared a report that was filed with the court and testified in court *viva voce*. Notably, the expert’s evidence, taken as a whole, did not support the Crown’s theory that the two victims were trafficked, including the appearance of few restrictions on their movements, and *Ng* was acquitted of the trafficking-specific immigration charge.²⁸⁹ Professor Dandurand was subsequently qualified as a victimology expert on behalf of Crown in the *Orr* labour trafficking trial where he was allowed to comment on a hypothetical scenario that closely resembled the complainant’s allegations and

²⁸⁴ *Ibid.*

²⁸⁵ *Masoudi*, 2016 ONCJ 476, para 65.

²⁸⁶ The 2012 judgment of Wein, J. in AA[1] [2012] O.J. No. 6256, paras 28, 33, 40 is cited extensively in the trafficking case law on this issue. See also *Gray*, 2018 NSPC 10, paras 32-34; *Lopez*, 2018 ONSC 4749, paras 52, 54.

²⁸⁷ *Crosdale*, 2019 ONCJ 3, paras 3, 32. See also *Webber*, 2019 NSSC 147 who was convicted of trafficking a minor and where the defence (unsuccessfully) argued that *Webber*’s prosecution was selective since others had previously exploited the complainant in the context of sex work and that the court should consider the harmful impacts of this previous exploitation. As the court stated: “Others may have harmed the complainant along the way, but that does not reduce the sentence that is fit to denounce the conduct of Renee Webber. An offender does not benefit from a reduced sentence because others have contributed to the objectification and exploitation of a victim” (para 98).

²⁸⁸ 2011 ONSC 7717, especially paras 30-36.

²⁸⁹ 2007 B.C.J. No. 1338, paras 6, 45, 52, 72, 111, 112, 124.

the Crown theory in the case.²⁹⁰ Allowing this expert opinion into evidence was one of four grounds of appeal against Orr's convictions, including on the immigration trafficking charge, and the main basis by which the Court of Appeal set aside Orr's convictions and ordered a new trial. In the words of Mr. Justice Willcock of the BC Court of Appeal: "Mr. Dandurand's opinion evidence in response to the hypothetical scenario posed to him ought not to have been admitted into evidence. Because its admission may have critically affected the outcome of the trial, I would set aside the conviction and order a new trial."²⁹¹

In a post-2015 case, *R v Bright*, Crown counsel successfully applied to have a career Vice police officer, Detective Sgt. Thai Truong qualified as an expert in the area of "Prostitution and Human Trafficking, including the Recruitment and Grooming Process for Prostitutes, Pimping Practices, On-line Prostitution, Rates of Pay, and Terminology."²⁹² Truong, whose main expertise is "prostitutes who have been exploited by pimps," previously provided expert testimony in two other cases. In this case, the Ontario Superior Court of Justice reviewed Truong's qualifications and admitted Truong's expert opinion evidence despite defence counsel concerns, as acknowledged by the detective in cross-examination, that he had little knowledge of sex workers who hire third parties for various protections and services and about the prejudicial and value-laden language to be used in his evidence, especially the terms "pimp" and "human trafficking."²⁹³ A main reason for allowing the Truong expert opinion evidence seems to have been concern with the complainant's testimony and the fact that the complainant was a "prostitute." In the words of Justice Kurke:

While lay people may have some popular and uninformed knowledge and opinions about "pimps" and their relationship to prostitutes, the task of the jury in this case will require the informed understanding that they can only gain through the assistance of the detail and comprehensiveness of the expert evidence. In addition, the complainant in this case is, or was, a prostitute, a figure that may not command much compassion or understanding from a lay person. Truong's opinion in the delineated area is absolutely essential for the jury to do its job properly.²⁹⁴

Other expert opinion evidence in the prosecuted cases include a medical expert in relation to the use of stupefying drugs like GHB and Ketamine by the defendant to commit sexual and intimate partner violence offences in *PNW*;²⁹⁵ a clinical psychologist in relation to assessing capacity to consent for a

²⁹⁰ See especially *Orr*, 2015 BCCA 88, paras 2, 6, 15-42, 61-83, 86-88.

²⁹¹ *Ibid*, para 6.

²⁹² 2016 ONSC 7641, para 5.

²⁹³ *Ibid*, paras 12, 45.

²⁹⁴ *Ibid*, para 37.

²⁹⁵ 2017 ONSC 5698, paras 36-40.

complainant affected by an intellectual disability in *AD*;²⁹⁶ the Native Women's Community Resource Centre on the community impact of the offence in *AS* involving an Indigenous victim;²⁹⁷ and expert police evidence on the use of Facebook in *Moazami*.²⁹⁸

Constitutional and Other Legal Challenges, including Appeals

To date, of the 92 cases, 25 have involved appeals on various grounds, although only 15 of these appellate cases relate to persons convicted of a trafficking offence, while an additional 5 cases relate to persons acquitted of trafficking as summarized in Appendix F. Of the 25 appellate cases, 11 involved an appeal exclusively against the verdict, while 8 additionally or exclusively involved an appeal against a sentence, discussed above on the subject of sentencing.²⁹⁹ All the appeals, except *Ng* and *Orr*, discussed above in relation to sentencing and expert opinion evidence, have been criminal rather than immigration appeals. The Ontario Court of Appeal judgments in *AA[2]* (2015), *Gallone* (2019), and *Sinclair* (2020) and the Quebec Court of Appeal judgement in *Urizar* (2013) are so far the most important appellate rulings on elements of the human trafficking offence, although two potentially significant British Columbia appeals against conviction (*Moazami*; *Mohsenipour*) have yet to be concluded.

Concerning the 10 verdict appeals from Ontario, in *R v. AA[1]* the defendant unsuccessfully appealed his 2012 convictions (and sentence) for trafficking and procuring convictions on the basis of the trial judge's instructions to the jury regarding credibility and reliability of the complainant.³⁰⁰ In the *Salmon* case, the Ontario Court of Appeal dismissed the Crown's appeal against the judicial ruling to stay 17 charges, including trafficking charges, based on the trial judge's finding of abuse of process due to police fabrication of evidence, violating the accused's s.7 *Charter* rights. The Ontario Court of Appeal was "... not persuaded that the trial judge made palpable and overriding errors in reaching his findings of fact and credibility."³⁰¹ Notably, *Salmon* was subsequently convicted for human trafficking and receiving a material benefit from human trafficking, among other sex work related offences, in 2018.³⁰² In *R v. AA[2]*, which remains one of the most important appellate judgments that directly addresses the definition of

²⁹⁶ 2018 ONSC 3405, paras 5, 88 -96.

²⁹⁷ 2017 ONSC 802, paras 19-20.

²⁹⁸ 2014 BCSC 1727, para 20.

²⁹⁹ We omitted a discussion of the *Mataev*, *Campbell-Ball*, *Rocker*, and *Symonds* cases since these appeals pertain to offences other than human trafficking.

³⁰⁰ 2013 ONCA 466

³⁰¹ 2013 ONCA 203, para 3.

³⁰² 2019 ONSC 1574, para 1.

exploitation (indicating then that the proper test is a subjective-objective test) and the elements of trafficking a person under 18 years of age, the Crown successfully appealed acquittals on trafficking a person under 18, receiving a material benefit from trafficking a person under 18, and living on the avails of prostitution. This appeal is an important ruling on the judicial interpretation of exploitation in relation to 279.011(1), 279.02 and 279.04(a), including the definition of exploitation and the legal elements of trafficking a person under 18 (conduct, prohibited group, purpose).³⁰³ It is also one of four prosecuted trafficking cases (together with *Orr, Gallone, Ibeagha*) in which the appellate courts have set aside a trial verdict and ordered a new trial.

For the post-*PCEPA* Ontario verdict appeal cases, in *R. v. Cain* (also referred to as *NC* and discussed above in relation to evidential issues) where the defendant was convicted of 11 offences against his ex-girlfriend, including three trafficking offences, *Cain* unsuccessfully appealed his convictions *inter alia* seeking exclusion of the “highly cogent” text messages presented at trial as a violation of his s. 8 *Charter* right and arguing that the robbery and withholding a travel document verdicts were unreasonable.³⁰⁴ In *Leung*, who was convicted of 16 charges involving two complainants, including human trafficking, in what is described as primarily a credibility case, *Leung* unsuccessfully appealed his conviction arguing, *inter alia*, that specific text messages exonerated him of controlling the complainant. The Ontario Court of Appeal disagreed noting there were an equal number of text messages demonstrating the opposite and finding the trial judge “had ample basis for rejecting his evidence.”³⁰⁵ In *Majdalani and Schmidt-Fabian* who were convicted of trafficking and procuring offences in relation to an adult female, they unsuccessfully appealed their convictions by trying to attack the trial judge’s credibility analysis. As the Ontario Court of Appeal ruled in dismissing their appeal, the trial judge understood the deficiencies with the complainant’s evidence and “... was entitled to accept that while the complainant voluntarily decided to commence and continue as a sex-trade worker, the appellants started to control her actions, withhold her earnings, and force her on numerous occasions to work as a prostitute against her wishes.”³⁰⁶ In *RS*, who was convicted of six counts including three trafficking offences and who appealed both his conviction and sentence, the Ontario Court of Appeal rejected his argument that the trial judge’s reservations about the complainants’ credibility was inconsistent with her findings of guilt, noting that the trial judge accepted much of the complainant’s testimony, relied on corroborative evidence, acquitted the appellant of three offences, and was careful in her analysis of the appellant and complainant’s

³⁰³ 2015 ONCA 558. Since we only have initials for this case, we were unable to determine further legal outcomes for this case.

³⁰⁴ 2019 ONCA 484, paras 1-7.

³⁰⁵ 2018 ONCA 298, paras 3-4.

³⁰⁶ 2019 ONCA 513, para 4.

relationship.³⁰⁷ In *NA* (referred to as *AN* by the appellate court), who was convicted of two counts of trafficking and who appealed his convictions, the Ontario Court of Appeal rejected his arguments that the trial judge erred in admitting video taped police statements the complainant recanted at trial and that the trial judge provided insufficient reasons for rejecting the complainant's trial testimony.³⁰⁸

In *Gallone*, the Crown successfully appealed *Gallone's* acquittals for human trafficking, procuring, and advertising sexual services involving an adult complainant, arguing the trial judge misinterpreted these offence provisions and misdirected the jury. The Ontario Court of Appeal agreed and ordered a new trial.³⁰⁹ With respect to the trafficking offence appellate arguments, also discussed above in relation to elements of the offence, the appellate court found that the trial judge erred by instructing the jury that (1) the conduct element was conjunctive rather than disjunctive; (2) exercising direction is similar to exercising influence and providing no direction to the jury on the meaning of influence; and (3) the complainant must actually be exploited.³¹⁰ The *Gallone* appeal is an important ruling on the elements of the trafficking offence. This includes the *actus reus* or conduct requirement; firstly, that the specified types of conduct be read disjunctively and, secondly, explaining what influence is and that it is less coercive than direction. It is also an important ruling on the *mens rea* (for the purpose of exploitation) requirement affirming that actual exploitation is not required.³¹¹ In the words of the court: "No exploitation need actually occur or be facilitated by the accused's conduct. The focus of this element is on the accused's state of mind – i.e. his or her purpose in engaging in the prohibited conduct – and not on the actual consequences of his or her conduct for the complainant."³¹²

In *Sinclair*, involving defence appeals against conviction and sentence for trafficking an adult woman who lived with him, *Sinclair* unsuccessfully argued the trial judge provided misleading instructions to the jury on the definition of exploitation; did not fully explain the significance of Facebook messages concerning prior inconsistent statements by the complainant; and did not adequately explain psychological safety.³¹³ In their ruling, as discussed above, the Ontario Court of Appeal clearly outlined the *actus reus* and *mens rea* elements of the offence that must be proven (in this case: exercised influence; for the purpose of exploitation; caused a service to be provided; based on an objective assessment of fear

³⁰⁷ 2017 ONCA 141, paras 7-10.

³⁰⁸ 2019 ONCA 741, paras 3-5.

³⁰⁹ 2019 ONCA 663, paras 1-2.

³¹⁰ *Ibid*, paras 28-55.

³¹¹ *Ibid*.

³¹² *Ibid*, para 54.

³¹³ 2020 ONCA 61, para 1.

for safety).³¹⁴ In addition to affirming the meaning of influence in *Gallone* and enumerating some of the circumstances relevant to assessing fear for safety, this appellate judgment is important for the clarity of its ruling on the *objective assessment* of fear for safety.³¹⁵ In the words of the Court of Appeal: “The assessment here was an objective one: could the appellant’s conduct be reasonably expected ‘to cause [the complainant] to believe that her safety was threatened’³¹⁶ In this judgment, the Ontario Court of Appeal also affirmed previous appellate court rulings that a complainant’s safety need not actually be threatened, and that safety includes psychological safety.³¹⁷

Concerning the four verdict appeals from Quebec, in *Hosseini*, who was convicted of trafficking and procuring offences, the Quebec Court of Appeal rejected his request for an extension of the appeal period to appeal his verdict and sentence. In dismissing the request for an extension of both appeal periods, the QCCA affirmed its application of the *Urizar* ruling there was evidence of exploitation, refuting the defence argument of an absence of evidence the complainant was repeatedly forced or coerced to engage in prostitution-related activities. The court also addressed the issue of corroborating evidence in the form of a transcript of smart phone messages between the accused and the complainant, which the complainant had voluntarily submitted, in relation to intercepted third party communications.³¹⁸ In *Murenzi*, on the other hand, who was convicted of trafficking, pimping and assault causing bodily harm and sentenced to a global term of 5 years imprisonment, the Quebec Court of Appeal granted Murenzi’s request for an extension to the appeal period, although the outcome of this appeal is unknown.³¹⁹

Urizar, as noted, remains one of four influential appellate court rulings on the human trafficking offence and, along with AA[2], is widely cited in the jurisprudence among the 92 trafficking cases. As we described in our earlier report, *Urizar* advanced five grounds of appeal, including (1) alleging a miscarriage of justice due to a lack of credibility and reliability of the complainant’s testimony, (2) objecting to the use of complainant testimony outside the courtroom (a screen was used to shield the complainant during her testimony), (3) arguing that the trafficking offence requires forced transportation and that the offence is meant to apply to migrants being transported or concealed for exploitation, (4) contesting the charge of extortion citing an absence of evidence to support the allegation the complainant was coerced to dance nude by threats or violence, and (5) seeking a conditional stay for uttering threats as

³¹⁴ *Ibid*, paras 10-14.

³¹⁵ *Ibid*, paras 10, 15.

³¹⁶ *Ibid*, para 24.

³¹⁷ *Ibid*, paras 12, 14, 24-25.

³¹⁸ 2014 QCCA 1187, paras 1, 5, 10-14 [Unofficial English translation on file with the authors].

³¹⁹ 2018 QCCQ 2707; *R c Murenzi*, 2018 QCCQ 7950; *Murenzi c. R.* 2018 QCCA 1863.

redundant in relation to the charges of robbery, trafficking and extortion and a stay of proceedings for the charge of possession of a weapon for a dangerous purpose. On the issue of testimony outside of the courtroom, the QCCA found no error of fact or law and the judgment is an important ruling on this issue, including its consideration of the legislative origins of the Bill C-49 provisions in relation to witness protection. Of note, the QCCA examined ss.279.01, 279.02 and 279.04, including the legislative origins of these provisions, and concluded that “no movement of victims is required.” The court determined that the central element of the 279.01-279.04 provisions is the concept of exploitation, including what the court describes as the fear for safety objective test requirement. The QCCA upheld the convictions on all trafficking charges but granted stays for the redundant charges of threatening, possession of a weapon and extortion.³²⁰

More recently, in *Ibeagha*, the Crown successfully appealed the acquittals of *Ibeagha* and *David* on trafficking, procuring, and advertising sexual service offences involving two complainants on the sole ground that the trial court erred in its decision that it lacked territorial jurisdiction to hear the case because the offences were committed exclusively in Alberta.³²¹ In granting the appeal, quashing the acquittals, and ordering a new trial, the Quebec Court of Appeal found that the offences were committed in *both* Quebec and Alberta:

With respect to the present case, there was evidence that the scheme continued from Montreal to Alberta and back, and included the presence of the respondents. Thus jurisdiction can be found in Montreal due to the continuity of this operation. Second, the evidence in this case discloses overt acts in Quebec that are "referable to or in furtherance of a criminal plan" extending beyond Quebec. In the present case, for example, there was evidence that in Montreal the respondents received and harboured the two women, took photographs used in advertising and issued directions, received money from the women in Montreal. Third, there was evidence that the scheme at issue in the case generated effects both in Quebec and Alberta and for this reason too territorial jurisdiction could be found in the Court of Quebec.³²²

Finally, concerning the one completed verdict appeal from BC, in *Orr*, as discussed above, the BC Court of Appeal found that the expert opinion evidence in response to the Crown's hypothetical scenario should not have been admitted into evidence and set aside the convictions and ordered a new trial.³²³ At his new trial, *Orr* was found guilty of one of the immigration offences (s. 124(1)(c)), employing a foreign national when he was unauthorized to do so and was acquitted of the two other immigration charges,

³²⁰ 2013 QCCA 46 [Unofficial English translation on file with the authors].

³²¹ 2019 QCCA 1534, paras 1, 15.

³²² *Ibid*, para 15.

³²³ 2015 BCCA 88 para 6.

including trafficking in persons. *Orr* was sentenced to a three-month conditional sentence.³²⁴ In BC, there are two additional and separate ongoing appeals against convictions, *Moazami*³²⁵ and *Mohsenipour*³²⁶ that are briefly discussed below since they also relate to alleged police misconduct.

In addition to the mandatory minimum sentence challenges discussed above, the prosecuted cases reflect constitutional challenges on a range of other issues. The immigration and criminal trafficking offence elements have been constitutionally challenged in four cases, two of which we detailed in our 2015 report. In *R v Ng* defence counsel unsuccessfully challenged the constitutionality of s.118 of *IRPA* as being vague and overbroad in relation to the terms ‘fraud and deception’ as a means of committing the offence and contrary to s.7 of the *Charter*.³²⁷ In *R v Stone and Beckford*, *Stone* unsuccessfully challenged the constitutionality of s.279.011 as violating the principles of fundamental justice contrary to s.7 of the *Charter* arguing that the legislation was overly broad and vague in relation to the range of conduct prohibited by the offence, a diminished *mens rea* requirement in the wording of s.279.01 and 279.011, and an imprecise and uncertain definition of exploitation.³²⁸

More recently, in *D'Souza*, the defence counsel unsuccessfully challenged the constitutionality of the adult and minor human trafficking and material benefit provisions of the *Criminal Code* (sections 279.01, 279.011 and 279.02) as being vague and overbroad and violating section 7 of the *Charter*. *D'Souza* was charged on a 13-count indictment for trafficking and materially benefitting from trafficking a 17-year old minor, living on the avails and procuring this complainant to become a prostitute, possessing child pornography, various firearms offences including pointing a firearm at the complainant and uttering a death threat against her, and several controlled drugs offences. The Crown alleged that the complainant worked for the defendant for several months and that she was a “victim of coercion” performing in and out call sexual services in exchange for money, some of which was given to the defendant who also advertised her sexual services and who pointed a firearm at her on one occasion.³²⁹

In the *D'Souza* constitutional challenge, a main disagreement between the defence and Crown was the strength of the evidence on whether the defendant exploited the complainant, whether evidence should be examined from the perspective of what the complainant subjectively felt, and whether exploitation

³²⁴ 2016 BCSC 2064.

³²⁵ See, e.g., 2019 BCCA 226.

³²⁶ 2020 BCCA 112.

³²⁷ 2006 BCPC 0111.

³²⁸ 2013 ONSC 653.

³²⁹ 2016 ONSC 2749, paras 5, 11, 13.

requires force.³³⁰ The defence cited various evidence—such as the complainant being curious and wanting to make money; controlling her own involvement and having the ability to leave at any time; being able to refuse clients; and taking her own selfies—to argue that the minor complainant voluntarily engaged in prostitution and that exploitation should be subjectively assessed from the complainant’s perspective who was described as a “willing participant and not necessarily fearful or having been threatened.”³³¹ In addition to arguing that child prostitution is illegal (i.e., a minor cannot consent to engage in sex work), the Crown argued that exploitation takes many forms and requires an objective assessment of the circumstances imposed by the defendant on the complainant (in this case, emphasizing the undue influence exercised by the defendant over the complainant).³³² Justice Conlan found sufficient evidence of exploitation, affirming a subjective-objective test and clearly distinguishing that force is not required to prove exploitation.³³³

On the issue of vagueness, the defence argued that the notion of trafficking is globally uncertain, *inter alia* suggesting there are significant concerns about the harms of conflating trafficking with prostitution, and that, with the exception of exploitation, Parliament failed to define many of the key terms in subsections 279.011(1) and 279.02(2) (paras 31-45). Justice Conlan sided with the Crown’s arguments that these terms are sufficiently defined by appellate jurisprudence and in other parts of the *Criminal Code* finding that the statutory provisions exceed “the minimum degree of precision required” and “are not unconstitutionally vague.”³³⁴

On overbreadth, the defence argued that the human trafficking provisions are overbroad and disproportionate to their intended legislative objective. Focusing specifically on the definition of exploitation being overly broad and lacking a requisite means (use of force, fraud, deception, coercion, abuse of a position of trust) element, the defence argued that the impugned provisions “target situations with little or no threat of victimization (contrary to the whole aim of the legislation) and regardless of choice on the part of the complainant” and that “some persons under 18 years of age choose to be involved in prostitution, whether we like it or not.”³³⁵ In examining the highly divergent positions of defence and Crown on the human trafficking legislative objectives, Justice Conlan found that the purpose of the impugned provisions (sections 279.01, 279.011 and 279.02 CCC) is “to prevent human trafficking

³³⁰ *Ibid*, paras 108-109.

³³¹ *Ibid*, paras 110-132.

³³² *Ibid*, para 109.

³³³ *Ibid*, paras 123-137.

³³⁴ *Ibid*. See paras 151-152 for a detailed analysis of the statutory interpretation.

³³⁵ *Ibid*, para 68.

and protect vulnerable persons, especially women and children, by criminalizing a wide range of conduct aimed at exploiting them.”³³⁶ In finding that the law was relatively broad but not unconstitutionally overbroad, the court rejected the defence argument “that the legislation ought to require that the alleged victim be forced to do something that s/he did not want to do.”³³⁷ In also rejecting the defence hypotheticals, the court found Sections 279.01, 279.011 and 279.02 to be constitutionally valid.

The conclusions and ruling on the purpose of the trafficking offences in *D'Souza* and *Beckford and Stone* have been adopted in more recent cases. *Ahmed* and *Ngoto* were charged with trafficking and prostitution-related offences relating to two minors and challenged s. 279.011 as being overbroad and contrary to s. 7 of the *Charter*.³³⁸ *Ngoto*, in particular, argued that she was a victim of trafficking, or at least a victim of violence at the hands of her co-accused *Ahmed* and another third party, her ex-husband *Aden*, in relation to her work as an exotic dancer and escort. *Ngoto* also provided evidence that she left her husband because of intimate partner violence.³³⁹ In rejecting the overbreadth arguments and the hypotheticals provided by both of the defence, Justice Labrosse found that the wording “for the purpose of exploiting them or facilitating their exploitation” is “... in keeping with the high degree of mens rea required in order for the offence to be made out.”³⁴⁰ Justice Labrosse stated further:

While I appreciate that the objective of the provision is to capture a wide range of activity that can be associated with facilitating human trafficking, this does not render the provision overly broad. Further, the fact that victims or subordinates already victimized by human traffickers can also fall under the ambit of “facilitating” exploitation does not capture conduct that bears no relation to its objective. These subordinates have a degree of moral blameworthiness that can result in a finding of guilt. The different levels of culpability are properly dealt with through the sentencing process”.³⁴¹

Albashir (co-accused of *Mohsenipour*) is also challenging the constitutionality (ambiguity) and elements (facilitating trafficking) of the section 279.01(1) adult trafficking offence as a proposed ground of his ongoing appeal.³⁴²

The *D'Souza* case is illustrative of the growing complexity and the extended length of proceedings in some trafficking cases (*D'Souza* was arrested in May 2014 and his trial was scheduled for September

³³⁶ *Ibid*, para 165.

³³⁷ *Ibid*, para 166.

³³⁸ 2019 ONSC 4822, paras 1, 3, 16.

³³⁹ *Ibid*, paras 33, 42, 43, 47, 48, 53-54, 67, 70, 74.

³⁴⁰ *Ibid*, para 49.

³⁴¹ *Ibid*, para 40.

³⁴² 2020 BCCA 112, para 106.

2016). In *D'Souza*, in addition to the s.7 constitutional challenge, defence and Crown counsel filed multiple pre-trial motions including:

- a defence application for a change of venue to ensure a fair trial due to inaccurate and prejudicial pretrial publicity and an application to sever the criminal and controlled drugs charges into two separate trials (applications denied);³⁴³
- a defence application for a stay of proceedings due to a s. 11(b) *Charter* argument that *D'Souza's* right to be tried within a reasonable time was violated (rejected);³⁴⁴
- a defence application for the exclusion of evidence in relation to alleged violations of his s. 8 (warrantless searches of his person and vehicle and warranted searches of two residences), and ss. 10(a) and 10(b) of the *Charter* (rights to be informed of the complete reasons for his arrest (allowed in part and certain evidence excluded));³⁴⁵
- a defence application on the admissibility of proposed evidence to cross-examine the complainant (allowed in part);³⁴⁶
- a Crown application for admission of a pistol receipt and manual (application denied).³⁴⁷

In relation to the other prosecuted trafficking cases, constitutional challenges have included alleged violations of ss. 7 and 10 of the *Charter* contesting the voluntariness and admissibility of statements made by defendants to the police;³⁴⁸ s. 8 challenges asserting unreasonable search and seizure and seeking the exclusion of certain evidence under s. 24(2) of the *Charter*;³⁴⁹ and s. 11(b) challenges on the right to be tried within a reasonable time.³⁵⁰ There have been various other legal challenges in relation to alleged abuse of process due to Crown late or non-disclosure;³⁵¹ applications to admit or exclude certain types of evidence, such as text messages, advertising images, and a book on pimpology;³⁵² applications seeking to introduce previous convictions for similar conduct as discreditable conduct or youth court convictions;³⁵³

³⁴³ 2016 ONSC 777.

³⁴⁴ 2016 ONSC 4293.

³⁴⁵ 2016 ONSC 5855.

³⁴⁶ 2016 ONSC 6019.

³⁴⁷ 2016 ONSC 5915. There apparently was also a Crown application on expert opinion evidence, but we do not have proceedings for this application.

³⁴⁸ For example: *Alexis-McLymont, Elgin and Hird*, 2018 ONSC 1389; *Joseph*, 2018 ONSC 4646; *P.N.W.*, 2017 ONSC 5698; *Webber*, 2019 NSSC 147.

³⁴⁹ For example: *Brown*, 2018 ABQB 136; *Evans*, 2017 ONSC 4028.

³⁵⁰ For example: *Brown* 2018 ABQB 469; *R v Rye*, 2018 ONSC 7474.

³⁵¹ For example: *Brown* 2018 ABQB 469; *R v R.W.*, 2018 ONSC 1806

³⁵² For example: *Bright*, 2017 ONSC 377; *Moradi*, 2016 ONCJ 842; *Webber*, 2019 NSSC 147.

³⁵³ For example: *Bright*, 2017 ONSC 377; *Evans*, 2017 ONSC 4028; *Moradi*, 2016 ONCJ 842.

and, applications to question complainants on certain matters or have a complainant's prior sexual history (especially in relation to voluntary engagement in sex work) admitted into evidence (s. 276 *Criminal Code*).³⁵⁴ The Crown have also applied for complainants (and witnesses) to give their testimony via video link in some cases or to have a support person present when a complainant is giving testimony.³⁵⁵

Troublingly, there have been allegations (some proven) of police abuse of process or misconduct in some cases. For example, the first time that *Salmon* was prosecuted for human trafficking in 2011, 17 charges, including the trafficking charges, were stayed based on the trial judge's finding of abuse of process due to police fabrication of evidence violating the defendant's s.7 *Charter* rights.³⁵⁶ The Crown appeal against this ruling was dismissed by the Ontario Court of Appeal.³⁵⁷ *Salmon* was subsequently prosecuted and convicted by a jury of four counts, including human trafficking (s. 279.01(1)) and receiving a material benefit from human trafficking (s. 279.02(1)), in late-2018 wherein defence counsel unsuccessfully applied to have evidence excluded based on the argument that *Salmon's* s.8 *Charter* right against unreasonable search and seizure was violated in relation to residential, vehicle and electronic devices (extraction of data) searches.³⁵⁸

In *Moazami*, the former lead Vancouver police Detective (Fisher) pleaded guilty to breach of trust and sexual exploitation offences in this case and in the *Bannon* procuring case³⁵⁹ for sexually interfering with a complainant (and key Crown prosecution witnesses) in each case. Former Detective Fisher was also a key Crown witness in the *Moazami* case. *Moazami* is currently appealing his "avails" and "obstruct" convictions arguing his right to a fair trial was jeopardized by alleged police misconduct.³⁶⁰ According to a media source, *Moazami* has made allegations against three other Vancouver Police

³⁵⁴ *Webber*, 2019 NSSC 147. See also *R v Floyd*, 2019 ONSC 7085, paras 1, 3, 4, 9-12, 15, 17-20 and *R v R.*, 2019 ONSC 6860, paras 3, 6, 8, 22, 28, 33, 37, 39 which are post-2018 prosecutions and additional to our datasets of 92 cases. In these cases, the court allowed the cross-examination since it is fundamental to the defence being able to challenge the elements of the offence. In both cases, the defence counsel were seeking to contest the theories of Crown and introduce evidence the complainants voluntarily engaged in sex work; for example in *Floyd* the defendants wanted to contest that they *recruited* the complainant and in *(L.)R.* the defendant wanted to challenge that they *groomed* the complainant into the sex trade.

³⁵⁵ *Lucas-Johnson*, 2018 ONSC 2370; *R v Turnbull*, 2017 ONCJ 309.

³⁵⁶ 2011 ONSC 3654.

³⁵⁷ 2013 ONCA 203.

³⁵⁸ 2018 ONSC 5670.

³⁵⁹ 2017 BCSC 511.

³⁶⁰ 2019 BCCA 226.

Department (VPD) Counter-Exploitation Unit members for assisting Fisher to obstruct an investigation.³⁶¹ Detective Fisher is also alleged to have interacted with three complainants in the ongoing *Mohsenipour* and *Albashir* case, who are appealing their convictions.³⁶² The *Albashir* case also involves criminal corruption allegations against other members of the VPD Counter Exploitation.³⁶³

There have been instances where the police have pressured complainants to implicate an alleged trafficker, sometimes inappropriately. Beyond our two datasets, in *Salmon and Foster*, a 2020 human trafficking case, the Ontario Court of Justice found that the police violated one of the two minor complainants' *Charter* rights during her detention and questioning, affecting the voluntariness of her statements. Among other observations about the complainant's detention, including not being informed of her right to retain and instruct counsel without delay or to contact a parent or other responsible adult, and denying her request to change into warmer clothing while being questioned, the court described the police questioning as being leading and aggressive; rude where the complainant was constantly interrupted when her answers did not conform to what the police wanted to hear; and patronizing and demeaning with the complainant being referred to as "Honey."³⁶⁴

In addition to alleged and proven police misconduct in some cases, the prosecuted cases raise complex questions about the selectivity of trafficking prosecutions, which was (unsuccessfully) argued by defence counsel in *Webber* where the minor complainant was allegedly recruited, controlled and directed in relation to providing sexual services by third parties other than just the defendant and her boyfriend Pellow who were singled-out for prosecution.³⁶⁵ The selectivity of prosecutions also relates to varied police and Crown charging practices where some "pimping cases" are being charged and prosecuted as trafficking *and* commodification cases, while others are being charged and prosecuted as commodification cases.³⁶⁶ This distinction is important since trafficking offence penalties are potentially

³⁶¹ Allison Hurst, "New allegations against 3 VPD officers being investigated in connection with disgraced cop" (6 December 2019), online: *CTV News* <https://bc.ctvnews.ca/new-allegations-against-3-vpd-officers-being-investigated-in-connection-with-disgraced-cop-1.4719316>.

³⁶² 2020 BCCA 112, paras 95-100.

³⁶³ Bethany Lindsay, "3 officers with VPD sex crimes unit under investigation for corruption, court hears" (20 November 2019), online: *CBC News* <<https://www.cbc.ca/news/canada/british-columbia/bc-court-of-appeal-corruption-investigations-vpd-counter-exploitation-1.5367274>>

³⁶⁴ 2020 ONSC 786, paras 21, 24, 28, 31-36, 41-44.

³⁶⁵ 2019 NSSC 147, para 198.

³⁶⁶ See, e.g., *R v Bannon*, 2017 BCSC 511; *R v Boodhoo, and others*, 2018 ONSC 7205; *R v Esho and Jajou*, 2017 ONSC 6152; *R v Gray-Lewis*, 2018 ONCJ 560; *R v Hall*, 2018 ABQB 459; *R v J.L.*, 2016 ONCJ 594; *R v Morgan*, 2018 ONSC 596; *R v A.R.-T.*, 2016 ONCJ 694; *R v Safieh*, 2019 ONSC 287 which were prosecuted as prostitution / commodification offences (especially s. 286.2 and s. 286.3 of the *Criminal Code*) even though these cases often share dynamics similar to the prosecuted trafficking cases

more severe in some cases (there is no mandatory minimum sentence for procuring as opposed to trafficking an adult) and given that certain legislative exceptions for materially benefitting from the commodification of sexual services are not available for trafficking offences (Appendix E below). As we have separately documented elsewhere and briefly discussed above, the prosecutions appear to be racially selective —and gendered and mediatized —where those charged, prosecuted, and convicted are disproportionately Black and People of Colour, while few Black, Indigenous, and other People of Colour are identified as alleged trafficking victims. This pattern is deeply troubling because it suggests the oversurveillance of some suspects and the under-protection of some complainants.³⁶⁷ It also coincides with now global momentum to end anti-Black, anti-Indigenous, and other forms of systemic racism and discrimination and to ensure that every individual is equal before and under the law and entitled to equal protection and benefit of the law without discrimination on various grounds including race, national or ethnic origin, or colour in full accordance with s. 15(1) of the *Charter of Rights and Freedoms* and other equality rights commitments that Canada is a party to, including those under core human rights treaties and the *UN Declaration on the Rights of Indigenous Peoples*.

Finally, adverse police and media publicity have been emphasized in several cases. In the *Ladha* case, it is alleged that the RCMP were under significant American pressure to produce more human trafficking prosecutions. This case received an enormous amount of media attention within Canada and internationally with *Ladha* being portrayed by the RCMP and the media as enslaving a young Tanzanian woman as her domestic helper. *Ladha* was fully acquitted of all charges and successfully pursued a civil out-of-court lawsuit settlement against, and an apology from the RCMP and the BC government for their “relentless” efforts to seize her assets and for their aggressive public narrative that she had enslaved a young woman.³⁶⁸ In her statement of civil claim, *Ladha* alleged a negligent investigation, malicious prosecution, defamation, and negligent publication including sensationalizing the case with a ‘slave narrative’ (and her subsequent demonization in the media).³⁶⁹ Another defendant, *Dzuazah*, was pursuing a civil claim for \$4 million for various tortious actions including malicious prosecution, abuse of process, negligence and defamation against the Peel Regional police and various adult entertainment agencies for

such as involving multi-defendants / multi-complainants, minor complainants, material benefit charges, and/or alleged exercising of control, direction, or influence.

³⁶⁷ *Millar & O’Doherty, supra* note 7.

³⁶⁸ Jimmy Jeong, “B.C. Woman Acquitted of Human Trafficking Settles Case Over Civil Forfeiture” (9 August 2017) online: *The Globe and Mail* <<https://www.theglobeandmail.com/news/british-columbia/bc-woman-acquitted-of-human-trafficking-settles-case-over-civil-forfeiture/article35933915/>>; *Mumtaz Ladha et al. v Canada (Attorney General) and BC (R)*. 2015. *Notice of Civil Claim*, British Columbia Supreme Court, paras 11, 58-59, 60. online: *Martin and Associates* <<https://martinandassociates.ca/wp-content/uploads/2015/02/Filed-Notice-of-Civil-Claim.pdf>>.

³⁶⁹ *Ladha et al. v Canada (Attorney General) and BC (R)*, *supra* note 368, paras 150-158.

the circulation of mug shot photos of 30 ‘notorious pimps’ to the media, including his. The human trafficking/prostitution charges against him originated in 2008 and were withdrawn or dismissed at his trial in 2010.³⁷⁰ *Moazami* also filed a defamation lawsuit against two newspapers owned by Post Media for allegedly unfair coverage of his case, which attracted widespread media coverage because of the nature of the allegations, mainly procuring and living on the avails, and sexual exploitation of 11 mainly minor victims.³⁷¹ Likewise, in 2019, after a high profile arrest and a two year legal process resulting in an absolute discharge for an immigration offence, an Ontario man filed a \$7 million lawsuit against the Ontario government for wrongful charges related to human trafficking, claiming malicious prosecution, negligent investigation, and racial profiling.³⁷²

In other cases, sensationalized police and media publicity, especially potentially damaging headlines, and inaccuracies in reporting, have resulted in a change of venue application³⁷³ and have been perceived as potentially prejudicing an accused’s right to a fair trial. In the *Joseph* case, the media appeared to deliberately mislead the public by publishing a photo of a Black male who was not the defendant. The sentencing judge was highly critical of the media in this case, not only in relation to the publication of a misleading photo but also concerning the publication of inaccurate information provided by the police to the media, which was part of an Operation Northern Spotlight campaign.³⁷⁴ On the other hand, in instances where a defendant has sought publicity, this information has been used as evidence against them as was the case in *Deiaco*, who agreed to videotaped interviews with the Toronto Star about his role as a “manager” in the sex trade while he was in custody awaiting trial for his human trafficking charges. Not only was the Toronto Star ordered to provide the videotaped interviews to the police,³⁷⁵ in *Deiaco*’s case, the sentencing judge allowed the prosecutor’s motion to have the videotape admitted into evidence. *Deiaco*’s voluntary admissions factored against him in the judicial assessment of his background and

³⁷⁰ *Dzuazah v Regional Municipality of Peel Police Services Board et al.*, 2016 ONSC 4714, paras 6-8.

³⁷¹ Andrew Weichel, “Newspaper stories ruined pimp’s ‘good reputation,’ lawsuit claims”. (16 October 2017), online: *CTV News* <https://bc.ctvnews.ca/newspaper-stories-ruined-pimp-s-good-reputation-lawsuit-claims-1.3635094>.

³⁷² Andrew Russell & Megan Robinson, “Ontario man files \$7M lawsuit over 16 ‘wrongful’ charges related to human trafficking” (24 July 2019) online: *Global News* <<https://globalnews.ca/news/5659860/ontario-man-lawsuit-human-trafficking-charges/>>

³⁷³ *D’Souza*, 2016 ONSC 777.

³⁷⁴ 2018 ONSC 4646, paras 11-21.

³⁷⁵ *Toronto Star v The Queen*, 2017 ONSC 1190.

character as an unlikely candidate for a rehabilitative sentence.³⁷⁶ *Deiaco*'s subsequent efforts to appeal his sentence and have this evidence excluded were unsuccessful.³⁷⁷

As the preceding legal analysis of the 92 prosecuted cases demonstrates, there is a growing body of jurisprudence and increasing clarity from the superior and appellate courts in interpreting the *actus reus* and *mens rea* elements of the trafficking offence, and in highlighting the importance of a trial judge's instructions to a jury in correctly interpreting the offence elements as an appellate issue. It is equally clear that the appellate courts are adopting a comparatively expansive interpretation of the *actus reus* element of exercising direction, control, or influence over a complainant's movements and that the courts interchangeably use trafficking *and* prostitution/commodification jurisprudence in interpreting this offence element in both trafficking and non-trafficking cases. Many of the trafficking cases rest heavily on the reliability and credibility of a complainant's testimony where the prosecution will seek to prove that a complainant's sex work was involuntary (specifically, that a defendant's conduct could reasonably be interpreted as causing a complainant to fear for their safety should they not provide the sexual services), while the defence will typically seek to provide evidence to the contrary. In this regard, both the evidential and appellate analysis underscore just how contentious complainant credibility continues to be, alongside the admission of corroborating digital evidence. When considered in the aggregate, the 25 appellate judgments so far suggest a reluctance to overturn a trial court's verdict of guilt ($n=1$ case) as opposed to an acquittal ($n=3$ cases). Our analysis illustrates the growing complexity of trafficking cases, in relation to defence and Crown pre-trial motions and constitutional challenges on various grounds, and the length of time it may take to adjudicate a case. Moreover, our analysis points to certain controversies associated with prosecuting trafficking cases, including in some cases alleged and proven police misconduct, the issue of selective prosecutions, and the potentially adverse legal consequences of sensationalized media coverage.

TENSIONS WITH FUNDAMENTAL PRINCIPLES OF LAW

Besides affirming the known list of harmful effects of legislative expansionism for those subjected to law and immigration enforcement actions,³⁷⁸ our findings suggest that the criminalization of sex work via

³⁷⁶ 2017 ONSC 3174, paras 21-23.

³⁷⁷ 2019 ONCA 12, paras 2, 5.

³⁷⁸ Kamala Kempadoo, Nicole McFadyen, Phillip Pilon, Andrea Sterling, & Alex Mackenzie A, *Challenging trafficking in Canada: Policy brief* (Centre for Feminist Research, York University, 2017), online: *Centre for Feminist Research* <<https://cfr.info.yorku.ca/challenging-trafficking-in-canada-policy-brief/>>; Lam, *supra* note 62; Robyn Maynard, "Fighting

anti-trafficking law leads to other concerning legal issues. As we discussed above, the judicial interpretation of the elements of offences raises important questions about the scope of the offences and the threshold for successful prosecution. The cases also demonstrate problematic evidentiary requirements specific to anti-trafficking laws and challenges about the use of expert opinion evidence in trials. While judicial interpretation appears to be moving towards expanded definitions, thus broadening the scope of prosecutions, there remain longstanding difficulties with witness credibility and victim treatment in Canadian sexual violence cases. These issues are heightened in the context of commercial sex, particularly in situations where the “victim” has consented to some—or all—of the conduct that is identified as violence but for which Canadian laws do not recognize such consent. Further, where individuals choose to work collectively with other sex workers or work with third parties to enhance their personal safety or for business-related reasons, they face additional vulnerability to state surveillance and even raids on their businesses that often seem to play out in racialized and gendered ways.³⁷⁹ In addition to these important legal issues, we argue that Canadian anti-trafficking laws potentially infringe fundamental principles of justice such as the rule of law and the principle of *res judicata*. Finally, we outline several consequences of Canada’s laws and laws enforcement on sex workers themselves, with particular attention to how the laws sustain and reproduce harmful (demeaning and degrading) stereotypes, contributing to the marginalization and ongoing targeting of sex workers for violence and victimization.

Legal Implications

As we previously documented, the criminal offence of trafficking in persons has received and continues to receive, in our view, an unjustified amount of political attention given how small a proportion of criminal activity it represents.³⁸⁰ We appreciate some of the reasons why the *PCEPA* was used as a legislative mechanism to simultaneously amend the criminal trafficking offence in 2014, such as ensuring consistency with the organized crime provisions of the *Criminal Code* and ensuring some level of parity between trafficking and commodification offences and penalties. However, it has legislatively and now judicially fused trafficking in persons with commercial sex work and applied the *PCEPA* legislative objectives of denunciation and deterrence to further increase the severity of trafficking in

Wrongs with Wrongs? How Canadian Anti-Trafficking Crusades Have Failed Sex Workers, Migrants, and Indigenous Communities.” (2016) 37:2 *Atlantis* 40; *Roots*, *supra*, note 31.

³⁷⁹ Elene Lam & Annalee Lepp, “Butterfly: Resisting the harms of anti-trafficking policies and fostering peer-based organizing in Canada.” (2019) 12 *Anti-trafficking Review* 91, DOI: <<https://doi.org/10.14197/atr.201219126>>.

³⁸⁰ *Millar & O’Doherty*, *supra* note 5.

persons sentencing post-*PCEPA*,³⁸¹ including through legally contentious mandatory minimum sentences that are argued in other contexts to perpetuate to systemic racism.³⁸²

To compound the situation, the fact that accused persons can be convicted for both commodification-related and human trafficking offences that arise out of the same incident, concern the same victims, and comprise essentially identical elements of the offences raises a very real concern about infringements of the long standing fundamental principle of *res judicata*. The arbitrary judicial inferences and refusal to employ social science evidence potentially raises troubling arguments about arbitrary state action, thus potentially infringing the rule of law. Finally, the enforcement patterns identified above indicate disproportionate, racialized and gendered effects on those already targeted for over-surveillance³⁸³ by the Canadian State as we all as under-protection where victimization does occur.

Legislative and Jurisprudential Conflation

A cursory examination of the jurisprudence demonstrates clearly there is significant overlap between elements of the material benefit, procuring, and human trafficking offences. Such overlap is not uncommon in criminal law; several other offences overlap (e.g. criminal negligence and dangerous driving) in part to allow Crown counsel to choose with which offence to proceed when given specific facts and in part to reflect the degree of seriousness of the harm done based on the case facts.³⁸⁴ There are important variations between the commodification and trafficking in persons offences (e.g. material benefit from sexual services contains exceptions that are incredibly important to sex workers, such as the dependant family member as beneficiary of an adult's sex work), and variations in the severity of sentences available for different offences (see Appendix E below).

Specifically, the legislative conflation of offence elements has produced the judicial conflation of case precedents where so-called “pimping” or “pimping plus” offences are now viewed as interdependent and indivisible, not only in interpreting elements of the offence (especially exercising control, direction, or influence) but also in sentencing for cases involving trafficking *and* commodification co-charges and for cases involving *only* trafficking or *only* commodification offence charges. In our review of the relevant cases, we found a consistent reliance on the same cases for both sets of offences. Quite

³⁸¹ For further discussion of the conflation of human trafficking and sex work, see: *Kempadoo, et al., supra* note 378; *Belak & Bennett, supra* note 16; Ronald Weitzer, “Human trafficking and contemporary slavery.” (2015) 41 *Annu Rev of Sociol* 223, DOI: <10.1146/annurev-soc-073014-112506>.

³⁸² See, e.g., Faizal R. Mirza. "Mandatory Minimum Prison Sentencing and Systemic Racism." (2001) 39:2/3 *Osgoode Hall Law Journal* 491. Online: <<http://digitalcommons.osgoode.yorku.ca/ohlj/vol39/iss2/11>>

³⁸³ *R v Le*, 2019 SCC 34.

³⁸⁴ See *R v Nova Scotia Pharmaceutical Society* [1992] 2 SCR 606.

problematically, many of the cited prostitution cases and authorities are now extremely dated and are based on repealed and/or constitutionally invalidated offences (such as ss. 193 and 195.1(1)(c), 195(2), 210 and 212 of the *Criminal Code*).

Conspicuously, the jurisprudence relied upon is extremely dated and tends to function to sustain certain myths about consent and credibility.³⁸⁵ Many of the cited authorities and cases are 20-50 years old. These decisions and authorities include but are not limited to a 1970 UK sentencing authority, Dr. DA Thomas *Principles of Sentencing* (2nd ed. (1970) at pp. 130, which is based on pre-1970s English case law and is linked to the formulation of the *Tang* factors; a 1992 Supreme Court of Canada decision *R v Downey* striking down a reverse onus provision in relation to living on the avails;³⁸⁶ the 1996 *Perrault* decision interpreting exercising control, direction or influence;³⁸⁷ and the 1997 *Miller*³⁸⁸ and *Tang*³⁸⁹ “additional” aggravating factors for sentencing in those cases bawdy house and living on the avails cases, all of which are widely cited across the prosecuted trafficking cases. These decisions appear to be based more on moralistic narratives about “predatory” and “parasitic pimps” and do not feature references to the incredible wealth of Canadian and comparative international social science evidence that is available about sex work and third parties, including social science evidence that has been judicially recognized by the courts. In fact, social science is demonstrably absent from most cases, allowing reliance on old stereotypes and problematic—and refutable—assumptions. The conflation between trafficking and “pimping” is evident in commonly used sources of statutory interpretation (e.g., the Criminal Law Notebook sentencing digest), case databases (QuickLaw, CanLII), as well as in jury charges about the *actus reus* of human trafficking as “pimping plus exploitation” even where “pimping” itself is tautologically described as exploitation. This conflation is evident even though the term “pimp” is not a legally defined term nor is it used in any statute itself.

Additionally, this legislative conflation of trafficking and commodification cases via *PCEPA* and its stated legislative objectives has led to a decisive punitive shift where there has been a sharp upward trend in the sentencing ranges used to sentence post-2014 trafficking (and commodification) cases. As the trafficking cases we reviewed reflect, the *PCEPA*-introduced mandatory minimum sentences across a wider number of offences illustrate the inherent tensions in criminal law policy between “tough on crime”

³⁸⁵ *Crosdale*, 2018 ONCJ 800.

³⁸⁶ 1992 SCC 109.

³⁸⁷ (1996), 6 C.R. (5th) 132, [1996] J.Q. No. 3825 (C.A.).

³⁸⁸ [1997] O.J. No. 3911.

³⁸⁹ 1997 ABCA 174.

approaches and the constitutionally protected rights of defendants, including the right not to be subjected to cruel and unusual punishment.

An Infringement of *Res Judicata*?

The substantial overlap between the offence of trafficking in persons and the previous and now amended procuring offence is problematic not only in terms of contributing to legal conflation but also because individuals are receiving multiple convictions for what is essentially the same offence. Indeed, 18 of the 45 convictions cases featured convictions for both offences (human trafficking *and* procuring or material benefit human trafficking *and* material benefit procuring) out of essentially the same conduct involving the same complainant, although in four of these cases the *Kienapple* principles were applied.³⁹⁰ This practice of allowing multiple convictions for the same conduct is arguably a violation of international law³⁹¹ as well as of s.12 of the *Criminal Code* and s. 11(h) of the *Charter*, which are both codifications of the long-standing principle of *res judicata*.³⁹² Section 12 clearly states that no person can be punished twice for the same conduct, something more commonly known in criminal law as “double jeopardy.” While the case law distinguishes between specific forms of the general principles to be applied in different circumstances, as well as procedural limitations, the general principles in question give rise to serious concern about the practice related to the offences in question.³⁹³ For example, s.12 of the *Criminal Code* gives allowance for circumstances where Parliament may have intended multiple convictions related to the same conduct; however, section 11(h) of the *Charter* prohibits both retrying an accused for an offence for which the accused has already been acquitted (*autrefois acquit*) as well as re-punishing the accused for an offence for which the accused has already been punished (*autrefois convict*).³⁹⁴ The additional *Charter* protection supersedes the *Criminal Code* allowance for contrary Parliamentary intentions, essentially negating such a possibility, unless constitutionally justified under s.1

³⁹⁰ *R v D.A.*, 2017 ONSC 3722; *Alexis-McLymont and Elgin and Hird*, 2018 ONSC 1389; *Alexis-McLymont and Elgin and Hird*, 2018 ONSC 1152; *R v Byron*, 2014 ONSC 990; *N.C.*, 2019 ONCA 484; *Crosdale*, 2019 ONCJ 3; *R v Estrella* [2011] O.J. No. 6616; *Gray*, 2018 NSPC 10; *Hosseini*, 2014 QCCA 1187; *Jordan*, 2019 ONCA 607; *Leung*, 2018 ONCA 298; *Lopez*, 2018 ONSC 4749; *Majdalani*, 2019 ONCA 513; *Mohsenipour and Albashir*, 2020 BCCA 112; *Murenzi*, 2018 QCCQ 2707; *Purcell*, 2018 ONSC 6520; *A.S.*, 2017 ONSC 802; *Salmon*, 2019 ONSC 1574; *Webber*, 2019 NSSC 147. The *Kienapple* principles were applied in *Estrella*, 2011; *Lopez*, 2018; *Salmon*, 2019; and *Webber*, 2019. See, especially, See *Lopez*, 2018 ONSC 4749, para 5; *Salmon*, 2019 ONSC 1574, para 32; *Webber*, 2019 NSSC 147, para 22.

³⁹¹ See Article 14(7) of the *International Covenant on Civil and Political Rights*, of which Canada is a signatory. Online: <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

³⁹² See Department of Justice Canada. “Section 11(h)- Protection against Double Jeopardy.” Online: <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd/check/art11h.html>>.

³⁹³ See *R v Wigglesworth* [1987] 2 SCR 541 and *R v Van Rassel*, [1990] 1 SCR 225.

³⁹⁴ *R v Van Rassel*, [1990] 1 SCR 225.

of the *Charter*. While these statutory protections are designed to address separate proceedings, protection against common law principles of fundamental justice, enshrined in section 7 of the *Charter*, apply more broadly.³⁹⁵

Multiple counts of an offence are allowable in Canadian law, if there are separate incidents associated with each act or different victims; likewise, multiple offences can come from one incident if the elements of the offences are distinct. In *R v Kienapple* (1975),³⁹⁶ the SCC stated that where the elements of the offences are the same, then the defence of *res judicata* would be open to the accused. It should not come as a surprise that *Kienapple* is now being applied in relation to cases where accused persons face convictions of both trafficking and procuring that arise from precisely the same conduct and where the elements of the offences are indistinguishable. For example, in *Salmon*, the court determined that two of the four counts were, “integral to, and wrapped up in” other counts, hence, “multiple convictions would offend the *Kienapple* rule.”³⁹⁷

Respecting the Rule of Law

In addition to the above legal implications of the legislative and jurisprudential conflation of trafficking in persons cases with commodification cases, the glaringly politicized nature of the enactment and enforcement of human trafficking provisions may also infringe another fundamental principle of justice: respect for the rule of law. In *Reference re Secession of Quebec* (1998), the SCC asserted that “...at its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.”³⁹⁸ Protection against arbitrary state action is further delineated within the constitutional jurisprudence related to s.7 of the *Charter*.³⁹⁹ Arbitrary state action can include such actions as misuse of power for the “likes, dislikes and irrelevant purposes of public officers acting beyond their duty”⁴⁰⁰ or as explained by the SCC in *Bedford*, “where there is no connection between the effect and the object of the law.”⁴⁰¹ In a more general sense, the rule of law functions to protect citizens from

³⁹⁵ *Canada (Attorney General) v Whaling*, 2014 SCC 20 at paras 34-35.

³⁹⁶ [1975] 1 SCR 729.

³⁹⁷ 2019 ONSC 1574, para 32. See also *Lopez*, 2018 ONSC 4749 at para 5 and *Webber*, 2019 NSSC 147 at para 22 for similar conclusions.

³⁹⁸ [1998] 2 SCR 217, para 70.

³⁹⁹ See *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350.

⁴⁰⁰ *Roncarelli v Duplessis* [1959] SCR 121 at 143.

⁴⁰¹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, para 98.

governmental interference where the government or its representatives may be acting arbitrarily, or in a manner that, “ignore[s] fundamental rights in order to accomplish collective goals more easily or effectively.”⁴⁰²

Under s.7 of the *Charter*, arbitrariness can be found where there is no connection between the law and the objective of the law; the standard is quite rigid and allows the judiciary to avoid entering into policy and discretionary determinations about the effectiveness of the law.⁴⁰³ Indeed, in *Bedford*, the SCC did not find the former criminal laws related to living on the avails, operating a bawdy house and communicating in public to be arbitrary. Instead, the SCC relied on the fundamental principles of justice related to overbreadth and grossly disproportionality.⁴⁰⁴ However, legal scholars are raising new arguments concerning arbitrariness. For example, Stewart, in assessing the constitutionality of *PCEPA*, argues that where the objectives of law are mutually inconsistent, and indeed one objective conflicts with, or makes the second objective nearly impossible to achieve, arbitrariness ought to be found. Stewart concludes that if the law is designed to protect sex workers from exploitation, but it criminalizes the safer methods of working in commercial sex thereby increasing the likely of danger and exploitation, that law ought to infringe fundamental principles of justice protected under s.7 of the *Charter*.⁴⁰⁵

Chu and Glass likewise assert that there is an arbitrariness argument to be made about *PCEPA*. These legal scholars suggest that governmental objectives must avoid ideological opinions or goals such as the desire to eradicate commercial sex in Canada.⁴⁰⁶ They reference jurisprudence related to obscenity to point out that judges have determined that issues related to sexual morality, or particular moral stances on controversial topics like sex work, ought not to form the basis of criminal laws.⁴⁰⁷ Here, the fact that there is no consensus about the definition of harm as it relates to sex work implies a weak and unsubstantiated basis for criminal law. Since the jurisprudence maintains such a high degree of conflation between human trafficking law and commodification law, then any arbitrariness arguments that apply to commodification ought to impact the law related to human trafficking.

⁴⁰² *Secession Reference (1998)*, *supra* note 398, at para 74.

⁴⁰³ *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791.

⁴⁰⁴ See Hamish Stewart, “The Constitutionality of the New Sex Work Law.” (2016) 54:1 *Alta. L. Rev.* 69 for a detail discussion of arbitrariness, *PCEPA* and the *Bedford* case.

⁴⁰⁵ *Ibid* at p. 86.

⁴⁰⁶ Sandra Ka Hon Chu and Rebecca Glass. “Sex Work Law Reform in Canada: Considering Problems with the Nordic Model.” (2013) 51:1 *Albert Law Review* 101.

⁴⁰⁷ See *R v Butler*, [1992] 1 SCR 452 and *R v Labaye*, 2005 SCC 80.

The politicized enactment and enforcement of trafficking in persons law raises troubling questions about the objective of the laws,⁴⁰⁸ the means used to achieve those objectives, and the disproportionate effects of law enforcement. As we have written about elsewhere, there are clear patterns of racialized and gendered enforcement of trafficking and commodification laws.⁴⁰⁹ Further, the conflation of human trafficking and commodification law has contributed to a near total focus on sexual exploitation, resulting in the invisibilization of other forms of labour exploitation and tremendous difficulty in employing the jurisprudence in non-sexual exploitation contexts.⁴¹⁰ The use of dated jurisprudence (including a UK sentencing authority from 1970 that is reliant on pre-1970 English case law and Canadian procuring, avails and bawdy house case law from 1992, 1996 and 1997) that functions to sustain myths about ‘innocent’ [female] victims and predatory [male, often racialized] defendants not only ignores the realities of the diversity of persons involved, it also dismisses the entire body of social science evidence in favour of subjective and personal moral judgements. As Kaye argues, the narratives present in the jurisprudence reinforce settler colonialism while entrenching neoliberal platitudes and settler interventions which only serves to sustain unequal access to justice.⁴¹¹ When the economic angles are examined, we see a clear financial gain offered to law enforcement agencies if they prioritize trafficking in persons enforcement actions⁴¹² along with popular support for politicians who stand as the face of the fight against human trafficking. There is also a targeted funding stream for agencies which serve to increase “awareness” about human trafficking, tautologically providing public support for the funding required to continue the cycle.⁴¹³ All of this occurs in the absence of social science evidence about the actual nature and scope of human trafficking in Canada, and without care for the negative consequences of such practices.

⁴⁰⁸ For an in-depth discussion of the “legal regulation of sexual morality” that is present in much Canadian law, see Brenda Cossman, “Feminist Fashion or Morality in Drag? The Sexual Subtext of the Butler Decision,” in *Bad Attitude/s on Trial* (Toronto: University of Toronto Press, 1997) 107.

⁴⁰⁹ *Millar & O’Doherty, supra* note 7 at 7-13.

⁴¹⁰ *Kaye & Hastie, supra* note 227.

⁴¹¹ *Kaye, supra* note 22.

⁴¹² See our 2015 report findings at 55-60.

⁴¹³ See, Alison Clancey, Noushin Khushrushahi, & Julie Ham, “Do Evidence-Based Approaches Alienate Canadian Anti-Trafficking Funders?” (2014) 3 *Anti-Trafficking Review* 87, DOI: < <https://doi.org/10.14197/atr.20121435>>; Ann De Shalit, Robert Heynen and Emily van der Meulen. “Human Trafficking and Media Myths: Federal Funding, Communication Strategies, and Canadian Anti-Trafficking Programs.” (2014) *Canadian Journal of Communication* 39, 385–412.

Creating and Sustaining Harmful Stereotypes and Stigma

There is an emerging body of case law and inquiry evidence in Canada challenging the problematic use of discredited yet pervasive and deeply harmful sexist, racist and misogynistic myths and stereotypes about sexualized violence in the criminal law, especially in relation to Indigenous women and sex workers.⁴¹⁴ Among other potential violations, these myths and stereotypes in criminal law arguably infringe the s. 8 (unjustified intrusions on privacy) and s. 15 (equality rights) *Charter* rights of sexual violence complainants.⁴¹⁵ To restore confidence in the criminal justice system, in early 2020 the Canadian government introduced Bill C-5: *An Act to amend the Judges Act and the Criminal Code*. The proposed amendment would require judges, as a condition of their appointment as provincial superior court judges, to participate in continuing education on sexual assault law and social context and to provide reasons for their verdict decisions in sexual assault proceedings.⁴¹⁶

In relation to these recent legal developments, our findings add to the existing literature demonstrating the ongoing stigmatization of commercial work based on unfounded assumptions and a lack of empirical evidence.⁴¹⁷ Equally concerning is, that beyond some commentary in the sex trafficking cases about the adverse health effects of unprotected sex for complainants as an aggravating factor in

⁴¹⁴ See, e.g., *Barton*, 2019 SCC 33; Canadian Judicial Council. *In the Matter of an Inquiry Pursuant to s. 63(1) of the Judges Act Regarding the Honourable Justice Robin Camp Report and Recommendation of the Inquiry Committee to the Canadian Judicial Council* (2016) online: Canadian Judicial Council <<https://cjc-ccm.ca/sites/default/files/documents/2019/2016-11-29%20CJC%20Camp%20Inquiry%20Committee%20Report.pdf>>; Roberta Campbell, *Independent report on the incarceration of Angela Cardinal* (Province of Alberta, 2018), online: Province of Alberta <<https://open.alberta.ca/dataset/8cd7c0a6-b8ea-4c33-ae01-f42177558fa1/resource/4867cd3d-9b2d-4ce1-9412-38d017d42b29/download/independentreportincarceration-angelacardinal.pdf>>; National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (Government of Canada, 2019), online: Government of Canada <<https://www.mmiwg-ffada.ca/final-report/>>; *R v Wagar*, 2015 ABCA 327. See also: Lisa Dufraimont, “Myth, Inference and Evidence in Sexual Assault Trials.” (2019) 44:2 *Queen's LJ* 316; Jennifer Koshan, “Judging Sexual Assault Cases Free of Myths and Stereotypes.” University of Calgary Faculty of Law ABLawg.ca. online: ABLawg <<https://ablawg.ca/2015/11/02/judging-sexual-assault-cases-free-of-myths-and-stereotypes/>>; Ran Hu. “Examining Social Service Providers’ Representation of Trafficking Victims: A feminist Postcolonial lens.” (2019) *Affilia* 34(4), 421-438.

⁴¹⁵ Department of Justice Canada. Charter Statement Bill C-5: *An Act to amend the Judges Act and the Criminal Code*, (Department of Justice Canada, 2020). Online: Government of Canada <<https://www.justice.gc.ca/eng/cs/j-sjc/pl/charter-charte/c5.html>>

⁴¹⁶ Bill C-5: *An Act to amend the Judges Act and the Criminal Code*, ss. 1(2) and 4. Online: Government of Canada <<https://www.parl.ca/DocumentViewer/en/43-1/bill/C-5/first-reading>>

⁴¹⁷ Cecilia Benoit, S. Mikael Jansson, Michaela Smith & Jackson Flagg, “Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers”(2018) 55:4-5 *The Journal of Sex Research* 457; Chris Bruckert & Stacey Hannem, “Rethinking the Prostitution Debates: Transcending structural stigma in systemic responses to sex work”(2013) 28:1 *CJLS* 43; *Kaye, supra* note 22.; *Kempadoo et al., supra* note 378.; Edith Kinney, “Victims, Villains, and Valiant Rescuers: Unpacking sociolegal constructions of human trafficking and crimmigration in popular culture” in Maria João Gui eds, *The Illegal Business of Human Trafficking*, (New York: Springer, 2015) 87; Krüsi et al., *supra* note 69; *Lam, supra* note 62; Maynard, *supra* note 63; Teela Sanders, “Inevitably violent? Dynamics of space, governance and stigma.”, 71 *SLPS* 93; *Sterling & van der Meulen, supra* note 66.

sentencing, and notwithstanding the *Bedford* decision, there seems to be very little concern for sex worker safety (beyond sex workers not being exploited and/or subject to violence by third parties or other sex workers they work with) including the potential beneficial role of third parties such as receptionists, drivers, and managers in contributing to sex worker health and safety.⁴¹⁸ This approach also ignores or deliberately invisibilizes the role of structural and state, including police, violence in the lives of sex workers. Rather than offering protection, as implied in the title of the *PCEPA*, the way that these laws work together—especially when the commodification laws are examined in conjunction with the human trafficking law and their enforcement—may very well serve to increase sex worker vulnerability to victimization, as a large body of Canadian empirical (experiential and social science) evidence would seem to suggest⁴¹⁹ and was successfully argued in *Anwar*. In *Anwar* (and *Harvey*), whose charges originally included human trafficking offences that were withdrawn, the Ontario Court of Justice relied on expert evidence in relation to operating an escort service employing adult women and measures aimed at ensuring the safety and security of sex workers. In this 2020 decision, the court found section 286.4 (prohibiting advertising the sale of sexual services) to violate section 2(b) of the *Charter* and section 286.3 (prohibiting procuring) and section 286.2 (prohibiting receiving a financial or material benefit) to violate section 7 of the *Charter*.⁴²⁰

While we acknowledge that not all courts engage in this practice, especially some of the more recent jurisprudence including a 2020 Ontario Court of Appeal decision⁴²¹ that use contemporary, neutral language, across many of the 85 prosecuted sex trafficking cases (and as highlighted by many of the judicial excerpts cited above) the courts frequently use stigmatizing (demeaning, degrading and, at times, patronizing) language to describe those who are involved in commercial sex work, irrespective of whether criminal conduct is found to occur. Specifically, the courts refer to the complainants as “prostitutes” and to the defendants as “pimps” or in some cases as “parasites.” This practice is not unique to the criminal courts but is reproduced by legal databases and referencing services, and by some journalists in the

⁴¹⁸ See, especially, *Anwar*, 2020 ONCJ 103.

⁴¹⁹ See especially the extensive experiential and social science evidence considered in *Bedford v Canada*, 2010 ONSC 4264 and *Canada (Attorney General) v Bedford*, 2013 SCC 72 and the careful weighing of that social science evidence by the courts. See also the careful weighing of social science evidence in *Anwar* 2020 ONCJ 103. See generally, Elya Durisin, Emily van der Meulen & Chris Bruckert (eds) *Red Light Labour: Sex work regulation, agency and resistance*, (Vancouver, UBC Press, 2018); *Kempadoo et al.*, *supra* note 378.

⁴²⁰ *Anwar*, 2020 ONCJ 103.

⁴²¹ *Sinclair*, 2020 ONCA 61, paras 31-33 also citing the importance of *Barton*, 2019 SCC 33, 376 C.C.C. (3d) 1 concerning the word “prostitute.”

mainstream media.⁴²² This practice, and particularly as related to referencing alleged victims of human trafficking as, “prostitutes,” is—in addition to inappropriate and stigmatizing—outdated and inconsistent with the language of the *PCEPA* amendments to the *Criminal Code* creating *commodification of sexual activity* offences. For example, consider the following judicial statement by the Ontario Superior Court in *R v Lopez*, a 2018 judgment that is heavily cited as sentencing jurisprudence for other trafficking cases:

For many years Canadian courts have decried the inherently exploitive, coercive and controlling actions of “pimps” in relation to prostitutes. The unfortunate contemporary reality of the sex trade is that male pimps typically are involved in the exploitation, degradation and subordination of women. At its most basic level, it is a form of slavery, with pimps living parasitically off the earnings of prostitutes. Pimps exercise their control over prostitutes by means of a variety of tactics including emotional blackmail, verbal abuse, threats of violence and/or pure physical violence and brutality. The prostitutes that are the subject of this coercive exploitation are typically vulnerable and disadvantaged women, who have been manipulated and taken advantage of by the pimp. Even in cases where their initial participation in the sex trade is voluntary, including perhaps their business association with the pimp, and adopted for reasons of perceived increased security and safety in an inherently dangerous line of work, the relationship invariably becomes one-sided and exploitive. Prostitutes are ultimately forced, in one way or another, to provide sexual services for money in circumstances where they would not otherwise have agreed to such services, and the money earned from those sexual services is collected by the pimp. Accordingly, in a very real and practical sense, pimps traffick [sic] in the human resources of prostitutes, callously using their sexual services as an endlessly available commodity to be simply bought and sold in the marketplace. Accordingly, pimps have been aptly described as a “cruel, pernicious and exploitive evil” in contemporary society.⁴²³

⁴²² Illustrative examples include the *Leung*; *Webber*; *Moazami*; and *Ngoto and Ahmed* cases. According to the press, the sentencing judge described *Leung*'s actions as “parasitic, exploitive, horrific, despicable”. See Keith Gilligan, “Pickering pimp Daryn Leung sentenced to more than eight years for human trafficking, sexual assault and more” (24 February 2016) at para 1 online: *Durham Region* <<https://www.durhamregion.com/news-story/6342471-pickering-pimp-daryn-leung-sentenced-to-more-than-eight-years-for-human-trafficking-sexual-assault-and-more/>>. *Webber*, who was found guilty of charges related to pimping, including trafficking a minor and receiving a material benefit of trafficking was described by the press as “helping lure a 16-year-old girl into prostitution in Halifax, Moncton and Toronto” wherein the Nova Scotia Court also described “the ‘insidious underworld’ of exploitation and commodification that *Webber* brought a teenager into for her own sexual and financial gratification”. Elizabeth McSheffrey, “Woman jailed four years for luring 16-year-old girl into prostitution”. (17 January 2019) at paras 1-3, online: *Global News* <<https://globalnews.ca/news/4859242/woman-jailed-for-pimping/>>. On press coverage of the *Moazami* case, see, e.g., Dene Moore, “Pimp who ran teen prostitution ring becomes first in B.C. convicted of human trafficking” (15 September 2015) online: *The Canadian Press* <<http://www.vancouversun.com/life/pimp+teen+prostitution+ring+becomes+first+convicted+human+trafficking/10204969/story.html>>. For *Ngoto and Ahmed*, see Garry Dimmock, “Pimps spared prison, judge strikes down mandatory minimum sentence for trafficking minors”. (1 November 2019), online: *Ottawa Citizen* <<https://ottawacitizen.com/news/local-news/pimps-spared-prison-judge-strikes-down-mandatory-minimum-sentence-for-trafficking-minors/>>

⁴²³ *Lopez*, 2018 ONSC 4749, para 52. Another frequently cited case in the sentencing jurisprudence is: *A.E.*, 2018 ONSC 471, paras 1, 8, 13, 32. Paradoxically *Deiaco*, 2017 ONSC 3174, who presented himself as “a manager of escorts” in the mainstream

While the judge references other 1990s authorities to support the statements made, there are multiple factual assertions made that the judge assumes to be correctly inferred. In contrast, many experiential and social science reports are publicly accessible that provide a far more complex and nuanced picture than this decision allows.⁴²⁴ Drawing inferences in this manner serves only to sustain stereotypes and entrench the notion that social science evidence on such “known” matters is unnecessary. Another recent 2018 decision, *Gray*, from the Nova Scotia Provincial Court demonstrates the consistency of the practice across courts and jurisdictions:

A person who chooses to be employed in the sex trade may be doing just that – making a choice over his or her own body and employment. However, the reality is that in most situations the relationship between the pimp and the prostitute does not involve any real choice or true employment for the prostitute. The pimp forces or coerces the prostitute to use his or her body with little or no compensation. In those circumstances, the relationship cannot be viewed as employment in the sex trade, it is exploitation. As a result, that relationship has been described, correctly in my view, as a form of slavery. ... Viewed in that way, it is entirely appropriate to categorize some aspects of “pimping” as human trafficking.⁴²⁵

And in an earlier 2012 Ontario Superior Court judgment, *R v AA[1]*, the judicial language is even stronger:

Pimps are not harmless. They should never be perceived by the naive as being harmless. They provide no beneficial service whatsoever. For money pimps can enslave prostitutes. They control and dominate prostitutes both in their professional and in their personal lives. They enslave the females upon whose earnings they prey. They do that by exploiting the survival needs of the homeless and the unloved.

And further:

Those who live on the avails of prostitution are the lepers of both the underworld and the decent world. The money they leach from others attracts no tax, hence directly contributes to human degradation. That is why they are perceived by those who know

media through an interview with the Toronto Star entitled “Beaten, Branded, Bought and Sold”, is not referenced as a pimp by the sentencing court.

⁴²⁴ See *Bruckert & Law*, *supra* note 105; Kara Gillies & Chris Bruckert, “Pimps, Partners, and Procurers: Criminalizing Street-Based Sex Workers’ Relationships with Partners and Third Parties” in Elya Durisin, Emily van der Meulen & Chris Bruckert eds, *Red Light Labour: Sex work regulation, agency and resistance* (Vancouver, UBC Press, 2018); Cecilia Benoit & Leah Shumka, *Sex Work in Canada*. online: <www.understandingsexwork.com>; CASWLR, *Safety, Dignity, Equality: Recommendations for Sex Work Law Reform in Canada*. online: CASWLR <www.sexworklawreform.com>; Caitlin Hawkes-Frost, *Pimps, Predators and Business Managers: Constructing the ‘procurer’ in Ontario courts* (MA Thesis, Criminology, University of Ottawa, 2014); *Roots*, *supra* note 24.

⁴²⁵ 2018 NSPC 10, para 32.

them, both in the criminal society as well as in the decent world, as being on a level with child molesters”.⁴²⁶

Although Justice Wein was citing a 1993 case precedent provided by defence counsel, her comments in AA[2] continue to be widely cited, even in 2020 trafficking cases, as describing the offence of human trafficking.⁴²⁷

The sentencing jurisprudence likewise demonstrates stigmatizing language both in characterizing accused persons as “pimps,” and about sex workers. The cases generally feature heteronormative relationships with only cisgender males as purchasers, predominantly cisgender and racialized (especially Black) males as procurers, and nearly always cisgender (and White presenting) females as exploited victims. In legal jurisprudence, the roles are static and fixed, with no allowance for the diversity of experiences or even a recognition of the dual roles that many sex industry participants play.⁴²⁸ Sex work is presented in a two-dimensional, uniform manner which demonstrates a lack of understanding of the complexity of sex work or of key distinctions between types of work and experiences within different markets, a poor understanding of third parties and the varying roles of third parties; with sweeping claims made about violence, and gendered and racialized depictions of “pimps.”⁴²⁹ Likely because nuance in issues such as consent complicates our understandings of whether victimization has occurred, cases tend to present sex work on a binary rather than a continuum of consent that more accurately reflects sex workers’ experiences.⁴³⁰ Commercial sex work is often fluid where an individual may work simultaneously in more than one sector or may alternate between sectors or may alternate in and out of sex work, at times based on choice and at other times based on circumstance or coercion.⁴³¹ The detailed biographical information provided across the 85 prosecuted sex trafficking cases affirm these exceptionally complex and nuanced patterns.

With the exception of *Bedford* and, more recently *Anwar*, these complex realities are virtually non-existent in Canadian legal jurisprudence; the significance of their invisibility is that unrepresentative and deeply flawed presumptions continue to be presented as reality, sustaining a system that criminalizes

⁴²⁶ [2012] O.J. No. 6256, para 32.

⁴²⁷ *Antoine*, 2020 ONSC 181, para 29. In *Antoine*, para 39 the court goes on to say: “In neither case did the offender use any overt violence *beyond the violence inherent in his activities as a pimp*” [emphasis added].

⁴²⁸ Raven Bowen, “Squaring Up: Experiences of Transition from Off-Street Sex Work to Square Work and Duality—Concurrent Involvement in Both—in Vancouver, BC” (2015) 52:4 *CRS* 429.

⁴²⁹ See, especially, *Anwar* 2020 ONCJ 103; *Bedford v. Canada*, 2010 ONSC 4264; *Canada (Attorney General) v. Bedford*, 2012 ONCA 186; *Canada (Attorney General) v. Bedford*, 2013 SCC 72.

⁴³⁰ See the Living in Community, “Continuum of Choice.” Online: <<https://livingincommunity.ca/why-sex-work/>>

⁴³¹ *O’Doherty*, *supra* note 64.

certain people while making access to justice difficult, if not impossible, for others.⁴³² Critical scholars consistently note that the victimization of racialized persons, and particularly Black and Indigenous persons, is too often unprosecuted, or where cases proceed, trial evidence shows incredibly stigmatizing and harmful language used to dehumanize the victims.⁴³³ The recent case *R v Barton* demonstrates this pattern most clearly. This case resulted in the SCC having to remind the judiciary that “implied consent” does not exist in Canada: one’s consent to commercial sex does not equate to consent to all sexual acts with all persons.⁴³⁴ Further, the Supreme Court felt it necessary to encourage judges, when they instruct juries on charges related to the victimization of sex workers, to provide juries with some direction to avoid discrediting victims on the basis of stereotypes and prejudices. The SCC provided the following as a list of suggested statements to address “troubling stereotypical assumptions about Indigenous women who perform sex work, including that such persons:

- are not entitled to the same protections the criminal justice system promises other Canadians;
- are not deserving of respect, humanity, and dignity;
- are sexual objects for male gratification;
- need not give consent to sexual activity and are “available for the taking”;
- assume the risk of any harm that befalls them because they engage in a dangerous form of work; and
- are less credible than other people.”⁴³⁵

That the SCC had to issue this directive is a clear indicator of how entrenched such views and systemic racism remain in Canada and within the Canadian criminal justice system. It is also one of the clearest indicators of the vulnerability of racialized and gendered sex workers and the failures of the criminal justice to respond adequately to their victimization. The conflation in the discourse on human trafficking and commercial sex work then imports these prejudices and systemic failures into the human trafficking jurisprudence. The dangers of such practices extend far beyond the legal academic

⁴³² See *Millar & O’Doherty, supra* note 7 for a more fulsome discussion of who is targeted and who is invisibilized in the Canadian system.

⁴³³ Sarah Hunt, “Representing Colonial Violence: Trafficking, sex work, and the violence of law” (2015) 317:1 *Atlantis* 25; *Chan & Chunn, supra* note 123; *Maynard, supra* note 65; Yasmin Jiwani, “Mediations of Race and Crime: Racializing crime, criminalizing race.” in Barbara Perry, ed, *Diversity, Crime and Justice in Canada*, 2nd ed (Ontario: Oxford University Press, 2016), at 43-62.

⁴³⁴ *Barton* 2019 SCC 33, para 115.

⁴³⁵ *Ibid*, para 201.

implications to the very real harm done to victims of violence who are unable to receive state protection or who are unfairly targeted for surveillance and intervention.

The patterns of enforcement and judicial interpretation of the human trafficking provisions raise significant concerns about the ways in which the laws are applied against individuals in Canada. However, there are additional vexing legal implications that flow from these data that are rarely discussed in related legal and academic discourse. The enactment, enforcement, and prosecution of Canadian human trafficking laws appear to infringe the longstanding principles of *res judicata* and the rule of law. When combined with an examination of the deeply harmful ways that the judicial discourse sustains a false unidimensional narrative about consent, racist depictions of deserving and undeserving victims, and harmful stereotypes about sex workers and third parties, it is clear that these practices need to change immediately. While it may seem an academic endeavour to discuss the impacts on fundamental principles of justice, it is not. These cases are about violence done to people. They are equally about systemic discrimination against individuals and the effects of allowing ideology and politics to guide the practice of criminal law. In essence, these data challenge the state's record on fairness, impartiality, equality, and accessibility of justice for all persons in Canada.

Recommendations

We embarked on this work several years ago for three primary reasons: 1) as longstanding anti-violence feminists, we view all forms of sexual violence as unacceptable human rights violations; 2) our work consistently pushed us into this subject area, as more and more media contacts, other legal and academic scholars and community connections consistently conflated commercial sex and violence against women with human trafficking, and 3) if we were to speak to a topic, we knew that we needed to know as much as possible about that topic before forming conclusions. What we found in the past six years of research has left us deeply concerned about the state of Canadian and international knowledge on the scope and extent of human trafficking as well as the scope and extent of the human rights impacts of the enforcement of politicized laws. More importantly, we have found no evidence that the way in which Canada has criminalized conduct related to commercial sex and human trafficking has had any positive impacts on preventing or responding to violence against women. Instead, the evidence demonstrates very clear and grossly disproportionate negative impacts on sex workers and other groups targeted by the State for surveillance and regulation.

Many of the recommendations we make are not our own nor are they new ideas. For decades, these recommendations have been made repeatedly by critical scholars and community activists (many of

whom, in both groups, are sex workers). We make them again to stand in solidarity and amplify the voices of these individuals and groups, but we do so knowing that scholarly work in this subject area is inherently limited by its readability, its reach, and its alignment with existing popular ideals. Law is a deeply political process, often more intricately connected to emotion and popular appeal than to a rational and empirical foundation.

We ask that those involved in law and policy reform, law enforcement broadly defined, the mainstream media, and the public sector carefully consider our list of recommendations. At their core, our recommendations call for a significant reconsideration, if not fundamental restructuring, of some entrenched structures and popular notions about deviancy and protectionism. These recommendations flow from our years of socio-legal research in this subject area, the hundreds of pages of jurisprudence we have read, and our existing knowledge base informed by Canadian and international critical legal scholarship and community practice. Based on these sources, we recommend the following modest and more broadly transformational actions:

1. Prioritizing independent assessment of the criminal anti-trafficking law, in its creation, its enforcement, and its application, with a particular focus on its intended and unintended consequences, especially for Black, Indigenous and People of Colour, gender and sexual minorities, and im/migrants who work in commercial sex.⁴³⁶ The government ought to give immediate consideration to de-conflating human trafficking from commercial sex work and im/migration in both the applicable laws and their enforcement.
2. Ensuring that immigration and criminal law reform is led by evidence-informed practice that respects basic human dignity and gives primacy to human rights, especially equality rights and access to justice. To this end, we support the Canadian Civil Liberties Association's call for independent oversight of the *Charter*-compliance of all legislation passed in Canada.⁴³⁷
3. Adopting an evidence-informed and rights-based approach to regulating commercial sex work. Sex workers should be afforded the right to decent work and health and labour rights protections, along with the ability to access routes of recourse when facing unsafe working conditions or other negative work-related situations.⁴³⁸ In view of current global events, the Canadian government

⁴³⁶ For a succinct analysis of the available independent empirical evidence on the *ineffectiveness* of criminalization in reducing precarity (poverty and inequality) and protecting sex workers and others from violence and exploitation, see especially Ine Vanwesenbeeck, "Sex work criminalization is barking up the wrong tree" (2017) 46:6 *Archives of Sexual Behavior* 1631. See also Platt et al., *supra* at note 21.>

⁴³⁷ *Canadian Civil Liberties Association*. "Charter First: A blueprint for prioritizing rights in Canadian Lawmaking." (2016) Online: CCLA <<https://ccla.org/cclanewsites/wp-content/uploads/2016/09/Charter-First-Report-CCLA.pdf>>

⁴³⁸ See, e.g., NSWP. *Policy Brief: Sex Work as Work* (NSWP, 2017), online: NSWP <https://www.nswp.org/sites/nswp.org/files/policy_brief_sex_work_as_work_nswp_-_2017.pdf>. In abbreviated form, the

- ought to give serious consideration to proposals to destigmatize and decriminalize sex work while simultaneously ensuring the extension of basic human, health and labour rights to sex workers.
4. Re-examining avenues to migration and immigration policies through an intersectional lens to ensure more equitable access to Canada. The Canadian government ought to consider rescinding immigration travel restrictions that are overtly discriminatory based on intersections of gender, age, race, national or ethnic origin, colour, citizenship status, and/or occupation.
 5. Addressing differential access to rights and remedies, including restitution, for victims of human trafficking or other violence, including the starkly different access to justice experienced by Black, Indigenous and People of Colour, gender and sexual minorities, and im/migrants. As emphasized by numerous UN human rights entities and domestic commissions of inquiry, Canadian governments should ensure we are meeting our international and domestic legal obligations for equality and non-discrimination and access to justice for all victims of crime and violence. In this regard, Canada ought to take immediate steps to fully implement the recommendations of these international bodies and commissions of inquiry, especially those on violence in policing, systemic racism in the criminal justice system, truth and reconciliation, and missing and murdered Indigenous women and girls.
 6. Educating—including through legislatively prescribed continuing legal education and social context and culturally specific competency training if necessary—all members of the criminal justice and immigration systems, and some members of the mainstream media, about the deeply harmful effects of (frequently racialized and gendered) myths, misconceptions, and stigma associated with sexualized violence and commercial sex work.
 7. Expanding the use of expert social science evidence in criminal proceedings to challenge highly problematic racist, sexist, misogynist and essentialist stereotypes, including those about the commercial sex sector and its participants, while recognizing the complexities of expert evidence in criminal and constitutional litigation.⁴³⁹

NSWP decent work agenda basic labour protections include: 'The decriminalisation of all aspects of sex work; Fair labour practices; A clean and safe working environment; Access to condoms and personal protective equipment; Access to voluntary, non-stigmatising and comprehensive health services; Freedom from violence and sexual harassment; The right to choose work arrangements; The right of sex workers to control establishment of health and safety standards in their industry; The right to form workplace associations, or to unionise; Rights for migrant sex workers; The right to social protections and benefits; Access to statutory complaint mechanisms to address contraventions of employment standards legislation; The right to refuse services; The right to access health and social services free from stigma and discrimination; Freedom from discrimination by other employers, landlords, or judges in family court due to current or prior involvement in sex work' (at 14).

⁴³⁹ John Lowman, "The Role of Expert Testimony in *Bedford v Canada* and *R v McPherson*. Excerpt from "In the Eye of the Storm: The (Ab)Use of Research in the Canadian Prostitution Law Reform Debate," (A paper presented at "Sex Work and Human Rights: Lessons from Canada for the UK," Durham Law School, Durham University, September 18–19, 2014).

8. Beginning the more complex work of addressing the root structural causes of exploitation and inequity, including prioritizing work on labour exploitation and the exploitation of migrant workers vis-a-viz internationally recognized concepts of coerced, forced, and unfree labour.⁴⁴⁰
9. De-centring whiteness, including by ensuring that all law-making bodies, criminal justice and immigration institutions, and the mainstream media fully represent the diverse communities they are intended to serve, including in managerial and decision-making positions.
10. Confronting ongoing systemic—especially anti-Black, anti-Indigenous, anti-Muslim, and anti-im/migrant—racism in Canada, for example by enacting explicit anti-racism laws and institutional practices. Canadian governments ought to review and act on proposals to transform the criminal justice system through various restructuring measures, including those to end racial profiling, the excessive use of police force, and police immunity, where they occur, and to decriminalize, decarcerate, defund and/or reallocate resources where appropriate in an effort to re-establish trust between the criminal justice system and the communities it serves and to ensure lived equality and justice for all individuals in Canada.

⁴⁴⁰ Kendra Straus, “Coerced, Forced and Unfree Labour: Geographies of Exploitation in Contemporary Labour Markets” (2012) 6:3 *Geography Compass* 137. See also *Beatson, Hanley and Ricard-Guay*, *supra* note 227; Klara Skrivankova, “Between decent work and forced labour: examining the continuum of exploitation” *Joseph Rowntree Foundation (JRF) Programme Paper: Forced Labour, 2010*. Online: *JRF* <<https://www.jrf.or.uk>>

APPENDICES

Appendix A: Case Identification Methods and Table of Cases

As discussed in our methods section, we used similar methods to our original (2015) report to identify cases by using legal databases and triangulating with other sources, including using some media reported convictions. We classified a trafficking case as occurring before 2014 where prosecution proceedings commenced, and ideally a verdict or other legal outcome was reached, before December 2014. We used the same criteria for categorizing the 2015-2018 cases. In view of continuing or ongoing legal proceedings (sentencing, legal challenges, and appeals), some of the published proceedings for each data set extend beyond these cut-off dates. For example, a prosecution that commenced before 2015 may have legal motions that are considered post-verdict, a sentencing or appellate judgment after 2015. Likewise, a prosecution that commenced between 2015 and 2018 may have legal motions, a sentence or appellate judgment after 2018. For this and our earlier report, we defined case legal outcomes as: (1) a trafficking-specific conviction, where a defendant was convicted of one or more trafficking specific charges; (2) a partial acquittal, where a defendant was acquitted of the trafficking charge(s) but convicted of other charges; (3) a full acquittal, where a defendant was acquitted of all charges; (4) other legal outcomes, including cases in which the charges were dismissed or stayed, or a verdict was overturned and a new trial was ordered on appeal; and (5) ongoing or unknown legal outcomes for cases where a verdict had yet to be determined at the time of writing or where we were unable to verify a verdict for the case. The cases we examined for each of the two datasets are listed below. Legal citations for specific cases cited in the report are provided in the footnotes. In view of the complexity of the case law in our report citations above where we often cite multiple judgments for one case, we provide full citations for all cases rather than using *supra*. However, for simplicity, and especially after we have cited a case in full once, we have omitted *R v* or *R c* in many instances and simply cite the case surname. And, when the case name is mentioned in the textual discussion, we only provide the case citation. A comprehensive listing of all case citations for every case is on file with the authors.

Table of Case Names, Case Data Set 2006-2014 ($n=35$)

| | |
|--|---|
| <i>R v AA</i> [1], 2012 | <i>R v Lennox</i> [also referred to as Lennox Mark], 2008 |
| <i>R v AA</i> [2], 2013 | <i>R v Lynch</i> , 2012 |
| <i>R v LA</i> , 2013 | <i>Mataev c R</i> , 2013 |
| <i>R v Beckford [and Stone]</i> , 2013 | <i>R v McCall</i> , 2013 |
| <i>R v Burton</i> (Mark Anthony), 2013 | <i>R v McFarlane</i> , 2012 |

| | |
|---|--|
| <i>R v Burton</i> (Tyrone), 2014 | <i>R v McPherson</i> , 2013 |
| <i>R v Byron</i> , 2013 | <i>R v Moazami</i> , 2014 |
| <i>R v Domotor [and Kolompar]</i> , 2012 | <i>R v Nakpangi</i> , 2008 |
| <i>R v Downey [and Thompson and Roberts]</i> , 2009 | <i>R v Ng</i> , 2007 |
| <i>R v Dzuazah</i> , 2010 | <i>R v Orr [and Huen]</i> , 2013 |
| <i>R v Emerson</i> , 2009 | <i>R v Salmon</i> (Courtney), 2011 |
| <i>R v Estrella</i> , 2011 | <i>R v Salmon</i> (Gregory), 2014 |
| <i>R v Gashi [and Simnica]</i> , 2014 | <i>R v St. Vil</i> , 2008 |
| <i>R v GKS</i> , 2014 | <i>R v Tynes [and Lafferty]</i> , 2010 |
| <i>R v Hosseini</i> , 2012 [unofficial translation] | <i>R v Urizar</i> , 2010 |
| <i>R v Johnson</i> , 2011 | <i>R v Vilutis</i> , 2009 |
| <i>R v KO-M</i> , 2014 | <i>R v Williams</i> , 2014 |
| <i>R v Ladha</i> , 2013 | |

Table of Case Names, Case Data Set 2015-2018 ($n=57$)

| | |
|--|--|
| <i>R v A.A</i> [3], 2017 | <i>R v M.M.</i> , 2018 |
| <i>R v D.A.</i> , 2017 | <i>R v Majdalani [and Schmidt-Fabian]</i> , 2017 |
| <i>R v K.G.A [and A.S.A, and K.Q.G]</i> , 2019 | <i>R v Masoudi</i> , 2016 |
| <i>R v N.A</i> [also referred to as A.N.], 2017 | <i>R v McGee</i> , 2016 |
| <i>R v Abara [and Kulafofski]</i> , 2018 | <i>R v Mohsenipour [and Albashir]</i> , 2018 |
| <i>R v Alexander [and Bell and Nolan]</i> , 2016 | <i>R v Moradi</i> , 2016 |
| <i>R v Alexis-McLymont [and Elgin and Hird]</i> , 2017 | <i>R v Murenzi</i> , 2018 |
| <i>R v Bright</i> , 2015 | <i>R v T.Q.N.</i> , 2015 |
| <i>R v Brown</i> , 2017 | <i>R v Ngoto [and Ahmed]</i> , 2018 |
| <i>R v Cain</i> [also referred to as NC], 2017 | <i>R v KO [and CS and DV and Vinje]</i> , 2018 |
| <i>R v Crosdale</i> , 2018 | <i>R v Oliver</i> , 2018 |
| <i>R v Campbell-Ball [and Roble and Kahin]</i> , 2016 | <i>R v H.P.</i> , 2016 |

| | |
|---|---|
| <i>R v A.D.</i> , 2018 | <i>R v Purcell</i> , 2018 |
| <i>R v Dagg</i> , 2015 | <i>R v Rasool</i> , 2015 |
| <i>R v Deiaco</i> [also referred to as MCD], 2017 | <i>R v Rocker</i> , 2018 |
| <i>R v D'Souza</i> , 2016 | <i>R v Rye</i> , 2018 |
| <i>R v Evans</i> [also referred to as AE], 2017 | <i>R v A.S.</i> , 2016 |
| <i>R v Finestone</i> , 2017 | <i>R v (R.R.) S.</i> [also referred to as R.S.], 2015 |
| <i>R v Gallone</i> , 2017 | <i>R v Salmon</i> , 2019 |
| <i>R v Gibson-Skeir</i> , 2016 | <i>R v Sinclair</i> , 2017 |
| <i>R v Gray</i> , 2018 | <i>R v Surendran [and Reece]</i> , 2015 |
| <i>R v H.H.</i> [and R.C.], 2015 | <i>R v Symonds</i> , 2018 |
| <i>R v Ibeagha [and David]</i> , 2016 | <i>R v Turnbull [and Kruzik]</i> , 2017 |
| <i>R v Jordan</i> , 2018 | <i>R v J.W [and K.N.]</i> , 2017 |
| <i>R v Joseph</i> , 2017 | <i>R v P.N.W.</i> , 2017 |
| <i>R v Leblanc</i> , 2018 | <i>R v R.W.</i> , 2018 |
| <i>R v Leung</i> , 2015 | <i>R v T.Y.W.</i> , 2016 |
| <i>R v Lopez</i> , 2018 | <i>R v Webber</i> , 2018 |
| <i>R v Lucas-Johnson</i> , 2018 | |

Appendix B: A Brief Summary of The PCEPA Legislative Changes

The *PCEPA* is broader than a Nordic or asymmetric criminalization model. It creates a new *Criminal Code* section on the “commodification of sexual activity” and two new offences criminalizing the purchase *and* advertising of sexual services. Specifically, section 286.1(1) for the first time criminalizes obtaining sexual services for consideration from an adult as a hybrid offence subject to a mandatory minimum fine (unsuccessfully constitutionally challenged as a violation of s. 12 of the *Charter* in *R v Mercer*).⁴⁴¹ Section 286.1(2) continues to criminalize obtaining sexual services for consideration from a person under 18 years of age as an indictable offence subject to a mandatory minimum term of imprisonment (successfully constitutionally challenged as a violation of s. 12 of the *Charter* and declared to be of no force or effect in *R v Charboneau*⁴⁴² and *R v J.L.M.*⁴⁴³ while increasing the maximum sentence, which was 5 and is now 10 years imprisonment. Section 286.4 for the first time criminalizes knowingly advertising sexual services (a hybrid offence). The *PCEPA* replaces a constitutionally impugned “living on the avails of prostitution” offence with a more narrowly defined third party material benefit indictable offence in relation to sexual services provided by both adults and minors (section 286.2). And, it re-enacts a procuring offence for both adults and minors as indictable offences (section 286.3), the mandatory minimum penalties for which have been found to be unconstitutional and of no force and effect in Ontario,⁴⁴⁴ while simultaneously increasing the maximum penalty of procuring an adult from 10 to 14 years imprisonment. It also creates certain legislative exceptions and non-exceptions and immunities from prosecution for materially benefitting from or advertising sexual services (sections 286.2(3), 286.2(4), and 286.5).⁴⁴⁵ The commodification offences are categorized as offences against the person and reputation and are considered for national statistical purposes to be violence offences.

In relation to a separate *Criminal Code* section on disorderly houses, gaming and betting offences, which are still considered non-violent or “other *Criminal Code* offences”, the *PCEPA* continues to criminalize publicly selling sexual services in two circumstances: if offering, providing or purchasing sexual services stops or impedes traffic *or* takes place in a place where children are likely to be present as summary conviction offences (section 213(1)). Finally, the *PCEPA* modifies the previously

⁴⁴¹ 2017 NSPC 20.

⁴⁴² 2019 ABQB 882.

⁴⁴³ 2017 BCCA 258.

⁴⁴⁴ The Ontario Superior Court of Justice found the 5-year mandatory minimum penalties for sections 286.2(2) and 286.2(3) to violate s. 12 of the *Charter* and to be of no force and effect in *R. v. Boodhoo, and others*, 2018 ONSC 7207 and *R. v. Safieh*, 2018 ONSC 4468.

⁴⁴⁵ See, *Stewart*, *supra* note 404.

unconstitutional keeping a common bawdy house “for prostitution” (i.e., a brothel) offence by replacing it with keeping a common bawdy house for “indecent acts” as an indictable offence (section 210(1)). There is some (now moot since this provision was repealed in 2019) scholarly debate as to whether the courts will interpret “indecent acts” to include commercial sexual services.⁴⁴⁶

In brief, the *PCEPA* has created new commodification offences and elevated the severity of these offences—as violence rather than non-violence criminal offences—and their attached penalties, including mandatory minimum penalties that are prescribed for all offences involving minors and some of the offences involving adults. It also unambiguously conflates commercial sex work with human trafficking, which has been recast as “*exploitation and trafficking in persons*”, by simultaneously increasing the severity of minimum and maximum penalties for an expanded number of trafficking in persons offences. Perhaps most problematically in view of the *Bedford* decision giving primacy to sex worker health and safety vis-a-vis constitutionally protected personal security rights (section 7 of the *Charter*), the *PCEPA* provisions are widely regarded as likely to jeopardize sex worker health and safety and are likely to continue to be legally challenged on various constitutional grounds. In this regard, sections 286.2(2), 286.3(2) and 286.4 pertaining to materially benefitting and procuring the sexual services of minors and advertising sexual services were *unsuccessfully* constitutionally challenged in *R v Boodhoo, and others*⁴⁴⁷ as a violation of sections 2(b) and 7 of the *Charter*. More recently, in *R v Anwar*⁴⁴⁸ in relation to operating an escort service employing adult women and measures aimed at ensuring the safety and security of sex workers, the Ontario Court of Justice found section 286.4 (advertising) to violate section 2(b) of the *Charter* and section 286.3 (procuring) and section 286.2 (material benefit) to violate section 7 of the *Charter*.

⁴⁴⁶ *Ibid.* See also Jacqueline M. Davies, “The Criminalization of Sexual Commerce in Canada: Context and Concepts for Critical Analysis.” (2015) 24:2 *CJHS* 78.

⁴⁴⁷ 2018 ONSC 7205.

⁴⁴⁸ 2020 ONCJ 103.

Appendix C: A Brief Summary of Canada's Evolving Anti-Trafficking Laws

In our original 2015 report, we provided a detailed overview of the section 118 *Immigration and Refugee Protection Act (IRPA)* trafficking in persons offence and the *Criminal Code* section 279.01-279.04 trafficking in persons offence, including a comparison with the *UN Trafficking Protocol* definition. Since coming into force in November 2005, the Canadian government has amended the criminal offence four times in 2010,⁴⁴⁹ 2012,⁴⁵⁰ 2014,⁴⁵¹ 2015,⁴⁵² which received Royal Assent but never entered into force until 2019.⁴⁵³ The net effect of the pre-2019 amendments was to recharacterize trafficking in persons as *exploitation and trafficking in persons* and to increase the number of trafficking offences to distinguish between trafficking in adults and minors (persons under 18 years of age) and the severity of the corresponding minimum and mandatory penalties. In 2019, two of the three 2015 amendments came into force in relation to, firstly, creating a rebuttable presumption of exploitation to facilitate the prosecution of trafficking cases and, secondly, to add trafficking in persons to the list of criminal offences involving a reverse onus for proceeds of crime forfeiture proceedings.⁴⁵⁴ Alongside numerous other *Criminal Code* offences, the 2019 amendments also hybridize and standardize two of the previously indictable subsidiary trafficking offences in relation to materially benefitting (s. 279.02(1)) and withholding documents (s. 279.03(1)) for trafficking an adult, allowing prosecutorial discretion to proceed summarily or by indictment.⁴⁵⁵

⁴⁴⁹ Bill C-268 *An Act to amend the Criminal Code (minimum sentence for offences involving trafficking of persons under the age of eighteen years)*. online: Government of Canada <<https://openparliament.ca/bills/40-3/C-268/>>

⁴⁵⁰ Bill C-310 *An Act to amend the Criminal Code (trafficking in persons)*. online: Government of Canada <<https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=5137989>>

⁴⁵¹ Bill C-36 *Protection of Communities and Exploited Persons Act*. online: Government of Canada <https://laws-lois.justice.gc.ca/eng/annualstatutes/2014_25/page-1.html>

⁴⁵² Bill C-452 *An Act to amend the Criminal Code (exploitation and trafficking in persons)*. online: Government of Canada <<https://www.parl.ca/LEGISInfo/BillDetails.aspx?billId=6254142&Language=E>>

⁴⁵³ Bill C-75 *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. online: Government of Canada <<https://www.parl.ca/legisinfo/BillDetails.aspx?billId=9745407&Language=E>>

⁴⁵⁴ Department of Justice Canada, *Legislative Background: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, as enacted (Bill C-75 in the 42nd Parliament)*. (Ottawa: Department of Justice Canada, 2019) at 42. online: Government of Canada <<https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/c75/c75.pdf>>. See also L. Barnett, M. Charron-Tousignant, T. Dupuis, J. Nicol, D. Valiquet, and J. Walker, *Legislative Summary: Bill C-75 An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*. (Ottawa: Library of Parliament, Canada, 2019) at 25. online: Government of Canada <<https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/42-1/c75-e.pdf>>

⁴⁵⁵ While also increasing and standardizing the default maximum penalty for summary convictions offences from 6 months to two years less a day imprisonment and extending the limitation period from six months to one year. Bill C-75 *An Act to amend*

The trafficking in persons rebuttable presumption of exploitation (s. 279.01(3) of the *Criminal Code* reads: “evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation”) appears to further conflate trafficking in persons with commercial sex work since the language of the amendment continues to draw on the now repealed s. 212(2) living on the avails presumption : “(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution” and the *PCEPA*-introduced section 286.2(3) material benefit 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.”⁴⁵⁶ This rebuttable presumption of exploitation is contentious and likely will be constitutionally challenged when enforced.⁴⁵⁷

the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts, Clauses 104 and 105. online: Government of Canada <<https://www.parl.ca/legisinfo/BillDetails.aspx?billId=9745407&Language=E>>

⁴⁵⁶ For a critique of Bill C-75 from a sex worker rights perspective, see CASWLR, *Submission on Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts To: House of Commons Canada, Standing Committee on Justice and Human Rights on Justice*. 2018. Online: CASWLR <[⁴⁵⁷ *Canadian Bar Association*, *supra* note 230.](https://www.ourcommons.ca/Content/Committee/421/JUST/Brief/BR10012197/br-external/CanadianAllianceForSexWorkLawReform-e.pdf.>.</p>
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Appendix D: Global Imprisonment Sentences Pre- and Post-PCEPA

| Case Dataset 2006-2014 | | Case Dataset 2015-2018 | |
|------------------------|---|------------------------|--|
| Pre PCEPA-Cases | Global Sentence | Post PCEPA-Cases | Global Sentence |
| <i>AA[1]</i> | 2 years, 3 months | <i>DA</i> | 3.5 years |
| <i>Burton</i> | 10.5 years | <i>NA</i> | 1.5 years & 12 months probation |
| <i>Byron</i> | 6 years | <i>Abara</i> | Sohrabzadeh 4 years Abara 3 years Kulafofski just over 2 years |
| <i>Domotor</i> | Domotor Senior, 7 years Domotor Junior, 7 years Kolompar, time served | <i>Alexis-McLymont</i> | Alexis-McLymont, 6 years Elgin, 7 years Hird, 9 years |
| <i>Emerson</i> | 7 years | <i>Brown</i> | 10 years |
| <i>Estrella</i> | 2.5 years | <i>NC</i> | 5.5. years |
| <i>Gashi</i> | Unknown | <i>Crosdale</i> | 6 years |
| <i>Hosseini</i> | 5 years | <i>Deiaco</i> | 8 years |
| <i>Lennox</i> | 2 years | <i>AE</i> | 10 years |
| <i>McFarlane</i> | 8 years | <i>Finestone</i> | 4 years |
| <i>Moazami</i> | 23 years | <i>Gibson-Skeir</i> | 7 years |
| <i>Nakpangi</i> | 5 years | <i>Gray</i> | 2.5 years & 2 years probation |
| <i>KOM</i> | 6.5 years | <i>Jordan</i> | 9 years |
| <i>St. Vil</i> | 3 years & 36 months probation | <i>Leung</i> | 8.5 years |
| <i>Urizar</i> | 6 years | <i>Lopez</i> | 5 years & 3 years probation |
| <i>Vilutis</i> | 2 years less one day | <i>Majdalani</i> | Unknown |
| <i>Williams</i> | 5 years | <i>McGee</i> | 8 years |
| | | <i>Mohsenipour</i> | Albashir 10 years Mohsenipour 9 years |
| | | <i>Murenzi</i> | 5 years |

| Case Dataset 2006-2014 | | Case Dataset 2015-2018 | |
|------------------------|-----------------|------------------------|---|
| Pre PCEPA-Cases | Global Sentence | Post PCEPA-Cases | Global Sentence |
| | | <i>Ngoto</i> | Ahmed 1.5 years Ngoto 11 months |
| | | <i>Oliver</i> | 9 years |
| | | <i>Purcell</i> | Unknown |
| | | <i>AS</i> | 13 years |
| | | <i>RS</i> | 5 years |
| | | <i>Rye</i> | Unknown [supposed to be sentenced April 2020] |
| | | <i>Salmon</i> | 6 years |
| | | <i>Sinclair</i> | 2.5 years |
| | | <i>Webber</i> | 4 years |

Appendix E: A Comparison of Criminal Trafficking and Procuring Offence⁴⁵⁸

| Offence Elements, Penalties, and Exceptions | |
|---|--|
| Offence Category: Offences against the Person and Reputation | |
| Kidnapping, Trafficking in Persons, Hostage Taking and Abduction | Commodification of Sexual Activity |
| Trafficking on persons | Procuring |
| <p>Basic offence elements (as applied to adults or minors)</p> <p>“Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation” [ss. 279.01(1), 279.011(1)]</p> | <p>Basic offence elements (as applied to adults or minors)</p> <p>“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” [ss. 286.3(1) and (2)]</p> |
| <p>Offence Purpose</p> <p>Exploitation as defined by s. 279.04</p> | <p>Offence Purpose</p> <p>Obtaining sexual services for consideration as defined by s. 286.1(1) or 286.1(2)</p> |
| <p>Consent</p> <p>Cannot consent to being trafficked [s. 279.01(2), 279.011(2)]</p> | <p>Not Applicable</p> |
| <p>Penalties</p> <p>Indictable offence</p> <p>Maximum adult: 14 years</p> <p>Minimum adult: 4 years</p> <p>Maximum minor: 14 years</p> <p>Minimum minor: 5 years [ss. 279.01(1), 279.011(1)]</p> | <p>Penalties</p> <p>Indictable offence</p> <p>Maximum adult: 14 years adult</p> <p>Minimum adult: Not Applicable</p> <p>Maximum minor: 14 years</p> <p>Minimum minor: 5 years [ss. 286.3(1) and (2)]</p> |
| <p>Aggravated Offence</p> <p>Kidnapping, committing an aggravated assault or aggravated sexual assault against, or causing death to, the victim during the commission of the offence</p> <p>Maximum sentence: life imprisonment</p> <p>Minimum sentence: 5 years imprisonment</p> | <p>Aggravated Offence</p> <p>Not Applicable</p> |
| <p>Presumption of Exploitation</p> | <p>Not Applicable</p> |

⁴⁵⁸ *Criminal Code of Canada*, RSC 1985, c C-46, ss. 279.01-279.04 and ss. 286.1-286.5.

| Offence Elements, Penalties, and Exceptions | |
|---|------------------------------------|
| Offence Category: Offences against the Person and Reputation | |
| Kidnapping, Trafficking in Persons, Hostage Taking and Abduction | Commodification of Sexual Activity |
| Trafficking on persons | Procuring |
| For trafficking and adult or minor, “evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation” [s.279.01(3)] | |

| Offence Elements, Penalties, and Exceptions | |
|---|--|
| Offence Category: Offences against the Person and Reputation | |
| Kidnapping, Trafficking in Persons, Hostage Taking and Abduction | Commodification of Sexual Activity |
| Material Benefit | Material Benefit |
| Basic offence elements (as applied to adults or minors) “Every person who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission an offence under subsection 279.01(1) or 279.011(1)” [s.279.02(1) and (2)] | Basic offence elements (as applied to adults or minors) “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) or 286.1(2)” (obtaining sexual services for consideration) [s.286.2(1) and (2)] |
| Hybrid offence (adult) Maximum adult: 10 years indictable; 2 years less summary Minimum adult: Not Applicable Indictable offence (minor) Maximum minor: 14 years Minimum minor: 2 years [s.279.02(1) and (2)] | Hybrid offence (adult) Maximum adult: 10 years indictable; 2 years less summary Minimum adult: Not Applicable Indictable offence (minor) Maximum minor: 14 years Minimum minor: 2 years [s.286.2(1) and (2)] |
| Not Applicable | Presumption “For the material benefit offence, 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” [s.286.2(3)] |

| Offence Elements, Penalties, and Exceptions | |
|--|--|
| Offence Category: Offences against the Person and Reputation | |
| Kidnapping, Trafficking in Persons, Hostage Taking and Abduction | Commodification of Sexual Activity |
| Material Benefit | Material Benefit |
| Not Applicable | <p>Exceptions. Unless non-exceptions (below), the offence does not apply to a person receiving a material 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” [s.286.2(4)]</p> <p>Non-Exceptions [aggravating factors]. Offence does apply if a 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 [procuring]; or (e) received the benefit in the context of a commercial enterprise that offers sexual services for consideration” [s.286.2(5)]</p> |
| | <p>Immunity. Cannot be prosecuted for deriving a material benefit from the provision of one’s own sexual services or for inchoate offences (aiding, abetting, conspiring, attempting, accessory before or after the fact, counselling a person to commit) if the offence relates to offering or providing one’s own sexual services [ss. 286.5(1) and 2]</p> |
| Not Applicable | <p>Aggravating Factor</p> <p>Receiving a benefit “in the context of a commercial enterprise that offers sexual services for consideration” [s.286.2(6)]</p> |

Appendix F: Prosecuted Trafficking Cases Involving Appeals

| Case Name | Court and Citation | Trafficking Offence Conviction | Appeal and Outcome |
|---|--------------------|--------------------------------|--|
| 2006-2014 | | | |
| AA[1] | 2013 ONCA 466 | Yes | Defence appeal against conviction and sentence; dismissed |
| AA[2] | 2015 ONCA 558 | No | Crown appeal against youth court acquittals; appeal allowed, and new trial ordered; retrial outcome unknown |
| <i>Hosseini</i> | 2014 QCCA 1187 | Yes | Defence request for appeal extension; dismissed |
| <i>Mataev</i> | 2019 QCCA 129 | No | Defence appeal against dangerous offender declaration for non-trafficking offences |
| <i>Moazami</i> | 2019 BCCA 226 | Yes | Defence appeal against convictions; appeal ongoing |
| <i>Ng</i> | 2008 BCCA 535 | No | Crown appeal against sentence; defence cross-appeal against sentence; Crown appeal allowed; defence appeal dismissed; global sentence increased to 27 months |
| <i>KO-M</i> | 2017 ONCA 106 | Yes | Defence appeal against adult sentence; appeal dismissed |
| <i>Orr</i> | 2015 BCCA 88 | No | Defence appeal against convictions; appeal allowed, and new trial ordered; Orr was subsequently convicted and sentenced for one non-trafficking immigration offence |
| <i>Salmon</i> | 2013 ONCA 203 | No | Crown appeal against a judgment dismissing charges relating to police fabrication of evidence; appeal dismissed |
| <i>Urizar</i> | 2013 QCCA 46 | Yes | Defence appeal against convictions; appeal allowed in part; stay of proceedings entered for 3 non-trafficking convictions. |
| 2015-2018 | | | |
| <i>NA (also referred to as AN by the trial court)</i> | 2019 ONCA 741 | Yes | Defence appeal against convictions; appeal dismissed. |
| <i>Cain (also referred to as NC)</i> | 2019 ONCA 484 | Yes | Defence appeal against convictions; appeal dismissed. |
| <i>Campbell-Ball</i> | 2019 SKCA 41 | No | Defence appeal against convictions for non-trafficking offences and Crown appeal against sentence; convictions appeal dismissed; sentence appeals dismissed other than extending |

| | | | |
|---|----------------|------------|---|
| | | | the duration of a SOIRA order to a lifetime order for one of the defendants. |
| <i>Deiaco (also referred to as MCD)</i> | 2019 ONCA 12 | Yes | Defence appeal against sentence; appeal dismissed. |
| <i>Gallone</i> | 2019 ONCA 663 | No/ongoing | Crown appeal against acquittals; appeal allowed, and new trial ordered. Retrial outcome unknown. |
| <i>Ibeagha</i> | 2019 QCCA 1534 | No/ongoing | Crown appeal against acquittals; appeal allowed, acquittals quashed, and new trial ordered. Retrial outcome unknown. |
| <i>Jordan</i> | 2019 ONCA 607 | Yes | Defence appeal against sentence; leave to appeal granted but appeal dismissed. |
| <i>Leung</i> | 2018 ONCA 298 | Yes | Defence appeal against convictions and sentence; conviction appeal dismissed; sentence appeal allowed but dismissed. |
| <i>Majdalani</i> | 2019 ONCA 513 | Yes | Defence appeal against convictions; appeal dismissed. |
| <i>Mohsenipour</i> | 2020 BCCA 112 | Yes | Defence appeal against convictions; ongoing. |
| <i>Murenzi</i> | 2018 QCCA 1863 | Yes | Request for appeal extension granted in 2018; unknown outcome although it appears the appeal may have been discontinued [2019 QCCA 565] |
| <i>Rocker</i> | 2019 ONCA 299 | No | Defence appeal against conviction and sentence for non-human trafficking but related drug trafficking offences. Conviction appeal dismissed; sentence appeal allowed but dismissed. |
| <i>RS</i> | 2017 ONCA 141 | Yes | Defence appeal against convictions and sentence in relation to credit for pre-trial custody; conviction appeal dismissed, and sentence appeal allowed reducing the sentence to reflect proper credit for pre-trial custody. |
| <i>Sinclair</i> | 2020 ONCA 61 | Yes | Defence appeal against convictions and sentence in relation to credit for pre-trial custody; conviction appeal dismissed, and sentence appeal allowed reducing the sentence to reflect proper credit for pre-trial custody. |
| <i>Symonds</i> | 2018 NCSA 34 | No | Defence appeal on the validity of a guilty plea to procuring a person for sexual services; appeal dismissed. |

Appendix G: Provincial / Territorial Acronyms

| Province/Territory | Internationally Accepted Acronym |
|---------------------------|----------------------------------|
| Newfoundland and Labrador | NL |
| Prince Edward Island | PE |
| Nova Scotia | NS |
| New Brunswick | NB |
| Quebec | QC |
| Ontario | ON |
| Manitoba | MB |
| Saskatchewan | SK |
| Alberta | AB |
| British Columbia | BC |
| Yukon | YT |
| Northwest Territories | NT |
| Nunavut | NU |

Source: Statistics Canada, 2011 Census of Population. Online: <<https://www150.statcan.gc.ca/n1/pub/92-195-x/2011001/geo/prov/tbl/tbl8-eng.htm>>