Post-*Bedford*: Judicial Variance in Applying Canada's New Sex Work Regime

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After the Supreme Court of Canada in Canada (Attorney General) v Bedford *struck down the old legislative scheme on the exchange of sexual services, the Parliament enacted the* Protection of Communities and Exploited Persons Act *(*PCEPA*). The* PCEPA *criminalizes the exchange of sexual services for consideration while protecting the sellers of these services from prosecution due to the exploitive nature of the conduct. However, since the enactment of the* PCEPA *in 2014, there remains uncertainty about the interpretation, application, and the purpose of the new scheme. This paper seeks to answer the questions about how the new laws are being interpreted and applied. Moreover, the author outlines what conduct is captured by the new regime, how courts understand its purpose, and where it intersects with other areas of the law.*

The author sampled seventy-seven decisions that have applied or substantively discussed the PCEPA *to showcase the shortcomings of the broad new scheme, including its failure to adequately address safety concerns, constitutional validity, and its ideological framework. The author then discusses reasons for limited case law on these new provisions, which is attributed to a focus on exploitation programs that have limited the number of cases that proceed to the court system. The author also notes an inconsistency in the interpretation of the* PCEPA*, which is attributed to its broad language and different interpretations about what exploitative conduct entails. Interpretation issues are also fueled by differing views on what constitutes culpable behaviour and differing judicial viewpoints on sex work itself. The author concludes that these uncertainties leave the constitutional validity of the new regime on rocky ground.*

* JD, University of Alberta (2022). I am grateful to Professor Steven Penney for his insightful comments, edits, and guidance throughout. Further thanks to Ellen Sutherland for her helpful edits and suggestions.

Introduction

In *Canada (Attorney General) v Bedford*, the Supreme Court of Canada struck down three prostitution-related *Criminal Code* offences for violating the *Canadian Charter of Rights and Freedoms*, leaving Parliament to develop a new regime.[1] Parliament enacted the *Protection of Communities and Exploited Persons Act* (*PCEPA*)[2] in response to the declaration of invalidity, and for the first time in Canada's history it became illegal to exchange sexual services

1. 2013 SCC 72 [*Bedford*].
2. SC 2014, c 25 [*PCEPA*].

for consideration. The new scheme has been referred to as an asymmetrical criminalization.[3] It prohibits the obtaining or third party facilitation of exchanging sexual services for consideration while immunizing sellers from prosecution.[4] The laws came into effect December 2014 and have now been applied in courts across Canada. This paper seeks to answer the question: how are the new sex work laws being interpreted and applied by the courts? Within this broad question, the paper attempts to ask what conduct is captured by the new criminal provisions, how courts understand and apply the laws, and some of the new spaces where *PCEPA* intersects with existing laws.

In answering this question, a sample of case law was collected and analyzed. The sample aggregates seventy-seven written decisions over a seven-year period that either applied or substantively discussed the new laws. Case law regarding each discrete criminal offence of the new regime was analyzed specifically for the conduct being captured, how the laws were interpreted, and how the court characterized their legislative purpose.

The case law sample indicates the new regime captures a broad array of conduct and, in turn, is being applied in an uneven manner. In particular, the provisions of material benefit, procurement, and the overlap between the two resulted in diverse interpretation and application by judges. Parliament purposefully designed a legal regime criminalizing all conduct related to sex work, adopting the view that sex workers are inherently exploited; however, there lacks judicial consensus on what amounts to exploitative conduct in practice. The case law demonstrates that judges may differ in their interpretation of criminally culpable behaviour and perhaps sex work itself. When a legal regime casts a broad net, it may be more difficult to ascertain a cohesive application or statutory objective. Perspectives on sex worker agency likely play a role in what cases come before the court, how the court applies the laws, and whether the court views the legal scheme as constitutional or not.

The remainder of this paper is broken into five sections. Part II explores the legislative evolution of sex work up to the current legal scheme, sections 286.1–286.5 of the *Criminal Code*. This section provides an overview of how Parliament's objectives in criminalizing sex work have shifted over time to reflect contemporary circumstances and social values. Part III examines three

3. See Canada, Department of Justice, *Technical Paper: Bill C-36, Protection of Communities and Exploited Persons Act* (Ottawa: DOJ, last modified 8 March 2017), online: <www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html> [*Technical Paper*].

4. But see *Criminal Code*, RSC 1985, c C-46, ss 213, 286.1(1)(a)(i) (criminalizing service providers who communicate for the purpose of prostitution near public spaces where children are reasonably expected to be).

core criticisms of the new laws: failure to remedy safety concerns; constitutional validity; and the ideological framework of the new scheme. Part III outlines the methodology and Part IV analyzes and discusses the results. The first result was the striking lack of section 286.1 cases, the new statutory provision which prohibits the purchase of sexual services, within the case law sample. Several reasons—including police practice and alternative measures—may point to why the controversial centerpiece of the legal scheme is markedly absent. The following *PCEPA* provisions capture third party conduct such as material benefit, procurement, and advertising. Difficulty arose in interpreting and applying these provisions in a consistent manner. The uneven application may stem from the legislation's broad scope, designed to capture all conduct related to sex work. But in practice the judges vary in finding sex work-related conduct exploitative or parasitic. Perspectives on sex work, safety, and agency may impact how the judiciary grounds an understanding of exploitative conduct. Variance in how judges interpret and apply the new sex work laws points to greater uncertainty around the scheme's legislative objective. In light of the broad statutory language and interpretation, the constitutional stability of the regime is left on uncertain grounds.

I. The Evolution of Sex Work Laws in Canada

Sex work[5] has long been tied to concepts of morality, victimization, and criminality. The public and judicial perception of it has undergone a metamorphosis. Historically in Canada the sale of sex has not been criminalized, but instead sex work-related activity has been shrouded with criminal prohibitions that target its incidental and consequential effects (i.e., communicating, vagrancy, profiting). In the late 1860s the federal government briefly toyed with the idea of regulating sex work after accepting abolishment was futile.[6] Judges during this period considered "prostitution an immoral" but "necessary social evil" because it provided the essential service of alleviating male sexual needs.[7]

5. I use the idiom "sex work", but I also use "sexual services for consideration", "seller", "escort", and "service provider" synonymously. The term "prostitution" is used only when referencing the courts and/or legislative language directly.

6. See Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991) at 235.

7. *Ibid* at 330.

Between Confederation and the early 1970s, sex work regulation shifted from being grounded on public health concerns[8] to a vagrancy-based offence that also sought to protect women from pimps and brothel owners.[9] Under the vagrancy model, the act of prostitution was initially considered a "status offence" that required neither act nor omission, merely a state of being.[10] In 1953, Parliament amended the definition of vagrancy in the *Criminal Code* to require some form of action and therefore greater due process.[11] However, "being a common prostitute or night walker" remained a pure status offence.[12] This exception was due to the perceived immorality of sex workers and highlights the gendered nature of the vagrancy laws.[13] The vagrancy law was repealed in 1972 and replaced with the ambiguous and ineffective "soliciting" offence, which focused on behaviour and prohibited soliciting in a public place for prostitution.[14]

Throughout the 1970s and early 1980s Parliament passed laws criminalizing more and more sex work-related activity such as keeping or occupying a bawdy-house, living on the avails of prostitution, and procuring. Police lobbied for legal reform to address what had become an "unmanageable" street prostitution problem.[15] The government formed the Fraser Commission to determine where Canadians stood on sex-for-sale issues. But consensus was nowhere to be found; groups advocated for everything from harsher penalties to decriminalization.[16] The final Fraser Report advanced a liberal position, noting

8. See *ibid* at 235 (under the *Contagious Disease Act*, police were able to "detain women suspected of prostitution for medical examination". Effectively, this approach was aimed at mitigating the transmission of venereal disease to men in the military).

9. See James Gacek & Richard Jochelson, "Sex Work in Canada: Beginnings, *Bedford*, and Beyond" in Richard Jochelson & James Gacek, eds, *Sexual Regulation and the Law: A Canadian Perspective* (Bradford, ON: Demeter Press, 2019) at 60.

10. Kent Roach et al, *Criminal Law and Procedure: Cases and Materials*, 11th ed, (Toronto: Emond, 2015) at 355; Prashan Ranasinhe, "Reconceptualizing Vagrancy and Reconstructing the Vagrant: A Socio-Legal Analysis of Criminal Law Reform in Canada, 1953-1972" (2010) 48:1 Osgoode Hall LJ 55 at 73.

11. See Ranasinhe, *supra* note 10.

12. *Ibid*.

13. See *ibid* at 79.

14. Statistics Canada, *Street Prostitution in Canada*, by Doreen Duchesne, vol 17:2, Catalogue No 85-002-XPE (Ottawa: Statistics Canada, February 1997) at 2.

15. Michael Kanter, "Prohibit or Regulate? The Fraser Report and New Approaches to Pornography and Prostitution" (1985) 23:1 Osgoode Hall LJ 171 at 172.

16. See *ibid* at 174–75.

that prostitution was unlikely to ever disappear and government efforts should flow towards permitting or regulating prostitution while addressing underlying causes.[17] However, in 1985 the federal government replaced soliciting with the "communication for the purpose of prostitution in a public place" offence.[18] Notably, both the seller and the buyer were captured by this provision.[19] The change towards prohibiting communication led to a drastic increase in charges as police cracked down on indoor and street-level sex work.[20]

The communicating offence and the bawdy-house provisions were put before the Supreme Court of Canada to answer constitutional questions in the *Prostitution Reference*.[21] The question was whether the laws violated *Charter* sections 2(b) (freedom of expression) and section 7 (right to life, liberty, and security of the person). For the majority, Dickson CJ found both offences valid, with only the communicating offence in breach of section 2(b) but ultimately justified under section 1.[22] Chief Justice Dickson held the purpose of the communicating offence was to supress the social nuisance caused by public solicitation.[23] Justice Lamer (concurring) found the purpose of the communication offence went beyond nuisance abatement. He held there is an additional "objective of minimizing the public exposure of an activity that is degrading to women" in an effort to reduce forms of violence associated with soliciting.[24]

In dissent, Wilson J adopted the same objective as Dickson CJ, finding the law was directed solely at public and social nuisance resulting from sex service transactions.[25] However, she held the communicating offence was inconsistent with *Charter* sections 2(b) and 7 and could not be justified under section 1.[26] The offence was found contrary to the principles of fundamental

17. See *ibid* at 179. See also John Lowman, *Regulating Sex: An Anthology of Commentaries on the Findings and Recommendations of the Badgley and Fraser Reports*, (Burnaby: School of Criminology, Simon Fraser University, 1986).

18. See Duchesne, *supra* note 14 at 2.

19. See *ibid*.

20. See Statistics Canada, *Prostitution Offences in Canada: Statistical Trends* by Cristine Rotenberg, Catalogue No. 85-002-X (Ottawa: Statistics Canada, 10 November 2016) at 4.

21. See *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, 77 CR (3d) 1 [*Prostitution Reference*].

22. See *ibid* at 1143–44.

23. See *ibid* at 1134–35.

24. *Ibid* at 1194.

25. See *ibid* at 1211.

26. See *ibid* at 1224.

justice because the deprivation of liberty was disproportionate to the nuisance abatement objective.[27]

The notion that sex work degraded women was weaved throughout the judgment. Justices Lamer and Wilson found selling sex to be inherently demeaning and that the true "victims" were the sex workers themselves.[28] The Supreme Court of Canada implicitly aligned with a more conservative feminist perspective, while at the same time liberal feminists advanced an opposing perspective: an individual should have sovereignty over his or her own body.[29] However, the liberty interest considered in the *Prostitution Reference* was solely concerned with incarceration. The notion that there may be a liberty interest intrinsic to the act of selling sexual services was absent from the decision.

In 2013, the Supreme Court of Canada again considered the constitutional validity of prostitution laws in *Bedford*. The three offences before the Court were the bawdy-house provisions (section 210), living on the avails of prostitution (section 212(1)(j)), and communicating for the purposes of prostitution (section 213(1)(c)).[30] All three laws were challenged for offending section 7 of the *Charter*. In order to establish a section 7 claim there must be a deprivation of either life, liberty, or security of the person.[31] In *Bedford*, the challenge was directed at security of person as opposed to liberty.[32] The claimants' principal argument, which the Court accepted, was that these laws diminished sex workers' safety by limiting their ability to take precautions such as working indoors, hiring security, or screening their clients.[33] For those selling sex, did the laws "heighten the risks they face in prostitution—itself a legal activity"?[34]

27. See *ibid* at 1221–23 (where Wilson J held that section 193, the bawdy-house provisions, were not inconsistent with either sections 2(b) or 7 of the *Charter*).

28. See *ibid* at 1193–94. See generally Frances M Shaver, "A Critique of the Feminist Charges Against Prostitution" (1988) 14:1 Atlantis 82 (the notion of sex workers as the victims of prostitution emerged strongly in the 1980s through community advocacy).

29. See Kanter, *supra* note 15; John Lowman & Christine Louie, "Public Opinion on Prostitution Law Reform in Canada" (2012) 54:2 Can J Corr 245.

30. See *Bedford*, *supra* note 1 at paras 4, 6.

31. See *ibid* at paras 57–58.

32. See *ibid* at paras 4, 6. Note that there was also a section 2(b) infringement claim with respect to section 213. Chief Justice McLachlin held, however, that it was not necessary to address this claim "since it is possible to resolve the case entirely on s. 7 grounds". *Ibid* at para 47.

33. See *ibid* at para 6.

34. *Ibid* at para 59.

Once a relevant section 7 interest is engaged, the court must determine if there was failure to adhere to a principle of fundamental justice.[35] The relevant principles in *Bedford* were: arbitrariness, "where there is no connection between the effect and the object of the law";[36] gross disproportionality, where the effects of a law are completely out of sync with its objective;[37] and overbreadth, where the "law goes too far and interferes with some conduct that bears no connection to its objective."[38]

In a unanimous decision, the Supreme Court of Canada invalidated all three laws and issued a suspended declaration of invalidity.[39] The communicating offence and the bawdy-house provisions were held to be grossly disproportionate, while the living on the avails provision was struck down for overbreadth.[40] The Court found that the primary purposes of the laws were to supress nuisance and prevent exploitation of sex workers.[41] Speaking for the Court, McLachlin CJ began the decision by stating that the selling of sexual services for consideration is not a crime in Canada.[42] In the absence of an objective more substantial than mere nuisance abatement, it was "not constitutionally permissible for Parliament to prohibit sex workers from taking elementary precautions to protect themselves from the dangers of this lawful work".[43] The three impugned laws were struck down and the suspended declaration of invalidity commenced December 2013, allowing Parliament one year to grapple with the question of how (if at all) to regulate sex work.[44]

The success of section 7 in *Bedford* was due in part to the "significant change in the circumstances" and the evidentiary record.[45] Reframing the issue through a security lens reflected a concern for street-level sex worker safety. This was a particularly salient issue against the disturbing backdrop of the Robert Pickton

35. See *ibid* at para 57.

36. *Ibid* at para 98.

37. See *ibid* at paras 103–04.

38. *Ibid* at para 101.

39. See *ibid* at para 2.

40. See *ibid* at paras 136, 145, 159.

41. See *ibid* at para 4.

42. See *ibid* at para 1. See also Hamish Stewart, "The Constitutionality of the New Sex Work Law" (2016) 54:1 Alta L Rev 69 at 70 [Stewart, "Constitutionality"].

43. Stewart, "Constitutionality", *supra* note 42 at 70.

44. See *Bedford*, *supra* note 1 at paras 166–69.

45. *Ibid* at para 44. See also Gacek & Jochelson, *supra* note 9 at 69 (there were over 25,000 pages of evidence in *Bedford*).

case in which police found dozens of sex workers murdered, dismembered, and scattered around a pig farm.[46] The Court found that the security of the person interest was not a prevalent concern in the *Prostitution Reference* and the disproportionate rates of violence faced by street-level sex workers "fundamentally shifts the parameters of the debate".[47]

The Court in *Bedford* avoided making any comment on the ethics of sex work. The objectives of the laws were constantly weighed against the *legal activity* of prostitution without any mention of morality or degrade.[48] The absence of any morality discussion is perhaps one of the most overt discursive shifts between *Bedford* and the *Prostitution Reference*. In the *Prostitution Reference*, Wilson J stated, "it is an undeniable fact that many people find the idea of exchanging sex for money offensive and immoral".[49] While that may still be a common belief today, the Supreme Court of Canada in *Bedford* conspicuously avoided any reference regarding the morality of selling sexual services.

Post-*Bedford*, Parliament quickly enacted new sex work laws that altered the legal regime by making it illegal to obtain sexual services for consideration. Six months after *Bedford*, Bill C-36 was tabled.[50] Parliament made its objective explicit: the sale of sexual services is intrinsically exploitative, and the goal is to eradicate this social harm through criminalization.[51]

The new *PCEPA* laws were placed in Part VIII of the *Criminal Code*, "Offences Against the Person and Reputation".[52] There are five new laws grouped together under the heading of "Commodification of Sexual Activity". The new legal regime criminalizes both those who purchase sex and those who profit or facilitate in selling sexual services other than their own. This regime has been referred to as a "Nordic Model" where the sale of sex is illegal but the sex

46. See *R v Pickton*, 2010 SCC 32; *Bedford*, *supra* note 1 at paras 64, 158; Hamish Stewart, "*Bedford v. Canada*: Prostitution and Fundamental Justice" (2011) 57:2 & 3 Crim LQ 197 at 214–15.

47. *Bedford*, *supra* note 1 at para 42.

48. There is no mention of morality within the written decision of *Bedford*; however, several of the interveners grounded their arguments under the auspice of morality.

49. *Prostitution Reference*, *supra* note 21 at 1216.

50. See Bill C-36, *An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (assented to 6 November 2014).

51. See *PCEPA*, *supra* note 2.

52. *Criminal Code*, *supra* note 4.

worker is granted immunity.[53] This results in an asymmetrical criminalization of sex work where the entire transaction from communicating to advertising is presumptively illegal and only individuals selling *their own* services are exempt from prosecution.[54] The preamble clearly states the shift to criminalizing sex work is to denounce, deter, and abolish the trade.[55]

A. Section 286.1: Prohibition on Purchase of Sexual Services

The first new offence, which Hamish Stewart describes as the "centrepiece of the new sex work law",[56] cements the illegality of sex work. The offence reads: "286.1(1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of [a hybrid offence]".[57]

The minimum penalty for obtaining or communicating for the purposes of obtaining sexual services ranges from $500 to $1,000 depending on Crown election.[58] Under subsection 286.1(2), if the individual selling sexual services is or is thought to be under 18 years of age at the time of the offence, the charge goes by way of indictment with a minimum six-month sentence.[59] Selling sex as a minor was illegal prior to *PCEPA*, however, the new law increased the sentencing range.[60] The move towards criminalization is explicitly justified within the Preamble of *PCEPA*. Parliament expressed a concern that sex work perpetuates the exploitation, objectification, and commodification of bodies resulting in social harm.[61]

Section 286.1 does not address the issues before the Supreme Court of Canada in *Bedford*, being greater protection for those engaging in risky—but legal—conduct. The conduct is now illegal and its effect on protected section 7

53. See generally Sandra Ka Hon Chu & Rebecca Glass, "Sex Work Law Reform in Canada: Considering Problems with the Nordic Model" (2013) 51:1 Alta L Rev 101.

54. See *Technical Paper*, *supra* note 3; *Criminal Code*, *supra* note 4, s 286.5. But see Backhouse, *supra* note 6 (sex workers can still be charged).

55. See *Technical Paper*, *supra* note 3.

56. Stewart, "Constitutionality", *supra* note 42 at 73.

57. *Criminal Code*, *supra* note 4, s 286.1(1).

58. See *ibid*, s 286.1(1).

59. See *ibid*, s 286.1(2).

60. See *ibid*.

61. See *PCEPA*, *supra* note 2.

interests, especially sex workers' personal safety, will have to be weighed against the new objective of discouraging sex work all together.[62]

B. Section 286.2: Material Benefit Prohibition

Section 286.2 prohibits receiving "financial or other material benefit" derived from the commission of an offence under section 286.1.[63] Anyone who lives with or habitually accompanies a sex worker is presumptively, "in the absence of evidence to the contrary, proof that the person received" such benefit.[64] Section 286.2 is a hybrid offence and carries a variable sentencing regime, contingent upon the age of the seller.[65] This provision is a reincarnation of the previous section 212 (living on the avails) which was struck down for overbreadth. Parliament attempted to remedy the issue of overbreadth by enacting a list of exceptions. These include a "legitimate living arrangement", "moral or legal" obligations, and consideration for services and goods offered to the general public.[66]

The statutory exceptions are followed by restrictions. The accused is unable to benefit from an exception if they received benefit through (a) violence or threats, (b) abuse of trust or position of power, (c) facilitating intoxication, (d) conduct amounting to procurement, or (e) in the context of a commercial enterprise.[67] If convicted, benefit derived from a commercial enterprise is to be considered an aggravating factor in receiving material benefit.[68]

C. Section 286.3: Prohibition on Procuring Sexual Services

Section 286.3—the prohibition on procurement of sexual services—reads as follows:

> (1) Everyone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an

62. I examine this issue in Part III, *below*.

63. *Criminal Code*, *supra* note 4, ss 286.1–286.2.

64. *Ibid*, s 286.2(3).

65. Note that section 286.2 has an analogous provision to section 286.1(2) in relation to youth. Receiving material benefit from someone under the age of eighteen carries a minimum sentence of two years (see *ibid*, s 286.2(2)).

66. *Ibid*, s 286.2(4).

67. See *ibid*, s 286.2(5).

68. See *ibid*, s 286.2(6).

> offence under subsection 286.1(1), recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years.[69]

Section 286.3 is aimed at third parties who facilitate in the sale of sexual services. The procurement offence existed prior to *PCEPA* with similar language.[70] Procurement is an indictable offence with a minimum sentence of five years for procuring a minor and no minimum for procuring someone over the age of majority. The procuring and material benefit offences work in tandem to prohibit "classic pimp" exploitation.[71] The laws demonstrate the clear legislative intention to denounce and deter profiters and their "parasitic, exploitative conduct".[72]

Procurement is one of the more discretionary provisions within the scheme. First, it does not present an obvious *actus reus* for the action of "procuring". The enduring definition of procurement comes from the *R v Deutsch* case, which states procuring is "to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged".[73] In addition, the provision lists multiple other modes of conduct for establishing the offence. The conduct clearly varies in degree of coercion, from recruiting or harbouring an individual to influencing movement. The numerous modes allow for a range of activity to be captured by the offence.

D. Section 286.4: Advertising Sexual Services

Section 286.4 criminalizes the publication or advertisement of sexual services. The offence reads:

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

69. *Ibid*, s 286.3(1).
70. See *Criminal Code*, *supra* note 4, s 212(d), (h) as it appeared on 27 February 2013.
71. *Technical Paper*, *supra* note 3.
72. *Bedford*, *supra* note 1 at para 137.
73. *Deutsch v The Queen*, [1986] 2 SCR 2 at 26 (Martin JA), 30 DLR (4th) 435.

(a) an indictable offence and liable to imprisonment for a term of not more than five years; or
(b) an offence punishable on summary conviction.[74]

There was no equivalent offence under the prior sex work regime.[75] The new prohibition on advertising is grounded on Parliament's abolition objective: advertising sexual services increases demand.[76] The law reflects the fact that sex work has predominately moved online.[77] Advertising sexual services through online platforms has allowed service providers to place ads, negotiate prices, and locations, largely outside of public view.[78] The offence applies to both the seller and third parties who facilitate advertising. Unlike the material benefit offence, there are no exceptions within the advertising provision. The absence of such indicates that *all* advertising is morally culpable and subject to criminal liability, unless the accused is captured by section 286.5.

E. Section 286.5: Immunity

The final provision under the regime is section 286.5:

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

74. *Criminal Code*, *supra* note 4, s 286.4(a)–(b).

75. See *Technical Paper*, *supra* note 3. See also Stewart, "Constitutionality", *supra* note 42 at n 28 (there was one case in 1990 where a magazine that advertised sex workers' ads was charged for "communicating" but the Crown withdrew the charges).

76. See *Technical Paper*, *supra* note 3.

77. See generally Teela Sanders et al, *Internet Sex Work: Beyond the Gaze* (Cham, Switzerland: Palgrave Macmillan, 2018).

78. See generally 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.

> or counselling a person to be a party to such an offence, if the offence relates to the offering or provision of their own sexual services.

Section 286.5 grants immunity for those selling their own sexual services. As stated in the *Technical Paper*, "Bill C-36 in no way condones the sale of sexual services; rather, it treats those who sell their own sexual services as victims who need support and assistance".[79] The immunity provision aligns with the new legislative objective that views sexual service providers as victims. The core function of section 286.5 is to immunize those selling their *own* services from criminal liability.[80] However, it is possible for sex workers to face prosecution if they assist others in advertising or referring clients.[81]

The provision provides further indemnity, stating: "No person shall be prosecuted for aiding, abetting, conspiring or attempting to commit an offence under any of sections 286.1 to 286.4 . . . if the offence relates to the offering or provision of their own sexual services."[82] The language of this section is unusual. Rather than stating those who sell sex have not committed the offence of aiding and abetting the purchaser, the provision states the seller cannot be prosecuted for this crime.[83]

The new sex work regime demonstrates a distinctive shift in how sex work is perceived and regulated. What was once considered a social nuisance has morphed into a degrading and exploitative act. Under the *PCEPA* regime, sex workers are now the victims, not the perpetrators of community harm.

III. Reception of New Sex Work Regime

A. Safety First? Remedying the Safety Concerns of Bedford

Several criticisms have been levied towards the new legislative scheme for its inability to truly address the harms associated with sex work.[84] Concern for

79. *Technical Paper*, *supra* note 3.

80. See *Criminal Code*, *supra* note 4, s 286.5(1).

81. See Stewart, "Constitutionality", *supra* note 42 at 75.

82. *Criminal Code*, *supra* note 4, s 286.5(2).

83. See Michael Plaxton, "First Impressions of Bill C-36 In Light of *Bedford*" (12 June 2014) [unpublished] at 5, online: *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=2447006>; Stewart "Constitutionality", *supra* note 42 at 74.

84. See generally Elya M Durisin, Emily van der Meulen & Chris Bruckert, eds, *Red Light Labour: Sex Work Regulation, Agency, and Resistance* (Vancouver: UBC Press, 2018); "Safety,

sex worker safety was the major impetus for the Supreme Court of Canada's declaration of invalidity in *Bedford*. Critics have nevertheless argued that *PCEPA* failed to address these safety concerns.[85] Recall, the invalidated section 213 offence was struck due to safety concerns arising from prohibitions that "displac[ed] prostitutes from familiar areas . . . to more isolated areas, thereby making them more vulnerable".[86] Section 286.1 prohibits the purchase and continues to criminalize communication with the caveat of seller immunity. Asymmetrical criminalization results in the buyer bearing the sole risk of criminal culpability during the transaction, which may inadvertently place more power in the buyer's hands.[87]

The *Bedford* intervener group, Pivot, identified client screening as a precautionary step for sex workers.[88] Once communication is criminalized, it forces transactional negotiations out of well-lit streets and into sequestered alleyways.[89] Asymmetrical criminalization does not remedy the pre-service screening issue; so long as one party is assuming a risk (potentially holding more power in the transaction) it forces the communication underground.[90] Street-level sex workers already tend to be the most marginalized group within the trade, due to their public presence they are likely to be the group most impacted by section 286.1.[91]

Not only does the purchasing offence likely push sex workers underground, the application of material benefits to commercial enterprises prohibits sex workers from working at most fixed indoor locations.[92] In *Bedford*, the inability to work from a safe indoor location was the driving force behind striking down the bawdy-house provisions.[93] In complete contradiction however, section 286.2(6) finds receipt of material benefit by a commercial enterprise to be an

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Dignity, Equality: Recommendations for Sex Work Law Reform in Canada" (March 2017), online (pdf): *Canadian Alliance for Sex Work Law Reform* <sexworklawreform.com/wp-content/uploads/2017/05/CASWLR-Final-Report-1.6MB.pdf> [CASWLR].

85. See CASWLR, *supra* note 84 at 37.

86. *Bedford*, *supra* note 1 at para 70.

87. See CASWLR, *supra* note 84 at 37.

88. See *supra* note 1 (Factum of The Interveners, Downtown Eastside Sex Workers United Against Violence Society, Pace Society and Pivot Legal Society at para 9).

89. See *ibid* at para 4.

90. See Angela Campbell, "Sex Work's Governance: Stuff and Nuisance" (2015) 23:1 Fem Leg Stud 27 at 40–41.

91. See *ibid*.

92. See Stewart, "Constitutionality", *supra* note 42 at 78.

93. See *supra* note 1 at paras 63–65.

aggravating factor.[94] The new legal regime does attempt to tailor constitutional defects by allowing for certain material benefit exceptions (i.e., legitimate relationships); however the failure to remedy some of the biggest safety issues of *Bedford*, perhaps even making conditions more deleterious than before, is a reasonable critique.[95]

An important question in this debate is whether Parliament was required to fix *Bedford*'s security problems. Bear in mind, Parliament was not tasked with creating a safer form of sex work. As the Supreme Court of Canada stated, "[t]he regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime."[96] The old regime exacerbated harm towards sex workers; the effect was overly broad and grossly disproportionate when weighed against the law's *nuisance objectives*. However, Parliament has augmented the objective and safety concerns will now be weighed against the backdrop of deterrence and denunciation.[97]

When tasked with remedying the constitutional defects of the old regime, Parliament opted to make the purchase illegal and treat all sex workers as exploited victims. Within this framework, sex work is inherently harmful.[98] Safety concerns are mitigated through the material benefit exceptions and immunity clause. Any concerns beyond that can only be ameliorated through separation from the illegal activity itself. From this perspective the best—if not only—way to truly remedy the harm is abstinence altogether. The discussion over whether the laws increase or decrease sex worker safety will continue to be had ad nauseum. But the fact remains that Parliament had the ability to tailor the new scheme in any (constitutional) manner they saw fit, including criminalization.[99] Though this may be an answer to whether Parliament had to produce a safer scheme, it fails to answer the normative safety concerns of critics.

B. Is the New Regime Constitutional?

Parliament had twelve months to develop and enact the new sex work laws in response to *Bedford*. Whether this new scheme is constitutionally valid is

94. See *Criminal Code*, *supra* note 4, s 286.2(6).

95. See CASWLR, *supra* note 84 at 20–21.

96. *Bedford*, *supra* note 1 at para 165.

97. See Stewart, "Constitutionality", *supra* note 42 at 83–84.

98. See *Technical Paper*, *supra* note 3.

99. See Plaxton, *supra* note 83.

an open question. In order to assess the validity of the law, it must have a discernible purpose that can be measured against its effects. The purpose itself stems from the intent of the drafters.[100] Given that this regime was drafted in 2014, Parliament made its objective patently known. It is clearly stated in both the Preamble and the *Technical Paper* that the purpose of the statutory scheme is denouncing and deterring sex work.

If deterring sex work is the objective, it is fair to say the effects of sections 286.1–286.4 in prohibiting the sale, benefit, facilitation, and advertisement of sexual services, likely align with said objective.[101] As Plaxton noted, "the fact that the legislation explicitly sets out to discourage sex work arguably makes the burdens imposed on sex workers more constitutionally permissible".[102] Under this interpretation of the legislative objective, the courts are likely to uphold the new laws. After all, it is within Parliament's purview to decide what is harmful, immoral conduct.[103]

The counter-argument is that the purpose of the new regime is to both deter sex work and improve sex worker safety.[104] Stewart argues the two purposes are irreconcilable to the extent they create arbitrary and grossly disproportionate effects on sex workers security.[105] For example, as mentioned the new law makes it difficult to work at a fixed indoor location which jeopardized the security of the sex worker, thus frustrating the second purpose. The incompatibility between the two purposes would render the regime arbitrary or grossly disproportionate and hence unconstitutional.[106]

Stewart's argument has been critiqued for reading in a second purpose.[107] However, sex worker safety is a dominant current throughout the entire regime from the Preamble to the definition of the offences. For example, the material benefit exceptions were enacted to account for "legitimate" supports that a sex worker may require for safety.[108] Though deterrence is a clear objective, it is difficult to claim it is the only one.

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100. See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 335, 18 DLR (4th) 321.

101. See Debra M Haak, "The Initial Test of Constitutional Validity: Identifying the Legislative Objectives of Canada's New Prostitution Laws" (2017) 50:3 UBC L Rev 657 at 694–95; Plaxton, *supra* note 83 at 1.

102. Plaxton, *supra* note 83 at 1.

103. See *R v Malmo-Levine*, 2003 SCC 74 at paras 78, 212.

104. See Stewart "Constitutionality", *supra* note 42 at 71.

105. See *ibid*.

106. See *ibid* at 86–88.

107. See Haak, *supra* note 101.

108. *Technical Paper*, *supra* note 3.

The difficulty in constitutional challenges will lie in how the purpose of the new regime is defined. The purpose must be "neither too specific nor too broad".[109] Beyond statutory interpretation, the new sex work laws will need to be applied through the ideology of an individual judge and the facts of the case. Whether they view sex work as inherently exploitative or not may impact the overall outcome.

C. Morality: Opposing Feminist Fronts

There is a stark feminist divide when it comes to which legal model is best for sex work. Opposing feminist tension is not unique to sex work laws. For decades, feminist perspectives on criminal justice have divided into camps, often pro-incarceration versus anti-carceral.[110] This paper does not attempt to resolve or even critically examine these opposing views, rather, it merely highlights how these opposing perspectives approach the regulation of sex work.

There are two diametrically opposing feminist views propelling the conversation around legal models of sex work. On one end of the spectrum is the view that sex work is inherently gendered, exploitative, and harmful to the seller; therefore, asymmetrical criminalization is the legal model of choice.[111] On the other end of the spectrum is the legalization and decriminalization view which touts agency of the seller. The liberal view is often framed through a labour or empowerment argument, asserting that those selling sex willingly engage in a form of labour and deserve the same labour rights and respect as other forms of work.[112]

The first perspective argues that sex work is exploitative and it cannot, nor should be, divorced from the gender, socio-economic, and racial matrix that overwhelms this population.[113] It would also be naive to ignore the empirical correlation between sex work and violence.[114] For Benedet, the advocacy of asymmetrical criminalization is not an anti-choice narrative, but rather, a rally

109. Haak, *supra* note 101 at 664.

110. See generally Kathryn Abrams, "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95:2 Colum L Rev 304; Lowman, *supra* note 17 at 193.

111. See Janine Benedet, "Marital Rape, Polygamy, and Prostitution: Trading Sex Equality for Agency and Choice" (2013) 18:2 Rev Const Stud 161 at 163.

112. See Gacek & Jochelson, *supra* note 9 at 62–63.

113. See CASWLR, *supra* note 84 at 9.

114. See Kathleen N Deering et al, "A Systematic Review of the Correlates of Violence Against Sex Workers" (2014) 104:5 American J Public Health e42.

for gender equality.[115] Benedet posits the problem with a libertarian lens on sex work is that it overlooks power and structural imbalances. If an analysis of sex work is rooted in anti-discrimination, it starts with "the premise that unquestioned adherence to the value of choice in a society that is structurally unequal merely replicates inequality".[116]

This feminist framework views sex work as both a form of violence and a violation of women's equality. The liberal feminist framework rejects the notion that all sex workers are victims and that sex work itself is an inherent form of violence.[117] Under this feminist framework, agency of the seller is central to dismantling the harms that result as a consequence of criminalization.[118] The violence incurred by sex workers is a result of legal and social structures.[119] The liberal feminist theory tends to advocate for the removal of legal barriers through a legalization or decriminalization model.[120] At the heart of this theory is autonomy of the sex worker. The freedom to have sovereignty over one's own body is viewed as the means to removing social stigma and stereotypes.

Conflicting feminist ideologies can be seen threaded throughout the history of Canada's sex work laws. These competing moral perspectives played a large role in both the *Prostitution Reference* and *Bedford*. The current *PCEPA* regime, created under a conservative government, adopts an abolitionist stance. While legal scholars have pointed to the regime's constitutional and security deficiencies, as time goes on *PCEPA* may face some of its biggest hurdles outside of the courts and in the values and ideology of the public.[121]

III. Methodology

The aim of this study was to aggregate and analyze the written judicial opinions on the new sex work regime in light of the legal and policy issues discussed above. I ask: how have the laws been interpreted and applied? Content analysis was used to code judgments which substantively considered

115. See Benedet, *supra* note 111 at 185–86.

116. *Ibid* at 186–87.

117. See Gacek & Jochelson, *supra* note 9 at 79–80.

118. See *ibid*.

119. See *ibid* at 67, 79–80.

120. See *ibid* at 62–63.

121. See generally "Petitions: e-3132 (Justice)" (last visited 28 February 2022), online: *House of Commons* <petitions.ourcommons.ca/en/Petition/Details?Petition=e-3132>.

the *Commodification of Sexual Activity* legal scheme.[122] The cases were coded into categories based on individual offences. I began by identifying in the Westlaw database all decisions that considered or referred to sections 286.1–286.5 from enactment (December 2014) to September 2020, resulting in 179 decisions. Of the initial 179 cases, 103 merely referenced the sex work laws and 77 yielded a more substantive consideration of the laws.[123] These 77 cases are the focus of this paper.[124]

IV. Results & Discussion

The results of this study have been broken into two sections: Sections 286.1–286.4[125] and Constitutional Validity.

A. Sections 286.1–286.4

(i) Section 286.1: Communication and Purchase

The communication or purchase of sexual services offence encompassed forty per cent of the sample (n=30) and primarily emerged as a discrete charge.

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122. See Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96:1 Cal L Rev 63 (this process is divided by three distinct components: "(1) selecting cases; (2) coding cases; and (3) analyzing the case coding" at 79).

123. For a complete dataset, see Elisa Carbonaro, "ss. 286 stats" (last modified 21 April 2021), online: *U Alberta Sharepoint* <ualbertaca-my.sharepoint.com/:x:/g/personal/ecarbona_ualberta_ca/EfplLhFQm8JAqGlWrmx8fPcBM7H9LLtQQPyjBqXRh_NrGg?rtime=bJ82-Rj72Ug>. I operationalized "substantive" as any decision that either applied the law or incorporated some discussion of the new regime. Cases that merely referenced a provision with no further dialogue were omitted.

124. Though the methods attempted to capture all written decisions substantively dealing with the new regime, the sample size remained small. This finding can be interpreted in several ways. In addition to the relatively short timeframe (2014–2020), the small sample size may also be a result of reduced policing in this area. Since the early 1990s there has been a noticeable decline in reported prostitution offences (see Rotenberg, *supra* note 20). Another possible explanation is prosecutorial discretion, which forces the question of whether pursuing sex work offences is in the public interest.

125. There is no separate section 286.5 result because the immunity provision was never applied in the case law, though it does appear in discussion throughout the results.

The stand-alone nature of section 286.1 is distinct from third-party offences (sections 286.2–286.4) which were characterized by heavy overlap. In other words, individuals charged with section 286.1 tended to *only* be buyers or "Johns". There were three cases in which the accused faced both purchasing and third-party charges but only one resulted in conviction on both counts.[126]

This result suggests that there are two distinct categories of offenders targeted by the legislation: buyers and third parties (providers). The two groups rarely intersected and third-party offences received slightly more representation within the sample. This finding reflects the fact that the two populations are on opposing ends of sexual service transactions. In the cases where overlap did occur, there was a prior legitimate relationship between the victims and accused, either as roommates, romantic partners, or friends.

i. Sting Operations

As the centerpiece of the new regime, section 286.1 cases contained the highest number of proactive police operations. A distinct trend that emerged within the case law was the presence of sting operations. Undercover police operations comprised nearly forty per cent of all section 286.1 cases.[127] Sting operations are not a new or novel technique. The Supreme Court of Canada has long recognized the difficulty in policing sex work and the necessity of undercover officers.[128]

However, the sample revealed that much like the sex work industry, police stings have also moved online. The most prolific operation was "Project Raphael" out of the York Region Police Service. The sting operation entailed police posting an ad on Backpage.com soliciting sexual services.[129] After a prospective client responded to the ad an officer would inform them that the seller was actually between fourteen and seventeen years old, and anyone

126. See *R v Eftekhar*, 2020 ONSC 1386 at para 19.

127. With the exception of *R v Anwar* (see *below*, Constitutional Validity), all stings were directed at the buyer.

128. See *R v Mack*, [1988] 2 SCR 903 at 966–67, 1 WWR 577.

129. Backpage was an online classified marketplace, and it was seized by the US authorities in 2018 due to its role in prostitution and human trafficking. See Charlie Savage & Timothy Williams, "U.S. Seizes Backpage.com, a Site Accused of Enabling Prostitution", *The New York Times* (7 April 2018), online: <nytimes.com/2018/04/07/us/politics/backpage-prostitution-classified.html>.

who attempted to follow through with the transaction was charged under section 286.1(2).[130]

In fact, an overwhelming sixty-eight per cent of all section 286.1 cases were with respect to the communication or purchase of sexual services from a minor, a modernized version of the previous section 212(4).[131] In many ways section 286.1(2) mirrors the pre-*Bedford* statute, however, its augmentation under *PCEPA* makes it relevant to this study. The former section 212(4) was housed under the offence of "Procuring" in Part VII: Disorderly Houses, Gaming and Betting of the *Criminal Code*. Now it sits under Part VIII: Offences Against the Person and Reputation. This symbolic shift reflects the change in legislative purpose.[132] Accordingly, the new case law on purchasing sex from a minor heavily draws on previous jurisprudence while also reflecting the increased gravity and penalty of the offence. Cases involving adult sexual service transactions were vastly under-represented within the sample. The relative deficit of adult sellers may, in part, be because police efforts focus on the purchase of sex from minors.[133] Outside of the odd police sting, section 286.1(1) only garnered convictions in three cases.[134] Within these three convictions, extreme vulnerability was emblematic of all three victims.

The few attempts where police actively pursued section 286.1(1) arose in undercover street-level busts, where officers implicitly attempted to sell the sexual services of an adult rather than a minor. *R v Mercer*, one of the first cases to consider the application of section 286.1, was the outcome of Nova Scotia's "John Be Gone" police street-level sting initiative.[135] The operation entailed an undercover officer posing as a sex worker on a notorious strip of downtown Sydney and the sting ultimately resulted in a total of twenty-seven accused being charged with communication.[136] In *R v Mercer*, the accused alleged that police conduct amounted to an abuse of process because it "was a misuse of the criminal law in an attempt to correct a small social problem".[137] Judge Williston went to

130. See *R v Haniffa*, 2018 ONCJ 960; *R v Weiland*, 2019 ONSC 5357; *R v Sinnappillai*, 2020 ONSC 1989; *R v CDR*, 2019 ONSC 4061; *R v Faroughi*, 2020 ONSC 780 [*Faroughi II*].

131. See *Criminal Code*, *supra* note 4, s 212(4) (repealed by *Protection of Communities and Exploited Persons Act*).

132. See *Technical Paper*, *supra* note 3.

133. See *ii. Entrapment*, *below*.

134. See *R v Baxter*, 2019 NSPC 8; *R v Rouse*, 2017 NSSC 292; *R v Eftekhar*, *supra* note 126.

135. 2016 NSPC 48.

136. See *ibid* at para 14.

137. *Ibid* at para 24.

great lengths to describe the necessity of the John Be Gone program,[138] finding it was a legitimate technique for police to target the demand side and ultimately protect vulnerable sex workers.[139]

ii. Entrapment

Once guilt was proven, several accused charged through sting operations utilized the procedural remedy of entrapment to obtain a judicial stay of proceedings. Every case that alleged entrapment was dismissed, either for failing to establish police lacked a bona fide inquiry or that they were induced into committing the offence.[140] The use of Backpage.com was found to be "a sufficiently precise location to dispel any concerns about random virtue testing", therefore, the bona fide branch failed in all internet-based operations.[141]

The courts tended to give slightly more consideration to the second type of entrapment whereby police induce an offence that otherwise would not have occurred. Arguably, the very nature of these sting operations requires police to "induce" the purchase of sex, either by posting a provocative ad or standing on a notorious sidewalk for sex work. It is perhaps conceptually easier to view sex work stings as inducement when compared to drug-based operations. Classic "buy-and-bust" drug stings typically have undercover police pose as the buyer rather than the seller, significantly reducing the likelihood police induced an individual into selling drugs.

In the *Faroughi* case, the accused replied to an undercover police advertisement for sexual services. The woman posing in the ad was thirty-four years old but claimed to be eighteen and Mr. Faroughi himself was nineteen years old at the time. Once communication started and the undercover officer revealed that the "escort" was in fact fourteen years old, the accused changed his mind several times and attempted to disengage from the transaction, during which the officer replied, "Stop playing games" and "U [*sic*] coming or not".[142] Ultimately, the judge held that police stopped short of threatening or coercing the accused into the transaction and therefore entrapment was not established.[143]

138. See *ibid* at paras 5–14.

139. See *ibid* at para 41.

140. See *R v Faroughi*, 2020 ONSC 407 at paras 24–32 [*Faroughi I*]; *R v Piluso*, 2018 ABPC 282 at paras 28–34.

141. *R v Sinnappillai*, *supra* note 130 at para 72.

142. *Faroughi I*, *supra* note 140 at paras 23–27.

143. See *ibid*.

From this sample, it appears the remedy of entrapment will face many hurdles when applied to section 286.1. First, given the way in which sex work transactions occur on the street, at a fixed location, or online, it will be virtually impossible for police to fail in establishing a sufficiently precise location as part of a bona fide inquiry. Second, there is a high threshold for establishing inducement of an offence that otherwise would not have occurred. It will likely require nothing short of the police convincing someone to purchase sexual services who otherwise has unequivocally said "no".

iii. Summary

The lack of adult sexual service providers within section 286.1 cases is striking. Why are there so few written decisions on the centerpiece of *PCEPA*? I believe there are several reasons that account for this gap. First, the offenders charged for the first time with purchasing or communicating with an adult for sexual services have diversion options through "John Schools" across Canada.[144] Alternative measure or diversion programs likely reduce the number of cases that go to court. Next, as mentioned above, police focus on adults purchasing sex from adults has been declining for years while simultaneously efforts on protecting youth from exploitation online have increased. Furthermore, adult sex workers who rely on the income of their clients were nowhere to be found in the sample. For the many men and women who engage in sex work, reporting clients to authorities would self-defeat their interests and therefore police stings remain the most viable technique to target buyers. The reality that police are uninclined to run stings with adult service providers, and when they do, alternative sentencing is promoted, suggests that perhaps there was some truth to the argument put forward in *Mercer*. Is policing and prosecuting the purchase of sex from adults a misuse of criminal law? The merit of targeting buyers remains split along feminist lines, however, the clear absence of adult transactions from the case law may reflect the justice system latently leaning towards a more liberal stance on the sex trade.

It is worth asking what, if any, impact criminalizing the actual purchase of sexual services has had. After all, this was a highly controversial component of the new statutory scheme, rendering sex work illegal for the first time in

144. See e.g. CEASE, "Sex Trade Offender Program" (last visited 26 February 2022), online: *Centre to End All Sexual Exploitation* <www.ceasenow.org/sex-buyers/prostitution-offender-program-john-school/>; John Howard Society, "John School" online: <johnhoward.on.ca/windsor-essex/services/john-school-diversion-program/>; Scot Wortley, Benedikt Fischer & Cheryl Webster, "Vice Lessons: A Survey of Prostitution Offenders Enrolled in the Toronto John School Diversion Program" (2002) 44:4 Can J Crim 369.

Canada. The cases tend to capture conduct only related to communication, which was illegal prior to *PCEPA* and struck down for its impact on sex worker safety. The answer may lie in the reality that the act remains difficult to police, as evinced by the prevalence of police stings in the case law. And police stings only target the communication aspect of the transaction. In order for the "obtains for consideration" component of section 286.1 to be established, it likely requires the service provider to report the transaction. There were only three examples of this occurring. In all three cases the victims were highly marginalized women with no prior experience in sex work.[145] Fundamentally, these cases came down to an abuse of power where drugs, shelter, or cigarettes were exchanged for sexual services. As mentioned above, sex workers, those who engage professionally in selling their services, were nowhere to be found in the sample. Ironically, the results of this study on the centerpiece of *PCEPA* virtually mirror the pre-*Bedford* landscape which only criminalized communication and underage sex work. Though the criminalization of sex work arguably has symbolic potency and reflects an ideological perspective, it has so far played an underwhelming role in the written case law.

(ii) Section 286.2: Material Benefit

The application and scope of the new material benefit provision was considered in forty-two per cent of the sample cases, making it the second most common offence behind procurement. Prior to *Bedford*, the vast majority of prostitution-related incidents reported by police were under section 213—communication for the purpose of sexual services.[146] At a glance, this sample demonstrates that policing (or at the very least, prosecutorial discretion) has shifted to place a greater focus on third parties. The courts found the material benefit provision was aimed at criminalizing the parasitic and exploitative conduct of pimps.[147] The offence is established either through proffering evidence of the essential elements or by employing the section 286.2(3) presumption.

In *R v Morgan*, the Ontario Superior Court of Justice held that for proving "the essential elements within section 286.2(1), the guilty *act* is the

145. See *R v Baxter*, *supra* note 134; *R v Rouse*, *supra* note 134; *R v Eftekhar*, *supra* note 126.

146. See Rotenberg, *supra* note 20 at 5 (the communication offence constituted 82% of all prostitution-related offences between 2009 and 2014. In 1998, 55% of accused were women, but by 2014 women only represented 9% of the population charged with section 213, an indicator that the police shifted to target the buyer rather than seller, at 8–9).

147. *R v Morgan*, 2018 ONSC 596 at para 23.

receipt of a financial benefit from the provision of sexual services. The guilty *intent* is knowing (or at least being wilfully blind to) the spurious origins of the benefit."[148] Either through proof of the elements or by employing the statutory presumption, a precondition for the material benefit offence is a violation of section 286.1. In other words, the receipt of benefit must be obtained from the sale of sexual services.

The case law defined "benefit" in broad terms, indicating receipt of material benefit is a low threshold, which can later be balanced by statutory exceptions. For most judges, the threshold was crossed if the accused received *any* material object, including gifts,[149] although a line was drawn at the "mere social sharing" of commodities such as drugs and alcohol. The communal use of substances purchased by a sex worker equated to a zero-sum game among friends. Any derived benefit lacked the necessary "nature of an advantage or profit".[150] The case law delineated the parameters of "material benefit" in accordance with the narrowed objective of section 286.2: targeting third parties that profit off sex work.[151] The limits are broad in an effort to capture all value gained through others' sexual labour, however, judges rightfully draw the line at benefits that fail to meet the nature of the offence—the essential concept of profit.

i. Statutory Exceptions

The statutory exceptions for receipt of material benefit had limited success within the sample. The offence captured a spectrum of conduct but rarely was it found to be "legitimate". The material benefit charge appeared in a wide range of circumstances, from blatant exploitation[152] to conjugal living situations.[153] The most prevalent exception within the sample was subsection 286.2(4)(a), where immunity was granted in "the context of a legitimate living arrangement".[154] This exception only succeeded twice, both in the context of romantic relationships.[155] All other attempts to qualify for an exception under subsection

148. *Ibid* at para 25 [emphasis in original].

149. *R v Morgan*, 2019 ONCJ 524 at para 1.

150. *R v ESHO and JAJOU*, 2017 ONSC 6152 at para 129.

151. *Technical Paper*, supra note 3.

152. See *R v Tazike*, 2019 ONCJ 819.

153. See *R c Placide*, 2016 QCCQ 14863.

154. *Criminal Code*, *supra* note 4, s 286.2(4)(a).

155. See *R c Placide*, *supra* note 153 at paras 41–43; *R v Lucas-Johnson*, 2018 ONSC 3953 at paras 255–56.

286.2(4) were barred by the presence of a statutory restriction under section 286.2(5). Restrictions include the use of threats or violence, abuse of power, providing intoxicating substances to aid and abet the purchase of sexual services, conduct amounting to a procuring offence, or benefit derived from a commercial enterprise.[156]

The sample indicated that judges varied in their interpretation and application of the material benefit exceptions and restrictions. *R v Floyd* provided an example of a material benefit acquittal.[157] The facts indicate that the accused travelled with a fifteen-year-old complainant as she sold sexual services through various motels.[158] The clear presence of habitual company and lack of contrary evidence would have been sufficient to trigger the presumption under section 286.2(3).[159] At trial the accused was found guilty of assaulting the complainant during this period which, according to the statutory restriction, would prohibit a material benefit exception.[160] The accused was ultimately acquitted of all human trafficking and sex work-related charges in the case.

Two factual forces buttress the verdict in *Floyd*. First, the accused was found not guilty of recruiting or persuading the complainant into sex work, as she was already escorting prior to meeting the accused.[161] Second, the assault did not relate to the complainant allegedly escorting for the accused, rather it occurred in a non-sex work related context.[162] Though this interpretation is logical, the words of the statute do not define such separation. They merely state no exception will apply if the violence transpired "in relation to the person" who provided sexual services.[163] Other cases have found that the allegation of a threat—even tangentially related to sex work—precludes reliance on a statutory exception.[164]

156. See *Criminal Code*, *supra* note 4, s 286.2(5).

157. 2020 ONSC 2014.

158. See *ibid* at paras 66–68.

159. Recall that habitual company satisfies the presumption of material benefit in the absence of proof to the contrary.

160. See *Criminal Code*, *supra* note 4, s 286.2(5)(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".

161. See *supra* note 157 at paras 56–57, 61.

162. See also *R v Hall*, 2018 ABQB 459 ("it appears to this Court that use, threat to use or attempt to use violence, intimidation or coercion must be to control, dominate or exploit the person from whose sexual services the benefit is derived" at para 86).

163. *Criminal Code*, *supra* note 4, s 286.2(5)(a).

164. See *R v Alexander*, 2016 ONCJ 882 at para 75.

This is an area of statutory interpretation that will hopefully be fleshed out through more case law. It would be an error to equate all violence perpetrated towards a sex worker as inextricably tied to sex work itself. To do so runs the risk of escalating what might otherwise be a minor assault charge to a material benefit conviction. Applying the statutory restriction in a manner that captures all violence, threats, and intimidation would have the potential of making the material benefit offence overly broad.

Another limitation to a material benefit exception was conduct amounting to procurement. The intersection between the procuring and material benefit offences has proven to be one of the more challenging aspects of the new regime. A finding of procurement under section 286.3 bars all enumerated material benefit exceptions and the procuring offence can capture a large range of conduct.

Judges may struggle with applying the overlap between these two offences. In *R v Lucas-Johnson*, the accused and complainant "were in a domestic living arrangement, albeit short-lived, in which they were romantic partners".[165] This dynamic met the requirement of the legitimate living arrangement exception and Mr. Lucas-Johnson was acquitted of his material benefit charge. However, he was later found to have procured the complainant when he introduced her to the idea of selling sexual services and was subsequently convicted under section 286.3.[166] Ultimately, the finding of guilt under section 286.3 should have prohibited an acquittal of his material benefit charge. This result can be interpreted in several ways, including an error in the application of law.

An important inference drawn from this example is that the current application of the material benefit scheme lacks certainty. While some judges treated the presence of procurement as a statutory restriction to a material benefit exception,[167] others have not. Future cases will determine the interaction between these provisions, but for now the appropriate application of these laws together remain unclear.

(iii) Section 286.3: Procuring

No ink has been lost on interpreting the elements of procurement or the scope of its application. Not only was section 286.3 the most common, representing forty-four per cent of the sample (n=34), but it also generated the longest discussions. First, the judiciary had to determine the elements of

165. *Supra* note 155 at para 256.

166. See *ibid* at paras 268–70.

167. See e.g. *R v Boodhoo*, 2018 ONSC 7205 at para 35.

section 286.3, which notably bears near-identical wording to the prior section 212(1). The leading authority comes from the Court of Appeal for Ontario in *R v Gallone*.[168] In a rare appellate level decision on the new sex work regime, the Court in *Gallone* weighed in on a trial judge's charge to the jury for, *inter alia*, the elements of procuring under section 286.3. The Court held there are two modes of committing the *actus reus* of the offence:

1. The accused "procures a person to offer or provide sexual services for consideration"; or

2. The accused "recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person."[169]

In the first mode, the Court of Appeal for Ontario adopted the *Deutsch* definition of "procure" as means "to cause, or to induce, or to have a persuasive effect upon the conduct" alleged.[170] The Court of Appeal for Ontario held that the second mode should be read disjunctively in order to meet the section 286.3 comprehensive prohibition objective.[171] In sum, any one of the distinct types of conduct listed in the second mode—if proven—would establish the *actus reus* for the offence. The enumerated types of conduct are discrete modes, conflation between them would run counter to legislative intent and the presumption against tautology.[172] Finally, the Court of Appeal for Ontario held that the *mens rea* for the offence will be established in the first mode through proof of intention to procure a person to offer or provide sexual services, and in the second mode it will be established if the Crown proves the "accused intended to do anything that satisfies the *actus reus*" of the offence and acted with the purpose of facilitating an offence under section 286.1.[173]

i. Is Introduction to Sex Work a Necessary Condition?

Whether or not the accused introduced the idea of sex work to the complainant played a critical role in establishing the offence. The procuring

168. 2019 ONCA 663.

169. *Ibid* at para 59.

170. *Ibid* at para 61.

171. See *ibid* at paras 70–71.

172. See *ibid* at para 72.

173. *Ibid* at para 63.

offence captured a wide range of activity, as one judge put it, it captures conduct "along a continuum from almost complete control to mere influence over the movements".[174] Several decisions led to acquittals due to the finding that the complainant voluntarily entered the sex trade prior to meeting the accused.[175] For example, in *R v Evans* the complainant had prior involvement in the sex trade when she approached the accused about forming a "business relationship".[176] The accused later went on to buy her trade-specific clothes, informed her about what to say to clients, set fees, booked hotels, transported her to and from locations, and dictated working hours.[177] The Ontario Superior Court of Justice acquitted the accused for procurement, finding he "could not have caused, induced or persuaded [the complainant] to engage in prostitution" due to the fact that she might have been involved in sex work at the relevant time of the alleged meeting.[178]

It appears that an essential element of the offence under this logic would be inducing the complainant to *become* a sex worker. This was the essential element under the old regime. The former offence of section 212(1)(d) prohibited against "procuring [someone] to become . . . a prostitute".[179] However, an individual who previously worked in the sex trade could subsequently be procured again and the notion that "once a prostitute, forever a prostitute" was rejected.[180] Under the new regime it remains ambiguous whether introduction to sex work is necessary. As mentioned above, some decisions found that an essential element of offence requires a causal connection between the accused and the introduction to sex work. For others, the lack of causal connection was not fatal.[181] However, in no way does the second mode articulated in *Gallone* require the accused be the original impetus for sex work. Statutory interpretation then rebuts the notion that inducing someone to become a sex worker is an essential component of procurement.

This finding opens the door to bigger questions about the role of autonomy in sex work. If procurement exists on a continuum, where does free

174. *R v Jeffers*, [2019] OJ No 1711, 2019 CarswellOnt 5209 at para 61.

175. *See R v Dykes*, 2018 ONSC 3405 at para 71; *R v Evans*, 2017 ONSC 4028 at para 130; *R v Morgan*, *supra* note 147 at paras 41–42; *R v Gray-Lewis*, 2018 ONCJ 560 at para 57.

176. *Supra* note 175 at para 130.

177. See *ibid* at para 149.

178. *Ibid* at para 130.

179. *Criminal Code*, *supra* note 4, s 212(1)(d) (as it appeared on 27 February 2013).

180. *R v B(K)*, [2004] OJ No 1146 at paras 50–52, 184 CCC (3d) 290 (Ont CA).

181. See *R v Salmon*, 2019 ONSC 1574 at para 25; *R v Purcell*, 2018 ONSC 6520; *R v Jeffers*, *supra* note 174.

will take over? The issue with this law is not only that it may be failing to capture harmful procurement conduct, but further, through such steadfast reliance on a causal connection to "introduction", it may be too broad. The introduction to the idea of sex work, or mere exposure to it, can result in conviction of an indictable offence, even if the complainant actively wanted to engage in sex work.[182] Parliament intended to comprehensively criminalize all aspects of procuring. No evidence of exploitation is necessary to establish the offence, nor is its absence a defence. But judges have weighed similar conduct in cases and rendered opposing verdicts. Given the wide interpretation of conduct, section 286.3 decisions may shed light on judicial perspectives towards sex work. If a judge adopts a more liberal perspective and views the sex worker as autonomous, then a degree of influence and control may not necessarily merit a finding of fault. Conversely, where a judge holds an exploitative perspective on sex work, the accused may be held liable for something as minor as suggesting the idea of sex work.

The case law demonstrates that section 286.3 casts a broad net on conduct and has been unevenly applied. The legislation runs the risk of criminalizing non-parasitic and non-exploitative relationships while simultaneously failing to capture such conduct. Given the breadth of the provision, procurement cases may also offer a small window into the ideology of the judiciary. In future cases, it will be imperative to see how the courts apply the law, whether introduction to the sex trade is a necessary element, and where the parameters will be set on "influencing" conduct.

(iv) Section 276: Prior Sexual Activity

Recruiting an individual for the purpose of facilitating an offence under section 286.1 may or may not be a necessary condition for procuring, however, it is sufficient. In turn, the case law indicates the complainant's prior activity in sex work is a material issue. Within the sample, the relationship between procuring and section 276 was a recurrent trend, and the diverse results point to an unclear terrain between *PCEPA* and existing legislation.

Section 276 of the *Criminal Code* governs the admissibility of the complainant's prior sexual activity in relation to the charge. It is referred to as the rape shield provision and it essentially functions to prohibit the twin myths: that a complainant is less worthy of belief or that they are more likely to have consented.[183]

182. See *R v Lucas-Johnson*, *supra* note 155 at paras 225–27; *R v Eftekhar*, *supra* note 126 at para 9.

183. See *Criminal Code*, *supra* note 4, s 276(1).

Section 276 applies to the offences enumerated within the statute. Notably none of the new sex work-related offences fall within this list. In *R v Barton*, however, Moldaver J held that section 276(1) can apply if the offences listed within the statute have "some connection to the offence charged".[184] This has broadened the scope of applicability and consequently rendered some uncertainty around whether section 276 applies to procurement.

The appropriate application of section 276 to the *PCEPA* offences remains an open debate within the courts. The case law sample demonstrates three perspectives. First, the regime applies to section 286.3 because procuring has some connection to the enumerated offences, such as section 153(1)(b) due to the presence of "some" exploitation.[185] Second, section 276 is not applicable to procurement because sex work is fundamentally different than the enumerated section 276 offences, and consent to sex work "is not necessarily vitiated" because the accused exercised some "control".[186] And third, even if section 276 is not applicable due to lack of connection, the court can impose the same procedural and substantive requirements through the common law.[187] All three perspectives emerged from the Ontario Superior Court of Justice and therefore all hold equal precedential weight.

How future courts apply section 276 to procuring offences is important because it will determine how sexual activity in sex work is framed. Section 276, or a common law variation, applied to sex work-related offences would problematically conflate consent and sex work. This was the holding in the *R v Williams* decisions.[188] Justice Stribopoulos rejected both the application of section 276 to sex work offences and the expansion of the common law for offences to which section 276 is inapplicable.[189] First, Stribopoulos J found although consent is not vitiated by the presence of procurement and influence, the complainant may still exercise some choice in selling sexual services and there is a danger in conflating sexual assault with the standards of section 286.3.[190] The notion that consent is gone when someone is procured into selling sexual services would strip agency, ultimately framing sex work that occurred due to procurement as sexual assault.

184. 2019 SCC 33 at para 76 (note that if the offence in question is a predicate offence or included offence, section 276 is applicable).

185. *R v Floyd*, 2019 ONSC 7006 at para 9.

186. *R v Williams*, 2020 ONSC 206 at para 30 [*Williams I*].

187. See *R v MD*, 2020 ONSC 951 at paras 57, 68–73.

188. 2020 ONSC 6347 [*Williams II*].

189. See *ibid* at para 49.

190. See *Williams I*, *supra* note 186 at paras 26–27.

Williams II provided insight into the fundamental nature of sexual service prosecutions. Justice Stribopoulos notes that sex workers are unquestionably at risk of the second myth—being less worthy of belief due to prior sexual activity. Although, this risk is inherently attached to every sex work-related offence because evidence of the complainant exchanging sex for consideration is material to the charge.[191] The offence of procuring automatically implicates the complainant's sexual activity; evidence of prior or post involvement in the sex trade is therefore relevant to the element of "inducing" and should accordingly be weighed through the common law discretion to exclude.[192]

Williams II addressed the apparently correct statutory interpretation to section 286.3 while also collaterally attacking the notion that all sex workers lack agency and free will. This is an important finding for future applications of section 276 in relation to sex work offences. Justice Stribopoulos also touched on the issue of "introduction" to sex work, stating a "complainant's prior involvement in the sex trade or her continuing in that industry after their relationship ended does not necessarily foreclose the accused having encouraged her participation".[193] Here, procurement is possible regardless of pre-existing activity in sex work, however, the evidence of such is still relevant because it has the tendency to alter the probability of a material fact.

In sum, the *Williams II* decision addressed the scope of section 276 to *PCEPA* offences, holding the regime should not apply in statute or common law. The logic of Stribopoulos J appears unassailable and clearly articulates the risk of applying the rape shield provision to sex work.

(v) Section 286.4: Advertising

The advertising offence yielded less discussion than the other offences in the sample, representing twenty-six per cent (n=20). Further, it nearly always arose in conjunction with either procuring, material benefit, or both. Unlike the offences of procuring and material benefit, there was no analogous provision under the previous regime.

Once again, the leading authority for establishing the offence elements comes from the Court of Appeal for Ontario in *Gallone*.[194] The Court held "[t]he *actus reus* of this offence is made out if the accused advertised an offer to provide sexual services for consideration. The *mens rea* is made out if: (i) the

191. See *Williams II*, *supra* note 188 at para 45.

192. See *ibid* at paras 59–61.

193. *Ibid* at para 60.

194. See *supra* note 168.

accused intended to advertise the offer; and (ii) the accused knew that the offer was one to provide sexual services for consideration."[195] In the case law, this offence appeared exclusively in the context of online advertising, specifically Backpage.com.[196] Lack of explicit reference to the sale of sexual services did not bar the Court from establishing the offence. Sexual services could be inferred given the placement of the ad under the "female escorts" heading and the nature of the advertisement.[197]

The most common trend emerging from the sample centered around the scope of what conduct is criminalized by the provision. In *Gallone*, the Court assessed whether the immunity provision under section 286.5 extended to those who help sex workers advertise their own sexual services.[198] The Court of Appeal for Ontario looked to both the words of the statute and the external Hansard evidence in their determination that the immunity provision only applies to a sex worker selling their own individual services.[199] This interpretation of sections 286.4 and 286.5 criminalizes a wide range of activity, including circumstances that have no exploitation at all such as web designers and sex workers working in collaboration. Courts were alive to the broad scope of the new advertising provision and its apparent friction with the Supreme Court of Canada's holding in *Bedford*. In the *R v Jeffers* case, Duncan J addressed the disconnect, stating:

> One might have thought that placing of advertisements was the sort of clerical assistance that *Bedford* held should not be criminalized. But the amendments were not a direct response to or correction of the *Bedford* concerns. Rather it was a new approach with an objective of deterring prostitution. Advertising, by its nature, seeks to promote and encourage purchase of the product. It is therefore quite in keeping with Parliament's objective to prohibit advertising.[200]

Emerging within courts' treatment of the advertising offence is recognition that the new law will be weighed against the objective of deterrence. Within this framework *any* contribution to advertising sex services, whether helping a sex worker or not, runs counter to Parliament's objective to reduce demand.

195. *Ibid* at para 78.

196. See Savage & Williams, *supra* note 129.

197. *R v AM*, 2020 ONSC 4191 at paras 45–47.

198. See *supra* note 168 at para 84.

199. See *ibid* at paras 86–99.

200. *Supra* note 174 at para 74.

The third-party assistance mentioned in *Bedford* can be further separated from advertising because it fails to endorse sex work. As held in *R v Boodhoo*, services, such as bodyguards, bookkeepers, and drivers do not have the material function of promoting sex work.[201]

The counter-argument is that the prohibition on advertising restricts important sex worker safety mechanisms.[202] This arose in *Anwar* when measuring the effect of section 286.4 against the legislative purpose. Justice McKay implicitly adopted the reduction of harm to sex workers as a pressing and substantial objective, finding an unjustified violation of section 2(b) of the *Charter*.[203] If every aspect of advertising is criminalized, including supporting a sex worker in developing her own advertisements, the law has essentially developed a de facto prohibition on sex workers advertising their services. Though they can "legally" post an ad, in practice they too are prohibited, which cuts off their ability to effectively post and negotiate terms with clients.

In analyzing the divergent views courts have taken, the crux of future constitutional challenges to section 286.4 will likely lie in how the legislative objective is defined. If it is solely a deterrence objective the law will likely be valid; however, if the court takes a robust definition that incorporates sex worker safety it will be harder to prove the effects are proportional.

B. Constitutional Validity

The validity of the new legal scheme was challenged through *Charter* claims under sections 12, 7, and 2(b). Parliament has classified the communication or purchase, material benefit, and procurement of minors as strict indictable offences that carry minimum sentences of six months (section 286.1(2)), two years (section 286.2(2)), or five years (section 286.3(2)), respectively.[204] Subsequently, within the sample, the sentencing component of these provisions constituted the vast majority of constitutional challenges via section 12: protection against cruel and unusual punishment. *Charter* challenges against minimum sentencing had a success rate of eighty-eight per cent and under *Charter* section 52, superior courts have struck down the minimum sentencing imposed for offences under sections 286.1–286.3 in relation to minors.[205]

201. See *supra* note 167 at para 41.

202. See *R v Anwar*, 2020 ONCJ 103 at para 128.

203. See *ibid* at paras 128–32.

204. See *Criminal Code*, *supra* note 4.

205. See e.g. *R v Charboneau*, 2019 ABQB 882; *R v Joseph*, 2018 ONSC 4646; *R v Safieh*, 2018 ONSC 4468.

Courts recognized the diversity of potential facts and degree of exploitation captured by these offences is eminently variable. The courts engaged in several "reasonable hypothetical" circumstances to determine whether a minimum sentence was grossly disproportionate.[206] The hypothetical conduct in question was invariably non-exploitative.[207] For example, *R v Charboneau* considered the hypothetical situation of an eighteen-year-old asking his seventeen-year-old classmate to flash him for twenty dollars, to which she refuses.[208] The lack of coercion or parasitic behaviour in the hypothetical scenario underscored the notion that not all conduct is equal.

Given the breadth of conduct captured, it stands to reason that the statutorily imposed minimum sentences risk becoming cruel and unusual punishment or grossly disproportionate. The offences have the potential to penalize activity that falls outside the bounds of what might be considered exploitative. However, Parliament removed the language of "prostitution" from the *Criminal Code* and adopted the broader language of "sexual services for consideration".[209] The hypothetical flashing example could then reasonably be categorized as the type of conduct Parliament meant to prohibit and punish as exploitative under section 286.1(2). The contention for sentencing minimums lies in the lowest common denominator. It is difficult to place the flashing example along the same plane as a mature adult purchasing sex from a fifteen-year-old. Regardless of whether the conduct is viewed as exploitation, minimum sentences can result in unjust outcomes.

(i) Sections 7 and 2(b)

Additionally, offences targeting third-party profiters under sections 286.2–286.4 have been constitutionally challenged through *Charter* sections 7 and 2(b). Within the sample there were two cases, *R v Boodhoo* and *R v Anwar*, both of which alleged sections 286.2–286.4 offended *Charter* section 7 because the offences were overly broad and grossly disproportionate.[210] Furthermore, both cases argued section 286.4 violated *Charter* section 2(b), freedom of expression. The two cases came out of Ontario and were decided within just over a year of one another.

206. *R v Nur*, 2015 SCC 15 at paras 56–58.

207. See e.g. *R v Charboneau*, *supra* note 205; *R v Safieh*, *supra* note 205.

208. See *supra* note 205 at para 84.

209. *Criminal Code*, *supra* note 4, s 286.1.

210. See *R v Boodhoo*, *supra* note 167; *R v Anwar*, *supra* note 202 at paras 2–3.

In *Boodhoo*, the accused had been found guilty of receiving material benefit and procurement of a minor along with advertising sexual services.[211] The accused advanced their constitutional claims through the use of reasonable hypotheticals, all of which included a sex worker as the alleged accused.[212] In the first scenario, one sex worker provided advice to another (a minor) on safety practices with clients. Justice Bale made the critical distinction that the sole purpose of the statement was not for procuring a minor, but rather, it was made to assist in safety.[213] Ultimately, Bale J found none of the hypotheticals violated section 7 and the infringement on 2(b) was minimally impairing, and was ultimately justified under the *Oakes* test.[214]

The *Anwar* case was factually quite different from *Boodhoo*, in fact, it was an outlier amongst the entire sample.[215] In *Anwar*, the accused were a couple who ran an escort company, and they were charged with offences under sections 286.2–286.4 after undercover officers posed as potential clients and sex worker applicants.[216] The case was marked by its distinct lack of violence, coercion, or maltreatment towards the sex workers. All sex workers had voluntarily applied for the job and as employees received safety protection, work autonomy, health benefits, vacation pay, and fifty per cent matched tuition for students.[217]

Needless to say, the factual landscape going into *Anwar* was miles away from the violence and youth sexual exploitation in *Boodhoo*. Justice McKay balanced the expert evidence of the Crown and the defence and found the material benefit and procurement offences violated section 7 of the *Charter* for being overly broad and arbitrary.[218] As mentioned above, the advertising offence was found to offend freedom of expression because it limited the tools sex workers could use to enhance safety.[219] Since *Anwar* was a provincial court level decision, the impugned provisions were not struck down under section 52.

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211. See *supra* note 167 at para 1 (there is no separate provision for advertising sexual services of a minor under section 286.4; this offence would be captured under *Criminal Code* section 163.1(3) (distributing child pornography)).

212. See *ibid* at para 14.

213. See *ibid* at para 34.

214. See *ibid* at paras 56–59.

215. See *supra* note 202 (this was the only case considering the new legal scheme and a commercial enterprise).

216. See *supra* note 202 at paras 15–18.

217. See *ibid* at para 11.

218. See *ibid* at paras 178, 214.

219. See *ibid* at para 130.

Since 2020, the constitutionality of *PCEPA* has continued to crop up across courts, although without much clarity or resolve.[220] In 2021, a series of cases out of the Ontario Superior Court of Justice undertook similar *Charter* challenges to sections 286.2–286.4. In particular, two cases have spurred legal uncertainty after Sutherland J struck down the impugned provisions for being unconstitutional in *R v NS*,[221] but then two months later, Gambacorta J reversed course in *R v MacDonald*, which found *PCEPA* to be constitutional.[222] The perplexing result has led to greater fractions within the same court level and pushed Ontario into "chaos" regarding the new regime.[223] Hopefully some clarity will come soon given the Court of Appeal for Ontario recently heard the Crown's appeal of *R v NS* on November 19, 2021.

How did such similar *Charter* challenges result in such divergent outcomes? I believe the difference can be traced to the courts' interpretations of *PCEPA*'s legislative objective. In both *Boodhoo* and *R v MacDonald*, the objective was gleaned directly from the *Technical Paper* and the courts plainly adopted the "reduce, discourage, and deter" purpose.[224] Here, both Bale and Gambacorta JJ rejected the argument that *PCEPA* contained a safety enhancement purpose, and therefore all effects of the law were weighed against the objective of deterrence.[225] Both Justices upheld the legal scheme because the effects—which impact sex workers' capacity to work indoors, advertise, and profit—were rationally connected to the overall objective of reducing and discouraging sex work.

Conversely in *R v Anwar* and *R v NS*, the courts read the *PCEPA* scheme more holistically and included the objective of protection and safety of sex workers.[226] From here, each Justice weighed the effects of criminalizing material benefit, procuring, and advertising against the objective of sex worker safety. In *Anwar*, McKay J adopted the position that sex workers can increase safety from commercial third parties, but the current laws prohibit those sex workers from receiving any support or aid. In turn, the procuring and receipt

220. The case law sample for this paper was pulled between 2014 and 2020; however, given the recent significant developments in the law, specific cases from 2021 have been included here.

221. 2021 ONSC 1628.

222. 2021 ONSC 4423.

223. Alyshah Hasham, "Are Canada's Sex Work Laws Unconstitutional? Why That Open Question Has Thrown Ontario Law Enforcement into Chaos", *Toronto Star* (1 October 2021), online: <www.thestar.com/news/gta/2021/10/01/are-canadas-sex-work-laws-unconstitutional-why-that-open-question-has- thrown-ontario-law-enforcement-into-chaos.html>.

224. See *R v Boodhoo*, *supra* note 167 at para 23; *R v MacDonald*, *supra* note 222 at para 81.

225. See *R v Boodhoo*, *supra* note 167 at para 22; *R v MacDonald*, *supra* note 222 at para 80.

226. See *R v Anwar*, *supra* note 202 at para 209; *R v NS*, *supra* note 221 at paras 55, 150.

of material benefit are framed as potentially mitigating harm rather than perpetuating it. Under this lens, not all third-party conduct captured by the regime is exploitative.

In *NS*, Sutherland J adopted a similar interpretation of legislative intent; however, he also found *PCEPA* "allow[s]" sex workers to exchange sexual services for consideration.[227] When considering section 7, Sutherland J analyzed the criminal immunity provided by *PCEPA* in substance not form, and found the scheme functioned in a similar manner to the laws before the Supreme Court of Canada in *Bedford*, where sex work itself was "not illegal".[228] Given the act itself is allowed for, Sutherland J assessed the causal effect of whether the impugned laws make sex work more dangerous for those permitted to sell their services. *MacDonald* was decided mere weeks after *NS* and directly rebutted the notion that providing sexual services for consideration is allowed by law.[229] The Court of Appeal for Ontario will hopefully resolve uncertainty around the legal status of sex workers and the legislative objective behind *PCEPA*.

In sum, the constitutional status of *PCEPA* sits on rocky ground. The opposing outcomes in the case law demonstrate how courts differ in defining sex work legality, and the legislative objective, notably whether the objective is fundamentally about deterrence or safety. One substantive difference between these statutory interpretations is the subject of the *Charter* analysis. Where courts find the purpose of *PCEPA* is to deter and abolish sex work, the subject of the *Charter* analysis is the third-party actor who committed the offence. For example, the court would consider whether section 286.4 disproportionately impacts the third-party actor who assisted with the advertisements. However, if the statutory objective includes safety, the subject becomes the sex worker. The same example of challenging section 286.4 would then focus on whether the law disproportionately impacts the sex worker, not the third-party actor. Altering which actor the laws are weighed against is a subtle shift that could have a tremendous impact on the future of sex worker safety and security. Arguably, their safety should remain at the forefront of any legal scheme. The fate of future constitutional challenges to the laws will be contingent on the facts and reasonable hypotheticals, but perhaps the most indicative metric of outcome will be in how the legislative objective is defined.

227. *R v NS*, *supra* note 221 at para 145.

228. *Ibid* at paras 145–47.

229. See *supra* note 222 at para 38.

Conclusion

The legal status of sex work in Canada has altered greatly over the years. This paper demonstrates how the laws evolved over time, changing alongside social and political discourses. In a short period of time, a sex worker has gone from being a public health risk, to a criminal, to a victim. There most likely is still a long journey ahead for sex workers and criminal law. The current objective adopted by Parliament is to ultimately abolish the trade. It is unclear how history will look back on this decision. Will Parliament's choice to criminalize buyers and third parties be seen as morally permissible harm prevention? Or will the offences fall to the same fate as the previous prohibitions against homosexual acts?[230] There are advocates on both sides of the debate, but only time will determine true moral culpability. The aim of this study was to determine how the new *PCEPA* regime is being applied and interpreted by the courts, which included looking broadly at what conduct is captured and considered culpable by the courts, how the *PCEPA* objective is defined, and how the laws interact with certain existing areas of criminal law. Parliament has adopted a policy that all conduct relating to the purchase of sexual services or third-party facilitation is exploitation. This study has demonstrated that the new laws achieve their legislative aim insofar as they have the capacity to capture all conduct related to sex work. But another important finding from the case law sample is the inconsistency in which the laws are applied. Particularly, the offences of material benefit and procuring have received uneven application and interpretations. The issue arising from these findings is that a broad array of conduct is penalized and then inconsistently treated. The notion that not all conduct captured is exploitative may play a role in the application of the new laws. As seen through the section 12 and section 7 *Charter* claims, the degree of exploitation can vary substantially. Indeed, in some cases exploitation may be absent altogether.

Finally, the case law points to clear uncertainty regarding the legislative objective behind *PCEPA*. The deterrence objective laid out by Parliament was wholly adopted by several decisions with no reference or mention of sex worker safety. In other cases, safety was a paramount issue, and concerns of *Bedford* crept back into judgments. The evolving dichotomy of legislative objectives is apparent in the constitutional challenge case law, and ultimately these cases came to opposing results. Future cases will determine the constitutional validity of the sex work laws. Until then, sex work remains illegal in Canada, the laws remain inconsistently interpreted and applied, and sex worker safety remains curiously absent from Parliament's stated objective.

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230. See *Expungement of Historically Unjust Convictions Act*, SC 2018, c 11; Gacek & Jochelson, *supra* note 9 at 88.