



December 8, 2014

Via email: lcjc@sen.parl.gc.ca

The Honourable Senator Bob Runciman
Chair, Senate Committee on Legal and Constitutional Affairs
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator:

Re: Bill C-452, An Act to amend the *Criminal Code* (exploitation and trafficking in persons)

The Canadian Bar Association is a national association representing 37,500 jurists across Canada. Among the Association's primary objectives are seeking improvement in the law and the administration of justice. The CBA's National Criminal Justice Section consists of criminal law experts, including a balance of prosecutors and defence lawyers from across Canada.

The CBA appreciates this opportunity to comment on Bill C-452, *Criminal Code* amendments regarding the offence of trafficking in persons. "Human trafficking" under section 279.01 is one of the most serious offences in the *Criminal Code* and carries a maximum penalty of 14 years imprisonment. Where the offence is committed against a person under 18 years of age, the mandatory minimum penalty is five years imprisonment.¹

Private Members' Bill C-452 would amend section 279.01 to create a rebuttable presumption against the accused. Currently, to establish the offence of human trafficking, the Crown must, among other things, prove two main elements beyond a reasonable doubt:

1. that the accused recruited, transported, transferred, received, held, concealed or harboured a person, **or** exercised control, direction or influence over the movements of a person; **and**
2. for the purpose of exploiting that person **or** facilitating their exploitation.

¹ If the accused kidnaps, commits an aggravated assault or aggravated sexual assault against the victim, or causes death to the victim, he or she is liable to a maximum term of life imprisonment. If the victim is under the age of 18 in these circumstances, the accused is also liable to a mandatory minimum penalty of six years imprisonment.

Put more simply, the offence is committed where an accused exercises control over another person *for the purpose* of “exploitation”.² No consent is valid in these circumstances (see, sections 279.01(2) and 279.011(2)).

Bill C-452 would amend section 279.01 to create a rebuttable presumption of guilt against any person who lives with or is habitually in the company of a person who is exploited, but who is not themselves exploited. More specifically, Bill C-452 seeks to add the following subsection to s. 279.01:

Presumption

(3) For the purposes of subsection (1) and 279.011(1), evidence that a person who is not exploited lives with or is habitually in the company of a person who is exploited is, in the absence of evidence to the contrary, proof that the person exercises control, direction or influence over the movements of that person for the purpose of exploiting them or facilitating their exploitation.

This presumption tracks the language contained in the presumption related to living off of the avails of prostitution in section 212(3) of the *Criminal Code*.³ It means that the Crown would only need to prove that the alleged victim was exploited by someone, and that the accused lived with, or was habitually in the company of the victim. In other words, the Crown would *not* have to prove that the accused *actually* exercised control, direction or influence over the movements of the alleged victim, or that the accused did so for the purpose of exploiting them or facilitating their exploitation. It would then be up to the accused to provide evidence that there was no exercise of control, direction or influence over the movements of the alleged victim, or that any exercise of control was not for the purpose of exploiting the victim or facilitating the victim’s exploitation.

The CBA Section believes that the proposal in Bill C-452 should not be passed into law, and is likely to be subject to constitutional challenge. Consider this example:

Ms. Smith is hired as a cleaner for a local janitorial service. She works six days a week and often takes double-shifts to make ends meet. She usually works alongside Ms. Martinez, a 17 year old young lady from Guatemala. As the more experienced worker, Ms. Smith supervises Ms. Martinez’s work and breaks. Ms. Martinez is an illegal immigrant who was trafficked to Canada by their mutual employer, Mr. Jones, but Ms. Smith has no knowledge of that situation. Ms. Martinez is unpaid, and has been

² Exploitation is defined in s. 279.04 as causing a person to provide, or offer to provide, labour or a service by engaging in conduct that, in all the circumstances, could reasonably be expected to cause the person to believe that their safety or the safety of a person known to them would be threatened if they fail to provide, or offer to provide, the labour or service.

³ This offence was recently found to be unconstitutional in *Canada (Attorney General) v. Bedford*, 2013 SCC 72. The presumption in s. 212 (formerly s. 195) had been previously upheld by the Supreme Court of Canada in *R. v. Downey* (1992), 72 C.C.C. (3d) 1. Critically, however, the wording of s. 212 did not create a presumption of control or exploitation by merely living with or habitually being in the company of a sex trade worker. The presumption merely related to the more logical deduction that if one lives with a prostitute, they are likely living off of the avails of that individual’s work. Conversely, Bill C-452 proposes a presumption of exploitation *and* control by virtue of merely living with or habitually being in the company of someone who is exploited.

threatened with harm if she does not continue working. Again, Ms. Smith is unaware of this arrangement and assumes that Ms. Martinez works for pay as she does.

The police discover Ms. Martinez's exploitation and arrest Mr. Jones and Ms. Smith at the workplace. The Crown can prove that Ms. Martinez was being exploited by Mr. Jones and that Ms. Smith spent over 60 hours a week with Ms. Martinez on the job.

If Bill C-452 was law in Canada, there would be a rebuttable presumption of guilt against Ms. Smith because she was not exploited, but was "habitually in the company" of Ms. Martinez, a person who was exploited. If she was unable to produce evidence to the contrary, the Crown could prove that Ms. Smith exercised control, direction or influence over the movements of Ms. Martinez for the purpose of exploiting her or facilitating her exploitation. If Ms. Smith could not produce evidence to the contrary, she would be liable to a mandatory minimum penalty of five years imprisonment.

As worded, the presumption proposed in Bill C-452 does *not* require that the accused intend to participate in the victim's exploitation, or have any knowledge of the exploitation. Moreover, the presumption applies even if the accused had no involvement in the actual exploitation of the victim. Given the extremely serious nature of this offence and the penalties and stigma associated with it, such a presumption would likely be found unconstitutional. One important consideration would be the infringement of the accused's right to be presumed innocent under section 11(d) of the *Canadian Charter of Rights and Freedoms*. The presumption is unlikely to be saved under section 1 of the *Charter*, as it would capture people unrelated to the social goal advanced by the human trafficking offence – to criminalize those who exploit the vulnerable.

For these reasons, the presumption articulated in Bill C-452 should be removed. We trust that these comments will be helpful in your deliberations. Thank you for considering them.

Yours truly,

(original signed by Gaylene Schellenberg for Eric V. Gottardi)

Eric V. Gottardi
Chair, Criminal Justice Section