THE CANADIAN BAR ASSOCIATION

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Bill C-36, *Protection of Communities and Exploited Persons Act*

NATIONAL CRIMINAL JUSTICE SECTION AND MUNICIPAL LAW SECTION OF THE CANADIAN BAR ASSOCIATION

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500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc** : 613.237.0185 | info@cba.org | **www.cba.org**

PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Criminal Justice Section, with input from the National Municipal Law Section and assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Criminal Justice Section and the National Municipal Law Section of the Canadian Bar Association.

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Bill C-36, *Protection of Communities and Exploited Person's Act*

I. INTRODUCTION

The Canadian Bar Association's National Criminal Justice Section (CBA Section), with input from the CBA's National Municipal Law Section, is pleased to comment on Bill C-36, *Protection of Communities and Exploited Persons Act* (the Bill). The CBA Section consists of defence lawyers, prosecutors and legal academics from every province and territory of Canada. The National Municipal Law Section represents lawyers from across Canada whose practices focus on areas of law relating to local government.

Bill C-36 was introduced in June 2014 by Justice Minister, the Honourable Peter MacKay.[1] The Bill would introduce a new regime aimed at combating prostitution in Canada. During consideration of the Bill, many interested parties have provided input on this important topic. Our comments focus primarily on the constitutionality of the new provisions, with particular emphasis on the Supreme Court of Canada's decision in *Canada (Attorney General) v. Bedford*[2] (Bedford).

More specifically, our focus is on the new sections that replace provisions declared by the Supreme Court as unconstitutional in *Bedford* (i.e. keeping a common bawdy-house; communication for the purpose of engaging in prostitution; living off of the avails of prostitution). We do not address the new procuring offence, offences which capture prostitution of those under the age of 18 years, or amendments to the human trafficking regime.

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1 *Legislative Summary*, www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?source=library_prb&ls=C36&Parl=41&Ses=2&Language=E&Mode=1 at 1.

2 2013 SCC 72.

The *Bedford* decision is the obvious starting point for any discussion of the constitutionality of Bill C-36. The opening words of the Supreme Court judgment, which are as true under Bill C-36 as they were under the previous regime, are instructive:

> It is not a crime in Canada to sell sex for money.[3]

The federal government has repeatedly emphasized Bill C-36 would criminalize prostitution for the "first time in Canadian law". The government's communications have suggested that prostitution is now "de facto" illegal and under Bill C-36, the purchase of sexual services would be considered a crime. This "shift" in policy is said to change the analytical framework underpinning the *Bedford* decision.[4] We have two comments.

First, the Bill is not the first time the purchase of sex has been codified as a criminal offence. In fact, section 286.1 (the new purchasing offence) mirrors almost exactly the existing section 212(4) prohibiting the obtaining of sexual services from a minor. The purchase of sex from minors has been a criminal offence for some time.

Second, the *Bedford* ruling applied to all prostitutes, including those previously protected under section 212(4). In other words, the fact that purchasing sex from adults is now explicitly illegal does not change the fact that prostitutes may still legally sell sex for money in Canada, and so deserve safety and protection. It is untenable to suggest that because purchasing sex would be made explicitly illegal, prostitutes deserve lesser protections under the *Charter*.

Whether *selling* sex is legal is critical from a constitutional standpoint. It means that sex trade work remains a "risky – but legal" vocation, and the government cannot add to the danger of that work in an unconstitutional way. The Court said:

> [59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.
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> [60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people

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3 *Supra*, note 2 at para. 1. See also: paras. 5, 61, 87 and 89.

4 Department of Justice *Technical Paper* (Ottawa: Department of Justice, 2014) at 2. www.justice.gc.ca/eng/rp-pr/other-autre/protect/p1.html. See also: *Legislative Summary*, *supra* note 1 at 1.

> engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.[5]

The constitutionality of Bill C-36 will therefore still turn on whether the new offences create dangerous conditions for prostitutes engaged in a legal activity (selling sex for money), and so represent a violation of section 7 of the *Charter*.

In addition, some of the new offences raise issues relevant to freedom of expression guarantees under section 2(b) of the *Charter*, particularly sections 213(1.1) and 286.4 on communicating and advertising for the purpose of offering sexual services.

The CBA Section does not take a position on the subject of criminalizing prostitution. However, we do caution that if the government proceeds with Bill C-36, portions of the Bill would suffer from constitutional problems that are likely to result in a declaration of invalidity. In particular, aspects of sections 213(1.1), 286.2 and 286.4 are unlikely to withstand constitutional scrutiny.

To properly frame our suggestions, we begin by briefly reviewing the previous legislative regime, with reference to the *Bedford* decision. We then turn to the specifics of Bill C-36.

II. *BEDFORD* AND BEFORE

The Supreme Court of Canada declared three aspects of the previous prostitution regime invalid in *Bedford*:

- keeping a common bawdy-house (sections 197, 210);
- living off of the avails of prostitution (section 212(1)(j)); and
- communicating in public for the purpose of engaging in prostitution (section 213(1)(c)).

These sections were primarily concerned with preventing public nuisance, and the exploitation of prostitutes.[6]

Sections 197 and 210 made it an offence to sell sex in any place that was kept, occupied or resorted to for the purpose of prostitution. The effect was to confine legal prostitution to "street prostitution" and "out-calls". The purpose was to prevent community harm in the

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5 *Supra*, note 2.

6 *Bedford*, *supra* note 2 at para. 4.

nature of nuisance, to combat neighborhood disruption and disorder, and to safeguard public health and safety.[7]

Like the other sections, this was struck down for violating section 7 of the *Charter*, in particular, the security of prostitutes. The Court found that the impact on prostitutes was "grossly disproportionate" to the objective of combating public nuisance. The Court noted that the offence denied prostitutes access to the safety benefits of working indoors which included "proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate."[8]

Section 212(1)(j) made it an offence to live off of the avails of prostitution in whole or part. The purpose was to target pimps and other parasitic/exploitive relationships which exist in prostitution. In effect, the offence captured other non-exploitive relationships unconnected to the law's purpose, including for example, bodyguards, accountants and receptionists.[9]

The Court held that section 212(1)(j) was "overbroad" and violated section 7 of the *Charter,* as it captured relationships which were not exploitive and in fact enhanced the safety of prostitutes.[10]

Section 213(1)(c) made it an offence to communicate in public for the purpose of prostitution. It sought to eradicate various forms of social nuisance arising from the public display of the sale of sex.[11]

The Court held that the negative impact of section 213(1)(c) on prostitutes was "grossly disproportionate" to the objective of eradicating public nuisance associated with street prostitution. It found that face-to-face communication was essential to enhancing prostitutes' safety, and the effect of section 213(1)(c) was to displace prostitutes to more secluded and less secure locations. The offence also prevented sex trade workers from bargaining conditions that would materially reduce their risk, such as condom use or the use of safe houses.[12]

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7 *Ibid.* at paras. 61-65, 131-132.

8 *Ibid.* at paras. 134-136.

9 *Ibid.* at paras. 66-67, 137, 141-142.

10 *Ibid.* at paras. 139-145.

11 *Ibid.* at paras. 68-72, 146-147.

12 *Ibid.* at paras. 148-159.

The Court benefited from submissions from numerous interested parties in *Bedford*. Evidence was introduced from the applicants, former and current sex trade workers, in addition to a documentary record of over 25,000 pages.[13] In reviewing this evidence, the Court made critical findings that create a useful factual background for analyzing Bill C-36. Some examples:

- It is not an offence to sell sex for money in Canada (paras. 1, 61);
- Face-to-face communication is an "essential tool" in enhancing street prostitutes' safety because it allows them to (a) screen clients for intoxication and propensity for violence and (b) to set terms for their work including the use of condoms and safe houses (paras. 69, 71);
- The effect of prohibiting public communication regarding prostitution is to displace prostitutes to more secluded and less secure locations, away from familiar areas where they may be supported by friends and regular customers, thereby making them more vulnerable (paras. 70, 155);
- The safest form of prostitution is working independently from a fixed location; indoor prostitution is "far less dangerous" than street prostitution (para. 63);
- So-called "out-call" work is "not as safe as in-call work", particularly where prostitutes are precluded from hiring a driver or security guard (para. 63);
- Complaints about nuisance arising from indoor prostitution establishments are rare (para. 134);
- The effect of prohibiting bawdy-houses is to prevent prostitutes from (a) resorting to or working within a fixed indoor location where they may benefit from the safety of being close to others and being familiar with their surroundings (b) having a regular clientele, (c) setting up indoor safeguards like receptionists, assistants and bodyguards, and (d) setting up health checks and preventative health measures (paras. 64, 67, 134); and
- The effect of prohibiting living off of the avails of prostitution is to prevent prostitutes from implementing safety measures like hiring bodyguards (para. 142).

III. BILL C-36

In *Bedford*, the Court explicitly held that Parliament was not precluded from regulating prostitution, so long as the new law did not infringe the *Charter*:

> [165]... That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for

13 *Ibid.* at paras. 7, 15.

> example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. [emphasis added]

Bill C-36 was introduced in an effort to criminalize prostitution.[14] This has been made explicit in many sources, including the Summary of the Bill, its preamble, Ministerial comments about the Bill, Parliament's *Legislative Summary* and Justice Canada's *Technical Paper*.[15]

The Bill has three primary objectives said to apply to each prostitution offence it introduces:

1. Protecting prostitutes, considered to be victims of sexual exploitation;
2. Protecting communities from the harms caused by prostitution; and
3. Reducing the demand for sexual services.

According to the *Legislative Summary*, Bill C-36 signifies a "notable shift in the legislator's objectives".[16] This comment appears to refer to the Supreme Court's repeated reference to "nuisance" as Parliament's objective with the previous regime.

The preamble to the Bill specifically identifies Parliament's current concerns and objectives, including,[17] among other things, (a) the exploitation inherent in prostitution and the risks of violence posed to those who engage in it; (b) the social harm caused by the objectification and commodification of sexual activity; and (c) the importance of protecting "human dignity and the equality of all Canadians" by discouraging prostitution. The preamble also references denouncing exploitation and the commercialization of prostitution, which is said to create a demand for prostitution. Finally, the preamble states that Parliament "wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution."[18]

To achieve these objectives, Bill C-36 introduces five offences and various consequential amendments to the *Criminal Code* and other Acts. The offences can be summarized as follows:

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14 *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.*

15 For *Summary* and *Preamble*, see *ibid.* See also, *Legislative Summary*, *supra* note 1, DOJ *Technical Paper*, *supra* note 4.

16 *Legislative Summary*, *ibid.* at 1-2.

17 *Ibid.* at 8.

18 Bill C-36, *Preamble*, *supra* note 14.

- **Section 213(1.1):** offence to communicate with any person for the purposes of offering or providing sexual services for consideration – in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre (replacing the former communication provision);
- **Section 286.1:** an offence to, in any place, obtain sexual services for consideration, or to communicate with anyone for the purpose of obtaining sexual services for consideration (new prohibition on purchasing adult sexual services);
- **Section 286.2:** an offence to receive a financial or other material benefit knowing it is obtained by or derived directly or indirectly from the obtaining of sexual services for consideration (replacing the living off of avails provision);
- **Section 286.3:** an offence to procure a person to offer or provide sexual services for consideration. It is also an offence to recruit, hold, conceal or harbor a person who offers or provides sexual services for consideration, or to exercise control, direction or influence over the movements of such a person for the purpose of facilitating an offence under section 286.1 (reformulating the former procuring offences under section 212);
- **Section 286.4:** an offence to knowingly advertise an offer to provide sexual services for consideration.

Bill C-36 includes exceptions to these offences, detailed below.

IV. *CHARTER* PRINCIPLES

The CBA Section believes that aspects of Bill C-36 are likely to be successfully challenged under the *Charter*. Sections 213(1.1) and 286.4 are likely to be challenged as unconstitutional infringements of *Charter* section 2(b), as violations of free expression. Sections 213(1.1), 286.2 and 286.4 will likely be challenged as infringing the section 7 *Charter* rights of prostitutes.

Before analyzing these claims, we provide a brief overview of the legal principles related to the relevant *Charter* sections.[19]

[19] As the Court held in *Bedford*, there must also be a "sufficient causal connection" between the impugned laws and the prejudice suffered by any potential applicant. For section 7 infringements, applicants must show that the law(s) impacted them negatively, and not in accordance with the principles of fundamental justice. It is not necessary to show that the government action or law was the "only" or "dominant cause" of the prejudice. For the reasons enunciated in *Bedford*, any negative impacts arising from Bill C-36 would be sufficiently and casually connected to the claimed prejudice if the applicant were a prostitute. See: *Bedford*, *supra* note 2 at paras. 75-76, 78, 85-91.

A. Freedom of Speech

Section 2(b) of the *Charter* provides that everyone has the right to "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Two aspects of Bill C-36 may directly infringe this right. First, section 213(1.1) would make it an offence to communicate with any person at or next to a school ground, playground or daycare centre for the purposes of offering or providing sexual services for consideration. Second, section 286.4 would make it an offence to knowingly advertise an offer to provide sexual services for consideration.

In *Bedford,* the Supreme Court declined to comment on the constitutionality of the former communicating offence under section (2)(b) of the *Charter*.[20] The trial judge had found that the former communicating offence violated section 2(b) of the *Charter*, despite the Supreme Court's decision in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*[21]. There, the Court ruled that the communicating offence violated section 2(b), but was saved under section 1 of the *Charter*.

As the communicating offence has now been reformulated, and a new advertising offence has been created, it seems that the section 2(b) issue would have to be re-litigated if Bill C-becomes law.

In the trial decision in *Bedford*, Justice Himel provided a concise analysis of the overarching principles relevant to section 2(b) of the *Charter,* derived from several Supreme Court of Canada decisions:

- Freedom of expression is of crucial importance in a free and democratic society;
- Section 2(b) has received very wide interpretation, protecting any expression if "it serves individual and societal values in a free and democratic society";
- Section 2(b) must be interpreted in a manner that recognizes the diversity in forms of individual self-fulfillment;
- The value of a particular form of expression will fluctuate with context, with those closest to the core of the right requiring the greatest level of protection;

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20 *Ibid.* at paras. 40, 47.

21 [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*").

- Courts must guard carefully against judging expression according to its popularity; and
- Expression that is offensive and disturbing may still be protected under s. 2(b).[22]

B. Principles of Fundamental Justice

The section 7 principles reviewed by the Supreme Court in *Bedford* would also arise in a challenge to Bill C-36. These principles include arbitrariness, overbreadth and gross disproportionality.[23]

Arbitrariness refers to the absence of a link between the objective of the law and its negative impact on the life, liberty or security of the person. Overbreadth refers to the situation where the law imposes limits on the life, liberty or security of the person that go beyond what is required to achieve its objective. Gross disproportionality deals with situations when the effects of a law are so extreme that they cannot be justified by the object of law. It only applies in extreme cases where the seriousness of the infringement is totally out of sync with the objective of the law.[24]

If Bill C-36 infringes even one person's section 7 rights, it can be declared unconstitutional.[25]

V. CONSTITUTIONAL ANALYSIS

Our focus is on the constitutionality of the new prostitution regime, and the offences that replace the earlier versions declared unconstitutional by the Supreme Court. We do not comment on the constitutionality of prohibiting prostitution in the first place, the prostitution offences as they relate to sex trade workers under the age of 18, or the human trafficking amendments in Bill C-36. Our focus is on the constitutionality of Bill C-36 prohibitions on adult prostitution, except for the procuring offence (which was not challenged in *Bedford*).

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22 *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264 (*Bedford #1*) at paras. 451-456.

23 *Bedford*, *supra* note 2 at paras. 35, 96, 123.

24 *Ibid.* at paras. 35, 98, 101, 103, 111-112, 119-120.

25 *Ibid.* at para. 123.

A. Bawdy-Houses

Bill C-36 changes the definition of "common bawdy-house" to remove any reference to prostitution. The previous definition prohibited indoor prostitution, which was a central criticism of the previous regime. With this change, prostitutes will theoretically be able to sell sex indoors so long as the activity does not fit within the meaning of "the practice of acts of indecency", which remains prohibited under sections 197 and 210. According to the Legislative Summary for Bill C-36, prostitution is not an indecent act in and of itself.[26]

While sections 197 and 210 no longer criminalize keeping a prostitution house, whether keeping a prostitution house is possible given other restrictions in Bill C-36 is questionable. It appears unlikely that many prostitutes could benefit from this change without relying on those who would be captured by the material benefit offence under section 286.2.

In any event, the CBA Section supports this shift in the legislation, as it brings the proposed regime more in line with the principles enunciated in *Bedford*.

B. Communication Offence

Section 213(1.1) is the only new offence that explicitly aims to criminalize prostitutes in the course of their work. This section would make it an offence to communicate with any person for the purpose of offering or providing sexual services for consideration in a public place, or in any place open to public view, that is or is next to a school ground, playground or daycare centre.[27]

Section 213(1.1) is similar to the existing offence under section 213(1)(c), declared unconstitutional in *Bedford*. The material change is that the offence will only be committed if the communication is at or next to a school ground, playground and daycare centre, as opposed to any public place.

Section 213(1.1) would be susceptible to challenges under sections 2(b) and 7 of the *Charter*. Under section 7, a persuasive argument can be raised that section 213(1.1) merely reproduces the same constitutional problems as its predecessor, although to a slightly lesser degree.

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26 *Legislative Summary*, *supra* note 1 at 11-12.

27 The original language of section 213(1.1) was amended by the House of Commons. The current language replaced a previous version that prohibited communicating in a public space, or in any place open to public view that is or is next to a place where persons under the age of 18 can reasonably be expected to be present.

In *Bedford*, the Court accepted that face-to-face communication was an "essential tool" to enhancing street prostitutes' safety, allowing them to (a) screen clients for intoxication and propensity for violence, and (b) set terms for their work including the use of condoms and safe houses.[28] There is no suggestion that this "tool" becomes less essential when communications takes place at or next to a school ground, playground and daycare centre.

Moreover, section 213(1.1), when coupled with the complete prohibition on purchasing sex under section 286.1, is likely to have the effect of displacing prostitutes to more secluded and less secure locations. This, in turn, will push them away from familiar areas where they may be supported by friends and regular customers. These negative impacts were all central to finding section 213(1)(c), the predecessor to section 213(1.1), unconstitutional.

For these reasons, section 213(1.1) is likely to be found in violation of section 7 of the *Charter*. In particular, this section seems to suffer from arbitrariness and gross disproportionality.[29]

One of the objectives of Bill C-36 is to protect prostitutes, recognizing them as "victims of sexual exploitation". The preamble to Bill C-36 states that Parliament "wishes to encourage those who engage in prostitution to report incidents of violence and to leave prostitution."

Section 213(1.1) criminalizes prostitutes for engaging in an essential aspect of their work that is intrinsically tied to preserving their safety. Criminalizing this conduct is inconsistent with treating prostitutes as victims of sexual exploitation and would have the effect of discouraging them from reporting incidents of violence to the police (e.g. where they illegally communicated with the john in the first place, potentially exposing themselves to prosecution under this section if their conduct was reported to the police).

Even if a connection between this prohibition and another objective could be identified, the negative impact of section 213(1.1) would likely be considered grossly disproportionate to any benefit it may provide. According to Justice Canada, section 213(1.1) is aimed at protecting communities by criminalizing communications where children could be exposed to this conduct.[30] This is vague, and section 213(1.1) may only minimally impact children, if at all. On

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28 *Bedford*, *supra* note 2 at paras. 69, 71.

29 A potential argument could be made that the term "next to" is vague in the circumstances. However, arbitrariness and gross disproportionality are unquestionably the stronger and more substantive challenges to section 213(1.1).

30 DOJ *Technical Paper*, *supra* note 4, at 4.

the other hand, section 213(1.1) potentially exposes prostitutes to violence and other dangers by prohibiting them from engaging in essential screening of their clients.

Some may argue that limiting the scope to school grounds, playgrounds and daycare centres effectively balances the interests of all citizens. While this may be a consideration under section 1 of the *Charter*, it does not assist in determining whether section 213(1.1) violates section 7.[31] In any event, section 213(1.1) fails to recognize that many prostitutes may not have a meaningful choice in where they work.

Street prostitutes, the group most likely targeted by this section, are a "particularly marginalized population" who often have "little choice but to sell their bodies for money."[32] It would be no surprise to learn that street prostitutes, if told to operate near school grounds, playgrounds or daycare centres, would do so in fear of reprisal from their pimps or others who may exploit them. To suggest that they should not be afforded the opportunity to screen clients, even near such locations, is untenable in light of the findings in *Bedford*.

Finally, section 213(1.1) would also likely to be found in breach of section 2(b) of the *Charter*, as an infringement on prostitutes' freedom of expression. The previous communication offence was found to violate section 2(b), but was saved under section 1 of the *Charter*. For the reasons enunciated in *Bedford #1* and the *Prostitution Reference*, section 213(1.1) would similarly violate section 2(b).[33] Whether it would be saved under section 1 is a different issue, analyzed in greater detail below.

RECOMMENDATION:

1. **The Canadian Bar Association National Criminal Justice Section recommends that section 213(1.1) be removed from Bill C-36.**

C. Purchasing Offence

Section 286.1 explicitly criminalizes the purchase of *adult* "sexual services" for the first time in Canadian history. It is difficult to predict the impact this will have on the safety of prostitutes. Some advocates claim that prohibiting the purchase of sex will drive prostitution further

31 *Bedford*, *supra* note 2 at paras. 121-123.

32 *Ibid.* at para. 86.

33 See: *Bedford #1*, *supra* note 22 at paras. 444-507 and *Prostitution Reference*, *supra*, note 21.

underground, making the practice more dangerous. For example, Pivot Legal Society's submission cites reports which suggest that prohibiting the purchase of sex displaces prostitutes.[34] This would appear to be a logical outcome from the prohibition, as johns would be less likely to discuss the terms of a purchase in open view. Until further research is done on the actual repercussions of section 286.1, we have no comment on its constitutionality as it relates to the section 7 rights of prostitutes.[35]

D. Material Benefit Offence

Section 286.2 makes it an offence to receive a financial or material benefit derived from prostitution. In an effort to comply with the decision in *Bedford*, Parliament has introduced a number of exceptions to this offence. Under section 286.2(4), the offence would not apply to a person who receives the benefit:

(a) in the context of a legitimate living arrangement with the person from whose sexual services the benefit is derived;

(b) as a result of a legal or moral obligation of the person from whose sexual services the benefit is derived;

(c) in consideration for a service or good that they offer, on the same terms and conditions, to the general public; or

(d) in consideration for a service or good that they do not offer to the general public but that they offered or provided to the person from whose sexual services the benefit is derived, if they did not counsel or encourage that person to provide sexual services and the benefit is proportionate to the value of the service or good.

These various exceptions are said to protect those who engage in non-exploitive relationships with prostitutes. For example, as a result of section 286.2(4)(c), a bodyguard theoretically would not be prosecuted if paid from the avails of prostitution. Similarly, a spouse could legally

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34 See, Pivot factum, http://www.scc-csc.gc.ca/factums-memoires/34788/FM090_Intervener_Pivot.pdf at 4-6.

35 The CBA Section does note, however, that the proposed interpretation of "sexual services" raises concerns of overbreadth. Justice Canada suggests that the term "sexual service" would include any activity that is "sexual in nature" where the purpose of the activity is to "sexually gratify the person who receives it." In particular, Justice Canada suggests that this term would include lap-dancing involving simulated intercourse and self-masturbation by "performers" in private settings where no physical contact with the "client" actually takes place. Ultimately, it will be for the courts to determine whether this proposed interpretation is correct and/or constitutional. See: DOJ Technical Paper, *supra* note 4 at 2.

receive a material benefit derived from their spouse's prostitution under section 286.2(4)(a). Also, under section 286.5(1)(a) and (2), prostitutes cannot be prosecuted for benefiting from their *own* sexual services, or otherwise assisting in the endeavor (e.g. aiding and abetting).

These exceptions would not apply in several circumstances, mostly related to exploitation. For example, one could not benefit from the exceptions if violence, intimidation or coercion was used on the person performing the sexual services. Similarly, a person would not be exempt if they abused a position of trust, power or authority, procured the prostitute, or provided an intoxicating substance for the purpose of aiding and abetting the prostitute to provide sexual services.

Unquestionably, the most contentious aspect of section 286.2 is the prohibition against receiving a material benefit from prostitution in the context of a commercial enterprise. Under section 286.2(5)(e), no one can use the exceptions in section 286.2(4) if the benefit was received in the context of a commercial enterprise that offers sexual services for consideration.

"Commercial enterprise" is not defined. Justice Canada suggests that the term necessarily involves third party profiteering, and would take into account the number of persons involved in the operation, the duration of the activities, and the level of organization surrounding the activities. Justice Canada states that the term "commercial enterprise" is intended to capture "informal" and formal operations.[36] In effect, section 286.2(5)(e) would prohibit prostitutes from benefiting from non-exploitive relationships if they provide sexual services in the form of a "commercial enterprise".

In general, we support criminalizing those who receive benefits from prostitution by exploiting those who provide the sexual service. We also support exceptions for those who receive benefits from prostitution in a non-exploitive setting.

The CBA Section does not support aspects of this offence that undermine the ability of prostitutes to avail themselves of the safeguards recognized in *Bedford*. We believe that these aspects of the offence are likely to be found unconstitutional for arbitrariness, overbreadth or gross disproportionality.

The cumulative result of section 286.2(1), (4), (5) and (6) would be to (a) undermine the ability of prostitutes to work indoors; (b) prohibit prostitutes from benefiting from non-exploitive

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36 *Ibid*. at 3.

relationships which are vital to ensuring their safety; and (c) prohibit prostitutes from taking advantage of the benefits associated with organized forms of prostitution.

As a result of section 286.2(5)(e), prostitutes who provide sexual services in an organized fashion will be precluded from hiring bodyguards, assistants and others who may enhance their safety. This is inconsistent with the goal of protecting prostitutes or considering them as victims of sexual exploitation. Restricting prostitutes from availing themselves of these protections actually *endangers* them. For these reasons, section 286.2(5)(e) is arbitrary.

Even if it could be said that section 286.2(5)(e) reduces the demand for sexual services (another goal of Bill C-36), its negative impact is grossly disproportionate to any benefit possibly derived, which is only theoretical at this stage. To suggest that prostitutes who engage in organized, formal prostitution are less deserving of essential safety features like bodyguards is unsustainable given the evidence and ultimate conclusions in *Bedford*.

The cumulative result of section 286.2(1), (4)(d) and (5)(e) is to effectively prohibit most forms of indoor prostitution. Indoor prostitution could not be organized in any meaningful way, as doing so could expose receptionists, assistants, bodyguards and others to criminal liability for benefiting from a "commercial enterprise". Nor could indoor prostitution involve managers or anyone who counseled or encouraged the prostitute to engage in the sale of sexual services. In other words, prostitutes could only provide sexual services indoors where they acted alone, or in loose concert with others in a disorganized fashion. They could not negotiate on behalf of or collectively with other prostitutes, nor could they form regular clientele and friendships for fear that it would be perceived as an "informal", but "commercial enterprise".

Consider the following example which illustrates the difficulties inherent in section 286.2:

> Ms. Smith provides lap dances which simulate sexual intercourse for consideration. She does this work voluntarily and by choice. She operates out of her friend's side suite. As such, her friend encourages her to use the side suite for her business, accepting rent on a monthly basis from Ms. Smith.
>
> Ms. Smith advertises her services on her website and is paid in cash. Ms. Smith has successfully operated her business for years. Her operation is highly organized, involving the same bodyguard, receptionist and health care nurse every Friday. All are paid from Ms. Smith's work. Due to her success, Ms. Smith's boyfriend no longer works and lives off of Ms. Smith's profits. No one has exploited Ms. Smith in any way.

According to Justice Canada, Ms. Smith is selling sexual services for consideration (lap-dances which simulate sexual intercourse).[37] In addition, the organization, duration and scope of Ms. Smith's operation strongly suggest that it is a commercial enterprise under section 286.2(5)(e). As such, despite there being no being no exploitation, Ms. Smith's friend/landlord, bodyguard, receptionist, health care nurse and boyfriend would all be guilty of receiving a material benefit from the sale of sexual services.

This example illustrates the counterintuitive nature of section 286.2(1), (4)(d) and (5)(e). The organized nature of Ms. Smith's operation, which obviously contributes to her safety, actually *increases* the likelihood that it will be found to be a "commercial enterprise" and therefore illegal for those providing Ms. Smith with the safeguards essential to her well-being.

RECOMMENDATION:

2. **The Canadian Bar Association National Criminal Justice Section recommends that section 286.2(4)(d) be amended to remove the words "if they did not counsel or encourage that person to provide sexual services".**
3. **The Canadian Bar Association National Criminal Justice Section recommends that section 286.2(5)(e) and section 286.2(6) be removed from Bill C-36.**

E. Advertising Offence

Section 286.4 makes it an offence to knowingly advertise an offer to provide sexual services for consideration. Prostitutes are exempt from prosecution for advertising their *own* sexual services under section 286.5(1)(b). The offence targets anyone else who places advertisements for sexual services, including publishers and website administrators if they are aware the advertisement is for sexual services. The offence would also capture prostitutes who advertise the services of any other sex trade workers, effectively prohibiting any collective effort to advertise.

While prostitutes cannot be prosecuted for advertising their own sexual services, section 286.4 makes it nearly impossible for them to do so openly. Practically, prostitutes could not post their advertisements on any third party website or publication, as doing so would expose those

37 *Ibid.* at 2.

organizations and their actors to criminal sanction. Prostitutes would be limited to posting on their own websites or publications, without the ongoing support of third parties or internet service providers. For the vast majority of prostitutes, this narrow exception is unworkable in practice given their destitute and marginalized position in society.

Restricting advertisements as outlined in section 286.4 is likely to be found to infringe prostitutes' freedom of expression. Arguably, these practical restrictions also infringe on their section 7 rights to security. Being able to effectively advertise is important to build regular clientele and to screen potential clients, both essential safeguards for prostitutes. Severely restricting the ability of prostitutes to advertise would also make it less likely that they will operate indoors, having no meaningful way to attract clients to their location.

RECOMMENDATION:

4. **The Canadian Bar Association National Criminal Justice Section recommends that section 286.4 be removed from Bill C-36.**

F. *Charter* Section 1

A comprehensive section 1 analysis is beyond the scope of this submission. Section 1 involves a complex balancing of interests and objectives. For example, in *Bedford*, over 25,000 pages of material were filed for the Court's consideration.

Given the evidentiary record in *Bedford*, it would appear that many of the same section 7 challenges would result in invalidating portions of Bill C-36. The Court noted that section 7 breaches are unlikely to be justified under section 1 of the *Charter*.[38] It is noteworthy that the Attorney General of Canada did not seriously argue that the section 7 breaches in *Bedford* could be justified under section 1.[39]

As a result, if the section 7 challenges to sections 213(1.1), 286.2, and 286.4 outlined above were substantiated, the sections would likely be declared invalid.

The issue is more complicated for the section 2(b) infringements identified with sections 213(1.1) and 286.4. In the *Prostitution Reference*, the former, broader communicating offence was declared valid despite infringing section 2(b). In *Bedford #1*, Justice Himel distinguished

38 *Bedford*, *supra* note 2 at para. 129.

39 *Ibid.* at para. 161.

the *Prostitution Reference* by reformulating the nature of the expression in issue. She explained that communicating for the purpose of prostitution, much like advertising for that purpose, encompassed more than just economic expression. Communicating in this context includes speech intended to safeguard the physical and psychological integrity of prostitutes, and therefore formed part of the core of the constitutional guarantee recognized in section 2(b).[40]

The CBA Section agrees with the approach Justice Himel took in analyzing section 2(b) in relation to communicating for the purpose of prostitution, which would apply equally to the advertising offence under section 286.4. The speech in issue goes beyond economic expression to include considerations involving the physical and psychological well-being of prostitutes – expression which deserves protection.

VI. MUNICIPAL CONCERNS

In addition to the constitutional issues outlined above, the CBA's Municipal Law Section raises practical concerns about Bill C-36. As legal counsel advising municipalities, we believe that Bill C-36 will make it difficult to provide clear legal advice, which is damaging to municipal governments and the communities they serve.

In the ordinary course, it falls to municipalities to regulate businesses under building, health and safety, business and zoning jurisdictions. Despite the fact that the Court in *Bedford* struck down the bawdy house prohibition, it would be difficult to advise municipalities on how to regulate sex-work related businesses in their communities. Several aspects of those businesses appear to remain illegal under Bill C-36 (prohibition on the purchase of sexual services (section 286.1(1)), the advertising ban (section 286.4), prohibition on third parties receiving material benefits (section 286.2(1), (3), (4), (5), and (6)). It is unclear when the lawful sale of sex by one individual becomes an unlawful commercial enterprise under the Bill.

These sections create significant uncertainty around zoning for and permitting the establishment of places where sexual services are offered, including those aimed at allowing sex workers to operate safely (including safe houses, as referenced in *Bedford*). The uncertainties create risk for municipalities attempting to exercise their zoning and business/licencing/taxing powers within the boundaries of the *Criminal Code* and the Court's findings in *Bedford*.

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40 *Bedford #1*, *supra* note 22 at paras. 457-506.

Despite the expressed intent of the Bill, municipalities have had no meaningful opportunity to consult with the federal government about the proposed amendments, including whether these amendments will indeed lead to the protection of communities.

Bill C-36 creates regulatory and enforcement burdens for municipal governments at the local level. Regulating the geographical location of local activities and businesses is the purview of local governments. The principle of subsidiarity, which was expressly endorsed by the Supreme Court for the regulation of public health and safety issues, favours local regulation of local issues[41]:

> The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.

Despite this, the federal government has not consulted with municipalities to determine whether, and how, geographic regulation of sex work-related activities might be effectively regulated in the community interest by local governments. The federal government has also not consulted with municipalities about how the blunt tool of section 213 of Bill C-36 may create added burdens on local law enforcement, and hinder police protection of vulnerable citizens by pushing solicitation activities to isolated areas.

RECOMMENDATION:

5. **The Canadian Bar Association National Municipal Law Section recommends that the federal government consult with municipalities before enacting any legislation on prostitution, as municipalities have jurisdiction over zoning and business licensing, and an important role in mitigating neighbourhood impacts through effective law enforcement.**

VII. CONCLUSION

Bill C-36 introduces a number of measures which on their face appear to comply with the central aspects of the *Bedford* decision. However, the practical application of these provisions undermines the spirit of the *Bedford* decision. Of even greater concern, we believe the Bill

41 See *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 3.

potentially imperils prostitutes going forward by restricting their ability to protect themselves in their inherently risky, but legal activities.