RECKLESS ENDANGERMENT:
Q&A ON BILL C-36:
PROTECTION OF COMMUNITIES AND EXPLOITED PERSONS ACT

JUNE 2014

In December 2013, the Supreme Court of Canada unanimously decided that several parts of Canada's *Criminal Code* dealing with prostitution are unconstitutional because they violate the rights of sex workers by undermining their health and safety. The Supreme Court decided that its ruling would take effect in one year's time, at which point those unconstitutional parts of the law would no longer be in force.

In response, the federal government introduced Bill C-36 in early June 2014. This document answers key questions about what changes Bill C-36 would make to the law if it were passed: What conduct related to sex work would be prohibited? In what circumstances? Who could be prosecuted?

Please note that this document should not be taken as legal advice.

SUMMARY

If Bill C-36 were passed, the law would be as follows:

• Sex workers are not guilty of a crime simply for selling their own sexual services.

• However, any client who purchases sexual services, even from a consenting adult sex worker, commits a crime.

• Any client who communicates with anyone, anywhere and at any time, for the purpose of purchasing sexual services, commits a crime.

• Any sex worker (or third party) commits a crime by communicating an offer of sexual services in any "public place" that is, or is next to, a place where people under 18 can reasonably be expected to be present.

• Spouses/partners, roommates, children and other dependants of sex workers are not likely to be criminalized for "receiving a material benefit" of sex work if they do not work in the sex industry. Nor are landlords who rent housing, at a fair market price, to a sex worker likely liable.

• Third parties[1] who work in the sex industry remain criminalized and may be charged for "receiving a material benefit," "procuring" and/or advertising sexual services. The individual third party who provides goods or services to a sex worker on the same terms as to the general public, or at a fair market price, is not guilty of "receiving a material benefit" of sex work — unless that activity is considered "procuring" or they provide the goods or services "in the context of a commercial enterprise" that offers sexual services for money.

• Sex workers cannot be prosecuted for advertising their own sexual services, but any other party that carries a sex worker's advertisement — e.g., a newspaper, the manager or owner of a website, the internet service provider hosting a website — commits a crime, and any advertisements can be seized.

• In practice, almost any indoor venue providing sexual services is unlikely to be able to operate legally. All clients will be criminalized, and venue operators risk being prosecuted as parties to the criminal purchase of sexual services or for receiving a material benefit from sex work. Any commercial establishment, and possibly some of those working within it, could be prosecuted for procuring. Sweeping prohibitions on advertising will impede any such venue from operating.

• In theory, sex workers can work out of their homes. But other aspects in Bill C-36 will make it difficult in practice to work anywhere because of clients and third parties being criminalized and the challenge of advertising services.

[1]In sex work, a third party is an individual who supervises, controls or coordinates some of a sex worker's labour process (what they do, when and where) or labour practices (how they work) for direct or indirect financial compensation. This may include owners, managers, receptionists, security, drivers and web-designers. Sex workers can also be third parties if they are organizing, supporting or in any way facilitating another sex worker's labour. J. Clamen, C. Bruckert and M. Nengeh Mensah, *Managing Sex Work: Information for Third Parties and Sex Workers in the Incall and Outcall Sectors of the Sex Industry*, 2013.

CLIENTS

How would clients be criminalized under Bill C-36?

Clients would be criminalized for purchasing sexual services anywhere — whether it's an indoor venue such as a bar or club, a massage parlour, a hotel room, a private apartment or home, or an outdoor setting such as a street. Bill C-36 would add a new section to the *Criminal Code* (section 286.1) that would make it a crime for anyone, "in any place," to "obtain for consideration" the sexual services of another person, or even to communicate with someone else to obtain sexual services. The term "for consideration" means that sexual services are exchanged for something of some value, whatever the form and however small the value.

What would be the sentence for a client found guilty of purchasing sexual services?

It depends on how the client is prosecuted. The proposed new section 286.1 is a "hybrid offence." This means a prosecutor has a choice about how seriously to treat the offence:

- If the prosecution proceeds by way of a **summary conviction**: the minimum sentence is a $500 fine for a first offence and $1000 for any later conviction; the maximum sentence is 18 months in prison.
- If the prosecution proceeds by way of **indictment**: the minimum sentence is a $1000 fine for a first offence and $2000 for any later offence; the maximum sentence is five years in prison.

In both cases, **the minimum fine doubles if the offence is committed in a "public place" or "any place open to public view,"** if that place is — or even if it's next to — a park, a school, a religious institution, or any other place where it is reasonable to expect people under the age of 18 to be present.

Prosecutors decide whether to proceed by way of summary conviction or by indictment. If they proceed as a summary offence, they have six months to press charges. In contrast, there is no time limit to start proceedings by indictment. So these time limits can affect the prosecutor's decision about how to proceed — as will the (perceived) seriousness of the crime, and the availability of witnesses (e.g., undercover police) to testify.

COMMUNICATING
FOR THE SALE OF SEXUAL SERVICES

How would the new law on "communicating" be different from the previous law?

In the *Bedford* case, the Supreme Court struck down as unconstitutional part of the existing "communicating" law — specifically, *Criminal Code* section 213(1)(c), which made it a crime for anyone to communicate in a public place for the purposes of prostitution. This section is the most widely used of the sections and is used primarily to arrest and prosecute sex workers who work on the street as well as their clients.

Bill C-36 would replace this with a new communicating offence: section 213(1.1). This new section makes it a crime for anyone 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 place where persons under the age of 18 can reasonably be expected to be present."

The new communicating offence is different from the earlier communicating law in two ways:

- Whereas the earlier law applied to anyone, including a client, who communicates in a public place for purposes of prostitution, the new law would specifically target just communications by those who offer or provide sexual services — i.e., sex workers (and some third parties).
- Whereas the old law applied to communicating in any public place, the new law would instead only apply in public places, or places open to public view, that are — or are next to — places where a person under 18 can reasonably be expected to be present. But, given that youth under 18 can reasonably be expected in many public places (e.g., anywhere on a public street), this still means the new law would cast a very wide net — including many indoor venues.

In other words, the new communicating law specifically targets sex workers communicating in public in or near places where youth may be present. Sex workers who communicate in a private, indoor setting that is open to the general public, but to which people under the age of 18 are not supposed to have access — e.g., a licenced bar or club — could still be at risk of prosecution because youth can reasonably be expected to be present on the public thoroughfare outside the establishment.

Finally, keep in mind that Bill C-36 does not substantially change parts of the communicating law that were not challenged in court in the *Bedford* case — specifically, *Criminal Code* sections 213(1)(a) and 213(1)(b), which also deal with communicating in a public place. These sections specifically make it a crime to stop or attempt to stop a vehicle, impede pedestrian or car traffic, or impede entry/exit to a venue, for purposes of prostitution. This continues to be the law.

In the end, under Bill C-36, the law on communicating would not be substantially different from what the law was before *Bedford* in its impact on sex workers' risk of prosecution for communicating with their clients.

And in the case of clients, as noted above, Bill C-36 would make it a crime for a client to communicate anywhere, whether in public or in private, to obtain sexual services (the new section 286.1). This is an even broader prohibition on communication — at least by clients — than existed before.

How broadly would Bill C-36 criminalize communications in a "public place"?

As noted above, Bill C-36 would make it a crime for any sex worker (or third party) to communicate in a "public place" or "any place open to public view" if that place is or is next to any place where people under 18 "can reasonably be expected to be present."

What places does this include?

A "public place" is defined as "any place to which the public have access as of right or by invitation, express or implied, and it includes being inside a motor vehicle located in a public place or in any place open to public view."[2] According to the Supreme Court of Canada, "access" means "the right or opportunity to reach or use or visit."[3]

As the presence of youth under 18 can reasonably be expected in many different settings, it is unclear whether sex workers could communicate about their services in any public space. Communicating charges could potentially be laid against two sex workers who are under 18 years of age if they are working in any public place in the presence of one another. And even indoor places that may not allow entry to those under 18, but that are next to places where youth are present — such as public streets — could end up being captured under this new rule in Bill C-36. The police will have considerable discretion to decide whether a given location is a place, or is "next to" a place, where it is reasonable to expect youth to be present, and they will have very broad powers to arrest someone under the proposed new section 213(1.1).

Because of its ambiguity, prosecutors and courts could interpret the communicating provision very broadly, which means it would capture most (if not all) street-based sex work and very likely a significant proportion of indoor sex work.

What about communicating online?

It is unclear whether the Internet will be considered a "public place" for the purpose of section 213(1.1). There is no definitive Canadian authority that determines that the Internet is a "public place" under the *Criminal Code*, although the broad wording of the legislation leaves open the possibility that a judge may interpret the Internet as a "public place."

The wording of the definition of "place" in the *Criminal Code* (section 197), as well as the existing court decisions about the previous section 213(1)(c) — the provision that was struck down by the Supreme Court in *Bedford* and that also refers to communicating in a "public place" — suggest that the new section is likely to be interpreted as referring to a physical place — and that the courts should not consider communicating on or via the Internet to be communicating in a "public place."[4] But whether the Internet is considered a "public place" could also depend on the circumstances of the online activity. While email communication is likely to be considered private, a more open forum of communication such as Facebook could be considered public. Courts have also indicated that the presence of features that restrict access to websites (e.g., requiring a password to log-in) would potentially make the communication private.[5]

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[2] Section 213(2) of the *Criminal Code*.

[3] *R v Clark*, 2005 SCC 2 at para 13. *R v Clark* involved an accused who was observed masturbating near the uncovered window of his illuminated living room by neighbours from the privacy of their darkened bedroom. The Supreme Court of Canada acquitted the accused of doing an indecent act "in a public place in the presence of one or more persons." The Court held that the accused's act was not committed in a "public place" within the meaning of the *Criminal Code*, defined as "any place to which the public have access as of right or by invitation, express or implied." "Access" means "the right or opportunity to reach or use or visit" and not the ability of those who are neither entitled nor invited to enter a place to see or hear from the outside, through uncovered windows or open doors, what is transpiring within.

[4] However, in the context of hate speech laws, there is some case law where a website was found to constitute public communication: *R v Noble*, 2008 BCSC 215.

[5] *R v Noble*, 2008 BCSC 215, *R v Tremaine*, 2011 SKPC 47, *R v Bahr*, 2006 ABPC 360.

THIRD PARTIES

PEOPLE WHO WORK AND/OR ASSOCIATE WITH SEX WORKERS (I.E., RECEPTIONISTS, DRIVERS, WEBMASTER, OWNERS, MANAGERS, BOOKERS, ETC)

In sex work, a third party is an individual who supervises, controls or coordinates some of a sex worker's labour process (what they do, when and where) or labour practices (how they work) for direct or indirect financial compensation. This may include owners, managers, receptionists, security, drivers and web-designers. Sex workers can also be third parties if they are organizing, supporting or in any way facilitating another sex worker's labour.[6]

What would be the new laws that criminalize people who work and/or live with sex workers?

The old section 212 of the *Criminal Code* targeted various "third parties" in prostitution — including individuals that have a work-related relationship with a sex worker — by targeting both "procuring" and "living on the avails of prostitution." In the *Bedford* case, the Supreme Court of Canada struck down the specific section on "living on the avails" (sub-section (1)(j) of section 212).

With Bill C-36, the government chose to rewrite the entire section 212 and replace it with two new sections:

- Section 286.2 would create the crime of **"receiving a material benefit"** from the crime of purchasing sexual services or communicating to obtain them. This is essentially a somewhat narrower version of the former offence of "living on the avails."
- Section 286.3 would create new wording of the offence of **"procuring"** a person to offer or provide sexual services for consideration. The proposed new wording of the offence of "procuring" does not change the scope of the offence in any substantial way, but does increase the penalties for the offence.

These are discussed below separately and in more detail.

Who and what is the new provision on "procuring" meant to criminalize?

The proposed new section 286.3(1) makes it a crime for anyone to "procure a person to offer or provide sexual services for consideration."

It also makes it a crime for anyone to "recruit, hold, conceal or harbour" a person who offers or provides sexual services for consideration, for the purpose of facilitating the purchase of sexual services or communicating to purchase those services, or to "exercise control, direction or influence over the movements of that person."

As with the previous law, this provision is very broad and would capture many third parties that sex workers work with or for (e.g., third parties with managerial roles). It could also capture those people that sex workers hire or who provide services related to sex workers' labour — specifically third parties who facilitate communications with clients. People who host website space and advertise for sex workers used to fall within the old procuring law; it is unclear whether they will be charged under the new procuring provision, the "material benefit" provision, the advertising provision, or under all these provisions (the "material benefit" and advertising provisions are discussed below).

The new procuring provision is very similar to the previous procuring provisions, but increases the sentence. For a third party working with an adult sex worker, the **maximum sentence** is increased from 10 to 14 years. In the case of an underage sex worker, the **minimum sentence** is increased from two to five years.

[6] J. Clamen, C. Bruckert and M. Nengeh Mensah, *Managing Sex Work: Information for Third Parties and Sex Workers in the Incall and Outcall Sectors of the Sex Industry*, 2013.

Who and what does the new offence of "receiving a material benefit" criminalize?

Bill C-36 would replace the "living on the avails" section that was struck down in *Bedford* with a new offence of "receiving a material benefit" (under the proposed new section 286.2). It captures all third parties who "receive a financial or other material benefit" knowing that the benefit is obtained through sex work. This provision is incredibly complicated, which makes it difficult to say exactly who would be at risk of prosecution and who would not.

Bill C-36 clearly states that sex workers could not be prosecuted for receiving a material benefit from selling their own sexual services (in the proposed new section 286.5). (The client, of course, commits a crime by purchasing those services under the proposed new section 286.1.)

But the new offence of "receiving a material benefit" would, in many circumstances, prevent sex workers from working for third parties, working with other sex workers, or hiring third parties for services related to their work.

Who is presumed to be guilty of "receiving a material benefit"?

Bill C-36 would establish a presumption that someone who lives with a sex worker, or who is "habitually in the company" of a sex worker, has committed the new offence of receiving a "financial or material benefit" from the purchase of sexual services (under the proposed new section 286.2), which is similar to the existing law. This means that:

- **A third party that a sex worker often works with or lives with is presumed to be guilty** of the crime of "receiving a material benefit" unless their relationship falls under one of the exceptions listed in the new law.
- A person charged with this offence could try to rebut this presumption by bringing evidence to show they did not, in fact, receive a material benefit from someone else's sex work despite living with or regularly being in the company of sex workers.

Bill C-36 does provide that, in some cases, this presumption of guilt would <u>not</u> apply to:

- anyone who is in a "legitimate living arrangement" with a sex worker, such as a spouse/partner or roommate; and
- anyone who is supported by a sex worker out of a legal or moral obligation, such as sex workers' children or other people under their care.

But friends and acquaintances of sex workers, and **anyone who receives the benefit "in the context of a commercial enterprise** offering sexual services for consideration" are **still exposed to prosecution** under this presumption. In other words, even if a person falls within one of the exceptions, if they received a benefit "in the context of a commercial enterprise offering sexual services for consideration," they can be charged. In fact, if the person is convicted, receiving a benefit in the context of a "commercial enterprise" is considered an aggravating factor that makes the offence even more serious and would likely be reflected in a harsher sentence.

In addition, Bill C-36 says that someone would not be presumed guilty of the crime of "receiving a material benefit" from someone else's sex work if that person is getting paid for providing "a service or good that they offer, on the same terms and conditions, to the general public" (e.g., a landlord). Or, even if it is not a service or good that they offer to the general public, a person receiving a benefit from a sex worker is not presumed guilty if the benefit received is "proportionate" to the value of the service or good they provide to the sex worker <u>and</u> the person "did not counsel or encourage" the sex worker to provide sexual services. Therefore, in theory, sex workers may also purchase goods or hire services from others if those people do not "encourage" participation in sex work, but there remains considerable uncertainty in the law — those people could still be prosecuted if they get paid for their services "in the context of a commercial enterprise" offering sexual services, which very significantly limits the working arrangements sex workers can set up.

The new offence of "receiving a material benefit" would be an indictable (i.e., more serious) offence, with a maximum penalty of 10 years. Where the offence involves a person under the age of 18, the maximum sentence increases to 14 years and there is a minimum sentence of two years.

What about the people a sex worker lives with or supports financially?

As noted above, Bill C-36 would make it an offence to receive a "financial or material benefit" from someone else's sex work (under the proposed new section 286.2), and anyone who lives with or is regularly in the company of a sex worker is presumed guilty of this crime.

However, as mentioned above, the bill would also list some exceptions of people who are not guilty of this offence, including:

- anyone who is in a "legitimate living arrangement" with a sex worker (e.g., spouse/partner or roommate); and
- anyone who is supported by a sex worker out of a legal or moral obligation (e.g., children or other people under their care).

It is important to note that a family member or other person who is in a "legitimate" living arrangement with a sex worker can still be convicted of "receiving a material benefit" if that person:

- received that benefit "in the context of a commercial enterprise" that offers sexual services for consideration;[7]
- engaged in any activity that would amount to "procuring" (under the proposed new section 286.3);
- provided drugs, alcohol or any intoxicating substance to the sex worker for the purpose of aiding or encouraging that person to offer or provide sexual services for consideration;
- "used, threatened to use or attempted to use violence, intimidation or coercion" against the sex worker; or
- "abused a position of trust, power or authority" in relation to the sex worker.

Are security personnel and receptionists criminalized?

If a receptionist, bodyguard or other person providing security is working in "the context of a commercial enterprise that offers sexual services for consideration" (e.g., an escort agency, an indoor venue that is a commercial establishment), then that person could be prosecuted for:

- "receiving a financial or other material benefit" from the purchase of sexual services (under the proposed new section 286.2); and/or
- depending on the nature of the job, facilitating the exchange between sex workers and clients (under the proposed new section 286.3 on "procuring").

If the person is providing this service in the context of a commercial enterprise (which is not defined in the *Criminal Code*), not only can this lead to conviction for "receiving a material benefit" (under the proposed new section 286.2), but the fact that they work for a business is understood as an "aggravating factor" when it comes to sentencing them (under the proposed new subsection 286.2(6)). This means that the judge considers this factor as warranting a harsher sentence.

It is unclear whether it would be legal for an independent sex worker to hire a bodyguard or a receptionist because of uncertainty around the definition of "commercial enterprise." As a result, police, prosecutors and ultimately judges will interpret the meaning of this phrase, potentially broadening the offence to include all third parties who work for a sex worker, regardless of the size or nature of the business. This would effectively maintain all the previous barriers to hiring third parties who might enhance sex workers' security, barriers which the Supreme Court already found unconstitutional.

Depending on the nature of the work being performed, a person could also face prosecution under the proposed new prohibition on advertising sex workers' services (under the proposed new section 286.4).

[7] A literal reading of section 286.2 could potentially capture a child who is over the age of 12 (age of criminal responsibility, section 13 of the *Criminal Code*) who lives with a parent who is a sex worker and receives a benefit "in the context of a commercial enterprise that offers sexual services for consideration." However, it is unlikely that such cases will be pursued.

Would agency owners be criminalized?

Agency owners will be criminals under Bill C-36. According to the Department of Justice's Backgrounder on Bill C-36,[8] agency owners (including online businesses, escort agencies, massage parlours and strip clubs) are targeted by Bill C-36 in two main ways:

- The proposed new section 286.2 would make it an offence for anyone to receive a financial or material benefit that derives directly or indirectly from the purchase of sexual services. While there are some exemptions to criminal liability, the bill emphasizes that those exceptions would not apply to anyone who receives the financial or material benefit "in the context of a commercial enterprise that offers sexual services for consideration."
- The proposed new section 286.3 would make it an offence for anyone to "procure" a person to offer or provide sexual services for consideration, or for anyone to facilitate the purchase of sex by "recruiting," "harbouring" or "exercising control, direction or influence over" a person for that purpose. All third parties who facilitate communications with clients or have managerial roles (supervise and/or coordinate sex workers) in the sex industry will be criminalized under Bill C-36.

While the federal Justice Minister has emphasized that the bill would not target "legitimate" and non-exploitative relationships (such as pharmacists, accountants, or firms and individuals that offer security services[9]), there is ambiguity in how the law will be applied. However, agency owners will undoubtedly be criminalized by Bill C-36.

According to the Minister, the police will have the same powers as before to carry out investigations and surveillance operations in massage parlours and strip clubs,[10] *but* ***police will now also be able to intercept private communications*** *(e.g., via phone, email) if they reasonably believe that:*

- "the urgency of the situation" requires them to do so;
- "the interception is immediately necessary to prevent an offence" (such as the offences of obtaining sexual services, materially benefiting from sexual services, procuring sexual services or advertising sexual services[11]);
- that offence "would cause serious harm to any person"; and
- either the person who sends the private communication or the intended recipient of it is the person who would commit the offence.[12]

Are drug dealers criminalized?

Under the existing *Criminal Code*, section 212(1)(i) makes it illegal for someone to administer "any drug, intoxicating liquor, matter or thing **with intent to stupefy or overpower** that person in order thereby to enable any person to have illicit sexual intercourse with that person…." The court's interpretation of this provision required that there be factors such as violence or intimidation in order for someone to be found guilty — in other words, it was not sufficient for a conviction that the drug use assisted the sex worker in facilitating the provision of sexual services.[13]

Bill C-36 would replace this provision with a new subsection. Under the proposed changes (the new section 286.2), if someone provides a sex worker with drugs, knowing that the payment for those drugs arises out of the sex worker's sale of sexual services, then that person could be charged with "receiving a material benefit" of sex work. This is the case even for those who would normally be exempt from liability under subsection 286.2(4) (i.e., someone who is in a legitimate living arrangement with or dependent on a sex worker, or is a legitimate service provider), if they provide a "drug, alcohol or any other intoxicating substance" to the sex worker "for the purpose of aiding or abetting that person to offer or provide sexual services for consideration."

If a client provides drugs to a sex worker as payment for sexual services, the client could be prosecuted for the purchase of sexual services (under the proposed new section 286.1).

[8] Department of Justice Backgrounder, *Protection of Communities and Exploited Persons Act*, June 2014, online at http://news.gc.ca/web/article-en.do?nid=853729.
[9] Press conference with Justice Minister Peter MacKay on Bill C-36 (*Protection of Communities and Exploited Persons Act*), June 4, 2014.
[10] Ibid.
[11] S. 183 of Bill C-36.
[12] S. 184.4 of the Criminal Code.

WORKING INDOORS

Does Bill C-36 prohibit "common bawdy-houses"?

Bill C-36 would not reinstate the prohibition on "common bawdy-houses" that was effectively struck down by the Supreme Court in the *Bedford* case. Instead, Bill C-36 would remove any reference to prostitution from the definition of "common bawdy-house" (in section 197 of the *Criminal Code*). The remaining definition of a common bawdy-house would be "a place kept, occupied, or resorted to for the practice of acts of indecency."[13] The changes proposed in Bill C-36 would mean that it would no longer be an offence to "keep" or be found in a common bawdy-house, or to knowingly let someone use premises for the purpose of prostitution.

However, several other provisions in C-36 make it very difficult to legally operate an indoor venue for sex work.

First, the blanket prohibition on purchasing or communicating to purchase sexual services in any place renders any client in any premises a criminal.

Second, a venue-owner could become liable as a party to the proposed new offence of purchasing sexual services. Under the *Criminal Code* (section 21), a person is a party to a crime if he or she "does or omits to do anything for the purpose of aiding a person" to commit an offence or "abetting" (i.e., encouraging) a person to commit an offence. A venue-owner could be prosecuted for aiding or encouraging a person to commit the offence of purchasing or communicating to purchase sexual services.

Third, some activities that could occur in conjunction with an indoor venue could perhaps be prosecuted as "procuring" someone to provide sexual services for consideration.

Fourth, the advertising restrictions make it effectively impossible to advertise sexual services other than those a person provides directly herself or himself to a client; any advertising by a venue would be a crime (see "Advertising" section, below).

Finally, the prohibition on "receiving a material benefit" from the purchase of sexual services, or communicating to purchase such services, would effectively render any commercial venue illegal (under the proposed new section 286.2).

The practical effect of Bill C-36 is that indoor venues for sexual services cannot operate legally.

Would sex workers be able to work from home?

Technically, sex workers can work from home in limited circumstances. However, in practice, under Bill C-36, many other provisions would affect sex workers' ability to do this.

- Clients would face criminal charges for purchasing or communicating to obtain sexual services, regardless of the location (under the proposed new section 286.1).
- Advertising sexual services in print, media and online would be a crime (under the proposed new section 286.4). Although Bill C-36 states (in the proposed new section 286.5) that sex workers will not be prosecuted for advertising their own sexual services, anyone else who knowingly advertises "an offer to provide sexual services" (e.g., newspapers, magazines and online providers) commits a crime. This obviously affects the ability to work anywhere, including from one's own home.

The practical effect of the law will be to render it virtually impossible for sex workers to work from home without threat of criminal liability, even if that threat is not directed specifically against them and instead weighs on others such as their clients or the service providers they use to advertise their business.

[13] *R v Pointejour-Salomon*, 2011 QCCA 771.
[14] People who were at risk of prosecution pursuant to indecency laws continue to be at risk under section 197 of the *Criminal Code*.

ADVERTISING

What does the prohibition on advertising sexual services mean? Would an independent sex worker be able to advertise?

Bill C-36 would introduce a sweeping new section making it a crime to "knowingly advertise an offer to provide sexual services" (under the proposed new section 286.4).

This is a hybrid offence, meaning the prosecution has choice about how seriously to treat the offence. If a prosecutor proceeds by indictment, the maximum penalty is five years in prison. If a prosecutor proceeds by way of summary conviction, the maximum penalty is 18 months in prison.

Under Bill C-36, sex workers would not be prosecuted for advertising their own sexual services (under proposed new section 286.5).

However, any other party (e.g., newspaper, website, phone-service, etc.) that is a vehicle for sex workers' advertising their services is guilty of a crime. This makes it virtually impossible for a sex worker to advertise. Even maintaining one's own website leaves the Internet Service Provider (ISP) host exposed to prosecution.

Bill C-36 would also amend several other provisions of the *Criminal Code* so that a judge can issue a warrant authorizing seizure of copies "of a recording, a publication, a representation or any written material" if it is "an advertisement of sexual services" (s. 164), as well as to order the custodian of a computer system (e.g., the ISP) to give an electronic copy to the court, to take the material down or off the computer system, and to provide the information necessary to identify and locate the person who posted the material (section 164.1).

Could a sex worker advertise if they are working with other sex workers?

You could be prosecuted under Bill C-36 if you are advertising collectively with other workers, because you could be found to be knowingly advertising someone else's services, not just your own.

What if sex workers use a website based in the U.S. or other country to advertise?

There is no clear answer to this question. If Bill C-36 is passed, courts will need to determine whether the owner/operator or host of a website hosted in the United States or other country that advertises sexual services in Canada could be liable to prosecution. A judge may seize "an electronic copy" of the advertisement, request that "the material is no longer stored on and made available through the computer system" and request "the information necessary to identify and locate the person who posted"[15] the advertisement if the computer system[16] is within the jurisdiction of the court.[17] Canadian courts could have jurisdiction if they establish that "a significant portion of the activities constituting that offence" occurred in Canada,[18] considering factors such as the origin of the content provider, the host server, the intermediaries and the end-user.[19]

The prohibition on advertising sexual services refers to "seizure." What does this mean?

Bill C-36 would give a judge the power to order the seizure of advertisements for sexual services that are recordings, publications, representations or written material, and would authorize a court to make an order allowing the material to be forfeited to the Attorney General, who may direct its disposal (under the proposed new section 164(4) of the Criminal Code). Sex workers cannot be prosecuted for advertising their own sexual services (according to the proposed new section 286.5), but according to the broad wording of Bill C-36, their advertisements could be subject to seizure.

[15] S. 164.1(1)(a), (b) and (c) of the *Criminal Code*.

[16] A computer system is "a device that, or a group of interconnected or related devices one or more of which (...) contains computer program or other data, and (...) pursuant to computer programs (...) performs logic and control, and (...) may perform any other function": *Criminal Code*, section. 342.1(2).

Although Bill C-36 does not specify that the proceeds or revenue from advertisements can be seized and forfeited, section 462.37 of the *Criminal Code* allows a court to order the forfeiture of property that is the "proceeds of crime" to the government if a person is convicted of an indictable offence. Most provinces also have civil (i.e., non-criminal) forfeiture laws that also permit authorities to seize the proceeds of most crimes. This would not apply to sex workers' own revenue from their own advertisements (because advertising one's own sexual services is not a crime), but would apply to any other party (e.g., newspaper, magazine, website owner/operator) that carries a sex worker's advertisements or advertises sexual services (e.g., bar or club).

WEAPONS

Why is it proposed to amend the definition of "weapon," and is it meant to criminalize doms or dominatrices?

Bill C-36 would expand the existing definition of weapon in section 2 of the *Criminal Code* to include "any thing used, designed to be used or intended for use in binding or tying up a person against their will."

However, this definition is changed only with respect to the following criminal offences:

- possession of a weapon for a purpose dangerous to public peace or for the purpose of committing an offence (section 88 of the *Criminal Code*);
- assault while carrying, using or threatening to use a weapon or causing bodily harm (section 267 of the *Criminal Code*); and
- sexual assault while carrying, using or threatening a weapon or causing bodily harm (section 272 of the *Criminal Code*).

It seems fairly clear that the intent behind expanding the definition of "weapon" is to address circumstances where someone may be intending to assault, or does assault, a sex worker (or other person) using rope or something else to tie someone up.

Technically, the expanded definition of "weapon" proposed in Bill C-36 should not affect doms or dominatrices. The offences listed above would not normally be relevant in most circumstances of providing sexual services for consideration, because in order to get a conviction on a charge of assault or sexual assault, a prosecutor has to first prove that there was no consent to the sexual activity. In the case of a client purchasing services from a dom/inatrix, there is obviously consent to the physical contact, including being tied up if that is part of the service requested.

The Supreme Court of Canada has ruled that a person needs to be conscious and have an "operating mind" throughout the encounter in order to give legally valid consent to sexual activity; there is no consent if a person is unconscious, even if consent to those acts was obtained in advance of becoming unconscious.[20] It is possible that, in the unusual circumstance where a client might be restrained and possibly lose consciousness, the expanded definition of "weapon," coupled with the Supreme Court's decision regarding consent in the case cited above, could give police added cause to investigate or arrest a sex worker for assault or sexual assault.

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[17] New section 164.1(1) proposed in Bill C-36.
[18] *Libman v The Queen*, [1985] 2 SCR 178 at page 213.
[19] *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, [2004] 2 SCR 427 at para 61. This case provides factors to consider when determining jurisdiction in the context of Internet disputes.
[20] *R v JA*, [2011] 2 SCR 440.

THE FUTURE OF BILL C-36

Can Bill C-36 be immediately subject to a court challenge? On what basis?

A court challenge could take many years to wind its way through the courts. But a challenge could be initiated immediately after a law has been passed, as long as there are willing applicants/plaintiffs.

A new challenge may rely on any of the applicable rights and freedoms found in the *Canadian Charter of Rights and Freedoms*, though it would be strategic to draw from helpful precedents in previous cases based on specific *Charter* provisions, e.g., section 7 of the *Charter* protecting the right to life, liberty and security of the person. This was the key section of the *Charter* on which the *Bedford* constitutional challenge was based.

Another option is for the government to "refer" a case directly to the Supreme Court of Canada. Under the *Supreme Court Act*, the Court may be asked to hear and consider important questions of law or fact referred by the Governor in Council (i.e., the federal cabinet) or the Governor General acting on the advice of the federal cabinet.[21] Where the government of any province has any special interest in any such question, the Attorney General of the province must be notified of the hearing.[22] A reference is unlikely in this case because the federal government has said that Bill C-36 is the right way forward and is consistent with the *Charter*; it is more likely that the onus will fall on sex workers or others to challenge one or more provisions enacted by Bill C-36.

Under the *Constitutional Question Acts* in various provinces, provincial Attorneys General could also advise their Lieutenant Governor in Council (i.e., provincial government cabinet) to refer a matter to a provincial superior or appellate court, and the opinion of such a court may then be further appealed to the Supreme Court of Canada.

Bill C-36 states new objectives for the new aspects of the criminal law it would introduce. What are the implications?

The objectives of legislation are important. In any court case challenging provisions in the law as unconstitutional, courts look at any negative impact of those provisions on *Charter* rights, measuring those impacts against the legitimate objectives of the law. Any challenge to new provisions enacted by Bill C-36 would likely be brought under section 7 of the *Charter* (and possibly other sections). Section 7 protects the rights to life, liberty and security of the person, and is the section that was successfully used in *Bedford* to challenge several aspects of Canada's prostitution laws because they harm sex workers' health and safety.

In the case of such a challenge under section 7, the courts will assess:

- whether the provisions are "arbitrary" in infringing life, liberty or security of the person, because they are not sufficiently related to, or consistent with, the objectives underlying the law;
- whether the provisions are "overbroad," in that they criminalize activity beyond what they are intended to prohibit; and
- whether the harmful effects of the challenged provisions on life, liberty or security of the person are "grossly disproportionate" to the beneficial objectives intended by the law.

If a law does not satisfy these criteria, then the court should conclude that the limits it imposes on the right to life, liberty or security of the person is not in accord with these "principles of fundamental justice." This would mean that the law unconstitutionally violates rights under section 7 of the *Charter*.

If this is the case, or if the law is found to violate another section of the *Charter* (e.g., on freedom of expression, or freedom of association, or the right to equality), then courts will also be required to examine whether the objective of a law is "pressing and substantial" (i.e., whether it is important enough to warrant overriding someone's constitutional right), whether a law is "rationally connected" to achieving its stated objective, whether it impairs as little as possible one's constitutional rights, and whether the harm done by limiting the right outweighs either the importance of the objectives or the law's benefits. If it can meet all these requirements, under section 1 of the *Charter* that allows for some permissible limits on constitutional rights, then it may be upheld; if not, then the court must order some other remedy, including possibly "reading down" a section to make it narrower if that would make it constitutionally acceptable, or striking it down entirely as unconstitutional, as was done with the several provisions challenged in the *Bedford* case. (If the court has already found a breach of section 7 of the *Charter* because the law is arbitrary or overbroad, or its harmful impact is grossly disproportionate to its supposed benefits, then it is highly unlikely the government could successfully defend it as constitutional at this last stage of the legal analysis under section 1 of the *Charter*.)

In the Bedford case, the Supreme Court found that:

- the main objectives of the criminal prohibition on "common bawdy-houses" were *(i)* to combat neighbourhood disruption, and *(ii)* to safeguard public health and safety;
- the main objective of the prohibition on "communicating" for the purpose of prostitution was to curtail solicitation and "social nuisance"; and
- the main objective of the prohibition against "living on the avails" of prostitution was to prevent the exploitation of sex workers by "pimps."

Because the new stated objectives of the *Protection of Communities and Exploited Persons Act* are much broader than addressing nuisance, and include wide-ranging objectives such as addressing exploitation, "objectification" and the "commodification of sexual activity," protecting "human dignity and equality" — and particularly communities — "from harms associated with prostitution," denouncing and prohibiting the purchase and procurement of sexual services, encouraging sex workers "to report violence and to leave prostitution," the bill will be judged against different objectives and different criteria than the previously invalidated provisions. Where the stated objectives of a law are so broad and difficult to measure, a court may find it challenging to assess the impact of a law against those objectives and judges could be deterred from finding a violation of constitutional rights.

But this key challenge remains: Can the government defend as constitutional legislation that reinstates provisions very similar to those already found by the Supreme Court to be harmful to sex workers' lives, health and safety, simply by re-labelling those provisions with new (and even broader) objectives?

[21] RSC, 1985, c S-26, s. 53.
[22] Ibid, s. 53(5).

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RECKLESS ENDANGERMENT:

Q&A ON BILL C-36:

PROTECTION OF COMMUNITIES AND EXPLOITED PERSONS ACT

UPDATE - AMENDMENTS TO BILL C-36

OCTOBER 2014

For a bill to become law it typically goes through a series of readings in both the House of Commons and the Senate. The bill can be accepted as is, approved with amendments, or rejected in its entirety. On October 6, 2014, Bill C-36 passed third reading in the House of Commons with some amendments. This document is an addition to *Reckless Endangerment – Q&A on Bill C-36: Protection of Communities and Exploited Persons Act.* It includes the main amendments made by the House of Commons to Bill C-36 since its introduction in June 2014.

Please note that this document should not be taken as legal advice.

Amendment #1: Communicating for the sale of sexual services [section 213(1.1)]

Bill C-36 makes it a crime to communicate for the purpose of offering or providing sexual services for consideration in a variety of circumstances and contexts. The term "for consideration" means that sexual services are exchanged for something of some value, whatever the form and however small the value. The initial version of this provision criminalizes communication when taking place "in a public place, 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." The amended version of Bill C-36, rather than using this language, targets three locations where the prohibition is in effect: a public place, or any place that is open to public view, that is or is next to school grounds, playgrounds and daycare centres.

Aspects of the communicating law unchanged by the amendment:

- It continues to be a crime for a sex worker or a client to stop or attempt to stop a vehicle, impede pedestrian or car traffic, or impede an entrance/exit to a venue for purposes of prostitution. These acts are made a crime under sections 213(1)(a) and 213(1)(b) of the *Criminal Code*. These laws where not challenged in *Bedford* and are therefore unaffected by the *Bedford* decision. They are also unaffected by Bill C-36.

- The amendment to section 213(1.1) does not impact the proposed section 286.1, which makes it a crime for a client to communicate anywhere, whether in public or in private, to obtain sexual services.

How broadly would the amended Bill C-36 criminalize communication in public places?

The new communicating law specifically targets the person offering or providing the sexual services. As such, it would apply to sex workers and third parties. The sex workers most at risk of arrest under this provision are those who work on the street. Sex workers working in indoor locations that are open to public view, and are or are "next to" one of the three public places named above, are also at risk of arrest. The amended version of Bill C-36 makes it a crime for any sex worker (or third party) to communicate "in a public place"[1] or "any place open to public view" if that place "is or is next to a school ground, playground or daycare centre."

The amendment in section 213(1.1) refers to school grounds, playgrounds, daycare centres and public places (or places open to public view) that are near one of these three types of locations. It is unclear how the communication law will be enforced for various reasons:

1. The law does not define what distance is considered "next to" one of these three types of locations. Therefore, the police will have some discretion in deciding whether a given location is "next to" a school ground, playground or daycare centre. When these cases go before the courts, judges will have to define the distance that will be considered "next to," and therefore which neighbouring indoor locations and outdoor public spaces will be found within this perimeter.

1 An explanation of the definition of "public place" is provided on page 5 of *Reckless Endangerment* (June 2014).

2. It is unclear what would be considered a "playground." Would this include all parks? Would the park require a swing set or other traditionally child-specific installation to be considered a playground? Once again, police will have very broad discretionary powers to decide which open public spaces will be captured in this category.

3. It is unclear how the law would be enforced next to "daycares." Would this include the numerous daycares that cannot be seen or identified by a passerby?

The language in both the initial and amended Bill C-36 communication provision is broad and ambiguous, and the bill itself will reproduce the harms exacerbated by the current communication law. The Supreme Court of Canada recognized these harms in *Bedford* and for this reason struck down the current communication law. Further, the amended communication provision is even broader than the current communication law in that it could capture sex workers working in an indoor location that is open to public view, if the work location is considered "next to" a school ground, playground or daycare centre.

What about communicating online?

The internet may be considered a "public place," but it is unlikely to be considered a place that is or is next to a school ground, playground or daycare centre.

However, courts may define some online communications as advertising – and these communications would then fall under the general advertising prohibition. Individual sex workers could not be prosecuted for such advertisement (i.e., if related to their own sexual services), but sex workers who advertise collectively, hire or work with third parties, and those who put out or publish sex work advertisements could be prosecuted.

And finally, all clients who communicate with sex workers online could be criminally charged under Bill C-36 for communicating for the purposes of obtaining sexual services for consideration.

Amendment #2: Review and report of the bill [section 45.1.1]

The amended version of Bill C-36 now requires that a comprehensive review of the provisions and operation of the new criminal law on prostitution be undertaken by the House of Commons within five years of the bill coming into force.

A review is extremely important to evaluate the impact of the new law. Five years, however, is too long given that the courts have already determined that the current law,[2] which criminalizes communicating for the sale of sexual services, is unconstitutional and detrimental to sex workers' health and safety. Evidence submitted to the courts and available to Parliament already demonstrates that criminalizing the sale of sexual services endangers sex workers. Waiting five years to demonstrate the impacts of criminalization is inhumane. The harms that are exacerbated by the current communication provision and that will persist under Bill C-36 must be recognized, and laws that continue to exacerbate those harms must be avoided.

It is essential to employ experienced and impartial researchers to conduct a thorough evaluation after two years of any bill's implementation. Consultations with and evidence from affected communities – those sex working under the regime of Bill C-36 – must be at the core of any review.

Any evaluation must also consider how conversations at the federal level coincide and work in tandem with conversations at a municipal level; comprehensive reviews must include concrete examples of how local law enforcement is implementing these new prostitution laws.

2 Section 213(1)(c) of the *Canadian Criminal Code* was struck down by the Supreme Court of Canada in December 2013 *(Bedford. v. Canada).*

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