

## Briefing Note – Bill C-36

An Act to amend the Criminal Code in response to the SCC decision in *AG Canada v Bedford* and to make consequential amendments to the act.

### Summary of the legislation

The draft legislation proposes a model that criminalizes the purchase of sexual services, the advertisement of sexual services, and communication in public for the purpose of prostitution by anyone, and it effectively prohibits indoor sex work.

This new model fails to address the problems identified by the Court in *Bedford*. It also creates new issues of constitutional validity with the prohibition on advertising.

The Charter rights engaged by this draft law include life, liberty, security of the person, freedom of expression, and equality. Arguably all are breached.

This is not the “Nordic” approach, nor is it a Canadian variation of the “Nordic” approach. It is an unconstitutional variation of our broken laws that imposes more danger, more criminalization, and fewer safe options. This model runs contrary to the requirement of the Supreme Court of Canada to address these dangerous and ineffective laws.

### Analysis

Provision 213: “Stopping or impeding traffic and Communicating to provide sexual services for consideration”

There is only one part of the Communicating provision that is different than the pre-Bedford regime. What was previously section 213(1)(c) of the Code now applies only to communicating to offer sexual services in a public place that is or is near somewhere where anyone under the age of 18 could reasonably be found. This Communicating provision is only marginally narrower than what the Court struck down in Bedford, as it captures a broad range of places where communication is prohibited.

All other aspects of section 213, including stopping or impeding traffic, remain criminalized and apply to everyone. These remain summary offences.

### Constitutional Implications:

This amounts to a version of the Communicating law in Bedford that is only marginally narrower, and defies the spirit of the judgment, which was concerned with the displacement of sex workers and blocking their ability to screen clients for safety. All that will be required for police to surveil and target sex workers is the suggestion that a person under the age of 18 can reasonably be expected to be present. This law will function in a highly similar fashion to the Communicating provision that the Bedford court struck down for creating dangerous circumstances, and it will violate section 7 of the Charter.

Provision 286: Prohibition against the purchase of sexual services  
“Commodification of Sexual Activity”

s. 286.1(1): Obtaining Sexual Services for Consideration

This single aspect of the law is similar to the Nordic model, in that it applies to purchasing or communicating in order to obtain sexual services.

This provision criminalizes everyone in any place who purchases or communicates in order to obtain sexual services. This provision adds mandatory fines to all violations. Sanctions include mandatory minimum fines ranging from \$500 to \$4,000, and can include up to five years in jail. These new mandatory fines are higher for repeat offenders and for anyone who purchases sex in a place where a person under 18 could reasonably be found.

The addition of tough punishments for clients will force sex workers to go to great lengths in order to help their clients avoid these sanctions. This will recreate the dangerous conditions that the court in Bedford said made the criminal laws unconstitutional.

### Key Considerations:

Prohibiting the purchase of sexual services creates extremely dangerous conditions for sex workers. In Sweden, Norway and in Canadian cities where law enforcement is directed at clients, sex workers are displaced to unsafe areas, they cannot screen their clients, they lack access to police protection and they are less able to operate in safer indoor venues. In Norway, violence against sex workers increased following the enactment of the law. Two recent reports on sex work in Vancouver found that street-based sex workers are facing very dangerous working conditions as a result of law enforcement targeting clients.

### Constitutional Implications:

While criminalizing the purchase of sexual services is said to be aimed at protecting sex workers, this prohibition will have the same harmful impact as the current adult prostitution laws that were struck down in Bedford. For this reason, the ban on purchasing sex or communicating for the purpose to obtain sexual services violates the security of the person rights of sex workers, which are protected by section 7 of the Charter.

Provision 286.2: “Material Benefit from Sexual Services”

The new provision continues to criminalize those who gain material benefits from sex work. This replaces the “living on the avails” provision that was struck down in Bedford.

This version of the law does not apply to those in “legitimate living arrangements” or with “legal or moral obligations” to sex workers. It does apply to exploitative and abusive relationships, and to those in which a person supplies drugs or alcohol.

### Key Considerations:

Being able to work together or to employ safety services is a key component of a safer sex trade. This provision does not assist in making this more possible for most sex workers.

It will only apply to occasional ad hoc services for sex workers, and does not allow sex workers to establish regular secure conditions for themselves.

This definition of exploitation may be inconsistent with the experiences of sex workers and may capture relationships that actually enhance their safety. It is therefore likely that this provision will be found inconsistent with section 7 rights because of over-breadth.

### Constitutional Implications:

This law still impairs the ability of sex workers to retain assistance in their work from employees or contractors. The provision applies to benefits received in the context of any commercial enterprise offering sexual services.

The bill also intrudes into personal relationships by exempting “legitimate living arrangements”.

This provision does not remedy the problem the SCC addressed by striking down the living on the avails provision. It introduces uncertainty, criminalizes relationships intended to improve safety, and recreates the same harms.

#### Provision 286.4: Advertising Sexual Services

The bill proposes to ban any advertising of sexual services, stating:

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

- (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
- (b) an offence punishable on summary conviction and liable to imprisonment for a term on not more than 18 months.

#### Key Considerations:

This is an entirely new provision that attempts to radically change the sex trade in Canada. Without the ability to advertise in newspapers, online, or other forms of media, sex workers will now have severely limited means for working safely indoors. This is particularly concerning given that the court in Bedford clearly found that the ability to operate in safer indoor venues is a key measure for sex workers to reduce their risks. This new provision does not ban working indoors itself, which is not surprising given that the Supreme Court of Canada clearly stated that such a law would violate the Charter. But this new provision makes the option of safer indoor work all but impossible.

We should also have serious doubts about the capacity of the state to enforce this law, and the extraordinary resources that such enforcement would require.

#### Constitutional Implications:

By restricting the ability of sex workers to effectively work indoors, this provision engages sex workers section 7 rights in that it increases the risks faced by sex workers. It also violates sex worker's section 2(b) rights by restricting their freedom of expression. This is a very misguided law, which is contrary to both the letter and spirit of the Supreme Court's decision in Bedford. There is little question that Canadian courts would declare this new prohibition on advertising to be unconstitutional.

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