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### How to Make Canada's New Prostitution Laws Work

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*True North In Canadian Public Policy*

# Commentary

October 2014

## How to Make Canada's New Prostitution Laws Work

Bill C-36 (*Protection of Communities and Exploited Persons Act*) and the Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford*

Benjamin Perrin

### Introduction

Bill C-36 (*Protection of Communities and Exploited Persons Act*) marks a turning point in Canada's approach to addressing prostitution that was spurred by the Supreme Court of Canada decision in *Canada (Attorney General) v. Bedford*, which declared the old approach unconstitutional. This proposed legislation was recently passed by the House of Commons and has already been pre-studied by the Senate. It is expected to become law in the coming weeks.

Under the new approach, prostitution is no longer considered merely a nuisance, but is recognized as inherently exploitative. While "johns", "pimps", and human traffickers are criminally liable, prostitutes generally are not. This is the right approach to this complex issue. It represents a major shift in how the harms of prostitution are characterized and confronted in the criminal law. It will require substantial work from governments, police, and civil society to ensure effective implementation.

This brief Commentary highlights the major differences between the old and new approaches to addressing prostitution in Canada,<sup>1</sup> discusses the anticipated *Charter* challenge to this new legislation that advocates for legalized/decriminalized prostitution have threatened, and identifies the next steps that are needed to ensure the effective implementation of Bill C-36.

*The author of this document has worked independently and is solely responsible for the views presented here. The opinions are not necessarily those of the Macdonald-Laurier Institute, its Directors or Supporters.*

To move forward after the adoption of Bill C-36, it is recommended that the Government of Canada, together with provincial and territorial governments:

- launch a national strategy with increased funding to help prostitutes exit;
- train police, prosecutors, judges, and service providers on the new approach;
- target police enforcement at johns, pimps, and traffickers; and
- monitor and conduct research on the effects of Bill C-36.

## Prostitution in Canada

Disturbing cases involving prostitution have garnered recent headlines across Canada on a weekly basis. In the last month alone, numerous cases involving both adult and child prostitution have shown a glimpse of the violence visited on prostitutes by johns, pimps, and human traffickers.

In British Columbia, Reza Moazami was found guilty on September 15, 2014 of luring 11 teenagers into prostitution and using drugs and physical abuse to control them. His victims were as young as 14 years of age (CBC News). In Newfoundland, on October 3, 2014 a public warning was issued about groups of 12 to 20 men who gang-raped prostitutes who were told to come to a hotel to engage in prostitution with a single man. The women were unwilling to speak with police about the incident (CBC News). On October 7, 2014, police announced that Operation Northern Spotlight has resulted in the rescue of 18 women and under-aged girls (as young as 12 years old) who had been forced to work as prostitutes against their will in major cities across the country. They had been sold to johns out of hotels, motels, and massage parlours (Canadian Press).

Studies by the Library of Parliament and the House of Commons Standing Committee on Justice and Human Rights have identified shocking trends related to prostitution in Canada:

- Street-level prostitution represents between 5–20 percent of all prostitution, with the rest occurring indoors;
- the majority of prostitutes are female (75–80 percent), while almost all “clients” of prostitution are male;
- the majority of prostitutes entered prostitution between 14 and 20 years of age;
- a disproportionate number of prostitutes were sexually abused as children;
- substance abuse is significant among street prostitutes; and
- marginalized women, including Aboriginal women, are particularly vulnerable to prostitution and more likely to face violence (including assaults, sexual assaults, and murder) (Cool 2004: 1–4; Standing Committee on Justice and Human Rights 2006: 10, 12).

## Old Approach to Addressing Prostitution

The old approach to addressing prostitution in the *Criminal Code* largely treated it as a nuisance and criminalized johns and prostitutes alike, as well as pimps and human traffickers. Adult prostitution itself (the buying and selling of sex acts) was not criminalized directly, but it was sanctioned indirectly through the criminalization of a range of activities surrounding prostitution (such as public communication for the purposes of prostitution, being found in a common bawdy house, and living off the avails of prostitution).

Under the old approach, prostitution-related activity was defined as criminal or non-criminal based on where it occurred. For example, while prostitution that occurred regularly at a fixed location (like massage parlours

and brothels) was illegal under the bawdy-house offence, so-called “out-call” prostitution that occurred at various locations of the john’s choosing (such as escorts going to a hotel room) was not criminalized. The main reason behind this distinction was that prostitution was largely considered to be a nuisance that should be kept out of public view.

In practice, the old approach was overwhelmingly enforced to the detriment of prostitutes and not johns. Female prostitutes were significantly more likely to face harsher sanctions than their male clients (Cool 2004: 9). For example, 68 percent of women charged with solicitation were found guilty, whereas 70 percent of men charged with solicitation had those charges withdrawn (Standing Committee on Justice and Human Rights 2006: 52–53).

## Supreme Court of Canada Decision in *Bedford*

The December 20, 2013 decision of the Supreme Court of Canada in *Bedford* found that the core offences of the old approach to prostitution infringed the *Charter* and declared them invalid within one year of the Court’s decision. These offences are summarized below:

Section	Description	Offence
210	Keeping a common-bawdy house	<p><i>(1) Every one who keeps a common bawdy-house is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.</i></p> <p><i>(2) Every one who</i></p> <ul style="list-style-type: none"> <li><i>(a) is an inmate of a common bawdy-house,</i></li> <li><i>(b) is found, without lawful excuse, in a common bawdy-house, or</i></li> <li><i>(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,</i></li> </ul> <p><i>is guilty of an offence punishable on summary conviction.</i></p>
212(1)(j)	Living off the avails of prostitution	<i>Every one who . . . (j) lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.</i>
213(1)(c)	Publicly communicating for the purpose of prostitution	<i>Every person who in a public place or in any place open to public view . . . (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.</i>

Chief Justice Beverley McLachlin, writing for a unanimous court, stated “it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants’ liberty, but rather that *compliance* with

the laws infringes the applicants' security of the person" (*Bedford* (SCC), footnote to paragraph 58). In finding that the impugned offences engaged section 7 of the *Charter* (principles of fundamental justice), she held that "[t]he 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 engaged in a risky – but legal – activity from taking steps to protect themselves from the risks" (paragraph 60).

Each of the challenged offences was found to have infringed section 7 of the *Charter*:

- The Bawdy-House Prohibition – section 210 of the *Criminal Code*: the harms to street prostitutes were found to be grossly disproportionate to the goal of deterring community disruption that the bawdy-house prohibition is pursuing.
- Living Off the Avails of Prostitution – section 212(1)(j) of the *Criminal Code*: this offence was found to be overbroad because it criminalized some non-exploitative relationships (including secretaries and body guards) that are not connected to the purpose of the law, which is to target pimps who engage in "parasitic, exploitative conduct" (*Bedford* (SCC), paragraph 137).
- Communicating in Public for the Purposes of Prostitution – section 213(1)(c) of the *Criminal Code*: this offence was found to be grossly disproportionate because "[t]he provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution" (*Bedford* (SCC), paragraph 159).

None of these offences were found to have been justified under section 1 of the *Charter*. The Court ordered a suspended declaration of invalidity for one year, meaning that by December 20, 2014, they would be struck down.

In its decision, the Court provided little guidance on what approach Parliament could adopt to address prostitution that would comply with the *Charter*, despite there being a significant body of evidence in the record related to the diverse approaches taken by a number of foreign jurisdictions. The Chief Justice recognized that it is up to Parliament to propose a new approach if it chooses to do so in the wake of this constitutional decision (*Bedford* (SCC), paragraph 165). She noted that "Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes" (paragraph 5).

## New Approach in Bill C-36

The preamble of Bill C-36 recognizes that prostitution is inherently exploitative, including a risk of violence to prostitutes, and disproportionately impacts women and children. It also acknowledges the social harm that is caused by prostitution through the objectification of the human body and the commodification of sexual activity. Accordingly, the legislation seeks to discourage prostitution, in order to protect human dignity and equality, and to protect communities from the harms of prostitution.

The means chosen in Bill C-36 to achieve these objectives are to:

- prohibit the purchase of sexual services because it creates demand for prostitution (johns are criminalized) (clause 20);
- prohibit the procurement of prostitutes for exploitation (pimps are criminalized) (clause 20);
- prohibit the commercialization and institutionalization of prostitution (advertisers of prostitution are criminalized) (clause 20); and
- encourage prostitutes to report violence and leave prostitution by no longer criminalizing their prostitution-related conduct. However, prostitutes are not allowed to communicate to sell sexual services next to a school, playground, or daycare centre (clauses 12, 13, 15).

While the old approach did not prohibit the purchase or sale of sexual services, it did make it an offence to publicly communicate for that purpose. Bill C-36 changes this to make it an offence to purchase sexual services or communicate in any place for that purpose. However, it does not make it an offence generally for a prostitute to sell their sexual services.

Bill C-36 effectively repeals the prostitution-related offences that the Supreme Court of Canada found violated the *Charter* in the *Bedford* decision. It also makes a number of additional amendments to the *Criminal Code*, including increasing sentences for human trafficking offences.

## Anticipating a New *Charter* Challenge

The proponents of legalized/decriminalized prostitution were quick to denounce Bill C-36 within mere hours of its announcement, threatening to challenge it before the courts. This is unsurprising given that it does not meet their objectives. However, closer scrutiny suggests that any constitutional challenge to Bill C-36 will be litigated on very different grounds than in *Bedford*. Indeed, the ground has shifted considerably with this new legislation.

First, a *Charter* claim based on section 7 against Bill C-36 will require actual evidence that this law materially increases the risks facing prostitutes. This is an empirical question that will require objective and unbiased research over a reasonable period of time (5 to 10 years after the coming into force of the new law). A *Charter* claim brought before such a period of time would be unlikely to have sufficient evidence for a court to assess and thus be premature and should fail. For example, in *Ontario (Attorney General) v. Fraser*, the Supreme Court of Canada dismissed a *Charter* challenge to provincial legislation related to labour relations for farm workers, indicating that the claim was “premature” because there had not yet been sufficient time for it to be “tested” to see if it had unconstitutional results for farm workers. In that case, the law was challenged several years after its adoption.

As I have written in a previous MLI report, the evidence in the *Bedford* case itself that was assessed by the applications judge suggests that an approach whereby prostitutes are not criminalized but johns, pimps, and human traffickers are held criminally responsible (the so-called Swedish or Nordic model) fared the best in terms of outcomes in comparison with those jurisdictions that have legalized/decriminalized prostitution (2014: 10–14). The ultimate question that will be addressed by a future court will be whether Bill C-36 increases the risk to prostitutes or not. That is a question that will be answered by evidence, based on Canadian experience – not speculation and conjecture.

Second, the Supreme Court of Canada decision in *Bedford* was clear in stating that it is up to Parliament to adopt a new approach, if it chooses, and that it has scope to prohibit certain activity related to prostitution. Chief Justice McLachlin states:

I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. 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 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. (paragraph 165)



Bill C-36 establishes “limits on where and how prostitution may be conducted”. It provides that prostitutes may not offer sexual services next to a school, playground, or daycare centre. Bill C-36 also provides “greater latitude” by permitting as the Court suggested the “assistance of security personnel” because it no longer criminalizes such persons. Rather, the new offence in section 286.2 of the *Criminal Code* would allow legitimate security personnel to be legally hired by prostitutes if such persons, *inter alia*, offered such services “on the same terms and conditions, to the general public” and they did not use violence or intimidation against the prostitute. In other words, genuine security personnel can now be hired by prostitutes – but if they are merely violent pimps posing as bodyguards (which is not uncommon), such persons will be criminally liable. This complex provision navigates this challenging issue in a way that should be recognized by the courts as valid.

Third, the safety-enhancing measures that were flagged in *Bedford* as being unavailable to prostitutes due to the old approach are now more readily available through Bill C-36. Prostitutes are now able to work indoors. They are not criminalized for offering sexual services at fixed indoor locations and they are immune from prosecution for advertising their own sexual services. As discussed above, prostitutes can also pay security staff. There has been some debate about the extent to which prostitutes will be able to screen johns on the street. Some have argued that because johns are criminally liable for attempting to purchase sexual services, they will attempt to pressure prostitutes to more quickly enter their vehicles such that effective screening is not possible. However, the Supreme Court of Canada was clear in *Bedford* that its concern is about laws that prevent prostitutes “from taking steps to protect themselves” (paragraph 60). Criminalizing johns alone does not prevent prostitutes from taking steps, such as screening johns, to protect themselves. The potential nominal monetary loss to a prostitute of losing a skittish john who won’t wait for the prostitute to screen them cannot legitimately be a basis for claiming that the prohibition on the purchase of sexual services increases the safety risk to prostitutes.

Bill C-36 does not repeal a provision whereby prostitutes are liable if they offer sexual services in a manner that stops traffic or impedes pedestrians. I publicly recommended that the Government of Canada repeal this prohibition on prostitutes because it is likely unconstitutional (9 June 2014). The offending provision as it applies to prostitutes is in section 213 of the *Criminal Code* and it would have been better to repeal it so that the screening that the courts have indicated is important for the safety of prostitutes would be more fully available. Accordingly, section 213 of the *Criminal Code* is vulnerable to a *Charter* challenge and will likely be struck down if challenged.

Fourth, a great deal of the analysis in the *Bedford* decision is premised on the old approach not actually having criminalized prostitution. For example, Chief Justice McLachlin states: “The impugned laws deprive people engaged in a risky, *but legal*, activity of the means to protect themselves against those risks” (paragraph 89, emphasis added). Under Bill C-36, prostitution can no longer be so simply characterized in this way because it is now illegal to purchase sexual services. Aspects of prostitution related to its purchase and advertising are now directly criminalized, making prostitution quasi-illegal or asymmetrically illegal.

Fifth, different and more compelling modern objectives are the basis for Bill C-36. Since constitutional analysis considers the objectives behind legislation in assessing it, the framing and coherence of those objectives are critical to the analysis. The old approach was largely based on preventing prostitution from becoming a public nuisance. The new approach is far more sophisticated, compelling, and proportionate to the measures taken in Bill C-36. The government would have a stronger case on this basis than it did in *Bedford*. It is notable that the majority of the Ontario Court of Appeal in *Bedford* stated: “We agree that a modern, comprehensive legislative scheme dealing with prostitution could reflect the values of dignity and equality, but that is not the legislative scheme currently in place” (paragraph 183). Bill C-36 is such an approach.

Sixth, it has been conventionally considered that laws that violate section 7 of the *Charter* will rarely, if ever,

be justified under section 1 of the *Charter* and thus be saved. Much of the section 7 jurisprudence appears to reflect that some “balancing” of interests could occur within the analysis in section 7, so this situation was largely unobjectionable. However, in the *Bedford* decision, the Supreme Court of Canada appears to question this understanding – even if slightly – by instead saying that section 7 is breached if the law is grossly disproportionate, overbroad, or has arbitrary effects “on one person” (paragraph 123). There is accordingly no room for balancing the concerns of others within this calculus. The Supreme Court of Canada, however, also went arguably further than it has in most section 7 cases by indicating that such a violation could be saved by section 1 of the *Charter*. The Chief Justice notes that there are “crucial differences between the two sections” (paragraph 124), that they “ask different questions” (paragraph 125), “work in different ways” (paragraph 126), and are “analytically distinct” (paragraph 128). However, she adds that it will be “unlikely” that a law that violates section 7 will be justified under section 1 (paragraph 129). Accordingly, it should be expected that a constitutional challenge to Bill C-36 would be litigated not only on the basis of section 7, but a section 1 component would be more prominent and important to the government than previously anticipated, in the event that a violation is found.

To conclude on this point, the outcome of a future *Charter* challenge will depend on the actual outcomes of Bill C-36 and would be analysed based on very different considerations than applied in the *Bedford* case. Accordingly, if the Government of Canada is serious about wanting its new approach to be upheld by the courts, it will need to work hard and devote sufficient resources, together with provincial and territorial governments, police, and civil society to effectively implement Bill C-36 and then monitor its effects.

## Next Steps and Recommendations

After Bill C-36 has been adopted by Parliament, the hard work of effective implementation begins. This is all the more complex given the multiplicity of jurisdictions and actors with different responsibilities related to the issue of prostitution. The following are recommendations for the Government of Canada to lead in implementing, together with provincial and territorial governments.

### 1. Launch a national strategy with increased funding to help prostitutes exit

International researchers have warned that merely changing prostitution laws is likely to be insufficient to effect positive change. Significant investments in programs to support prostitutes and promote equality are also required (Picarelli and Jonsson 2008: 56).

While the federal government is responsible for enacting criminal laws, the provincial and territorial governments are responsible for the administration of justice, including policing, victim services, and prevention programs. These lower levels of government are also responsible for providing social services such as drug detoxification facilities, mental health services, welfare, vocational and educational training, and a raft of related programs or services that a person would need to prevent entry into prostitution or promote their exit from it. The federal government has announced it will provide some \$20 million to programs to help implement Bill C-36. Provincial and territorial governments also need to step up since it is their primary area of responsibility to provide these services. It is interesting to note that Sweden’s national action plan to address prostitution and human trafficking received SEK213 million (C\$32.2 million). If this amount were proportionate to Canada’s population, the relative amount of funding would be approximately C\$118.6 million – almost \$100 million more than has been committed to date by the Government of Canada to implement Bill C-36. A national strategy on exit from prostitution with involvement and funding from Federal, Provincial, and Territorial Justice Ministers is needed urgently.



## **2. Train police, prosecutors, judges, and service providers on the new approach**

Reforms to the *Criminal Code* can take considerable time to be communicated to people on the frontlines. Bill C-36 is a very different approach to the old one and it will take resources and time to ensure everyone is informed and understands this different paradigm.

Justice system participants and frontline support workers have been operating for decades under the model of prostitutes as criminals and have not seen johns generally treated as such, in practice. Bill C-36 flips this conception on its head and it will need to be clearly and effectively communicated to these professionals so that they can properly and effectively conduct their duties in implementing this legislation. Provincial Crown prosecutors, municipal police forces, the National Judicial Institute, provincial law societies, and relevant provincial and territorial departments should all be actively engaged in training their members and staff about Bill C-36 and how the law is to be implemented. They will also need to change their own internal policies, protocols, and procedures accordingly.

## **3. Target police enforcement at johns, pimps, and traffickers**

The flip side of Bill C-36 is the criminal responsibility of johns, pimps, and traffickers. Police forces will need to identify and implement investigative approaches and tactics to identify and charge johns under this new framework. They should also name johns publicly when they are charged, just as they do with virtually every other offence. This would demonstrate that purchasing sex is now a crime that is taken seriously and could contribute to deterrence.

## **4. Monitor and conduct research on the effects of Bill C-36**

Given that a Parliamentary review of Bill C-36 will occur in five years and a court challenge is anticipated, it is imperative that credible research be conducted on the outcomes of this legislation. This will assist in potential amendments to address issues that arise in practice, responding to judicial decisions interpreting Bill C-36, and be important in responding to an anticipated *Charter* challenge to this new legislation.

## **Conclusion**

Canada is taking a new approach to prostitution that seeks to encourage prostitutes to exit, while holding johns, pimps, and traffickers criminally responsible. It is an approach that has much promise and recognizes the inherent harms of prostitution. However, it will only be able to have a positive impact if it is effectively implemented and monitored in the coming years.

## Author Biography



Benjamin Perrin is an Associate Professor at the University of British Columbia, Faculty of Law and a Senior Fellow at the Macdonald-Laurier Institute. He previously served as Special Adviser, Legal Affairs & Policy in the Office of the Prime Minister and was a Law Clerk at the Supreme Court of Canada. He is a member of the Law Society of Upper Canada and Law Society of British Columbia. Professor Perrin is the author of *Invisible Chains: Canada's Underground World of Human Trafficking* (Penguin, 2011) and co-editor of *Human Trafficking: Exploring the International Nature, Concerns, and Complexities* (CRC Press, 2012).

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## Endnotes

- 1 This Commentary is focused on adult prostitution (where the prostitute is over eighteen years of age).



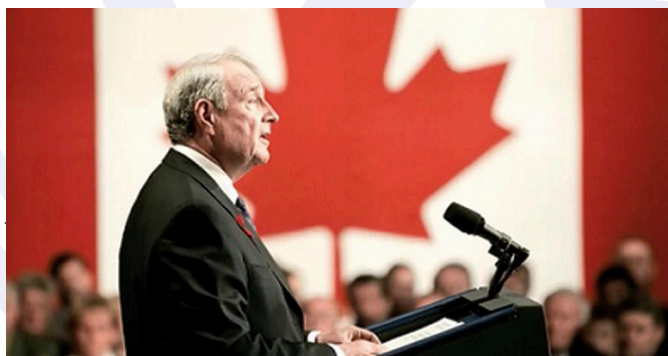
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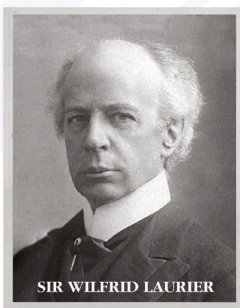
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PETER NICHOLSON, FORMER SENIOR POLICY  
ADVISOR TO PRIME MINISTER PAUL MARTIN

*I saw your paper on Senate reform [Beyond Scandal and Patronage] and liked it very much. It was a remarkable and coherent insight – so lacking in this partisan and anger-driven, data-free, ahistorical debate – and very welcome.*

SENATOR HUGH SEGAL, NOVEMBER 25, 2013

*Very much enjoyed your presentation this morning. It was first-rate and an excellent way of presenting the options which Canada faces during this period of "choice"... Best regards and keep up the good work.*

PRESTON MANNING, PRESIDENT AND CEO,  
MANNING CENTRE FOR BUILDING DEMOCRACY