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LEGISLATIVE SUMMARY



Bill C-36:

An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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Legislative Summary of Bill C-36
(Legislative Summary)

Publication No. 41-2-C36-E

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CONTENTS

| | | |
|---------|--|----|
| 1 | BACKGROUND..... | 1 |
| 1.1 | Objectives of Bill C-36 and Principal Amendments | 1 |
| 1.2 | The Constitutional Challenge Behind Bill C-36: The <i>Bedford</i> Decision..... | 2 |
| 1.2.1 | Sections 210 and 211 – Provisions Pertaining to Common Bawdy-Houses..... | 3 |
| 1.2.1.1 | Analysis of Section 210 in <i>Bedford</i> | 4 |
| 1.2.2 | Section 212 – Procuring | 4 |
| 1.2.2.1 | Analysis of Section 212(1)(j) in <i>Bedford</i> | 4 |
| 1.2.3 | Section 213 – The Provision on Communicating | 5 |
| 1.2.3.1 | Analysis of Section 213(1)(c) in <i>Bedford</i> | 5 |
| 1.3 | Canadian Studies of <i>Criminal Code</i> Provisions Relating to Adult Prostitution..... | 5 |
| 1.3.1 | Fraser Committee, 1983 to 1985..... | 6 |
| 1.3.2 | Standing Committee on Justice and the Solicitor General, 1990..... | 6 |
| 1.3.3 | Federal–Provincial–Territorial Working Group on Prostitution, 1992 to 1998..... | 7 |
| 1.3.4 | Subcommittee on Solicitation Laws, 2003 to 2006 | 7 |
| 1.3.5 | Standing Committee on the Status of Women, 2006 to 2007 | 7 |
| 2 | DESCRIPTION AND ANALYSIS | 8 |
| 2.1 | Preamble | 8 |
| 2.2 | Definition of “Weapon” (Clause 2)..... | 8 |
| 2.3 | Extraterritorial Application (Clause 3) | 9 |
| 2.4 | Mistaking the Age of the Victim (Clause 4) | 9 |
| 2.5 | Order of Prohibition (Parks, Schoolgrounds, Internet, etc.) (Clause 5)..... | 9 |
| 2.6 | Seizure of “Advertisement of Sexual Services” (Clauses 6 and 7)..... | 9 |
| 2.7 | Making Sexually Explicit Material Available to a Child with a View to Trafficking (Clause 8)..... | 10 |
| 2.8 | Luring for the Purpose of Human Trafficking (Clause 9) | 10 |
| 2.9 | Agreement or Arrangement via Telecommunication for the Purpose of Human Trafficking (Clause 10) | 11 |

| | | |
|--------|--|----|
| 2.10 | Electronic Surveillance (Clause 11) | 11 |
| 2.11 | Common Bawdy-House (Clause 12) | 11 |
| 2.12 | Procuring, Living on the Avails and Juvenile Prostitution (Clause 13)..... | 12 |
| 2.13 | Offences Related to Communicating in a Public Place for the Purpose of Prostitution (Clauses 14 and 15)..... | 13 |
| 2.14 | Corroboration (Clause 16) | 14 |
| 2.15 | Production of Records to Accused (Clause 17) | 14 |
| 2.16 | Human Trafficking: Increase in Maximum Punishments and Establishment of Minimum Punishments (Clauses 18 and 19) | 15 |
| 2.17 | Prostitution-Related Offences (Clause 20) | 16 |
| 2.17.1 | Obtaining in Any Place Sexual Services for Consideration (New Section 286.1 of the Code) | 18 |
| 2.17.2 | Receiving a Material Benefit from the Sexual Services of Another Person (New Section 286.2 of the Code) | 18 |
| 2.17.3 | Procuring (New Section 286.3 of the Code)..... | 18 |
| 2.17.4 | Advertising the Sexual Services of Another Person (New Section 286.4 of the Code) | 19 |
| 2.17.5 | Immunity in Respect of One's Own Sexual Services (New Section 286.5 of the Code) | 19 |
| 2.18 | Procedure for Protecting the Identity of the Accused, Victims or Witnesses (Clauses 21 and 22) | 20 |
| 2.19 | DNA Sampling (Clauses 23, 24 and 36) | 20 |
| 2.20 | Sex Offender Registry (Clauses 25 to 28, 37 to 40, 44 and 45) | 21 |
| 2.21 | Dangerous Offenders and Long-Term Offenders (Clauses 29 and 30) | 21 |
| 2.22 | Peace Bond – Fear of Sexual Offence in Respect of Persons Under the Age of 16 Years (Clause 31)..... | 22 |
| 2.23 | Consequential Amendments..... | 22 |
| 2.23.1 | Testimony of a Spouse, <i>Canada Evidence Act</i> (Clause 34) | 22 |
| 2.23.2 | Record Suspension, <i>Criminal Records Act</i> (Clause 35) | 22 |
| 2.23.3 | Detention and Conditions of Release, <i>Corrections and Conditional Release Act</i> (Clauses 41 and 42) | 23 |
| 2.23.4 | Confidentiality of Criminal Record, <i>Youth Criminal Justice Act</i> (Clause 43) | 23 |
| 2.24 | Statutory Review (Clause 45.1) | 23 |

LEGISLATIVE SUMMARY OF BILL C-36: AN ACT TO AMEND THE CRIMINAL CODE IN RESPONSE TO THE SUPREME COURT OF CANADA DECISION IN ATTORNEY GENERAL OF CANADA V. BEDFORD AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in *Attorney General of Canada v. Bedford* and to make consequential amendments to other Acts (short title: Protection of Communities and Exploited Persons Act) was introduced in the House of Commons on 4 June 2014 by the Honourable Peter Mackay, Minister of Justice and Attorney General of Canada. On 15 July 2014, the House of Commons Standing Committee on Justice and Human Rights of the made two substantive amendments to the bill.

1.1 OBJECTIVES OF BILL C-36 AND PRINCIPAL AMENDMENTS

The legislative approach in Bill C-36 considerably alters the manner in which the *Criminal Code*¹ addresses voluntary prostitution activities between consenting adults.

Unlike juvenile prostitution, which is specifically prohibited in the Code,² adult prostitution has never been illegal in Canada.³ Thus it is not currently against the law to exchange sex for money. Rather, the Code provisions pertaining to prostitution are intended to curb the public nuisances associated with this practice (sections 210, 211 and 213) and the exploitation of individuals who engage in prostitution activities (section 212). While it is difficult to engage in prostitution without committing a criminal offence, the existing regime allows two types of prostitution:

- street prostitution, provided the communication surrounding the sale and purchase of sexual services occurs outside of public view; and
- so-called “out-calls” – where the prostitute goes out and meets the client at a designated location, such as the client’s home.”⁴ To remain lawful, this location must not be used frequently or regularly for this purpose (see the definition of a “common bawdy-house” in section 1.2.1 of this Legislative Summary).

Bill C-36 criminalizes the purchase of sexual services, thereby making prostitution between adults a *de facto* illegal activity for the first time in Canada’s history. Under the new regime, the act of prostitution can no longer be practised without at least one of the individuals involved committing a crime. Moreover, the bill introduces a notable shift in the legislator’s objectives. The following three overarching objectives apply for all provisions:

- protecting prostitutes, considered to be victims of sexual exploitation;
- “protecting communities from the harms caused by prostitution”; and
- “reducing the demand for sexual services.”⁵

The bill creates two new prostitution-related criminal offences that would:

- prohibit an individual from purchasing sexual services at any time and in any place;
- forbid advertising the sale of others’ sexual services.

In addition, the bill amends the existing provisions on procuring and on communicating for the purpose of prostitution so as to grant a certain degree of immunity to individuals who offer their own sexual services in exchange for consideration and to individuals who have legitimate living arrangements free of exploitation with persons selling sexual services (e.g., roommates, dependants, bodyguards). Prostitutes face prosecution, however, if they communicate for the purpose of selling sexual services in public places where a child could reasonably be expected to be present. The bill also increases the existing penalties for offences related to prostitution and human trafficking, particularly for those involving minors.

The government has announced \$20 million in new funding to support proposed measures to address prostitution. In particular, these funds will support community organizations that provide assistance to vulnerable individuals; they will also support the establishment of programs to assist individuals who want to give up prostitution and rebuild their lives.⁶

1.2 THE CONSTITUTIONAL CHALLENGE BEHIND BILL C-36: THE *BEDFORD* DECISION

In 2007, a group of individuals (current and former sex workers) launched a court challenge to the constitutionality of three provisions of the Code pertaining to prostitution.

In a unanimous decision (the *Bedford* decision) rendered on 20 December 2013, the Supreme Court of Canada invalidated the three impugned provisions. The Court held that sections 210 (keeping a common bawdy-house), 212(1)(j) (living on the avails of prostitution) and 213(1)(c) (communicating for the purpose of engaging in prostitution) of the *Criminal Code* imposed dangerous conditions on prostitution and violated section 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees the right to life, liberty and security of the person.⁷

In its decision, the Court recognized that the impugned provisions had a negative impact on the security of prostitutes and that the state had a responsibility to protect those individuals:

The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky – but legal – activity from taking steps to protect themselves from the risks [para. 60] [Emphasis in original] ...

It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence. [para. 89].

The Court suspended the declaration of invalidity for one year in order to give Parliament sufficient time to respond.

It should be noted that the Court did not rule on whether an amendment to the Code making prostitution illegal would be constitutional. In its decision, the Court clearly stated that the appeal is “not about whether prostitution should be legal or not. [It is] about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster” [para. 2].

Moreover, the Court made it clear that its decision does not prevent Parliament from imposing restrictions on the manner in which prostitution is practised and the places where it may be practised, so long as those restrictions do not infringe upon the constitutional rights of prostitutes:

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 [para. 165].

The following sections of this Legislative Summary examine the existing Code provisions concerning prostitution and discuss the analysis in the *Bedford* decision and the implications of that decision.

1.2.1 SECTIONS 210 AND 211 – PROVISIONS PERTAINING TO COMMON BAWDY-HOUSES

Sections 210 and 211 of the Code prohibit the keeping of a common bawdy-house, the presence of individuals in a common bawdy-house without lawful excuse, and the transportation of persons to a common bawdy-house. A common bawdy-house is a place that is kept, occupied or resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency.⁸

Courts have interpreted the definition broadly to mean that any defined space is capable of being a “common bawdy-house,” provided that there is frequent or habitual use of it for the purposes of prostitution or for the practice of acts of indecency, and that the premises are controlled or managed by individuals selling sexual services or individuals with a right or interest in that space.⁹

To be found guilty of keeping a common bawdy-house, a person need not necessarily participate in sexual acts; however, the person must have some degree

of control over the care and management of the premises and must participate to some extent in the illicit activities that take place there.¹⁰ A person who uses his or her own residence or any other fixed location as a place in which to exchange his or her sexual services for money may therefore be charged under section 210 of the Code and is liable to imprisonment for a term of up to two years.

1.2.1.1 ANALYSIS OF SECTION 210 IN *BEDFORD*

The Court's decision in *Bedford* invalidated section 210 of the Code, with respect to prostitution. The Court pointed out that this provision is prejudicial to the security of prostitutes and thus negatively impacts the security of the person rights guaranteed by section 7 of the Charter.¹¹ The Court held that prohibiting prostitutes from working in a fixed location prevents the application of safeguards, such as the installation of surveillance devices and the hiring of a receptionist or a security guard. The prohibition also prevents the existence of safe houses to which prostitutes working on the street can take clients (para. 64).

1.2.2 SECTION 212 – PROCURING

Section 212 of the Code prohibits procuring and carries stiff penalties, with potential imprisonment of up to 14 years for offences relating to persons under the age of 18 years. Section 212(1) of the Code lists 10 acts that can be considered procuring; these include enticing a person into prostitution and living on the avails of prostitution of another person.

Section 212 also contains the general prohibition concerning juvenile prostitution. Section 212(4) currently states that every person who obtains for consideration the sexual services of a person who is under the age of 18 years is guilty of an indictable offence and liable to imprisonment for a term of up to five years. Section 212(2) makes it an indictable offence for any person to live wholly or in part on the avails of prostitution of a minor. Anyone found guilty of such an offence is liable to imprisonment for two to 14 years. A minimum penalty of five years is provided in cases where it is demonstrated that someone aided, abetted, counselled or compelled a person under the age of 18 to engage in or carry on prostitution activities or used, threatened to use or attempted to use violence, intimidation or coercion against that person for that purpose (section 212(2.1)). In all cases, the belief that a young person was at least 18 years of age at the time of the offence does not constitute a defence (see section 150.1(5)).

Lastly, “[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution” (section 212(3)).

1.2.2.1 ANALYSIS OF SECTION 212(1)(J) IN *BEDFORD*

In the *Bedford* case, the Court invalidated section 212(1)(j), which prohibits living wholly or in part on the avails of prostitution of another person. Of the 10 acts of procurement listed in section 212(1), this is the only one that was challenged.

The Court held that this provision, the purpose of which is to target pimps and the parasitic, exploitative conduct in which they engage (such as a pimp who forces a person into prostitution and lives off the avails of the prostitution), is overbroad in scope, since anyone who provides a service to a prostitute is liable to be prosecuted simply because of the manner in which the prostitute makes a living. Section 212(1)(j) therefore has the effect of preventing prostitutes from taking steps – such as hiring a driver or bodyguard – to reduce the risks they face. The Court concluded:

The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad [para. 142].

1.2.3 SECTION 213 – THE PROVISION ON COMMUNICATING

The purpose of section 213 of the Code is to control the public nuisances associated with street prostitution, including the harassment of passers-by and disruptions to the free flow of traffic and the free use of goods. It is the public aspects of prostitution that are targeted by this section.

It is illegal, in a public place, to stop a motor vehicle or to communicate for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute. Anyone who commits such an offence is liable to imprisonment for up to six months or a fine of \$5,000 or both. This is the prostitution-related law most often enforced by police.

1.2.3.1 ANALYSIS OF SECTION 213(1)(C) IN *BEDFORD*

Despite the precedent set in 1990 by the Supreme Court in the *Prostitution Reference*,¹² the Court's decision in *Bedford* invalidated section 213(1)(c) of the Code. The Court held that this provision contravened section 7 of the Charter, because “[b]y prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses” (para. 71). This prohibition also has the effect of forcing prostitutes to move to more isolated areas. The Court held that the negative impact on the right to life and security for street prostitutes is entirely disproportionate to the objective of the provision, which is to stop the nuisance caused by street prostitution.

1.3 CANADIAN STUDIES OF *CRIMINAL CODE* PROVISIONS RELATING TO ADULT PROSTITUTION

While everyone agrees that juvenile prostitution and forced prostitution are forms of sexual exploitation that must entail severe criminal penalties, Canadian public opinion remains divided on the issue of voluntary prostitution between adults.¹³

The Code provisions pertaining to adult prostitution have been studied and debated in various contexts since the start of the 1980s. At the federal level, the subject has been analyzed by a number of committees and by a federal–provincial–territorial working group. Since the publication of these studies, several amendments have been made to the Code in order to crack down on juvenile prostitution, but no substantial changes have been made to the regime governing adult prostitution. This may be the result of continuing differences of opinion concerning how best to approach the issue¹⁴ – most of the committees and working groups that have considered the matter have been unable to come to any agreement on an appropriate approach.

1.3.1 FRASER COMMITTEE, 1983 TO 1985

The Special Committee on Pornography and Prostitution (better known as the “Fraser Committee,” after the name of its chairperson) did make recommendations on approaches to prostitution. Established in June 1983 by the Department of Justice, its mandate was to study problems related to pornography and prostitution and to recommend legal and social reforms to address those problems.

In its report,¹⁵ which was released in 1985, the Committee recommended harsher criminal penalties for offences related to street prostitution. However, it suggested that one or two prostitutes working at home should not be subject to prosecution under the provisions of the Code. The Committee also recommended that offences related to procuring and living on the avails of prostitution be amended to restrict their scope to situations involving exploitation.

Lastly, taking the view that legal reform would not be sufficient to properly address prostitution-related problems, the Committee recommended the implementation of various social measures and policies, including a stronger commitment on the part of governments to eliminate the economic and social inequalities between men and women, as well as discrimination on the basis of sexual orientation (recommendation 50) and to establish social programs to assist women and young people in need (recommendation 51).

1.3.2 STANDING COMMITTEE ON JUSTICE AND THE SOLICITOR GENERAL, 1990

Not long after the publication of the Fraser Report, the government tabled Bill C-49,¹⁶ which created the offence of communicating for the purposes of prostitution as it currently exists (section 213 of the Code). The bill provided for a parliamentary review of the new provision three years after it came into force; this review was carried out by the House of Commons Standing Committee on Justice and the Solicitor General.

In its report published in October 1990,¹⁷ the Standing Committee found that the objective of this section of the Code, specifically to reduce the public nuisances caused by these activities, had not been achieved. Instead, the effect of the provision had been to displace the problem elsewhere. In order to curb street prostitution, the Standing Committee recommended in particular that programs be developed to fund agencies that help those involved in prostitution to leave prostitution.

1.3.3 FEDERAL–PROVINCIAL–TERRITORIAL WORKING GROUP ON PROSTITUTION, 1992 TO 1998

The Federal–Provincial–Territorial Working Group on Prostitution was established in 1992 by the federal, provincial and territorial deputy ministers responsible for justice. The Group's mandate was to review legislation, policy and practices concerning prostitution-related activities; it was also asked to bring forward recommendations to address any problems that were identified.

Despite six years of cooperative work, the Group failed to come up with a consensus proposal for the reform of laws governing voluntary prostitution between adults.

In its final report,¹⁸ the Group recommended, among other things, that governments review their social programs (e.g., housing, crisis intervention and counselling services) to ensure that they effectively met the needs of persons who engaged in prostitution.

1.3.4 SUBCOMMITTEE ON SOLICITATION LAWS, 2003 TO 2006

A subcommittee of the House of Commons Standing Committee on Justice and Human Rights was established in February 2003 pursuant to a motion adopted unanimously by the House of Commons. The Subcommittee on Solicitation Laws was asked to examine the laws governing prostitution in Canada in order “to improve the safety of sex-trade workers and communities overall, and to recommend the changes necessary to reduce the exploitation of and violence against sex-trade workers.”¹⁹

Published in December 2006, the Subcommittee's report took into account testimony from approximately 300 researchers, policy experts, social advocates, lawyers, police officers, private citizens, and persons involved in prostitution from across the country. The report contained seven recommendations, two of which pertain to sexual exploitation and forced prostitution.

Although the Subcommittee felt that the status quo in criminal law as it applied to voluntary prostitution between adults was unacceptable, differences of opinion among its members prevented it from proposing a legal reform in this respect. The Subcommittee did recommend that the government develop awareness campaigns and programs “to prevent people from entering prostitution because of lack of choice or coercion” and that it invest resources “to obtain a clearer picture of prostitution activities in the country, the associated problems, and the needs of people involved in those activities.”²⁰

1.3.5 STANDING COMMITTEE ON THE STATUS OF WOMEN, 2006 TO 2007

In its 2007 report on human trafficking for the purpose of sexual exploitation,²¹ the House of Commons Standing Committee on the Status of Women recommended that the Code be amended in order to criminalize the purchase of sexual services and decriminalize the sale of such services, thereby shielding prostitutes from criminal sanctions for having engaged in prostitution. The Committee also recommended that persons selling sexual services be given the protection and assistance to which they are entitled as victims of sexual exploitation and access to adequate services to allow them to leave the prostitution environment.²²

2 DESCRIPTION AND ANALYSIS

Bill C-36 comprises a preamble and a total of 49 clauses. Some clauses make consequential amendments (e.g., by replicating Code offences in the *National Defence Act*)²³ or technical amendments (e.g., amending the wording of the English text in clause 17(1) of the bill) or reformulations aimed at clarifying the legislator's intent (e.g., in clause 17(3) of the bill). In addition, several sections of legislation are amended to include offences created by the bill in existing lists of offences (e.g., with respect to the dangerous offender registry and DNA sampling).

Rather than reviewing all of the bill's provisions, the following analysis emphasizes the substantive amendments brought about by the bill.

2.1 PREAMBLE

The preamble to Bill C-36 sets out the guiding principles for the legislation. It begins by stating that exploitation is inherent in prostitution and that prostitution leads to the objectification of the human body, thereby causing irreparable harm to society in general.

The original purpose of sections 210, 211 and 213 of the Code was to prevent nuisances, as noted by the Supreme Court of Canada in its decision in *Bedford*. However, the legislator is clearly signalling a shift in direction through the *de facto* prohibition of prostitution. Thus the government's new objectives with regard to prostitution are to protect communities – in particular, women and children – and persons who engage in prostitution, who are considered victims themselves, and to reduce the demand for sexual services.

The preamble then emphasizes that the commercialization and institutionalization of prostitution exacerbate its negative impact and inherent exploitation. The bill therefore criminalizes the purchase of sexual services and, in general, the advertising of such services in order to curb both the demand for and the commercial supply of those services.

The bill nevertheless grants a certain degree of immunity to persons who sell their sexual services so as to encourage them, as the preamble puts it, to report incidents of violence and to leave prostitution.

2.2 DEFINITION OF "WEAPON" (CLAUSE 2)

The definition of the term "weapon" in section 2 of the Code is extremely broad. What is important is not the thing itself, but rather the intent that is brought to bear in using that thing to kill, injure, threaten or intimidate a person or persons; thus a beer bottle could be considered as much a weapon as a knife. This definition applies to all relevant offences in the Code.

In reference to the specific Code offences of carrying a weapon for a purpose that is dangerous to the public peace or for the purpose of committing an offence (section 88), assault with a weapon (section 267) and sexual assault with a weapon (section 272), the bill supplements the definition of the term "weapon" by adding the following: "any

thing used, designed to be used or intended for use in binding or tying up a person against their will.” This would, for instance, include such items as handcuffs, rope, adhesive tape and tie wraps.

2.3 EXTRATERRITORIAL APPLICATION (CLAUSE 3)

Generally, offences under the Code apply only to acts committed within Canadian territory. However, exceptions to this principle of territoriality are provided in section 7 of the Code; these include terrorism offences, human trafficking and sexual offences against children. In this last example, the bill provides that anyone who obtains for consideration the sexual services of a minor outside Canada faces the new minimum (6 months or 1 year) and maximum (10 years) penalties.

2.4 MISTAKING THE AGE OF THE VICTIM (CLAUSE 4)

Section 150.1(5) of the Code states in reference to a number of listed offences that the belief that a victim was at least 18 years of age generally does not constitute a defence, unless the accused can prove that he or she took all reasonable steps to ascertain the age of the victim. The bill adds the procuring of a minor (current section 212(2.1), replaced by new section 286.3(2) of the Code) to the list of offences set out in section 150.1(5) of the Code.

2.5 ORDER OF PROHIBITION (PARKS, SCHOOLGROUNDS, INTERNET, ETC.) (CLAUSE 5)

Section 161 of the Code permits a court to make an order prohibiting an offender from, among other things, attending a public park or a schoolground, having any contact with a person who is under the age of 16 or using the Internet. The order may be issued if the accused is found guilty of a listed sexual offence against a victim of less than 16 years of age.

The bill adds the three existing offences pertaining to trafficking of minors (sections 279.011, 279.02 and 279.03 of the Code) to the list of offences for which such an order of prohibition may be imposed.

2.6 SEIZURE OF “ADVERTISEMENT OF SEXUAL SERVICES” (CLAUSES 6 AND 7)

A judge may currently issue a warrant to authorize seizure of physical (section 164) or digital (section 164.1) materials that are a voyeuristic recording or child pornography. In addition, section 164.1 of the Code currently allows the court to order the custodian of a computer system on which there is voyeuristic material, child pornography or associated data to:

- provide the court with an electronic copy;
- ensure that the material is no longer stored and available through the computer system; and
- provide information to identify and locate the person who posted the material.

Clauses 6 and 7 of Bill C-36 add “advertisement of sexual services” to the list of materials for which a judge may issue a physical or digital seizure order. Clause 6(4) defines “advertisement of sexual services” to mean “any material – including a photographic, film, video, audio or other recording, made by any means, a visual representation or any written material – that is used to advertise sexual services [for consideration].”

2.7 MAKING SEXUALLY EXPLICIT MATERIAL AVAILABLE TO A CHILD WITH A VIEW TO TRAFFICKING (CLAUSE 8)

In 2012, Bill C-10 (*Safe Streets and Communities Act*)²⁴ created the offence of making sexually explicit material available to persons under 18 years of age with a view to facilitating the commission against them of one of the offences – generally sexual in nature – listed in section 171.1 of the Code.

Bill C-36 adds the three existing offences pertaining to trafficking of minors (sections 279.011, 279.02 and 279.03 of the Code) to the offences listed in section 171.1(1)(a) of the Code. Accordingly, an accused person convicted of having made sexually explicit material available to a person under 18 years of age for the purpose of facilitating the commission of a trafficking-related offence against that person shall be liable to the following penalties:

- upon indictment – imprisonment for a term of between 90 days and two years; or
- upon summary conviction – imprisonment for a term of between 30 days and six months.

2.8 LURING FOR THE PURPOSE OF HUMAN TRAFFICKING (CLAUSE 9)

The offence of luring a child, created in 2002, consists in communicating, via any means of telecommunication, with a person under 18 years of age for the purpose of facilitating the commission of one of the offences with respect to that person – generally a sexual offence – listed in section 172.1 of the Code.

As it does for the offence of making sexually explicit material available to a person under 18 years of age, the bill adds the three existing offences pertaining to trafficking of minors (sections 279.011, 279.02 and 279.03 of the Code) to the list of offences. Consequently, an accused person convicted of having lured a person under 18 years of age for the purpose of facilitating the commission of a trafficking-related offence against that person shall be liable to the following penalties:

- upon indictment – imprisonment for a term of between one year and 10 years; or
- upon summary conviction – imprisonment for a term of between 90 days and 18 months.

2.9 AGREEMENT OR ARRANGEMENT VIA TELECOMMUNICATION FOR THE PURPOSE OF HUMAN TRAFFICKING (CLAUSE 10)

In 2012, Bill C-10 also made it an offence to agree or arrange with another person, by any means of telecommunication, to commit one of the offences – generally of a sexual nature – mentioned in section 172.2 of the Code.

As it does for the offences of making sexually explicit material available to a minor and luring, Bill C-36 adds to the list of offences the three existing offences pertaining to trafficking of minors (sections 279.011, 279.02 and 279.03 of the Code). An accused person convicted of having made an agreement or arrangement with another person over the Internet to commit a human trafficking offence in respect of a person under 18 years of age shall be liable to the same minimum and maximum sentences as those provided for luring (i.e., a term of one year to 10 years upon indictment or of 90 days to 18 months upon summary conviction).

2.10 ELECTRONIC SURVEILLANCE (CLAUSE 11)

Section 183 of the Code lists the offences for which law enforcement agencies may, generally under the authority of a warrant, conduct electronic surveillance activities. The bill amends section 183 of the *Criminal Code* by adding two new offences to the list of offences:

- obtaining the sexual services of an adult for consideration (new section 286.1(1)); and
- advertising sexual services for consideration (new section 286.4).

2.11 COMMON BAWDY-HOUSE (CLAUSE 12)

In the *Bedford* decision, the Court invalidated section 210 of the Code with respect to prostitution. This section made it a criminal offence to keep, reside in, be found in or own a common bawdy-house.

The bill does not repeal section 210 in its entirety. Instead, it amends the definition of the term “common bawdy-house” to eliminate all reference to prostitution as such; it also repeals the definition of “prostitute” in section 197(1) of the Code. Table 1 contrasts the current provisions with the amendments brought about by Bill C-36.

Table 1 – Definitions in Section 197(1) of the *Criminal Code*
Repealed or Amended by Bill C-36

| Current Section 197(1) of the <i>Criminal Code</i> | Bill C-36 |
|--|--|
| "prostitute" means a person of either sex who engages in prostitution. | [Definition repealed.] |
| "common bawdy-house" means a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency. [Invalidated in <i>Bedford</i> , with respect to prostitution.] | "common bawdy-house" means, for the practice of acts of indecency, a place that is kept or occupied or resorted to by one or more persons ["for the purpose of prostitution" removed]. |

Keeping a common bawdy-house (as well as residing in, being found in and owning a common bawdy-house) will therefore remain illegal, but only if the acts committed therein are considered indecent.²⁵ According to the Supreme Court of Canada, an "indecent act" is one that presents a significant risk of harm to individuals or society in general in a way that is formally recognized by society as being incompatible with the proper functioning of society.²⁶

Since prostitution is not an indecent act in and of itself, it would therefore be possible under new section 210 to legally keep a house of prostitution. The new regime under sections 286.1 to 286.3 nevertheless imposes a certain number of restrictions because, unless otherwise provided, anyone who profits from the prostitution activities (whether considered indecent or not) of another person will remain subject to criminal sanctions.²⁷

In this context, it will be legal for persons to:

- engage in prostitution activities at home or in premises designated for this purpose, so long as they do not profit from the prostitution activities of another person;
- allow a prostitute to use particular premises for this purpose (e.g., a hotel or community agency providing premises to one or more prostitutes), so long as they do not advise or encourage the person to engage in prostitution activities (new sections 286.2(4)(c) and 286.2(4)(d)).

A detailed explanation of the offence of receiving a material benefit from sexual services is provided in section 2.17.2 of this Legislative Summary.

2.12 PROCURING, LIVING ON THE AVAILS AND JUVENILE PROSTITUTION (CLAUSE 13)

Section 212 of the Code currently deals with several offences:

- procuring (e.g., by aiding, abetting or compelling a person to engage in prostitution (sections 212(1) and 212(2.1)));

- living on the avails of prostitution of another person (section 212(1)(j) and section 212(2)); and
- obtaining for consideration the sexual services of a minor (section 212(4)).

In *Bedford*, the Court found the wording of section 212(1)(j) of the Code to be overly broad in scope and consequently invalidated it (see section 1.2.2.1 of this Legislative Summary). The bill repeals section 212 in its entirety. However, it reformulates the offences from section 212 and shifts them to new sections 286.1 to 286.3. These new sections are discussed in section 2.17.2 of this Legislative Summary.

2.13 OFFENCES RELATED TO COMMUNICATING IN A PUBLIC PLACE FOR THE PURPOSE OF PROSTITUTION (CLAUSES 14 AND 15)

In keeping with its replacement of any reference to “prostitution” (which presupposes an exchange of money)²⁸ with “sexual services for consideration” (which also includes an exchange of services), clause 14 of the bill amends the heading preceding the offence related to communicating in a public place, which currently reads “Offence in Relation to Prostitution,” with “Offences in Relation to Offering, Providing or Obtaining Sexual Services for Consideration.”

The bill does not amend the offences set out in sections 213(1)(a) and 213(1)(b), which are consequently maintained. However, in clause 15(2), it repeals the offence currently set out in section 213(1)(c) of the Code, specifically, in a public place, “stop[ping] or attempt[ing] to stop any person or in any manner communicat[ing] or attempt[ing] to communicate with any person for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute.” This section was invalidated in the *Bedford* decision (see section 1.2.3.1 of this Legislative Summary).

Clause 15(3) of the bill then creates an offence similar to that currently provided in section 213(1)(c) of the Code, but with the addition of a condition limiting its scope. Under the terms of new section 213(1.1), which was amended by the House of Commons Standing Committee on Justice and Human Rights, it will be possible for a prostitute to communicate in a public place for the purpose of offering his or her sexual services, unless it is a place that is “open to public view, that is or is next to a school ground, playground or daycare centre.”²⁹

Unlike the existing offence – which targets both clients *and* prostitutes – the new offence applies only to persons selling sex (new section 213(1.1)). In addition, the new provision retains the existing definition of what constitutes a “public place.”

Table 2 presents the amendments brought about by Bill C-36 to section 213 of the Code.

Table 2 – Amendments in Bill C-36 to Offences Provided for in Section 213 of the *Criminal Code*

| Current Section 213(1) of the <i>Criminal Code</i> | Bill C-36 |
|--|---|
| <p>Section 213(1): Every person who in a public place or in any place open to public view</p> <p>(a) stops or attempts to stop any motor vehicle,</p> <p>(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or</p> <p>(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person [invalidated in <i>Bedford</i>]</p> <p>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.</p> | <p>Section 213(1): Everyone is guilty of an offence punishable on summary conviction who, in a public place or in any place open to public view, for the purpose of offering, providing or obtaining sexual services for consideration,</p> <p>(a) stops or attempts to stop any motor vehicle, or</p> <p>(b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place.</p> <p>[Section 213(1)(c) is repealed.]</p> <p>Section 231(1.1) Everyone is guilty of an offence punishable on summary conviction who communicates with any person – <i>for the purpose of offering or providing sexual services for consideration</i> – in a public place, or in any place open to public view, <i>that is or is next to a school ground, playground or daycare centre.</i> [Authors' emphasis]</p> |

The new provision remains a summary conviction offence (for which fingerprinting is not permitted)³⁰ liable to the same penalties as are currently in force – a fine of up to \$5,000 or a term of imprisonment not exceeding six months or both.³¹

2.14 CORROBORATION (CLAUSE 16)

Section 274 of the Code sets out a list of offences for which no corroboration is required for a conviction. These are primarily sexual offences against minors or adults, where quite often the judge of fact is confronted with two pieces of conflicting evidence. The bill adds to this list the new offence of obtaining the sexual services of an adult for consideration (new section 286.1(1) of the Code).

In a case where a person is charged with having obtained the sexual services of an adult for consideration and conflicting testimony is presented by the client and the prostitute, the judge may no longer instruct the jury that it would be unwise to find the accused guilty in the absence of corroboration.

2.15 PRODUCTION OF RECORDS TO ACCUSED (CLAUSE 17)

In 1997, Bill C-46³² established a two-stage process for limiting production to the accused, during the disclosure of evidence, of records relating to a complainant or witness. This process places greater emphasis on the equality and privacy rights of complainants, and therefore imposes a more onerous test for the defence to meet.

Section 278.2(1) of the Code sets out the list of offences for which no record relating to a complainant or a witness may be produced to an accused other than by means of the process set out in sections 278.3 to 278.91. This list comprises sexual offences against children, incest, prostitution, indecent acts, sexual assaults and other sexual offences. Clause 17(2) of Bill C-36 adds to this list the existing offences

for human trafficking and the new offence of obtaining the sexual services of an adult for consideration (sections 279.01, 279.011, 279.02, 279.03 and 286.1(1)).

In its 2012 study of the application of Bill C-46, the Standing Senate Committee on Legal and Constitutional Affairs noted that

this list may not include historical sexual offences committed prior to 1970, which could be particularly relevant in prosecutions of sexual offences committed against Aboriginal children in residential schools.³³

Further to the Senate Committee's recommendation, clause 17(3) of Bill C-36 stipulates that the list also comprises all historical sexual offences (new section 278.2(1)(b) of the Code).

2.16 HUMAN TRAFFICKING: INCREASE IN MAXIMUM PUNISHMENTS AND ESTABLISHMENT OF MINIMUM PUNISHMENTS (CLAUSES 18 AND 19)

Unlike the current offence of trafficking of minors, trafficking of adults does not comprise minimum punishments. Clause 18 of Bill C-36 adds minimum penalties of five and four years – depending on the infraction committed while trafficking³⁴ – to the offence of trafficking of adults.

Clause 19 increases the maximum penalty (from 10 years to 14 years) and adds a minimum penalty (two years) for the infraction of receiving a material benefit from trafficking of minors. It also increases the maximum penalty (from five to 10 years) and adds a minimum penalty (one year) for the infraction of withholding or destroying documents to facilitate trafficking of minors.

Table 3 shows the amendments made to the sentences stipulated in sections 279.01 to 279.03 of the Code.

Table 3 – Bill C-36 Amendments to Sentences Provided for in
Sections 279.01 to 279.03 of the *Criminal Code*

| Offences | Current Punishments | Punishments in Bill C-36 |
|---|---|---|
| Trafficking of adults (section 279.01 of the Code) | (a) if the trafficker also kidnaps, commits an aggravated assault or aggravated sexual assault against, or causes the death of the victim: <ul style="list-style-type: none"> • Maximum: life (b) other cases: <ul style="list-style-type: none"> • Maximum: 14 years | (a) if the trafficker also kidnaps, commits an aggravated assault or aggravated sexual assault against, or causes the death of the victim: <ul style="list-style-type: none"> • Maximum: life • Minimum: 5 years (b) other cases: <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 4 years |
| Receiving a material benefit from trafficking of minors (section 279.02(2) of the Code) | <ul style="list-style-type: none"> • Maximum: 10 years | <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 2 years |
| Withholding or destroying documents to facilitate trafficking of minors (section 279.03(2) of the Code) | <ul style="list-style-type: none"> • Maximum: 5 years | <ul style="list-style-type: none"> • Maximum: 10 years • Minimum: 1 year |

2.17 PROSTITUTION-RELATED OFFENCES (CLAUSE 20)

Table 4 summarizes the principal amendments brought about by clause 20 of the bill to the offences and punishments regarding prostitution set out in the Code.

Table 4 – Amendments Made by Bill C-36 to *Criminal Code* Offences and Punishments Regarding Prostitution

| Current Offences and Punishments | Offences and Punishments in Bill C-36 |
|---|---|
| <p>No specific offence for obtaining, for consideration, the sexual services of an adult or for communicating for the purposes of obtaining such services.</p> <p>However, if “in a public place,” the person may be accused of communication-related offences (sections 213(1)(a) and 213(1)(b) of the Code).</p> <ul style="list-style-type: none"> Maximum: 6 months and/or \$5,000 | <p>Obtaining, for consideration, the sexual services of an adult or communicating for the purposes of obtaining such services [“in any place”] (section 286.1(1) of the Code)</p> <ul style="list-style-type: none"> Indictable offence: <ul style="list-style-type: none"> Maximum: 5 years Minimum: <ul style="list-style-type: none"> A public place, where minors may be present, or next to a religious institution: <ul style="list-style-type: none"> \$2,000 (first offence) \$4,000 (subsequent offences) In other cases: <ul style="list-style-type: none"> \$1,000 (first offence) \$2,000 (subsequent offences) Offence punishable on summary conviction: <ul style="list-style-type: none"> Maximum: 18 months Minimum: <ul style="list-style-type: none"> A public place, where minors may be present, or next to a religious establishment: <ul style="list-style-type: none"> \$1,000 (first offence), \$2,000 (subsequent offences) In other cases: <ul style="list-style-type: none"> \$500 (first offence) \$1,000 (subsequent offences) |

LEGISLATIVE SUMMARY OF BILL C-36

| Current Offences and Punishments | Offences and Punishments in Bill C-36 |
|---|--|
| <p>Obtaining, for consideration, the sexual services of a minor ["in any place"] (section 212(4) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 5 years • Minimum: 6 months | <p>Obtaining, for consideration, the sexual services of a minor or communicating for the purposes of obtaining such services ["in any place"] (section 286.1(2) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 10 years • Minimum: 6 months (1st offence), 1 year (subsequent offences) |
| <p>Living on the avails of prostitution of an adult (section 212(1)(j) of the Code – invalidated in <i>Bedford</i>)</p> <ul style="list-style-type: none"> • Maximum: 10 years | <p>Receiving a material benefit from the sexual services of an adult (section 286.2(1) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 10 years <p><i>Note: Exceptions to this offence are provided in new section 286.5(1)(a) for the provision of one's own sexual services and in new section 286.2(4) for dependants and legitimate, non-violent relationships (bodyguards, family, etc.), for example. However, limits to the latter exceptions are set out in new section 286.2(5) to prevent exploitation.</i></p> |
| <p>Living on the avails of prostitution of a minor (section 212(2) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 2 years | <p>Receiving a material benefit from the sexual services of a minor (section 286.2(2) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 2 years <p><i>Note: Exceptions to this offence are provided in new section 286.5(1)(a) for the provision of one's own sexual services and in new section 286.2(4) for dependants and legitimate, non-violent relationships (bodyguards, family, etc.), for example. However, limits to the latter exceptions are set out in new section 286.2(5) to prevent exploitation.</i></p> |
| <p>Procuring an adult (section 212(1) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 10 years | <p>Procuring an adult (section 286.3(1) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 14 years |
| <p>Procuring a minor [aiding, abetting, coercing, threatening, etc.] (section 212(2.1) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 5 years | <p>Procuring a minor [recruiting, holding, harbouring, controlling, etc.] (section 286.3(2) of the Code)</p> <ul style="list-style-type: none"> • Maximum: 14 years • Minimum: 5 years |
| <p>No specific offence for advertising sexual services.</p> | <p>Advertising sexual services</p> <ul style="list-style-type: none"> • Maximum (indictable offence): 5 years • Maximum (summary conviction): 18 months <p><i>Note: An exception is set out in new section 286.5(1)(b) for advertising one's own sexual services.</i></p> |

2.17.1 OBTAINING IN ANY PLACE SEXUAL SERVICES FOR CONSIDERATION (NEW SECTION 286.1 OF THE CODE)

Bill C-36's criminalization of obtaining, in any place, sexual services for consideration constitutes a *de facto* prohibition of prostitution between consenting adults.

The new offence of obtaining, for consideration, or communicating with anyone for the purpose of obtaining, for consideration, the sexual services of an adult is punishable by minimum fines of \$500 to \$1,000. These are doubled for a subsequent offence or when the offence is committed in a public place that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where minors can reasonably be expected to be present (new section 286.1(1) of the Code).

For the offence of obtaining, for consideration, or communicating with anyone for the purpose of obtaining, for consideration, the sexual services of a minor, the bill increases the maximum punishment from five years to 10 years of imprisonment and imposes a minimum punishment of one year for a subsequent offence (new section 286.1(2) of the Code).

2.17.2 RECEIVING A MATERIAL BENEFIT FROM THE SEXUAL SERVICES OF ANOTHER PERSON (NEW SECTION 286.2 OF THE CODE)

Bill C-36 reformulates the offence of living on the avails of prostitution so as to limit its scope and provides the same penalties as currently exist in sections 212(1)(j) and 212(2) (repealed and replaced by new section 286.2).³⁵ It does specify, however, that receiving a benefit in the context of a commercial enterprise that offers sexual services for consideration constitutes an aggravating factor warranting a harsher penalty (new section 286.2(6) of the Code).

In response to the *Bedford* decision, in which the Court held that section 212(1)(j) was overbroad in respect of section 7 of the Charter because it encompasses clearly non-exploitive relationships, the legislator has provided exceptions to the offence of receiving a material benefit from sexual services.

These exceptions – listed exhaustively in new section 286.2(4) and limited to non-exploitive relations within the meaning of section 286.2(5) – essentially refer to persons who have legitimate relations with a person involved in prostitution, such as co-tenants, children and other dependants, certain employees (such as receptionists, drivers or bodyguards) or certain firms that do business with the general public (e.g., Internet service providers).

2.17.3 PROCURING (NEW SECTION 286.3 OF THE CODE)

The bill reframes the offence of procuring. According to terms of new section 286.3 of the Code:

[e]veryone who procures a person to offer or provide sexual services for consideration or, for the purpose of facilitating an offence [of obtaining sexual services for consideration], recruits, holds, conceals or harbours a person who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an ... offence.

The bill increases the maximum punishment for procuring an adult to 14 years of imprisonment from 10 years of imprisonment. The punishment for procuring a minor remains unchanged (a minimum of 5 years and a maximum of 14 years of imprisonment).

2.17.4 ADVERTISING THE SEXUAL SERVICES OF ANOTHER PERSON (NEW SECTION 286.4 OF THE CODE)

Under the terms of the bill, anyone who advertises in any way (written material, photograph, video, etc.) the sexual services of another person for consideration commits an offence. Anyone who makes such advertising available to the public (e.g., the owner of a website) may only be found guilty of an offence if he or she acted knowingly, that is, if that individual was aware of the content of the advertising in question.

Unlike the new section that prohibits receiving a material benefit from the prostitution of another person (new section 286.2 of the Code), new section 286.4 added by the bill does not provide any exceptions to the offence of advertising, other than that allowing persons to advertise their own sexual services.

Under new sections 164 and 164.1 of the Code, a judge may order the seizure and removal from circulation of any advertising material offering sexual services (see section 2.6 of this Legislative Summary).

2.17.5 IMMUNITY IN RESPECT OF ONE'S OWN SEXUAL SERVICES (NEW SECTION 286.5 OF THE CODE)

Given that persons selling sexual services are henceforth considered victims of sexual exploitation, the bill stipulates that these persons cannot be found guilty of:

- receiving a material benefit from or advertising sexual services if the services in question are their *own* sexual services (new section 286.5(1));
- aiding, abetting, conspiring or attempting to commit an offence related to the “commodification of sexual activity” set out in the bill (purchasing sexual services, receiving a material benefit, procuring and advertising sexual services) or to have counselled a person to participate or have conspired to have the person participate *if the offence is related to their own sexual services* (for example, a prostitute who encourages a co-worker to be a party to a sexual act with a client [new section 286.5(2)]).

Such immunity, however, does not extend to the offence of communicating in a public place for the purposes of prostitution, as set out in new section 213(1.1) of the Code (see section 2.13 of this Legislative Summary). According to the wording of

section 213(1.1), a person communicating for the purposes of prostitution in a public place that is recognized to be a place where the prostitution of minors occurs (even in an industrial district or a park at 3 a.m.) could conceivably be liable to the punishment provided in this section, namely, a maximum fine of \$5,000 and/or imprisonment for a maximum term of six months.

2.18 PROCEDURE FOR PROTECTING THE IDENTITY OF THE ACCUSED, VICTIMS OR WITNESSES (CLAUSES 21 AND 22)

Criminal proceedings are generally held in open court. However, the presiding judge may order that the public be excluded in certain circumstances, as in cases where the judge is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice, or to protect the identity of witnesses under the age of 18.

Section 486(3) of the Code sets out a list of offences – generally sexual in nature – for which the presiding judge must justify a decision to deny a request by the prosecutor or the accused to order the exclusion of the public. Clause 21 adds to this list the new offence of obtaining, for consideration, the sexual services of an adult (new section 286.1(1) of the Code).

Section 486.4(1) of the Code also sets out a list of offences – generally sexual in nature – for which the presiding judge *may* order a publication ban on all information that could identify a victim or witness. The judge is *required*, upon request, to issue such a non-publication order if the victim of an offence or any witness is under 18 years of age. Clause 22 adds to this list the new offence of obtaining, for consideration, the sexual services of an adult (new section 286.1(1) of the Code).

2.19 DNA SAMPLING (CLAUSES 23, 24 AND 36)

Section 487.04 of the Code sets out a list of offences for which, upon conviction, samples of bodily substances may be taken from the offender for forensic DNA analysis purposes.

Clause 23 amends section 487.04 such that:

- a person convicted of an offence related to trafficking of minors *shall automatically be subject* to DNA sampling;
- a person convicted of an offence related to the trafficking of adults *shall be subject to* DNA sampling, *unless* the offender has established that such sampling would have an impact on his or her privacy and security of the person grossly disproportionate to the public interest; and
- a person convicted of the new offence of obtaining, for consideration, the sexual services of an adult *may be subject* to DNA sampling.

Clause 24 amends sections 487.051(1) and 487.051(2) of the Code to reflect these amendments, and clause 36 makes similar amendments to the *National Defence Act*.

2.20 SEX OFFENDER REGISTRY (CLAUSES 25 TO 28, 37 TO 40, 44 AND 45)

The purpose of the *Sex Offender Information Registration Act* (SOIRA), which came into force in December 2004, is to help police services prevent and investigate crimes of a sexual nature by requiring the registration of certain information relating to sex offenders.

The SOIRA works in tandem with sections 490.011 to 490.032 of the Code. These sections require a person convicted of a “designated offence,” as defined in section 490.011 of the Code, to supply information to the national sex offender database.

Consistent with the changes to the DNA sampling regime, clause 25 amends the list of offences set out in section 490.011 so that:

- information on a person convicted of an offence related to trafficking of minors *shall automatically* be added to the registry;
- information on a person convicted of an offence related to trafficking of adults or an offence related to the commodification of the sexual activities of an adult (purchasing or communicating for the purposes of purchasing sexual services, receiving a material benefit, and procuring) *may be added to the registry, subject to certain conditions*.³⁶

Clauses 26 to 28 take these changes into account in other provisions of the Code. Clauses 37 to 40 and clauses 44 and 45 make similar amendments to the *National Defence Act* and the *International Transfer of Offenders Act*, respectively.

2.21 DANGEROUS OFFENDERS AND LONG-TERM OFFENDERS (CLAUSES 29 AND 30)

The provisions applicable to offenders presenting a high risk of recidivism – “dangerous offenders” and “long-term offenders” – are set out in sections 752 to 761 of the Code.

By definition, dangerous offenders present a higher risk of reoffending than long-term offenders. A long-term offender could, after being sentenced to a term of imprisonment of two years or more, be released under the conditions of a long-term supervision order. By contrast, a dangerous offender designation automatically results in an indeterminate prison sentence, which is the harshest sentence in Canada’s system of criminal law.

Section 752 of the Code sets out a list of offences for which the prosecution has a duty, under certain conditions, to advise the court of its intention to make an application to have the offender declared a dangerous offender or a long-term offender. This list already comprises the offences of juvenile prostitution, procuring and human trafficking. Clause 29 adds to that list offences related to human trafficking: receiving a material benefit (section 279.02 of the Code) and withholding or destroying documents (section 279.03 of the Code).

Whereas clause 29 pertains to two types of offenders, clause 30 refers exclusively to long-term offenders. Clause 30 adds to the list in section 753.1(2)(a) of the Code – for which the court may find an offender to be a long-term offender – the three offences related to trafficking of minors (sections 279.011, 279.02(2) and 279.03(2) of the Code).

2.22 PEACE BOND – FEAR OF SEXUAL OFFENCE IN RESPECT OF PERSONS UNDER THE AGE OF 16 YEARS (CLAUSE 31)

Section 810.1 of the Code allows any person to lay an information before a provincial court judge for the purpose of having the defendant enter into a recognizance, including conditions that prohibit the person from engaging in activity that involves contact with persons under 16 years of age and from attending certain places where persons under 16 years of age are likely to be present.

The judge may grant such an order where there are reasonable grounds to fear that the defendant will commit one of the specified sexual offences in respect of a person under 16 years of age. This list of specified offences already comprises juvenile prostitution and procuring. Clause 29 of the bill adds to the list the three offences related to trafficking of minors (sections 279.011, 279.02(2) and 279.03(2) of the Code).

2.23 CONSEQUENTIAL AMENDMENTS

The bill makes consequential amendments to Acts other than the Code.

2.23.1 TESTIMONY OF A SPOUSE, *CANADA EVIDENCE ACT* (CLAUSE 34)

There is a general common law rule that the spouse of an accused person is not competent or compellable to testify for the Crown, with a number of exceptions set out in section 4 of the *Canada Evidence Act*,³⁷ such as charges of procuring or sexual assault.

Bill C-36 amends the *Canada Evidence Act* to provide new exceptions to make the spouse of a person charged with an offence related to human trafficking (sections 279.01 to 279.03 of the Code) or with the new offence of obtaining, for consideration, the sexual services of an adult (new section 286.1(1) of the Code) a competent and compellable witness, meaning that he or she could be required by the prosecution to testify against the accused.

2.23.2 RECORD SUSPENSION, *CRIMINAL RECORDS ACT* (CLAUSE 35)

Barring certain mitigating circumstances, section 4(2) of the *Criminal Records Act*³⁸ restricts the record suspension application possibilities of offenders convicted of an offence referred to in Schedule 1 to that Act. The offences listed in Schedule 1 are primarily sexual offences against minors. The bill amends Schedule 1 to the *Criminal Records Act* to add the offences related to trafficking of minors (sections 279.011, 279.02 and 279.03 of the Code).

2.23.3 DETENTION AND CONDITIONS OF RELEASE, *CORRECTIONS AND CONDITIONAL RELEASE ACT* (CLAUSES 41 AND 42)

Sections 129 to 132 of the *Corrections and Conditional Release Act* set out a procedure for the continued detention of an offender beyond the statutory release date, which is two thirds of the offender's sentence.³⁹

The Parole Board of Canada can prevent the statutory release of an offender until the expiration of the offender's sentence if it believes that the offender will commit "a sexual offence involving a child." Clause 41 of the bill adds to the definition of "sexual offence involving a child" offences related to trafficking of minors (sections 279.011, 279.02(2) and 279.03(2) of the Code) and procuring of minors (section 286.3(2) of the Code).

Clause 42 also allows the Board to order an offender who is released on statutory release to reside in a halfway house or mental health facility if the Board believes that, without this condition, the offender will commit an offence related to trafficking of minors (sections 279.011, 279.02(2) and 279.03(2) of the Code).

2.23.4 CONFIDENTIALITY OF CRIMINAL RECORD, *YOUTH CRIMINAL JUSTICE ACT* (CLAUSE 43)

As a general rule, the criminal record of a young offender kept pursuant to the *Youth Criminal Justice Act* is confidential.⁴⁰ However, disclosure of a record is authorized for certain specific purposes if a youth reoffends within a specified period of time and commits one of the offences listed in the schedule to the Act. Clause 43 adds to that schedule the offences related to trafficking of minors (sections 279.011, 279.02(2) and 279.03(2) of the Code) and procuring of minors (section 286.3(2) of the Code).

2.24 STATUTORY REVIEW (CLAUSE 45.1)

The House of Commons Standing Committee on Justice and Human Rights amended Bill C-36 in order to provide for a review of the bill by a parliamentary committee within five years after its coming into force. The committee is required to table a report within a year of the start of its review.

NOTES

- 1 [*Criminal Code*](#), R.S.C., 1985, c. C-46.
2. Sections 212(2), 212(2.1) and 212(4) of the Code make it an offence to obtain for consideration, or communicate with anyone for the purpose of obtaining for consideration, the sexual services of a person under the age of 18, to procure minors for this purpose and to live on the avails of prostitution of a minor.

3. In Canada, prostitution activities are governed by a combination of federal, provincial and territorial statutes and municipal by-laws. Criminal laws, however, fall under the exclusive jurisdiction of the federal government. For additional information on the legal framework governing prostitution in Canada, see Laura Barnett, [*Prostitution in Canada: International Obligations, Federal Law, and Provincial and Municipal Jurisdiction*](#), Publication no. 2011-119-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 19 March 2014.
4. [*Canada \(Attorney General\) v. Bedford*](#), [2013] 3 S.C.R. 1101, para. 5.
5. Department of Justice Canada, “[Protection of Communities and Exploited Persons Act](#),” Background, 4 June 2014.
6. Ibid.
7. [*Canada \(Attorney General\) v. Bedford*](#), [2013] 3 S.C.R. 1101 [*Bedford*].
8. *Criminal Code*, s. 197(1).
9. *R. v. Patterson*, [1968] S.C.R. 157; *R. v. Sorko* (1969), 4 C.C.C. 214 (B.C. C.A.); *R. v. Rockert*, [1978] 2 S.C.R. 704; *R. v. Ikeda* (1978), 42 C.C.C. (2d) 195 (Ont. C.A.); *R. v. Lahaie* (1990), 55 C.C.C. (3d) 572 (Que. C.A.); *R. v. Labaye*, [2005] 3 S.C.R. 728; and *R. v. Kouri*, [2005] 3 S.C.R. 789.
10. [*R. v. Corbeil*](#), [1991] 1 S.C.R. 830.
11. In 1990, in the *Prostitution Reference* ([*Reference re ss. 193 and 195.1\(1\)\(c\) of the Criminal Code \(Man.\)*](#)), [1990] 1 S.C.R. 1123), the Supreme Court upheld the constitutionality of the provision on bawdy-houses, noting that the infringement of section 7 of the *Canadian Charter of Rights and Freedoms* was consistent with the fundamental principles of justice. This decision, however, did not prevent the Court from reopening the debate in the *Bedford* case in the light of changes in case law and the evolution of the principles of fundamental justice over the intervening 20 years. Moreover, the Supreme Court felt that the *Prostitution Reference* did not in fact focus on the issue of security of the person, which is central to the *Bedford* case, but rather on the right to liberty (*Bedford*, para. 45).
12. In 1990, the Supreme Court upheld the constitutional validity of section 213(1)(c) of the Code, which prohibits communicating in a public place for the purposes of prostitution. The Court held that

although section 213(1)(c) does violate freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*, this is a reasonable limit under section 1, given Parliament’s objective of eliminating street solicitation and the social nuisance it creates [Barnett (2014), p. 8].

13. In Canada – as in many other countries – there is no consensus on the best legal approach to adopt toward prostitution activities involving consenting adults. The results of public opinion surveys confirm this trend.
 - According to two public opinion polls published by Angus Reid in 2010 (Angus Reid Public Opinion, “[Half of Canadians Willing to Allow Adults to Engage in Prostitution](#),” News release, 19 October 2010) and in 2011 (Angus Reid Public Opinion, “[Canadians Remain Divided on How to Deal with Prostitution](#),” News release, 30 June 2011), between 49% and 53% of Canadians support partial decriminalization of consensual prostitution activities between adults.
 - In 2012, Ipsos released a survey (Ipsos, “[Two in Three \(65%\) Support Legalization of Brothels in Canada](#),” News release, 3 April 2012) showing that 65% of Canadians are in favour of legalizing brothels.
 - Of the approximately 31,000 respondents to the federal government’s online consultation on prostitution, 56% were of the opinion that buying sexual services should be a criminal offence, while 44% held the opposite view (Department of Justice, [Online Public Consultation on Prostitution-Related Offences in Canada – Final Results](#), 2014).

See also John Lowman and Christine Louie, “Public Opinion on Prostitution Law Reform in Canada,” *Canadian Journal of Criminology and Criminal Justice*, Vol. 54, No. 2, April 2012.
14. Amélie Augère, “La résistance au changement de la politique en matière de prostitution au Canada,” *Déviance et société*, Vol. 38, No. 1, 2014, pp. 29–53.
15. Special Committee on Pornography and Prostitution, “Summary,” *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution*, 1985.
16. Bill C-49, An Act to amend the Criminal Code (prostitution), 1st Session, 33rd Parliament (R.S.C. 1985, c. 51 (1st Supp.)).
17. House of Commons, Standing Committee on Justice and Legal Affairs, Fourth Report (respecting soliciting for the purpose of prostitution), *Minutes of Proceedings*, Issue No. 42, 4 October 1990.
18. Federal–Provincial–Territorial Working Group on Prostitution, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-Related Activities*, Department of Justice, 1998.
19. House of Commons, Standing Committee on Justice and Human Rights, Subcommittee on Solicitation Laws, [The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws](#), December 2006, Appendix A, p. 93: Letter from the Honourable Irwin Cotler, Minister of Justice, 19 November 2004.
20. *Ibid.*, pp. 85–90.
21. House of Commons, Standing Committee on the Status of Women, [Turning Outrage into Action to Address Trafficking for the Purpose of Sexual Exploitation in Canada](#), February 2007.
22. *Ibid.*, p. 15.
23. [National Defence Act](#), R.S.C., 1985, c. N-5.
24. [Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts](#), 1st Session, 41st Parliament (S.C. 2012, c. 1).
25. The punishments currently set out in section 210 of the *Criminal Code* apply.

26. [R. v. Labaye](#), [2005] 3 S.C.R. 728, para. 62. The Court gives examples of the kind of harm that can lead to a finding of indecency, such as physical or psychological harm caused to participants in the impugned activity, or conduct that perpetuates negative or demeaning images of humanity.
27. The new punishments for this offence are set out in new section 286.2 of the *Criminal Code*. The offence of receiving a material benefit from prostitution is discussed in greater detail in section 2.17.2 of this Legislative Summary.
28. The term “prostitution” is not defined in the *Criminal Code*. However, case law has established three key aspects of this activity: the offer of sexual services, the fact that the activity is directed at an undetermined number of persons and the need for some form of payment. In *Bedford*, the term “prostitution” is defined as “the exchange of sex for money” (see *Bedford*, para. 87).
29. The initial text of section 213(1.1) read:

Everyone is guilty of an offence punishable on summary conviction who communicates 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*. [Authors’ emphasis.]
30. [Identification of Criminals Act](#), R.S.C. 1985, c. I-1, s. 2.
31. *Criminal Code*, s. 787.
32. [Bill C-46, An Act to amend the Criminal Code \(production of records in sexual offence proceedings\)](#), 2nd Session, 35th Parliament (S.C. 1997, c. 30).
33. Senate, Standing Committee on Legal and Constitutional Affairs, [Statutory Review on the Provisions and Operation of the Act to amend the Criminal Code \(production of records in sexual offence proceedings\)](#), Final Report, December 2012, p. 16.
34. The infractions are these:
 - kidnapping, committing an aggravated assault or aggravated sexual assault against, or killing the victim during the commission of the offence; and
 - all other cases.
35. By the same token, it maintains the presumption that a person who is habitually in the company of a prostitute is in receipt of a material benefit from prostitution (new section 286.2(3)). This presumption was upheld by the Supreme Court in [R. v. Downey](#), [1992] 2 S.C.R. 10.
36. The Court is required to order the registration of information if the prosecution proves that the offender in question also intends to commit an offence referred to in sections 490.011(1)(a), 490.011(1)(c), 490.011(1)(c.1), 490.011(1)(d), 490.011(1)(d.1) or 490.011(1)(e) of the *Criminal Code* (e.g., sexual assault [section 490.012(2)]).
37. [Canada Evidence Act](#), R.S.C., 1985, c. C-5.
38. [Criminal Records Act](#), R.S.C., 1985, c. C-47.
39. [Corrections and Conditional Release Act](#), S.C. 1992, c. 20.
40. [Youth Criminal Justice Act](#), S.C. 2002, c. 1.