THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

March 18, 2022

Via email: JUST@parl.gc.ca

Randeep Sarai, M.P.
Chair, Committee on Justice and Human Rights
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Randeep Sarai,

Re: ***Protection of Communities and Exploited Persons Act***

The Municipal Law and Criminal Justice Sections of the Canadian Bar Association (CBA Sections) welcome the opportunity to participate in the Standing Committee on Justice and Human Rights' review of the *Protection of Communities and Exploited Persons Act.*

The CBA is a national association of over 36,000 members, including lawyers, law students, notaries and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Criminal Justice Section consists of a balance of Crown and defence counsel from every part of Canada, lawyers who appear in criminal courts daily. The CBA Municipal Law Section's mandate covers legal issues and practice as they relate to municipalities and their activities.

When the Act (then Bill C-36) received Royal Assent in 2014, it amended the *Criminal Code* in response to the Supreme Court of Canada (SCC) decision in *Canada (Attorney General) v. Bedford.*[1] As noted by the Department of Justice in its 2017 technical paper, the SCC in *Bedford* found that the prior law was overly broad. The Department of Justice stated that Bill C-36 attempted to strike a balance between the interests of two vulnerable groups, namely "those who are subjected to prostitution and children who may be exposed to it":

> The Supreme Court of Canada's final concern [in *Bedford*] was that individuals who sell their own sexual services should not be prevented from taking steps to negotiate safer conditions for the sale of sexual services in public places. One of the offences found unconstitutional by the Supreme Court of Canada criminalized all public communications for the purpose of either purchasing or selling sexual services. Bill C-36, on the other hand, creates, first, a new offence that criminalizes communicating *in any place* for the purpose of *purchasing* sexual services and, second, a separate offence that criminalizes communicating for the purpose of *selling* sexual services, but only *in public places that are or are next to school grounds, playgrounds or day care centres*. This approach strikes a careful balance between the interests of two vulnerable groups: those who are subjected to

1 2013 SCC 72

prostitution and children who may be exposed to it. Notably, Bill C-36 does not prohibit persons who sell their own sexual services from communicating for that purpose, other than in public places that are or are next to school grounds, playgrounds or day care centres.[2]

Purchase of Adult Non-exploitive Sexual Services

The CBA Sections have assessed the practical impacts of the Act and recommend removing s. 286.1, which criminalizes the purchase of adult sexual services, including consensual and non-exploitative transactions. While the sale of sexual services is not criminalized, and sex workers themselves are not criminally liable under section 286.1, the illegality of the transaction itself presents barriers to sex workers' ability to work safely.

Clients may be reluctant to engage in screening procedures, knowing they are breaking the law. Renting or leasing indoor workspace may be difficult, since most leases and condominium bylaws prohibit criminal activity on site. The goal of section 286.1 is to end sex work, based on the premise that all sex work is exploitative and harmful, and yet the conditions imposed by section 286.1 undermine the ability of sex workers to screen clients and work indoors.

For these reasons, we find that section 286.1 is arbitrary, grossly disproportionate, and overbroad in that it captures non-exploitative, consensual sex work in the net of criminal liability and prevents sex workers from availing themselves of protective measures.

Material Benefit and Advertising Offences

Shortly before enactment, the CBA Sections made an extensive submission on Bill C-36 (2014 CBA Submission)[3]. We reiterate our proposed amendments to section 286.2 of the *Code*, the provision restricting the receipt of financial benefits derived from sex work and the proposed removal of section 286.4, the section that restricts how sex workers can advertise their services.

We are concerned with the framing of sections 286.2 and 286.4 as both impact the safety of sex workers in various ways. Restricting sex workers' ability to advertise (section 286.2) limits their access to clientele, forcing them to conduct their business in public locations rather than a safe indoor environment. Restricting sex workers' ability to hire employees (section 286.4) such as bodyguards and executive assistants, by making them vulnerable to criminal liability, severely limits their ability to protect and organize themselves and grow their business with a recurring clientele in safe, secure locations.

The 2014 CBA Submission anticipated these sections would likely be the subject of challenges under *Canadian Charter of Rights and Freedoms* sections 2(b) and 7. *Charter* challenges have since been launched at the Superior Court level in both Alberta and Ontario. In *R v. Kloubakov*[4], the Alberta Court of Queen's Bench ruled that sections 286.2 and 286.3 were unconstitutional because they breached section 7. The two accused were drivers who worked for a sex trafficking ring. The Court was concerned the new regime prevented sex workers from taking measures to protect themselves from the harms identified in *Bedford* because the exceptions for non-exploitative conduct were overly broad and likely to have a chilling effect on potentially legitimate conduct. That decision is currently under appeal.

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2 Canada, Department of Justice, "Technical Paper: Bill C-36, *Protection of Communities and Exploited Persons Act*" (March 8, 2017) online.

3 Canadian Bar Association, Bill C-36, Protection of Communities and Exploited Persons Act, October 2014 online.

4 2021 ABQB 960

In the Ontario Superior Court of Justice, several cases have assessed the constitutionality of the new sections. Although sections 286.2, 286.3 and 286.4 were found unconstitutional in both *R. v. Anwar*[5] and *R. v. N.S.*[6] for breaching section 7 of the *Charter*, *N.S.* was recently overturned at the Court of Appeal,[7] the accused's acquittals were overturned and the matter was returned for a new trial.

In our view, the volume of litigation dealing with the breadth of these sections and its impact on their constitutionality militates in favor of amendments narrowing the sections.

Mandatory Minimum Sentences

The 2014 CBA Submission did not address mandatory minimum sentences created by the *Act*. At its 2021 Annual General Meeting, the CBA urged the federal government to eliminate mandatory minimum sentences for offences other than murder, and to include a "safety valve" for offences where mandatory minimum sentences remain.[8] The mandatory minimum sentences implemented by the *Act* are vulnerable to constitutional challenge and the CBA Sections recommend their removal.

The Ontario Court of Appeal in *R. v. Joseph*[9], recently ruled that the mandatory minimum sentence required by section 286.2(2) is unconstitutional. Maintaining the mandatory minimum sentences mandated by the *Act* runs contrary to its broader, high-minded purpose of prioritizing the protection of vulnerable populations from exploitation. Mandatory minimum sentences have consistently been shown to exacerbate the exploitation of vulnerable populations particularly Black, Indigenous and racialized populations. The Public Health Agency of Canada notes that Indigenous women – those most likely to be affected by mandatory minimum sentences – are also disproportionately overrepresented in sex work.[10]

Imposing mandatory minimums on those who communicate for the purpose of securing sexual services negates the self-determination of vulnerable and marginalized people over their own bodies, further marginalizing those individuals. This is the opposite effect of the legislation's intent.

Municipal concerns

Definitions of school grounds, playgrounds, day care centres and delineation of public place

While section 213(1.1) (Communicating to provide sexual services for consideration) impacts freedom of expression, the CBA Sections support the policy rationale of not exposing children to communications for the purpose of offering or providing sexual services. In *Bedford*, the decision underscores the proposition that imprecise provisions are "difficult to prosecute."[11] However, the *Criminal Code* has no definitions for "school grounds", "playgrounds" or "day care centres", even though these terms are critical to determining whether there is an offence respecting communication under section 213(1.1) (see definition).[12]

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5 2020 ONCJ 103

6 2021 ONSC 1628

7 2022 ONCA 160

8 Resolution 21-04-A, Mandatory Minimum Sentences (CBA: Ottawa, 2021)

9 ONCA 2020 733

10 Sex work in Canada, The Public Health Perspective (CPHA, 2014): see online.

11 2010 ONSC 4264, at para 152 [*Bedford*].

12 Communicating to provide sexual services for consideration

(1.1) 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 school ground, playground or daycare centre.

The definition of "public place" is at subsection 213(2):

> (2) In this section, public place includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

In our view, this definition is circular, essentially stating a public place is a place to which the public has access. While the terms "school grounds", "playground" or "day care centres" may seem self-evident, a careful review reveals application challenges in specific circumstances:

- What is required for a park to become a "playground"? Is there a minimum amount of equipment--such as swings, a monkey bar, or slides—for an area to be classified as a "playground"? Are a ball diamond, outdoor basketball court, tennis court or soccer pitch within the definition of a "playground"?
- Can a "playground" be inside a building, or is it necessarily outside?
- What if there is a "playground" or "day care centre" in a multi-use facility? Does the prohibition extend to the entire parcel, or is a spatial connection or certain proximity required between the communication and the precise location of the "playground" or "day care centre"? What is meant by the phrase "is next to"?
- Does a "day care centre" include a day care home, i.e. where a person, in their own residence, cares for children from another family?
- Does "school ground" apply only to certain types of educational institutions, i.e. those restricted to minors? Or is it extended to post-secondary institutions, such as universities, colleges, or technical schools? Is there an age restriction involved?
- The current version of s. 213(1.1) refers to "or in any place open to public view." Does this mean that the viewing would need to be from a public place, such as a municipal road or sidewalk? Would this prohibition extend to viewing from, for example, an individual's privately owned lands?

Pre-2014 case law underscores these interpretation challenges. The Alberta Court of Queen's Bench evaluated what constitutes a "public place" in *Condominium Plan No. 9422336 v Jeremy Chai Professional Corp.*[13] A condominium corporation's bylaws prohibited using units for commercial purposes illegal or injurious to the project's reputation. Certain owners used units as massage parlors allegedly offering sexual services. The condominium owners applied for an interim injunction prohibiting this use. The application was dismissed, as the evidence did not establish illegality; the Court found that the offering of sexual services did not occur in a "public place" as defined in section 213(2) of the *Criminal Code*, so no offence occurred under section 213(1). The Court offered the following insight:

> 20. While this application does not exclusively focus on sections of the *Criminal Code*, it does *not* seem to me that the definition of "public place" defined as any place which the public "has access as a right or by invitation, express or implied", would be intended to include private rooms in the back of a massage parlour.
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> 21. While the massage parlour may be open to the public for business, presumably the public does not have access as a right or by expressed or implied invitation to those back private rooms. Even though the former police officer deposed in a Statutory Declaration that he gained access on one occasion, it was in his words only by invitation of the attendant.

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[13] 2005 ABQB 837. The case is in the private law setting, specifically the enforcement of condominium bylaws that prohibited activity illegal or injurious to the reputation of the project. The Court considered the pre-Bill C-36 version of the *Criminal Code*, in the context of an interim and permanent injunction application to enforce the condominium bylaws.

In *R. v. Clark*,[14] the Supreme Court of British Columbia further considered the definition of "public place." The accused was charged with willfully committing an indecent act in a public place. Uninvited observers saw the accused masturbating behind a well-lit front window of his home. The accused was convicted, and his appeals were dismissed until the SCC allowed the appeal and entered an acquittal. The Court found that "public place" extended only to a place where the public had an express or an implied permission to physically enter. Because no observer had permission to enter the accused's home, it was accordingly not a public place.

Similarly, the Ontario Court of Justice considered the definition of "public place" in *R. v. D'Angelo*,[15] in a different context. Here, the accused was subject to a three-year probation order which required him "not to associate with children under the age of 14" and a 10-year prohibition order under s. 161 of the *Code* which prohibited him from attending a "public swimming area," where persons under age 14 were or could reasonably be expected to be present. Despite the probation order, the accused went swimming in a pool at the condominium and apartment complex where he lived and was charged with failure to comply with his probation order. The trial judge concluded that the pool did not constitute a "public swimming area," because use of the facilities was not open to the general public. The accused was acquitted, and the Crown appealed on the basis that the trial judge erred in her interpretation of the words "public swimming area." The appeal was allowed.

In determining what constitutes a "public swimming area," the Court of Appeal found that the trial judge should have had regard to the definition of "public place" in section 150 of the *Code*, the legislation's purpose, the ordinary meaning of words, the particular facts including the number of people with access, the particular community and the manner in which the place is used. "Public place" was statutorily defined as any place to which the public has access as of right or by invitation, express or implied. The pool in question easily fell within the statutory and dictionary definitions of "public," as membership in the pool was open to 8,000 residents of the complex and to people from neighboring communities. Further, many users were children. The Court of Appeal found that adopting a narrow definition of "public swimming pool" would be a disservice to this particularly vulnerable social group. Ultimately, it found that the trial judge erred in concluding that the pool was not a "public swimming area," and as such the acquittal was set aside and a new trial was ordered.

These pre-2014 cases illustrate the challenges that arise if *Criminal Code* sections incorporate terminology without sufficient definitions or scope.

Extending prohibition on communication under s. 213(1.1) to additional lands and facilities that children frequent; if extended, including appropriate definitions

The prohibition on communication under section 213(1.1) does not apply to numerous public places that children frequent. It only applies to three specific locations: a public place, any place open to public view that is or is next to a school ground, playground or a day care centre. However, children frequent many other locations and it is surprising that the prohibition does not apply to specific other facilities or lands, such as: public parks, swimming pools, recreation facilities and shopping malls.

If the Committee recommends extending the scope of the prohibition, appropriate definitions would enhance enforceability to limit children's exposure to communications for the purpose of offering or providing sexual services.

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14 2005 SCC 2.

15 [2002] O.J. No. 4312, 166 O.A.C. 92.

Consultation with municipalities and their police forces

In the 2014 CBA Submission, the CBA Sections encouraged the federal government to consult with municipalities before enacting any legislation on prostitution. We now suggest that the government also consult the Federation of Canadian Municipalities and provincial and territorial municipal associations. At this stage of the Act's review, we did not consult extensively with Canadian municipalities or their police forces. Our comments draw on the collective experience of our executive members only.

In *Bedford*, for example, evidence included affidavits from the RCMP and police officers from across the country, including Toronto, Brampton, Edmonton, Vancouver and Winnipeg.[16] These police officers spoke to issues including street prostitution, enforcing the communicating provision, links to harmful activity including drugs, violence, organized crime, child exploitation and human trafficking, the growing number of missing persons and unsolved homicide cases, links to missing female prostitutes and the lack of enforceability of the bawdy house laws in place prior to the Act.[17]

We encourage the Committee to proceed with comprehensive consultations as part of its study. Among other things, the Committee would benefit from input on the impact of the deletion of the bawdy-house prohibitions.

Calls to Justice in Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls

Since the Act came into force, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*[18] has been issued. We encourage the Parliamentary Committee to consider the letter, spirit and intent of relevant Calls to Justice.

The CBA Sections highlight the Calls to Justice dealing with pairing trauma and addiction programs with other essential services, support for programs and services for Indigenous women, girls and 2SLGBTQQIA people in the sex industry to promote their safety and security, support for prevention initiatives in areas of health and community awareness, developing training, reporting and implementation practices for transportation and hospitality services, policing guidelines for the sex industry, rigorous requirement for safety and harm prevention within group, care or foster homes, identifying exploitation against Inuit women, girls and 2SLGBTQQIA and improvement of quality of police and coroner services for 2SLGBTQQIA. (See Calls to Justice 3.4, 4.3, 7.3, 8.1, 9.11, 12.14, 16.24 and 18.14 in Volume 1 – see Appendix)

These Calls for Justice came after extensive studies identified that, despite gaps in data collection, "Indigenous women, girls, and 2SLGBTQQIA people make up the majority of those involved in the street-level sex work."[19] In addition, studies show that Indigenous women, girls, and 2SLGBTQQIA people are "more likely than other groups to be targeted for, or to experience, sexual exploitation or trafficking for the purposes of sexual exploitation."[20] It follows that *Criminal Code* sections dealing with the sale of sexual services ought to align with these Calls to Justice. Doing so would further

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16 *Supra* note 3, at para 89.

17 *Ibid*, at paras 89-94.

18 Canada, *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls* (2019). See online, (vol 1a) and online, (vol 1b).

19 See *Reclaiming Power and Place: the Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, *supra* note 9, vol 1a, at p. 656; citing Amnesty International, No More Stolen Sisters; Farley and Lynne, "Prostitution of Indigenous Women"; Hunt, "Representing Colonial Violence."

20 *Ibid*, citing Assistant Commissioner Joanne Crampton, Mixed Parts 2 & 3, Public Volume 15, St. John's, NL, p. 40.

assist in striking a balance between the interests of two vulnerable groups, namely those involved in prostitution and children who may be exposed to it. Further, the CBA Sections' comments on municipal concerns focus primarily on the community and societal impacts of the Act. The Calls to Justice underscore the polycentric nature of these complex issues.

We hope these observations will assist the Parliamentary Committee in its review of the *Protection of Communities and Exploited Persons Act*.

Yours truly,

(original letter signed by Julie Terrien for Tony Paisana and Jeneane Grundberg)

Tony Paisana
Chair, Criminal Justice Section

Jeneane Grundberg
Chair, Municipal Law Section

APPENDIX

3.4: We call upon all governments to ensure that all Indigenous communities receive immediate and necessary resources, including funding and support, for the establishment of sustainable, permanent, no-barrier, preventative, accessible, holistic, wraparound services, including mobile trauma and addictions recovery teams. We further direct that trauma and addictions treatment programs be paired with other essential services such as mental health services and sexual exploitation and trafficking services as they relate to each individual case of First Nations, Inuit, and Métis women, girls, and 2SLGBTQQIA people.

4.3: We call upon all governments to support programs and services for Indigenous women, girls, and 2SLGBTQQIA people in the sex industry to promote their safety and security. These programs must be designed and delivered in partnership with people who have lived experience in the sex industry. We call for stable and long-term funding for these programs and services.

7.3: We call upon all governments and health service providers to support Indigenous-led prevention initiatives in the areas of health and community awareness, including, but not limited to programming:

- for Indigenous men and boys
- related to suicide prevention strategies for youth and adults
- related to sexual trafficking awareness and no-barrier exiting
- specific to safe and healthy relationships
- specific to mental health awareness
- related to 2SLGBTQQIA issues and sex positivity

8.1: We call upon all transportation service providers and the hospitality industry to undertake training to identify and respond to sexual exploitation and human trafficking, as well as the development and implementation of reporting policies and practices.

9.11: We call upon all police services to develop and implement guidelines for the policing of the sex industry in consultation with women engaged in the sex industry, and to create a specific complaints mechanism about police for those in the sex industry.

12.14: We call upon all child welfare agencies to establish more rigorous requirements for safety, harm-prevention, and needs-based services within group or care homes, as well as within foster situations, to prevent the recruitment of children in care into the sex industry. We also insist that governments provide appropriate care and services, over the long term, for children who have been exploited or trafficked while in care.

16.24: We call upon all governments to fund and to support programs for Inuit children and youth to teach them how to respond to threats and identify exploitation. This is particularly the case with respect to the threats of drugs and drug trafficking as well as sexual exploitation and human trafficking. This awareness and education work must be culturally and age-appropriate and involve all members of the community, including 2SLGBTQQIA Inuit.

18.14: We call upon all police services to take appropriate steps to ensure the safety of 2SLGBTQQIA people in the sex industry.