Bill C-36: Are There Protections for Sex Workers Under Existing Labour Protection Legislation?

Alisa Maegawa and Sumra Mahmood

In October 2014 Bill C-36, *The Protection of Communities and Exploited Persons Act*, was passed. The bill was a response to the Supreme Court of Canada striking down existing Criminal Code provisions on bawdy houses, communication and living on the avails. The Government took a Nordic model approach to sex work, grounded in the notion that sex workers are vulnerable individuals who must be protected from exploitation. Purchasing sexual services and advertising the sexual services of others' are offences under Bill C-36. As sex workers are not criminalized, there is the question of whether their employment affords them any rights and protections.

Summary of findings
Unfortunately, the passage of Bill C-36 does little to advance the protection of sex workers as part of the labour force. The means of distinguishing between employees and independent contractors, as accepted by the Supreme Court of Canada for most industries, suggests that sex workers are not employees, and thus not entitled to rights under the *Employment Standards Act*.

Are sex workers employees or contractors?

Much of the existing labour protection legislation focuses on the employer-employee relationship. In countries where sex work is legalized, sex workers are contractors. They rent rooms and negotiate their own rates. The Supreme Court of Canada has established a general test to distinguish between independent contractors and employees. Applied to sex work, the test would raise questions including:

- Is the manager responsible for purchasing items such as condoms and clothing and for payment of the room rental?
- Does the manager employ support staff?
- Does the potential for profit beyond salary lie with the sex worker or the manager?

If a worker has the right to refuse service and choose clients, it generally implies that there is autonomy and lends support to the conclusion that the worker is a contractor. However, given the nature of sex work and the industry norm of allowing workers to refuse certain work and clients, this factor should be given less weight. Workers always have the right to refuse and consent can never be contracted.

The legality of employment contracts, can be questioned as under the Criminal Code of Canada, consent cannot be given by a third party. Hence the employer cannot require their

employee to engage in sexual services, yet the employee's contract is to provide sexual services to the client.

There is a conflict there between an employee's duties to their employer and the provisions in the Criminal Code regarding consent to sexual activity, and in particular the idea that consent cannot be given by a third party. Hence, the current employment laws are inadequate to deal with expressedly contracting sexual services through an employer.

If sex workers were considered employees they could use the Employment Standards Act, and be able have parental leave, vacation pay, minimum wage rates, minimum call-out benefits and overtime pay. Employees gain the benefit of protections under employment insurance and on occasion medical benefits and pensions

As an independent contractor a sex worker would not be entitled to benefits, pension benefits, employment insurance, or the Canadian Pension Plan.

Protections under existing legislation

Erotic massage parlours and escort agencies

These are the types of businesses in which sex workers would be most able to establish an employment relationship. WorkSafeBC is the province's workers' compensation insurer and does in fact have a classification that covers massage parlours and escort service agencies.

In some municipalities certain forms of sex work such as escort services, exotic dancing, and massage parlours, are regulated by municipal licensing and zoning policies and workers in these areas are treated as independent contractors. Exotic dancers are independent contractors as they dance for tips and rent their stage.

Victoria has business licensing for an Escort and an Escort Agency. Vancouver has licensing for: Dating Services; Escort Services; Massage Parlours; Health Enhancement Centres; Body Rub Parlours/Body-Painting Studios/Model Studios. However, only escort services and body-rub parlours have to report names and addresses of employees to the bodice. Unlike the by-law of a health enhancement centre, a body rub by-law does not expressly prohibit acts of prostitution on the premise. The body-rub by law prohibits the advertising of "sexual entertainment" but not not expressly forbid it from occurring in a body-rub parlour. In a dating service the names of both parties must be recorded, yet for escort services only the service provider's name must be recorded and the client remains unrecorded.

Bill C-36

Bill C-36 reformulated the “living on the avails” offence as receiving “material benefit from sexual services”. Since the act of selling sex is legal sex workers are permitted to be self-employed, however if sex workers want to work collectively or in a third party operated house that is not permitted under s. 286(2). Under this section anyone who receives benefit in the context of a commercial enterprise offering sexual services for consideration can be prosecuted.

What remains unclear is whether licensed businesses referenced above will be able to operate if they are located near a public place a person under 18 could be reasonably expected to frequent. Under s. 213(1.1) makes it a crime for any sex worker (or third party) to communicate “in a public place” or “any place open to public view” if that place “is or is next to a school ground, playground or daycare centre.” While It is unlikely to be extended to a residence or the interior of a commercial space, it pushes sex workers from the public eye to high risk downtown or industrial areas.

Exceptions to the material benefit section cannot be extended to the commercial enterprise as the ambiguous language of in s. 286(2) is broad enough to prosecute another who is “receiving a material benefit” from a sex worker’s work (e.g., sex workers’ bodyguards, sex workers who are working together, and sex workers’ family and friends).

Municipal regulations cannot conflict with the Criminal Code hence businesses such as escort agencies cannot require escorts to provide or promise sexual services to clients as this is a violation of section 286(2) because of the procurement. The independent contractor model comes into play here as the exchange of money for sexual services must be privately negotiated between the client and escort. However, under s. 286(1) it is a crime for a client to communicate to obtain sexual services in a public or private setting.

What needs to happen? Recognize sex work as legitimate work

Before sex workers have any certainty as to their labour rights and protections, the government must first acknowledge sex work as a legitimate type of work. We may look to New Zealand for a model that respects sex work as a legitimate form of employment. In 2003 prostitution was decriminalized and the *Prostitution Reform Act* had the purpose of safeguarding the human rights of sex workers and protecting them from exploitation and promoting the welfare and occupational health and safety of sex work.

References:

http://www.parl.gc.ca/HousePublications/Publication.aspx?Pub=Bill&Doc=C-36
http://www.nationalmagazine.ca/Articles/July-2014-Web/Working-for-a-living.aspx
http://www.nationalmagazine.ca/Articles/Fall-issue-2014/Sex-work.aspx
http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr02_9/a.html

document contains general discussion of certain legal and related issues only. If you require legal advice, please consult with a lawyer."