Foy Allison Law Group

A submission to the Senate Committee on Legal and Constitutional Affairs regarding Bill C-36

Prepared by Gwendoline Allison of Foy Allison Law Group

207-2438 Marine Drive, West Vancouver, BC V7V 1L2 Telephone 604.922.9282 gwendoline.allison@foyallison.com

I. INTRODUCTION

I am a lawyer, and partner in the firm of Foy Allison Law Group, in West Vancouver, BC. I have nineteen years of experience in the field of employment law and human rights law. I have advised a number of women's groups since the outset of my career. My most recent work has centred on the implications for employment-related laws should Parliament decide to decriminalise the purchase of and profiteering from sex, or should Parliament decide to do nothing.

My particular focus is a consideration of those laws in relation to the Supreme Court of Canada's concerns for the safety and security of those engaged in prostitution and the recognition that the primary source of danger to those in prostitution are those who buy sex and those who profit from the sale of sex.

I recognise that employment-related laws, for most employees, fall within provincial jurisdiction and outwith the control of Parliament. I will also say at the outset that I reject the contention that prostitution is work, but do not intend to focus my presentation on that point. I agree with my clients that prostitution is a form of violence and a practice of sex inequality and subordination.

In the *Bedford* case, I was co-counsel to Asian Women Coalition Ending Prostitution ("Asian Women") and appeared before the Supreme Court of Canada. One of the challenges we had was constructing a submission that the court should pay attention to how racialised women, and in particular Asian women, are affected by prostitution. Among the many volumes of evidence was the sum total of one line regarding Asian women in prostitution. That one line was contained in the affidavit of a police officer, Michelle Holm, who deposed that women in bawdy houses were often illegal immigrants and residential brothels contained mainly Asian women.

In *Bedford*, Asian Women's position was that the impugned laws were unconstitutional as they applied to those in prostitution but were constitutional as they applied to those who buy sex and those who profit from prostitution: those men who are the primary source of danger to women.

II. Response to *Bill C-36*

> Prostitution is a "human rights devastation" "inflict[ed] on whole swathes of the globe's female population".[1]

Bill C-36 Protection of Communities and Exploited Persons Act has many positive aspects, notably its explicit recognition that:

- Prostitution is inherently exploitative and violent; it is a form of sexual violence.
- Prostitution is demand driven and it is necessary to target demand.

[1] Caroline Norma, *lecturer in the School of Global, Urban and Social Studies at RMIT University, and member of Amnesty Australia*, May 23, 2014

- Prostitution has a disproportionate effect on women and children; consequently is a practice of inequality and sexual subordination.
- Prostitution objectifies and commodifies the girls, youth and women who are prostituted.
- It is necessary to invoke the criminal law to protect the dignity and equality rights of those who are prostituted.
- It is necessary to resist the commercialisation and institutionalisation of prostitution.

I support the clear statement from Parliament that girls, youth and women are not for sale; that they are full human beings, with dignity and human rights. I particularly applaud the commitment of the State to encourage the reporting of crimes against those in prostitution and to assist those in prostitution to exit.

I also applaud the commitment of funds to assist with exiting and the commitment to a long term discussion with provincial, local and Aboriginal governments. All levels of government must be engaged to address the human rights devastation caused by prostitution.

III. GUIDANCE FROM THE SUPREME COURT

The Supreme Court of Canada has provided guidance in the framing to date of *Bill C-36* and potential amendments. In *Bedford,* the court stated first that the case was not about whether prostitution should be legal but whether the laws then in place were constitutional.[2] The case did not address equality issues. Indeed, there was only a fleeting reference in the evidence to Asian women: that women in brothels are often in Canada illegally and that residential brothels contain mainly Asian women.[3]

The court noted that those engaged in street prostitution were largely the most vulnerable class of those in prostitution and faced an "alarming amount of violence".[4] The court made a number of comments about the nature and the cause of the harms faced by those in prostitution:

- Many have no meaningful choice but to engage in prostitution.
- Those in street prostitution, with some exceptions, are a particularly marginalized population. Realistically, while they may retain some minimal power of choice, these are not people who can be said to be truly "choosing" a risky line of business.
- The violence of a buyer does not diminish the role of the state in making a prostitute more vulnerable to that violence.

[2] Para. 2
[3] (JAR, Vol. 35, Tab 83, p. 10248)
[4] Para. 64

The court recognised that the safety risks vary within the various sectors, with street prostitution being the most dangerous, to indoor being the least dangerous. Street prostitution tends to be the most vulnerable to violence, drug addiction, mental health, poverty and other issues. Although not highlighted by the court, there are also racial divisions within the sectors. Aboriginal women are over-represented within street prostitution while Asian women are over-represented in massage parlours.

The court reviewed the provisions against the purposes for which they were enacted, which the court found to be related to public disorder and neighbourhood disruption. The court specifically rejected the contention that the objectives of the laws included the promotion of dignity and equality.

The decision leaves a great deal of scope for Parliament, for three reasons. First, the court did not decide that Parliament cannot create offences which make prostitution less dangerous. Rather the court was dealing with whether Parliament could create offences to make prostitution more dangerous.[5] Second, the court described the objectives of the offences in issue very narrowly. Third, the court did not carry out a full constitutional analysis, specifically a racial or sexual equality analysis.

Thus Parliament is entitled to consider various provisions which will require a different constitutional analysis, including criminalizing aspects of prostitution, changing the objectives to include the promotion of equality, and of course in any event including equality in its analysis of any particular option. Parliament has the opportunity to protect those vulnerable persons without meaningful choice to engage in prostitution by tailoring the legislation to the problem addressed.

IV. Continued Criminalisation of Those Engaged in Street Prostitution is Inconsistent with the Purposes of *Bill C-36* and a Barrier to Exiting

The continued criminalisation of women in prostitution, as set out in proposed subsections 213(1) and (1.1), is, in my opinion, inconsistent with the stated purposes of *Bill C-36*, and in particular the purposes of encouraging those in prostitution to report incidents of violence and to leave prostitution.

There is also a practical consideration. Continued criminalisation is counter-productive to successful exiting. Those exiting prostitution already face barriers in entering the workforce, not least of which would be explaining how they have earned income during their years in prostitution. A criminal record is a further, and in some cases an absolutely prohibitive, barrier to achieving employment. Those who exit prostitution may have insights which would make them valuable employees, particularly in social services and other forms of public service. In many such positions, criminal records checks are required.

In BC, for instance, the *Criminal Records Review Act,* RSBC 1996 c. 86 requires a criminal records check for anyone who works with children or has unsupervised access to children or vulnerable adults, which would include working in child care

[5] Para. 87

facilities, after school programmes, schools and hospitals. Likewise, volunteering is a useful and successful method of gaining skills to enter the workforce, which often requires a criminal records check.

Continued criminalisation of those engaged in prostitution will both punish them for the inequalities they suffered which led them into prostitution and keep them tied to prostitution by impeding the chance of a successful exit.

V. The Provisions Criminalising Advertising are Necessary for the Promotion of Equality Rights

Prostitution is an inherently discriminatory practice. It is sexist, racist, ageist and ableist. The discrimination in prostitution is obvious in newspapers advertising.

The question to be asked: can prostitution ever be non-discriminatory? The answer in my opinion is "no". Provincial human rights legislation does not cover such advertising. Provincial human rights legislation only prohibits discrimination in job advertisements. It does not include advertising prostitution services.

However, notwithstanding the obvious discrimination and human rights abuses inherent in prostitution, there are few, if any, provisions to prevent the advertisement of a service which is sexist and based on racist stereotypes. *Bill C-36* provides a meaningful tool to combat the insidious discrimination inherent in the advertising of sexual services.

VI. Human Rights and Health and Safety Laws Cannot Protect the Safety and Security of Those in Prostitution.

Many of those who support decriminalisation of buyers and profiteers maintain that those who are engaged in prostitution may be protected through labour and employment laws and human rights laws. In that regard, those laws would be tasked with protecting those in prostitution from the catastrophic harms suffered by them, primarily at the hands of men. The ultimate question is whether such laws are up to the task. In my opinion, they are not.

Although employment-related laws are mainly within provincial jurisdiction, Parliament should be aware of how such laws could apply if Parliament decides to reject *Bill C-36*.

There are three legal regimes: the common law, human rights legislation and Occupational Health and Safety regimes. Employment laws are inadequate, first, because they are engaged primarily in compensating people for harms done to them, such as the failure to give reasonable notice of termination. Second, employment-related laws are focussed on the protection of "employees", a status not obviously conferred on those in prostitution.

In the case of those who work on the street and those who work alone from their homes, there is no employer. The underlying protections of employment law would not

be available to such girls, youth and women. There is no-one against whom to seek protections. The reality is that most women who work indoors in a decriminalised or legal environment are treated as independent contractors: self-employed business people. That is the case in the bunny ranches of Nevada, the mega-brothels of Germany and the red light districts of the Netherlands, where the women rent their rooms from the brothel owners. A recent newspaper article published in the UK newspaper The Telegraph[6] reported that in a "mega-brothel" chain called the Paradise in Germany, where prostitution is legal, both buyers and women pay an entrance fee of €79. In addition, the women rent their rooms from the brothel owner. The services are negotiated directly between the woman and the buyer and the going rate is €50 for half an hour. At the Pascha in Cologne, the women rent their rooms for €175 for 24 hours. The services are negotiated directly between the women and the buyers.

It is also the case in New Zealand. In 2008, the Prostitution Law Review Committee recognised that exploitative working conditions are longstanding in the industry and that decriminalisation made no significant difference to working conditions. Nonetheless, the committee decided not to interfere, leaving the matter to be one of negotiation between the woman and the brothel. The committee decided not to recommend that women in prostitution be granted employment rights. The committee noted that street-based workers and workers in small owner-operated brothels are self-employed, and do not have employment contracts to negotiate. However, as self-employed workers they have tax and workers compensation obligations that they must meet.[7]

The committee recommended that the sex industry be encouraged through education, consultation and advocacy to move to a situation where brothel-based women have a "best-practice" based written contract with a brothel operator but that the decision of whether the women will be employees or independent contractors will be left as a matter of negotiation between the parties. The industry has not adopted a best-practises contract.

The only employment right an independent contractor has under the NZ law is that the Department of Labour offers free dispute resolution services to independent contractors. In some cases, the Employment Relations Authority may adjudicate a dispute between an independent contractor and a hiring party and in the course of adjudicating the dispute will determine that the independent contractor was in fact an employee.

There is a second element to employment law, and that is the corresponding duties of the employer and employee. An employer has obligations to provide a safe working environment and not to force an employee to carry out unlawful acts. However, employees also owe duties to their employer:

- To be loyal and faithful
- To act in good faith and not act to the detriment of or in competition with the employer

[6] Nisha Lilia Diu, *Welcome to Paradise*, The Telegraph http://s.telegraph.co.uk/graphics/projects/welcome-to-paradise/

[7] last paragraph of section 10.7

- To obey the reasonable and lawful directions of the employer
- To act with all due skill, care and competence
- Not to act to destroy the trust and confidence between the employer and the employee
- Not to neglect her duties.

Some of those duties may not translate well in the context of prostitution where the primary obligation of the employee to the employer is to provide sex to a third party, as directed by the employer.

There is an apparent conflict between an employee's duties to her employer and the provisions in the *Criminal Code*[8] regarding consent to sexual activity. Under s. 271, it is a criminal offence to engage in sexual activity without the consent of the participants. Further, under s. 273.1, consent cannot be given by a third party; and consent is not obtained where the complainant expresses by word or conduct a lack of agreement. The *Criminal Code* provisions raise a question regarding the legality of an employment contract where the fundamental and core duty of the employee is to provide sex to the clients of the employer.

In the end, therefore, employment laws offer no protection, either to those on the street or those who work indoors, even in managed settings.

Similarly, human rights legislation is inadequate. Human rights protection is limited to certain spheres of activities: employment, services, housing. Although "employment" is more broadly interpreted than under the common law, and can include some independent contractor situations, the key requirement is that there has to be an "employer". Once again, those on the street and those who operate independently will have no employer. (As a service provider, however, they will be subject to human rights legislation with respect to clients. Human rights legislation could, at most, only operate to protect women in indoor managed situations.

Decriminalisation of the buyers and profiteers has implications that go beyond those in prostitution. Over many years, and it has taken many years, it has become unlawful to require a person to engage in sex as a condition of their employment. That would apply to a server in a restaurant, a domestic worker, a babysitter or any other form of employment. The days of "coffee, tea or me" are gone.

In addition, it would be unlawful for an employer to advertise for a young, slim busty Asian woman to work in a massage parlour.

[8] R.S.C. 1986, c. C-46

The question arises as to how, in a decriminalised environment, those unlawful activities could become lawful? How could human rights laws be used to protect women in indoor managed prostitution, when the core elements of the job are unlawful under human rights legislation?

Under the current schemes, it could be that indoor managed prostitution would not be a criminal offence but neither would it necessarily be a lawful activity. There are two potential scenarios to make such conduct lawful: either to recognise that requiring sex as a condition of employment is no longer unlawful, which has significant implications for all women (back to the "tea, coffee and me" days, and back to discriminatory hiring practices); or to provide a specific exemption, either in part or in whole, to those in the prostitution industry. The latter approach would create a separate category of person with a different, lower level of rights than the rest of us. That would surely create the very inequality the Bill is addressing with its focus on the demand for such a lower level of worker.

Finally, workers' compensation legislation provides regulations for ensuring safety in the workplace and a regime for compensating workers for workplace injuries. It is somewhat attractive to suggest that prostitution should be decriminalised and the safety issues addressed through provincially-regulated health and safety regimes. Indeed, it has been suggested here. However, there are issues with such a proposal, all of which would require significant amendments to those legal regimes.

When we think of occupational health and safety, we think of hard hats and steel toed boots on construction sites. We think of how many hours a long distance truck driver can drive. We think of training manuals. What would occupational health and safety regulations look like for the prostitution industry – for street workers? For those who work independently? For those in indoor managed brothels and massage parlours? How would we eliminate the risk of violence? How many sexual acts can a woman endure during any shift? How many hours should be worked? How much topical anaesthetic should be used? All of these issues are under-researched, and are not covered in current regulations.

WorkSafe BC has produced a handbook for employees who work alone. Arguably some people who work in prostitution work alone. There are specific requirements in the regulations, all of which are designed to minimise contact between the worker and the general public (who may pose a threat to them).[9] Again, the regulations require a "manager" or operator; someone to be responsible for the worker's safety. As such, the regulations would be inapplicable for street workers and women working on their own.

In New Zealand, a key stated goal of the legislation is to provide occupational health and safety to those in prostitution.[10] The Department of Labour issued a

[9] S. 4.20.1-4.20.23
[10] *PRA*, ss. 3, 8-10, 24-29

guide to health and safety in the sex industry.[11] The guide provides general advice, mostly regarding diseases and cleanliness, but no regulations and very little about violence. The guidelines also apply in "employment" situations. Small owner-operated brothels are not covered to the same extent nor are those in street prostitution.

In its report, the Prostitution Law Review Committee noted that after initial training of health inspectors, there were no additional resources to carry out the inspections required.[12] The committee also found that the ministry directed staff not to be proactive (leaving the regime to be purely complaint driven); government inspectors felt ill-equipped to carry out inspections because no-one knew what the baselines were; there was no knowledge of how to use the legislation constructively; and no- one knew where the brothels were to carry out inspections. That latter point arose because small-owner operated brothels are exempt from any registration requirements. Information regarding registered brothels was not made available to health inspectors and even if it had been, it would not have assisted because registered operators are not required to identify where the prostitution takes place.

Finally, the report acknowledged that the complaints received (ten over a five year period) were all anonymous, so could not be investigated.

Arguably, one key benefit of the scheme is the ability to obtain compensation for workplace injuries. Such a scheme could, but does not yet, compensate for the known injuries caused by prostitution: violence, mental disorders (many of those in prostitution suffer from depression, addiction, anxiety disorders and post-traumatic stress disorder is common[13]), occupational diseases, repetitive "strain" type injuries, and pregnancy.[14]

However, the scheme is employer-funded. Employers are assessed on their payroll at a percentage that reflects the injury, disease and death rates that occur in the industry, as well as the cost of claims for that employer. Massage parlours, steam baths and escort agencies are already included in coverage in BC, as part of the leisure industry.[15] The base rate is $0.50 per $100 assessable payroll to a maximum wage per worker of $77,900.

---

[11] *A Guide to Occupational Health and Safety in the New Zealand Sex Industry*; http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/sex-industry-a-guide-to-occupational-health-and-safety-in-the-new-zealand/sexindustry.pdf

[12] *PLRC report*, pp. 53-4

[13] Pivot Legal Society *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* Pivot Legal Society Vancouver 2006, p. 112

[14] *Beyond Decriminalization*, p. 114

[15] *Beyond Decriminalization*, p. 110; 2014 – Classification Unit 761021 massage parlour, Steam bath or Massage Services; http://worksafebc.com/insurance/premiums/2014_rates/classification/browse_sectors_and_subsectors/cu.asp?id=761021

The practical issue, however, is compliance.[16] For those in prostitution who do not have an identifiable "employer", such as those who operate independently or those in street prostitution, they will be responsible for premium coverage on the basis of being accepted as an "independent operator". They must register for Personal Optional Protection, and be assessed for premiums. Without being registered, there is no protection. That is also the situation in New Zealand where self-employed women have obligations to pay premiums for workers compensation premiums and to comply with the (still non-existent) regulations.

The lack of attention to those in prostitution and the obvious inapplicability of the current mechanisms illustrate how ineffective the schemes are to protect the safety and security of those in prostitution.

Parliament has an opportunity to create laws which fully respect all of the *Charter* rights of women in prostitution, including their section 7 *Charter* rights engaged in *Bedford* but also the rights to equality under section 15 of the *Charter*.

I submit that to transfer responsibility for the safety, security and equality of women in prostitution to inadequate provincially regulated schemes whereby the meagre potential level of protection accorded to them depends on their ongoing and continuous purchase of that protection, would amount to a failure to comply with the *Charter of Rights and Freedoms* and the requirements outlined by the Supreme Court of Canada in the *Bedford* decision; and a failure to adequately protect the health, safety and equality rights of vulnerable people, particularly women.

[16] *Beyond Decriminalization*, p. 110