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Can the Failure to Pay for Sexual Services Form the Basis of a Contractual Claim?

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Case commented on: *Sheehan v Samuelson*, [2023 NSSM 27 \(CanLII\)](#)

Pat and Al enter into a contract. Pat will drywall Al's basement in exchange for \$2,100. Pat drywalls Al's basement but Al refuses to pay. Al breached his contractual obligations to Pat and would be liable for damages. Now, keep all the facts the same but assume that the service is sex work as opposed to dry walling – does that change the analysis at all?

In a well-reasoned decision, and one that appears to be the first to deal with this issue in Canada, *Sheehan v Samuelson*, [2023 NSSM 27 \(CanLII\)](#) (“*Sheehan*”), Adjudicator Darrel Pink found that the provision of sex work is a contract. As the Defendant had received the services but had not paid the agreed amount, the adjudicator found for the Claimant and ordered the Defendant to pay damages.

In Canada, the sale of sexual services is not illegal but the purchase of sexual services is. In the context of criminal law, that means the person purchasing the services is committing a crime, but the person providing them is protected from criminal liability. But what about civil law? If it is not illegal to sell sexual services, but it is illegal to buy them, that leaves contracts for these services in a grey area.

What follows is a discussion on how the potential illegality of the contract can and should influence its enforceability in a civil context. Specifically, I argue that the modern common law doctrine of illegality provides a framework for making these contracts enforceable, but only by the sex worker, boiling it down to: if you want to buy sex, you do so at your own peril, both criminally and contractually.

Facts

The Claimant is a sex worker and peer support counselor for those engaged in sex work. She carries on business under the name Brogan Leigh Sheehan, a business registered with the Canada Revenue Agency (“CRA”). The Defendant was one of her clients.

The Claimant and Defendant were not known to each other. The Defendant contacted the Claimant through a message on LeoList, an advertising and social media/messaging website used by sex workers and their clients. The two agreed that she would do “outcall”, meaning she would go to his location. They agreed that he would pay her hourly rate of \$300 plus transportation costs.

The Claimant went to the Defendant's apartment. She stayed with the Defendant for seven hours, during which time they engaged in various forms of sex. Afterward, the Claimant advised the Defendant that he owed her \$2,100 for seven hours of companionship. The Defendant only paid the Claimant \$300.

The Claimant brought a claim against the Defendant for the outstanding \$1,800.

Findings/Decision

The Adjudicator found on the facts that the parties had contracted for the provision of, and payment for, companionship and other services. He found the required elements of contract formation: offer and acceptance were established upon the Defendant replying to the claimant's posting (her offer) on LeoList and accepting her proffered services at \$300/hour. The consideration was in the form of the services provided and payment for those services (at paras 28-29).

However, given that the service was sex work, the Adjudicator went on to consider the Defendant's argument: that it was an illegal contract for sexual services, and therefore unenforceable (at para 32).

The Adjudicator started with the Supreme Court's decision in *Canada (AG) v Bedford*, [2013 SCC 72 \(CanLII\)](#) ("*Bedford*"), which declared criminal the laws regulating prostitution to be unconstitutional, and acknowledged that sex work involves carrying on a business. In *Bedford* the Supreme Court struck down the existing prostitution and sex work provisions of the *Criminal Code*, RSC 1985, c C-46. He noted that in response to *Bedford*, Parliament enacted [Bill C-36, Protection of Communities and Exploited Persons Act](#) ("Bill C-36") to protect sex workers. Bill C-36 amended the *Criminal Code* by, *inter alia*, enacting ss 286.1 and 286.5(2), provisions that make it an offence to obtain sexual services for consideration but protect those who sell their own sexual services from criminal liability for participating in the commission of this offence.

The Adjudicator went on to find that commercial law benefits afforded by civil law should be available to sex workers if the work is legal and the business arrangements supporting the work is legal (at para 42). He noted, "[i]t follows that to allow a sex worker to pursue a business and not to allow that worker, as a business enterprise, to have access to a civil claim in contract... is logically inconsistent" (at para 42). He also found that not allowing recovery would not be in the public interest as it would preclude recovery for services that are legal for the worker to perform.

He pointed out that sex workers must collect and remit GST/HST on the income they earn, and that they must report income and pay income taxes. If they breach tax laws, there would be civil penalties (at para 45). If these penalties are available, then the remedies for a breach of contract should also be available.

The Defendant argued that the contract was illegal and therefore unenforceable. On this point, the Adjudicator considered the law governing illegal contracts. He noted that in *Still v Minister of National Revenue*, [1997 CanLII 6779 \(FCA\)](#), [1998] 1 FC 549, the court rejected the more rigid approach, that illegal contracts are unenforceable, and opted for a more flexible interpretation, one which takes into account the circumstances of the case (at para 48 of *Still*). The Adjudicator

concluded that even if the contract is illegal for the Defendant, it should be enforceable for the Claimant, and ordered the Defendant to pay \$1,800 plus interest (at para 56).

The Adjudicator went on to analyse the claim on the alternate grounds of restitution or unjust enrichment. He found that the Defendant received a benefit from the Claimant. He found no juristic reason that the Defendant would not have to compensate the Claimant for that benefit when she had been deprived of the opportunity to generate income while she was with him (at para 61). He also found that there was no public policy reason preventing the Claimant from receiving restitution for the value of the services she had provided (at para 67).

Comments

On a strict contract law interpretation, this would be an enforceable contract, as it has the required elements of contract formation. However, the Defendant in this case argued that because buying sexual services is a criminal offence, the contract should be unenforceable.

In Canada, it is not a crime to sell sex, but it is a crime to buy it. Below I consider how this potential illegality of the contract can and should influence its enforceability in a civil context. In particular, I maintain that the modern common law doctrine of illegality provides a framework for considering this issue.

The Common Law Doctrine of Illegality

The common law has evolved on the issue of whether contracts involving illegality are unenforceable. It used to adhere to the maxim, *ex dolo malo non oritur action*, or, no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. It now considers the circumstances of the case, the purpose of the statutory prohibition, and public policy (*Still*).

In *Still*, Robertson JA, writing for a unanimous court, said:

where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all the circumstances of the case, including regarding the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claim, to do so. (at para 48)

In *Chandos Construction Ltd v Deloitte Restructuring Inc*, [2020 SCC 25 \(CanLII\)](#), the Supreme Court confirmed this approach, indicating that the modern approach has been to relax the rigidity of the traditional doctrine “by permitting the enforcement of contracts in appropriate cases even where they contravene the provisions of the statute” (Côté J. at para 109, dissenting but not on this point).

Each of these factors is relevant in whether and how these contracts should be enforceable. The criminal and business law statutory schemes both support contract enforceability. The circumstances of sex work, however, raise public policy issues that support enforcing these contracts, while also highlighting the costs of enforcement for sex workers.

The Circumstances of Sex Work: Enforcing Contracts Protects Sex Workers

First, sex workers need to enforce these contracts to ensure they are paid for the provision of their services. Without enforceable contracts they would not have recourse to civil remedies, providing much incentive for clients to take advantage of them. In other words, it would make sex workers even more vulnerable.

Statutory Regime: Criminal Law

Second, the criminal law scheme governing sex work must be considered. Bill C-36 aimed to “protect those who sell their own sexual services” while “protect[ing] the dignity and equality of all Canadians by denouncing and prohibiting the purchase of sexual services...” (preamble). The regime acknowledges the vulnerability of sex workers by providing different treatment to parties to the same transaction. In other words, criminal law protects sex workers by making it a crime to buy sex but not to sell it.

Statutory Regime: Tax/Business Law

Third, the government recognizes sex work as a business. In *65302 British Columbia Ltd v Canada*, [1999 CanLII 639 \(SCC\)](#), [1999] 3 SCR 804 the Court specifically noted that the income from prostitution is taxable, and expenses incurred to earn the income are deductible (at para 56). This principle is not new. In *Minister of National Revenue v Eldridge*, 1964 CanLII 1110 (CA EXC), [1 Ex CR 758](#), the court held, “it is abundantly clear from the decided cases that earnings from illegal operations or illicit businesses are subject to tax” (at 759).

If sex workers are required to declare their income and collect and remit GST, and if they can register as businesses with the CRA, then it naturally follows that the government could sanction them if they fail to do any of those things. In other words, if the government can utilize civil penalties against sex workers who fail to follow tax laws, then sex workers should also be able to utilize civil law when they are not paid the taxable income to which they are entitled. The Adjudicator noted this when he said:

[i]f civil aspects of federal tax law are applicable to sex workers regarding their business earnings, as they are for all businesses, then the full range of legal principles applicable to a business, including the law of contract, apply to sex workers, along with the remedies for a breach of commercial or contractual obligations (at para 46).

Public Policy Concerns About the Circumstances of Sex Workers

Despite the positive aspects of enforcing these contracts, enforcement also leads to the problem of commodifying sex work. If sex work is the subject of legally enforceable agreements, it arguably allows courts to enforce the contract against both parties. In other words, courts could impose damages on sex workers who did not provide services for which they were paid.

Some may perceive this position to be problematic, as sex workers do not typically occupy strong bargaining positions. Many sex workers “find themselves forced into the trade due to the effects of social determinants or structural violence or as a means of survival” (“[Sex Work in Canada, The](#)

[Public Health Perspective](#)”, Canadian Public Health Association Position Paper, December 2014, at 3). The New York Times recently published an opinion piece arguing against using the language “sex work” and “sex worker”, as it “whitewashes the economic constraints, family ruptures and often sordid circumstances that drive many women to sell themselves” (Pamela Paul, “[What It Means to Call Prostitution ‘Sex Work’](#)”, (17 August 2023), *New York Times* (“Paul, Sex Work”)). In other words, imposing contract damages on people who are contracting from a place of desperation raises public policy concerns. In fact, in an effort to protect sex workers from having these contracts enforced against them, some may even challenge the notion that the agreement is between two consenting adults (“the language of ‘sex work’ ... implies falsely that engaging in the sex trade is a choice most often made willingly” (Paul, Sex Work)). But this position undermines sex workers’ ability to contract in the first place, leaving them unable to enforce payment.

A Middle Ground Solution?

If sex workers cannot enforce their contracts because it is illegal to purchase sex, that would undermine the purpose of Bill C-36, contributing “to the very exploitation the legislation was designed to prevent” (*Sheeham* at para 44). It would also be inconsistent with the government’s ability to utilize civil remedies against sex workers. At the same time, having the contract enforceable against sex workers raises public policy concerns.

There is a middle ground, though, a position criminal law has already legislated. As noted above, criminal law treats sex workers and clients differently, even though they are on opposite ends of the same transactions. Criminal law recognizes that prostitution is a form of sexual exploitation but also that some will have no choice but to be involved in it. It does so by criminalizing the buying of sex but not the selling, making it possible for sex workers to sell their own sexual services and enter into legitimate tangential business relationships, such as with drivers and security guards.

The common law can approach contracts for sexual services in much the same way. Like criminal law, it can denounce the purchase of sexual services, while also recognizing that some will be given no choice but to provide them. By permitting contracts to be enforceable against clients but not against sex workers, the law can protect sex workers by making it possible for them to sell their own sexual services and enforce non-payment.

Defendant’s Illegality Position

One final point is that the Defendant should not be able to rely on the illegality argument to his own benefit. Finding this contract unenforceable on the grounds of illegality would permit the Defendant to use the defence of statutory illegality to protect his own illegal conduct (failing to pay for services rendered), and public policy maintains that a person should not benefit from their own wrongdoing.

Unjust Enrichment and Restitution

As the Adjudicator noted, if the contract is not enforceable, there would be an alternate ground of restitution or unjust enrichment. A plaintiff can recover for unjust enrichment if there is a benefit

to the defendant, a corresponding deprivation to the plaintiff, and the absence of a juristic reason for the enrichment (see *Pettkus v Becker*, [1980 CanLII 22 \(SCC\)](#), [1980] 2 SCR 834; *Kerr v Baranow*, [2011 SCC 10](#) at para 31). The illegality of the contract does not prevent the Claimant from claiming restitution. In *Kim v Choi*, [2020 BCCA 98](#), the court maintained that “the defence of illegality does not apply to prevent restitution of wrongfully retained funds” (at para 8).

A claim for restitution by a sex worker could rely on the same arguments as those outlined above. The same public policy reasons would provide the absence of a juristic reason for the enrichment to the client. Conversely, they may also provide the juristic reason for the enrichment if the claim were brought by a client.

One Final Note

This post is based on the current criminal laws in Canada, though it would not be complete without mentioning the other view of sex work. Some sex workers reject the above narrative, maintaining that this “so called ‘victimhood’ is based on a false dichotomy” (Meredith Ralston, “[Halifax Lawsuit Shows Why Sex Workers Need Legal Protections](#)” (16 July 2023), *The Conversation* (“Ralston, Halifax Lawsuit”)). These sex workers, particularly escorts, maintain that they are “far from being victims” and that they “had agency, made good money and wanted sex work for consensual adults to be decriminalized fully” (Ralston, Halifax Lawsuit). The sex workers discussed in the Ralston article were in favour of decriminalizing sex work altogether, arguing that the current laws make their jobs harder by creating “a legal grey area”. Whether sex work should or should not be completely decriminalized is beyond the purview of this post, but the issue continues to be debated in many circles.

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