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Exploitation or Agency? A Critical Analysis of Bill C-36 and the Regulation of Sex Work in Canada

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ABSTRACT

By advancing a critical analysis of modern Canadian laws governing sex work, this paper will discuss the landmark Supreme Court case *Canada v. Bedford* and the social and political context from which the case arose. This paper will go on to outline key amendments to the *Criminal Code* related to sex work introduced through Bill C-36 in 2014, highlighting key theoretical perspectives and issues arising from academic literature on Bill C-36. In conclusion, this paper will discuss a number of critical issues raised in response to Bill C-36 and the role of law in protecting the rights and safety of sex workers in Canada.

KEYWORDS: *Sex Work, Bill C-36, Charter of Rights and Freedoms, Canada v. Bedford, Sex Workers' Rights*

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In recent years, laws governing sex work in Canada have gained national attention due to the Supreme Court's landmark 2013 ruling on existing adult sex work laws, which were found to be unconstitutional. The subsequent passage of Bill C-36 in 2014 and the introduction of new laws governing sex work has been highly controversial, raising critical questions around the roles of agency, exploitation, and the law in relation to sex work. This paper will discuss the Supreme Court case *Canada v. Bedford*, laws governing sex work prior to *Bedford*, and the social and political context from which the case arose. This paper will go on to outline new and updated laws governing sex work introduced through Bill C-36, discussing key theoretical perspectives arising from the literature in terms of how sex work is viewed in society and under the law, often as either inherently exploitative or as an expression of personal agency. In conclusion, this paper will discuss critical issues raised in response to Bill C-36, including concerns relating to constitutionality and notions of exploitation and victimhood underlying the contentious legislation.

Sex work Law in Canada: Background

Since Canada's inception as a British settler colony, laws and regulations have existed with the objective of regulating sex work. Early laws aimed at addressing sex work in Canada were largely rooted in English common law and criminalized women involved in sex work, giving police the authority to arrest ''all common sex workers or night walkers wandering in the fields, public streets or highways" (Backhouse, 1985, p. 389). Over time, law and policy governing sex work has shifted in objectives and outcomes, with modern laws focusing more on addressing the harms associated with sex work rather than the act itself (Casavant & Valiquet, 2014, p. 1). Prior to 2014, the exchange of sex for money was not illegal in Canada, with laws aiming to "curb the public nuisances associated with this practice and the exploitation of individuals who engage in sex work activities" (Casavant & Valiquet, 2014, p. 1). The three main sections of the Criminal Code that were applied by the courts to address the issue of adult sex work in Canada prior to 2014 are as follows: s. 210, which outlines the charge of keeping, managing, working in or being inside a bawdy-house; s. 212, outlining the charge of procurement and includes offences such as encouraging another person to become involved in sex work and living of the avails of sex work; and s. 213, which outlines the charge of communicating in public for the purposes of sex work, including attempting to stop any person or vehicle for the purpose of engaging in or the solicitation of sex work (Barnett, 2008, pp. 6-10).

Critics have argued that prior to 2014, sections 210, 212 and 213 of the Criminal Code created significant barriers for women to engage in sex work safely (Sampson, 2014, pp. 138). For example, section 210 has been criticized as placing women involved in sex work at increased risk of physical harm from clients as it prevent sex work from occurring in indoor environments where increased

security measures may be available (e.g. cameras, security staff) and clients may be more easily screened by workers to negotiate services, prices, and the use of prophylactics (Sampson, 2014, p. 141; Belak & Bennett, 2016, p. 14). Section 213 has been criticized as reducing opportunities for women involved in street sex work to adequately screen clients, as communicating with clients in public involves increased risk of police detection (Belak & Bennett, 2016, p. 14). Additionally, section 212 has served as a barrier for individuals involved in sex work to hire drivers and other security staff in order to prevent assaults from clients (Sampson, 2014, p. 141).

Concern for the safety of sex workers in Canada came to national attention with the 2002 capture of serial killer Robert Pickton, who was involved in the murders of over 30 predominantly Indigenous women involved in sex work who had gone missing from the Vancouver's Downtown Eastside beginning in the late 1990s (Sampson, 2014, p. 137; Keller, 2011, para. 6). Critics argued that the failure to capture Pickton was due in part to the failure of the Vancouver Police Department to complete adequate investigations into Pickton and the numerous cases of missing women, as well as a result of the existing laws governing sex work that contributed to dangerous working conditions for sex workers, particularly street-based workers who are considered the most vulnerable to violence (Sampson, 2014, p. 138). As noted above, Criminal Code sections regulating sex work prior to 2014 placed street sex workers in vulnerable situations by severely limiting opportunities for adequate client screening and indoor sex work, pushing women to work in isolated areas and avoid seeking police assistance (Belak & Bennet, 2016, pp. 14-16). Ongoing sex worker activism and concerns from the public following the Pickton case led to a constitutional challenge of Canada's sex work laws, led by three current and former Ontario sex workers: Terri Jean Bedford, Amy Lebovitch and Valerie Scott (Sampson, 2014, p. 138; Perrin, 2014, p. 8). The plaintiffs in *Canada v. Bedford* argued that s.210 (keeping a common-bawdy house), s.212 (1)(j) (living off the avails of sex work) and s.213 (1)(c) (communicating in public for the purpose of sex work) violated the fundamental rights of sex workers under s. 7 of the *Charter of Rights and Freedoms*, which states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" (Perrin, 2014, p. 9). Specifically, the plaintiffs argued that these sections of the *Criminal Code* placed sex workers at increased risk of violent victimization, limiting opportunities for sex workers to protect themselves through thorough client screening, the hiring of security staff and opportunities to work indoors and in close proximity to others who may be able to assist in case of an emergency (Sampson, 2014, p. 138).

The case was brought to the Ontario Superior Court, where Justice Susan G. Himel's decision to strike down the three sections of the Code was stayed following an appeal by the Attorney General of Ontario and Attorney General of Canada that brought *Bedford v. Canada* before the

Supreme Court of Canada in 2013 (Perrin, 2014, pp. 9-11). On December 20, 2013, the Supreme Court dismissed the appeal and ruled that sections 210, 212 (1)(j) and 213 (1)(c) violated the rights of sex workers under section 7 of the *Charter of Rights and Freedoms*, upholding Justice Himel's finding that the sections "deprived the plaintiffs and other sex workers of their liberty and security of the person, either through potential imprisonment or by enhancing their risk of injury" (Sampson, 2014, pp. 141; Perrin, 2014, p. 11). Specifically, Justice Himel's finding noted that s. 210 prevented sex workers from working indoors where she argued that sex work is the safest, s. 213 prevented street sex workers from adequately screening potential clients thus compromising safety, and that s. 212 pushed sex workers into working alone or in dangerous conditions as it prevented the hiring of security, drivers and other staff (Sampson, 2014, pp. 141). The Court noted that their decision in *Canada v. Bedford* was unrelated to the question of whether or not sex work should be legal in Canada, focusing instead on addressing laws that contributed directly to increased risk of harm for women involved in sex work. (Sampson, 2014, p. 142).

Bill C-36 Overview

Following the 2013 Supreme Court ruling in *Canada v. Bedford*, Parliament was given a period of one year to draft new legislation relating to the regulation of sex work before the existing laws were to become void (Perrin, 2014, p. 11). In June of 2014, Bill C-36, or the "Protection of Communities and Exploited Persons Act" was introduced to the House of Commons, officially coming into force on December 6, 2014 (Casavant & Valiquet, 2014, p. 1; Department of Justice, 2015a, p. 1). The new provisions introduced in Bill C-36 make the purchase of sexual services illegal for the first time in Canadian history, whereby "the act of sex work can no longer be practiced without at least one of the individuals involved committing a crime" (Casavant & Valiquet, 2014, p. 1). The Department of Justice (2015a) describes the primary objectives of Bill C-36 as follows: "to protect those who sell their own sexual services, to protect communities, and especially children, from the harms caused by sex work, and to reduce the demand for sex work and its incidence" (p. 1)

Bill C-36 introduced two new offences relating to sex work, including s. 286.1 of the Criminal Code which prohibits purchasing, or communicating for the purpose of purchasing, the sexual services of an adult and applies specifically to those seeking to purchase sexual services as opposed to those selling them (Casavant & Valiquet, 2014, p. 18). As a modification to the previous communication offence, those selling sexual services are not exempt from s. 286.1 when such communication occurs near a location where children may likely be present such as schools and daycares (Department of Justice, 2015a, p. 4). Additionally, Bill C-36 introduced s. 286.4 of the Code, which prohibits the advertising of sexual services of another person in any form, including print and web media (Department of Justice, 2015a, p. 2). In addition to introducing new offences, Bill C-36 includes

updated offences relating to sections of the Code that were struck down in *Canada v. Bedford*. For example, in response to the repealed s. 212 (1)(j) (living off the avails of sex work), a new section (s. 286.2, or the "material benefit" offence) was introduced and reduced the scope of the offence to exclude dependents, co-tenants, and some employees of sex workers including drivers and security staff (Casavant & Valiquet, 2014, p. 18). The offence of procurement was also updated to specifically address the issue of procuring others to participate in the sale of sexual services and is now separate from the material benefit offence (Department of Justice, 2015a, p. 4).

It is important to note that none of the laws introduced in Bill C-36 criminalize those who sell sexual services, with the exception of the provision relating to communication near a location where children may be present. The new laws specifically target the purchasers of sexual services, an objective aligned closely with the Swedish or "Nordic" model of sex work regulation (Sampson, 2014, p. 139). The Nordic model is based on the notion that adult sex work is inherently harmful to women and should be eliminated (Perrin, 2014, p. 15). Within the Nordic model, this objective is achieved through eliminating demand for sex work by exclusively criminalizing the purchasers of sexual services, constructing sex workers as victims in need of help and support, and offering programming to facilitate exiting and prevention from entering sex work (Perrin, 2014, p. 15).

Theoretical Perspectives

The introduction of Bill C-36 has been highly controversial among academics and those with lived experiences as sex workers, with a number of conflicting theoretical perspectives on the issue raised in current literature. One significant theme arising from the literature relating to Bill C-36 and modern discourse on sex work is a dichotomy in terms of how sex workers are viewed under the law and within society, primarily as either inherent victims of exploitation or free agents empowered to make their own decisions around participation in sex work. Sampson (2014) discusses this issue in contrasting radical second wave feminist approaches to understanding sex work with sex-positive or third wave "sex radical" approaches (pp. 146). Radical feminist perspectives hold that sex work is inherently harmful and represents the exploitation of women within a patriarchal system of oppression, with any notion of choice to engage in sex work as an "illusion" whereby women involved in sex work may be unable to recognize their own oppression (Sampson, 2014, p. 146). In contrast, sex radical perspectives view sex workers as individuals exercising choice in their participation in sex work, rejecting the notion of the inherent harms of the act of sex work and pointing instead to the criminalization of sex work as contributing to dangerous working conditions. (Sampson, 2014, p. 146-147). Sampson (2014) notes that the sex radical perspective emphasizes the subjective experiences of those involved in sex work, acknowledging the diverse perspectives of those involved in sex work and avoiding generalizations of their experiences or opinions (p. 147).

This dichotomy in theoretical perspectives is echoed in the work of Heath, Braimoh and Gouweloos (2016) who describe the divide in moral stances taken on sex work in the context of Bill C-36 between two competing viewpoints: the "danger" stance and the "choice" stance (p. 203). Heath et. al. (2016) describe how from the danger stance sex work is understood as inherently harmful to sex workers as the exchange of sex for money is inherently exploitative, as well as to society as a whole as sex work is connected to other social ills including poverty, substance misuse and violence (pp. 206). Proponents of this perspective in the context of Bill C-36 included a number of women's and Christian groups that joined together in advocating for the abolishment of sex work in Canada through criminalization, with women's groups calling for the criminalization of sex purchasers and Christian groups advocating for criminalization of all parties involved in sex work (Health et. al., 2016, pp. 206-207). Both groups argued that the best strategy to address the harms associated with sex work is the elimination of sex work itself, with women's groups focusing on the protection of women in sex work and Christian groups working towards protecting society as a whole as well as traditional "Canadian values" (Heath et. al., pp. 205-206)

In contrast to the danger stance, Heath et. al. (2016) describe the choice stance as rooted in the belief that sex work is not inherently harmful but rather a form of work deserving the same protections as any other work in Canada (pp. 210). Proponents of this perspective included numerous sex worker advocacy groups, many of whom submitted statements to the Supreme Court in *Canada v. Bedford* arguing against the criminalization of sex work and advocating for a harm-reduction approach to address the risks associated with sex work, emphasizing education, health and safety (Heath et. al., 2016, p. 210). Proponents of the choice stance acknowledge that some sex work may be exploitative in nature, advocating for the ongoing criminalization of coerced sex work and the need to address factors limiting choice in sex work such as poverty and lack of social support (Heath et. al., 2016, pp. 211-212).

The different perspectives highlighted by the authors suggest that on the issue of sex work, there are disagreements in terms of how ideas of agency, and exploitation are understood among scholars and stakeholders in Canadian sex work law reform. It is important to note that while some of the authors cite direct quotations from sex workers and discuss sex worker activism in the context of Bill C-36, the academic literature on the issue remains largely informed by scholars and researchers who may not have direct lived experiences in sex work, with the voices and perspectives of sex workers being interpreted through an academic lens. The direct voices of sex workers are less prominent in the literature, and more research may be required to fill this gap and understand the needs of those the law is claiming to protect.

Key Issues

The literature on sex work in Canada reveals a number of issues related to Bill C-36 raised by academics and other key stakeholders, including those directly involved in sex work. One critical issue raised is the moral position on sex work taken by legislators, which is rooted in traditionally conservative notions of victimhood and exploitation (Campbell, 2015, p. 33). Bill C-36 was formulated on the premise that sex workers are victims of the inherently exploitative practice of sex work (Department of Justice, 2015b, para 16). On Parliament's position on sex work and exploitation, a paper published by the Department of Justice states: "…Bill C-36 recognizes that sex work's victims are manifold; individuals who sell their own sexual services are sex work's primary victims, but communities, in particular children who are exposed to sex work, are also victims, as well as society itself" (2015b, para. 16). In discussing the position of Conservative legislators on the issue of sex work and Bill C-36, former Prime Minister Stephen Harper is quoted by Sampson (2014) as stating: "We believe that the sex work trade is bad for society. That's a strong view held by our government, and I think by most Canadians" (p. 152). In taking a conservative approach to creating laws governing sex work that construct sex workers as victims, legislators have largely silenced the voices and perspectives of those involved in sex work who have openly advocated for decriminalization and a harm-reduction approach to addressing sex work. For example, PIVOT legal society, a Vancouver-based sex workers' rights group that has been vocal on the issue of sex work legislation, advocated for the decriminalization of sex work in order to protect sex workers from violence and ensure the protection of their rights under the Charter (Pivot Legal Society, 2016, para. 1). Sampson (2014) points out that many requests of those involved in sex work include improved access to health and harm reduction resources, as well as efforts to combat violence against women in order to increase the safety of sex work (p. 167). Despite the inclusion of numerous intervenors and commentators on the proposal of Bill C-36, the voices of sex workers and groups advocating their interests were not reflected in the legislation, with Bill C-36 largely representing the interests of women's and Christian abolitionist groups (Sampson, 2014, pp. 151-152). In failing to acknowledge the voices and perspectives of those involved in the area of work legislators are seeking to make safer, the federal government may be failing to prevent harm to sex workers as well as the community overall.

Questions relating to the constitutionality of Bill C-36 are also raised in the literature. Many critics argue that the new and updated laws introduced through Bill C-36 closely mirror those that were struck down in *Canada v. Bedford*, failing to address the harms associated with the previous laws and continuing to endanger sex workers (Sampson, 2014, p. 154; Wrinch, 2014, para. 3-4). For example, Wrinch (2014) points out that the new communication provision banning communication near areas where children may be present (s. 286.1) is only slightly narrower than the previous law,

continuing to push women to work in isolated areas where they are less likely to be identified by police and limiting opportunities for women to adequately screen clients for potential safety concerns (Wrinch, 2014, para. 8-9). Wrinch (2014) notes that this new communication law closely mirrors the original law, potentially reproducing the dangerous circumstances that resulted in the previous law being ruled unconstitutional under s. 7 of the Charter (para. 9). Additionally, s. 286.4 (the advertising offence) creates significant barriers to sex workers operating indoors, potentially violating sex worker's s. 7 and s. 2(b) (freedom of expression) rights under the Charter by encouraging sex work to occur outdoors where it is more isolated and significantly less safe (Wrinch, 2014, para. 27).

A number of authors point out an additional critical issue related to Bill C-36, relating to the effectiveness of Canada's Nordic-based model in *actually* reducing harms associated with sex work rather than increasing them. Sampson (2014) points out that the Nordic model upon which Bill C-36 is based often forces sex workers underground and into isolation, creating dangerous situations for sex workers whereby they are limited in their ability to screen clients and work in close proximity to others to increase safety (p. 155). Additionally, Sampson (2014) describes how the top-down approach to regulating sex work associated with Canada's new model fails to address the unique systemic factors that influence women's participation in sex work and the dangers associated with it, including race, gender and class (p. 164). Campbell (2015) emphasizes the prioritization of the needs of the community and "unsightliness" of sex work over the safety of sex workers under Bill C-36, suggesting that the new laws will continue to put women at an increased risk of harm as they push sex workers into further isolation (p. 43). In criticism of Canada's new approach, Wrinch (2014) states: "This made-in Canada model will lead to a continued epidemic of violence against sex workers in Canada" (para. 5). These issues suggest that in the creation of Bill C-36 and adoption of the Nordic model, Parliament has taken a moralistic approach to legislating sex work and has failed to prioritize the safety of those involved in sex work (Bruckert, 2015, p. 1-2).

The "Official Version of Law"

In analyzing the numerous perspectives on sex work regulation in Canada in the context of Bill C-36, a number of critical questions arise relating to whose voices and perspectives are echoed within the law and how the law may be used to achieve social change. The "official version of law" suggests that the law is objective and neutral, applied equally and fairly to everyone within a given society. However, this equality is not extended to the creation and enforcement of laws, with dominant groups afforded the power to have their own interests represented in the law. This issue is evident in Bill C-36, as the expressed interests of sex workers were largely ignored in favor of the interests of dominant groups (i.e. the federal Conservative government, religious groups) in the regulation of sex work. The law may be limited in its capacity to achieve social change when

dominant groups maintain control over the enforcement and creation of the law, illustrating the importance of representation and the inclusion of voices of minority groups in future legislative endeavors. In order for the law to be used as a tool for social change and combatting inequality, representation of groups affected by the social issues being addressed is imperative. Legislators will be required to acknowledge their own power and privilege, seeking to understand the perspectives and needs of those who are being affected by the law in question. As long as legislators maintain the paternalistic belief that that they know what is best for those affected by inequality and injustice without considering their unique perspectives and lived experiences, meaningful change may be difficult to achieve through the law.

Conclusion

Canada's approach to the regulation of sex work under Bill C-36 has been highly controversial, raising a number of pivotal questions relating to notions of choice, exploitation, harm and agency. In *Canada v. Bedford*, the Supreme Court of Canada called for a new approach to regulating sex work that did not serve to place those involved in sex work at increased risk of violent victimization. Parliament responded with Bill C-36, which was recognized by some as a novel approach to eliminating the dangers of sex work through criminalization, while others criticized the approach as reproducing many of the harms associated with the previous laws and continuing to put sex workers in danger. In a careful review of the literature, key theoretical perspectives arose that construct sex work as either inherently exploitative or as legitimate work deserving protection under the law. Key issues raised in the literature, including concerns regarding the constitutionality of Bill C-36 and moralistic notions underlying the legislation, suggest that Parliament has prioritized the protection of society from the social and moral ills associated with sex work over the safety and wellbeing of those engaging in sex work. Looking forward, the potential for constitutional challenges of Bill C-36 may afford legislators a second chance to address the issue of sex work in Canada, perhaps this time as informed by those directly impacted by it.

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