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SEX WORK AND THE CITY:
CREATING MUNICIPAL LICENSING REGIMES FOR BROTHELS

by

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for the degree of Master of Laws

at

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DEDICATION PAGE

This thesis is dedicated to my father, Ronald Powell, who never stopped believing in me. He imparted upon me the courage to undertake the greatest challenges, the resolve to see them through and the strength to persevere in the face of adversity. I know he is watching over me until the day we meet again, just around the corner.

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ABSTRACT

The debate over how to regulate sex work in Canada has long occupied courts, governments, policymakers, sex workers and activists. In the aftermath of the Supreme Court decision in *Bedford v Canada* and the enactment of the constitutionally suspect *Protection of Communities and Exploited Persons Act*, this thesis examines municipal law's potential role in regulating brothels. Municipalities already grant licenses to adult service providers, the licensing of brothels is a natural extension of their powers. The current licensing regimes are in need of reform, both for adult services and before any attempts to license brothels. This thesis uses New Zealand as an example of an effective licensing regime. By treating the sex trade akin to other industries and respecting the expertise of those who work in it, there are minimal disruptions in communities and safer working conditions for employees.

LIST OF ABBREVIATIONS USED

AIDS	Acquired Immune Deficiency Syndrome
CBA	Canadian Bar Association
Charter	Canadian Charter of Rights and Freedoms
CJC	Chief Justice of the Supreme Court of Canada
CORP	Canadian Organization for the Rights of Prostitutes
HIV	Human Immunodeficiency Virus
JA	Court of Appeal Judge
LGA	Local Government Act (New Zealand)
NZPC	New Zealand Prostitutes Collective
PRA	Prostitution Reform Act
PLRC	Prostitution Law Reform Committee
SOOBs	Small Owner Operated Brothels

CHAPTER 1 - INTRODUCTION

From the day that dominatrix Terri-Jean Bedford first cracked her whip on the steps of a Toronto courthouse, Canadians were engrossed by the debate about how sex work should be regulated in this country. The sale of sex between consenting adults was not a criminal offence.¹ Bedford, along with co-applicants Valerie Scott and Amy Lebovitch challenged three *Criminal Code* provisions that made it illegal to sell sex safely.² Their victory at the Supreme Court of Canada could have prompted the beginning of decriminalized sex work in Canada and the ability for municipalities to develop licensing bylaws which explicitly regulate sex work. The concept is neither new nor startling. As this thesis will detail, a wealth of research supports the decriminalization of voluntary adult sex work, coupled with regulation of the industry. New Zealand provides a suitable model for success. The introduction of Bill C-36 signaled that the Federal Government was not prepared to allow that to happen.³

A future challenge to the new criminal law, however, could again open the door to the possibility of decriminalized sex work. The term decriminalization typically means the repeal of all criminal law provisions - “so that it is no longer a prohibited act”.⁴ It is somewhat of a misnomer when used in regard to sex work. While voluntary adult sex work could easily be removed from the *Criminal Code*, some regulatory laws would need

¹ *Canada (Attorney General) v Bedford*, 2013 SCC 72, 3 SCR 1101 at para 1 [*Bedford*] See also paras 5, 61, 87, 89.

² *Criminal Code*, RSC 1985, c C-46, ss 210, 212(1)(j), 213(1)(c) [*Criminal Code*].

³ Tonda MacCharles, “Peter MacKay rules out legalization, municipal regulation of prostitution”, *Toronto Star* (20 January 2014), online: <http://www.thestar.com/news/canada/2014/01/20/peter_mackay_rules_out_legalization_municipal_regulation_of_prostitution.html> accessed 20 January 2014 [*MacCharles*]. These comments were made to the media months prior to the introduction of Bill C-36 on June 4, 2014: *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 (assented to 6 November 2014) [C-36].

to adapt to ensure sex workers have access to the same rights and protections as other workers. For example, in New Zealand, decriminalization meant the *Health and Safety in Employment Act* was extended to encompass the sex trade.⁵ As a result, the Department of Labour developed a comprehensive occupational health and safety guide designed to provide clarity to the “duties, rights and responsibilities” of those in the industry.⁶

It also means leaving criminal laws in place that restrict the sex trade to adults and prevent coercion or exploitation. This is the definition of decriminalization that will inform the discussion that follows. As Maggie MacNeil explains, there is no such thing as *pure* decriminalization:

neither [New Zealand nor New South Wales] has absolute decriminalization because both have one or two laws that don't apply to other industries (prohibiting those under 18 from working, for example), but the number of such special restrictions is so small as to make no practical difference for the vast majority of sex workers.⁷

Even if a challenge to the new law were successful, the criminal law would remain necessary, just in a different capacity. This thesis will argue that decriminalization, and allowing municipal regulation is a preferred model to continued criminalization.

⁴ Barron's Canadian Law Dictionary, 6th ed, *sub verbo* “decriminalize.”

⁵ *Health and Safety in Employment Act 1992* (NZ) 1992/96; New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) online: <<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report>> accessed 30 January 2014 at 4.2.1 [*PLRC Report*].

⁶ *Ibid*; New Zealand, Department of Labour, Occupational Safety and Health Service, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (Wellington: Department of Labour, 2004) online: <<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>>.

⁷ Maggie MacNeil, “Responses to Weitzer, Post, and Wagner: Don't Be Swayed by Exaggerated Claims”, *The Conversation* (11 December 2013), online: <<http://www.cato-unbound.org/2013/12/11/maggie-mcneill/responses-weitzer-post-wagner-dont-be-swayed-exaggerated-claims>> accessed 9 February 2015.

While research clearly indicates the many benefits of decriminalizing sex work, including enhanced safety⁸, better health⁹ and the extension of labour rights to benefit sex workers¹⁰, the Federal Government has enacted new criminal law provisions that aim to eliminate the sex trade.¹¹ As these provisions moved through Parliament, there were calls for them to be referred to the Supreme Court for an opinion on their constitutionality.¹² Others pointed to constitutional weaknesses that could become part of a future court

⁸ Bedford, *supra* note 1 at para 63; Gillian Abel, Lisa Fitzgerald, & Cheryl Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers* (Christchurch: University of Otago, 2007) online: <<http://www.otago.ac.nz/christchurch/otago018607.pdf>> at 133-4.

⁹ Global Commission on HIV, *HIV and the Law: Risks, Rights & Health* (New York: UNDP, HIV/AIDS Group, 2012) online: <<http://www.hivlawcommission.org/index.php/report>> accessed 9 February 2015 at 45 [*HIV & the Law*]; Kate Shannon et al, “Global epidemiology of HIV among female sex workers: influence of structural determinants” (2014) *The Lancet*, online: <[http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(14\)60931-4/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(14)60931-4/abstract)> accessed 9 February 2015.

¹⁰ Emily van der Meulen, “When Sex is Work: Organizing for Labour Rights and Protections” (2012) 69 *Labour/Le Travail* 147 at 152 [*van der Meulen*].

¹¹ Canada, Parliament, *House of Commons Debates*, 41st Parl, 2nd Sess, No 101 (11 June 2014) at 1700 (Hon. Peter MacKay).

¹² Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, Evidence, 41st Parl, 2nd Sess, No 44 (15 July 2014) Hon. Françoise Boivin (Gatineau, NDP) at 09:30 and Hon. Sean Casey (Charlottetown, Lib.) at 09:35, online: Parliament of Canada <<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6689198&Language=E&Mode=1&Parl=41&Ses=2>> accessed 9 February 2015; British Columbia, City of Vancouver & Vancouver Coastal Health Authority, *Position Paper on:*

Bill C-36 the Protection of Communities and Exploited Persons Act” (Ottawa: City of Vancouver and Vancouver Coastal Health Authority, 2014 [*Vancouver Brief*]).

¹³ Canadian HIV/AIDS Legal Network, *Brief to the Senate Standing Committee on Legal and*

challenge.¹³ Despite the fact that decriminalization, if it can be achieved, is still years away, it is important to examine the implications now so that a potential transition from the criminal law to municipal governance of the sex trade occurs smoothly.

This chapter will set the stage for a discussion of the next steps. *Bedford* was the spark that reignited the debate about sex work regulation in Canada and detailing the decision of the Supreme Court provides valuable context.¹⁴ The decision of the Court also provides a lens through which to view the legislative response found in Bill C-36. The provisions became law on December 6, 2014, before the Court's declaration of invalidity came into effect, with the result that there was no lapse in the criminal law governing sex work.¹⁵ This chapter will also discuss the work position and detail the implications that flow from that view. For many, it is difficult to think of sex work as a job. Parent and Bruckert put forward the proposition that: "We suffer from tunnel vision in two senses: on the one hand, we do not see the sexualized dimension in other jobs; on the other hand

¹³ Canadian HIV/AIDS Legal Network, *Brief to the Senate Standing Committee on Legal and Constitutional Affairs regarding Bill C-36, the Protection of Communities and Exploited Persons Act* (Ottawa: Canadian HIV/AIDS Legal Network, 2014), online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/C-36_brief_Cdn_HIV-AIDS_E.pdf> accessed 17 September 2014; Providing Alternatives Counselling & Education (PACE) Society, *Briefing Note Bill C-36: An Act to amend the Criminal Code in response to the SCC decision in AG Canada v Bedford*, online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/SM_C-36_brief_PACE_Society_E.pdf> accessed 17 September 2014; Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 15 (9 September 2014) (Katrina Pacey), online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/15ev-51557-e.htm?Language=E&Parl=41&Ses=2&comm_id=11> accessed 30 September 2014 [Pacey]; Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, Issue 16 (17 September 2014) (Alan Young), online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/16ev-51569-e.htm?Language=E&Parl=41&Ses=2&comm_id=11> accessed 30 September 2014 [Young]; National Criminal Justice Section and Municipal Law Section of the Canadian Bar Association, *Bill C-36, Protection of Communities and Exploited Persons Act*, (Ottawa: Canadian Bar Association, 2014), online: <<http://www.cba.org/CBA/submissions/pdf/14-57-eng.pdf>> accessed 9 February 2015 [CBA Brief]

¹⁴ The Criminal provisions were previously subject to Supreme Court scrutiny in the Prostitution Reference (*Reference re ss. 193 and 195.1 (1)(C) of the Criminal Code* (Man.) [1990] 1 SCR 1123, 77 CR (3d) 1). In that instance the Court held that the bawdyhouse and communicating provisions were constitutional.

¹⁵ C-36, *supra* note 3 ; *Bedford*, *supra* note 1 at 169.

we see sex work only through the prism of sexuality”.¹⁶ The work position looks beyond the sexualized nature of the job to better examine the labour involved.¹⁷ The work position demonstrates the commonalities that sex work has with other professions thus making it easier to think critically about the advantages of using regulatory laws instead of criminal prohibitions. These three items are critical for understanding the current state of the law, the potential problems with the federal response, and why the debate over how to best regulate sex work in Canada will continue. The synopsis of the case and the Federal Government’s response are provided for context of the legal and political environments in which these decisions are being made. The work position will provide a means of moving the conversation forward in light of the potential failings in the new criminal provisions.¹⁸

BEDFORD V CANADA (ATTORNEY GENERAL)

In *Bedford*, the Supreme Court struck down three *Criminal Code* provisions under section 7 of the *Charter of Rights and Freedoms*.¹⁹ Although dangerous, selling sex was legal until the enactment of Bill C-36.²⁰ The Court in *Bedford* concluded that the prohibitions on bawdy-houses, living on the avails and communicating for the purposes of prostitution, prevented sex workers “from taking steps to protect themselves from the

¹⁶ Colette Parent & Chris Bruckert, “The Current Debate on Sex Work” in Colette Parent et al, eds, *Sex Work: Rethinking the Job, Respecting the Workers* (Toronto: UBC Press, 2013) 9 at 24 [Parent & Bruckert].

¹⁷ *Ibid.*

¹⁸ See note 13.

¹⁹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11, s 7: “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.”

²⁰ *Bedford*, *supra* note 1 at para 1; See also *Ibid* at paras 5, 60, 61, 87, 89.

risks” of violence.²¹ The Attorney General had argued that it was not the law but the choice to engage in sex work that caused the harms but the Court rejected this premise for three reasons.

First, the Court concluded that the most marginalized workers face “financial desperation, drug addictions, mental illness, or compulsion from pimps, [and] they often have little choice”.²² Second, those who choose to sell sex are engaging in a legal activity.²³ Third, the Court reiterated that the application was not launched to compel the government to make sex work safer; it was to “strike down legislative provisions that aggravate the risk of disease, violence and death”.²⁴

The bawdy-house provision made it an offence to sell sex from a “fixed indoor location”.²⁵ The Court noted that sex work was limited to “street prostitution and *out-calls* – where the prostitute goes out and meets the client at a designated location, such as the client’s home”.²⁶ The Court agreed with the application judge’s determination that “indoor work is far less dangerous than street prostitution” and that “out-call work is not as safe as in-call work”.²⁷ Writing for the Court, McLachlin CJC determined the bawdy-house provision denied sex workers the ability to protect themselves in three ways: first, by preventing sex work from occurring in a “fixed indoor location” - the prohibitions on hiring staff compounded this insecurity; second, by making health services harder to access and; third, by denying access to safe house brothels.²⁸ When the effects of the provision were balanced against the purpose of preventing “community harms in the

²¹ *Ibid* at para 60; See also *Ibid* at para 18.

²² *Ibid* at para 86.

²³ *Ibid* at para 87.

²⁴ *Ibid* at para 88.

²⁵ *Criminal Code*, *supra* note 2, s 210; *Bedford*, *supra* note 1 at para 64.

²⁶ *Ibid* at paras 5, 62.

²⁷ *Ibid* at para 63.

nature of nuisance”²⁹, the Court held that “the negative impact of the bawdy-house provision on the applicants security of the person is grossly disproportionate”.³⁰ The Court found the provision prohibiting living on the avails was overbroad because in addition to capturing exploitive relationships, it also prevented sex workers from remunerating others who could help protect them against violence and exploitation.³¹ The law prohibited sex workers from hiring receptionists, drivers or bodyguards who could make their work safer. Even the “judicial restrictions” developed in *Shaw*³² and *Grilo*³³, which added exclusions for those providing goods and services, and for those living with sex workers, were insufficient. The Court also rejected the Ontario Court of Appeal’s reading in of “in circumstances of exploitation” as an appropriate solution.³⁴ McLachlin CJC wrote that narrowing the provision was problematic because it may “create evidentiary difficulties” leading some to escape culpability for exploitation.³⁵

The prohibition on communicating in public for the purposes of prostitution “significantly increased the risks” of street based sex work.³⁶ The Court concurred with the application judge that “face to face communication is an *essential tool* in enhancing street prostitutes’ safety” and that the provision displaced and dispersed sex workers into more isolated areas, further increasing the danger of the trade.³⁷ The objective of the communicating provision was to “prevent the nuisances that street prostitution can

²⁸ *Ibid* at para 64.

²⁹ *Ibid* at para 131.

³⁰ *Ibid* at para 134; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law Inc, 2012) at 149. Due to the fact that a finding of gross disproportionality is a high standard to meet, the Supreme Court had yet to overturn a law on this basis under s. 7 prior to *Bedford*.

³¹ *Bedford*, *supra* note 1 at para 66.

³² *Shaw v Director of Public Prosecutions*, [1961] UKHL 1, [1962] AC 220 (HL).

³³ *R v Grilo* (1991) 2 OR (3d) 514, 64 CCC (3d) 53.

³⁴ *Bedford*, *supra* note 1 at para 143.

³⁵ *Ibid*.

cause”.³⁸ The Court held that the increased risk to sex workers was grossly disproportionate to the goal of preventing “neighbourhood disruption”.³⁹

Individually, and as a regime, these provisions created an environment in which sex work became more dangerous because the laws denied workers the ability to take safety precautions. The Court recognized that “[t]he regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime”.⁴⁰ The Court granted the Federal Government one year to enact new legislation before the declaration of invalidity took effect.⁴¹

Ultimately, Parliament could have chosen not to draft new legislation. The effect of such a decision would have allowed for municipal regulation as brothels. The Federal Government indicated almost immediately that they would introduce new criminal legislation so that consensual adult sex work would not become decriminalized.⁴² The Supreme Court was clear new legislation would need to be carefully drafted to ensure that the objectives and the effects did not violate the *Charter* rights of sex workers.⁴³ Unfortunately, the new provisions were rushed through Parliament and the Senate with

³⁶ *Ibid* at para 71.

³⁷ *Ibid* at paras 69-70.

³⁸ *Ibid* at para 147.

³⁹ *Ibid* at 146, 159.

⁴⁰ *Ibid* at para 165.

⁴¹ *Ibid* at para 169.

⁴² Canada, Department of Justice, *Statement by the Minister of Justice Regarding the Supreme Court of Canada Ruling in Attorney General of Canada V. Bedford et al.* (Ottawa: Department of Justice, 2013) online:

<<http://news.gc.ca/web/articleen.do?ctr.sj1D=&ctr.mnthndVl=12&mthd=advSrch&ctr.dpt1D=6681&nid=804609&ctr.lc1D=&ctr.tp1D=1&ctr.yrStrtVl=2008&ctr.kw=&ctr.dyStrtVl=26&ctr.aud1D=&ctr.mnthStrtVl=2&ctr.page=6&ctr.yrndVl=2015&ctr.dyndVl=31>> accessed 20 December 2014.

⁴³ *Bedford*, *supra* note 1 at para 5.

little meaningful consultation resulting in a new criminal regime that largely replicates the harms of its predecessor.⁴⁴

THE PROTECTION OF COMMUNITIES AND EXPLOITED PERSONS ACT

The Court gave the Federal Government one year to draft new legislation.⁴⁵ One month later, Justice Minister Peter MacKay stated that new criminal legislation controlling sex work would be introduced.⁴⁶ This was one of the earliest indications from the government that municipal regulation was not under consideration. On February 1st, the Minister announced that the new bill was already being drafted,⁴⁷ despite the fact that a month-long, public consultation did not commence until February 17th.⁴⁸

Bill C-36, entitled the *Protection of Communities and Exploited Persons Act* was introduced on June 4, 2014, and for the first time in Canadian history, a move had been made to criminalize sex work.⁴⁹ The new legislation aims to “denounce and prohibit

⁴⁴ The legislative process is fully documented on the Parliament of Canada website including evidence presented: Canada, Parliament, 41st Parliament, 2nd Session, Bill C-36, online: <<http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&Bill=C36&Parl=41&Ses=2>>.

⁴⁵ *Ibid* at para 169.

⁴⁶ The Canadian Press, “New prostitution bill expected ‘well before’ deadline, Peter MacKay says”, *CBC News* (1 February 2014), online: <<http://www.cbc.ca/news/canada/new-prostitution-bill-expected-well-before-deadline-peter-mackay-says-1.2520073?cmp=rss>>.

⁴⁷ *Ibid*.

⁴⁸ Canada, Department of Justice, *Public input to inform government’s response to Supreme Court of Canada’s decision on prostitution*” (Ottawa: Department of Justice, 2014) online:

<<http://news.gc.ca/web/article-en.do?ctr.sj1D=&ctr.mnthndV1=12&mthd=advSrch&ctr.dpt1D=6681&nid=815959&ctr.lc1D=&ctr.tp1D=1&ctr.yrStrtV1=2008&ctr.kw=&ctr.dyStrtV1=26&ctr.aud1D=&ctr.mnthStrtV1=2&ctr.page=3&ctr.yrndV1=2015&ctr.dyndV1=31>> accessed 9 February 2015. In March, the Justice Minister indicated that all suggestions were being considered despite having said a month earlier that the law was already being drafted. See John Ivison, “Flawed report could be basis for Tories’ new prostitution law”, *National Post* (20 March 2014), online: <<http://ww2.nationalpost.com/m/wp/blog.html?b=fullcomment.nationalpost.com%2F2014%2F03%2F20%2Fjohn-ivison-flawed-report-could-be-basis-for-tories-new-prostitution-law>>.

⁴⁹ *Young, supra* note 11; *CBA Brief, supra* note 11; Susana Mas, “Prostitution bill would make it illegal to buy, sell sex in public”, *CBC News* (4 June 2014), online: <<http://www.cbc.ca/news/politics/prostitution-bill-would-make-it-illegal-to-buy-sell-sex-in-public-1.2664683>>.

demand for prostitution”.⁵⁰ This is counter to the findings of the three major government-commissioned reports which concluded: “repression, far from doing away with prostitution, creates conditions that interfere with this objective by pushing the most vulnerable people to sell sexual services under ever-riskier conditions”.⁵¹

Instead of allowing sex workers the ability to protect themselves, the preamble of the Act reduces sex workers to victims by labeling the sex trade as “inherently” exploitative and violent, and by labeling “prostitution” as an affront to “human dignity” that ought to be discouraged.⁵² Patrice Corriveau, a criminology professor at the University of Ottawa, describes this type of regulation as “paternalistic and infantilizing”.⁵³ The Act goes on to introduce criminal prohibitions for the purchasing of sexual services⁵⁴, advertising sexual services⁵⁵ and to recriminalize communication in public places.⁵⁶ Canada’s new law classifies sex workers as “victims of sexual exploitation” while also anticipating that sex workers will “report incidents of violence”

⁵⁰ Canada, Department of Justice, *Technical Paper: Bill C-36, An Act to amend the Criminal Code in response to the Supreme Court of Canada decision in Attorney General of Canada v. Bedford and to make consequential amendments to other Acts (Protection of Communities and Exploited Persons Act)* (Ottawa: Department of Justice, 2014) online: < <http://www.justice.gc.ca/eng/rp-pr/other-autre/protect/protect.pdf>> accessed 15 December 2014 [*DOJ Technical Paper*].

⁵¹ Patrice Corriveau, “Regulating Sex Work” in Colette Parent et al, eds, *Sex Work: Rethinking the Job, Respecting the Workers* (Vancouver: UBC Press, 2013) at 39 [*Corriveau*]. The three reports are: Canada, Department of Justice, *Report of the Special Committee on Pornography and Prostitution, Volume 2* (Ottawa: Department of Justice, 1985); Federal/Provincial/Territorial Working Group on Prostitution, *Report and recommendations in respect of legislation, policy and practices concerning prostitution related activities* (Ottawa: Department of Supply and Services, 1998); Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, *The Challenge of Change: A Study of Canada’s Criminal Prostitution Laws* (Ottawa: Public Works and Government Services, 2006) [*Challenge of Change*].

⁵² *C-36, supra* note 3, at preamble.

⁵³ *Corriveau, supra* note 51 at 39.

⁵⁴ *C-36, supra* note 3, s 286.1.

⁵⁵ *Ibid* at s 286.4.

⁵⁶ *Ibid* at s 213 (1.1).

or exit the sex trade entirely.⁵⁷ While the (purported) intent is new, the problems created by the provisions remain the same.

Even before Bill C-36 became law, questions were being raised about the constitutionality of the new provisions it introduced.⁵⁸ A full constitutional analysis is beyond the scope of this project. However, I will briefly draw attention to some of the arguments that are being made about the constitutionality of the new criminal regime to underscore why it is important consider the municipal regulation of sex work, even in the face of new criminal provisions. This section will highlight the issues raised by the provisions prohibiting receiving sexual services for consideration and communicating. It will also examine the difficulties that may be created for municipalities that license adult service providers in the face of the commercial enterprise clause in s.286.2 (5)(e).⁵⁹ The intense questioning of the Federal Government's response to *Bedford* indicates that the conversation about how to regulate sex work in Canada has not yet concluded.

CRIMINALIZING CLIENTS

The sale of sex *by* consenting adults remains legal, but receiving sexual services for consideration is now prohibited.⁶⁰ This type of asymmetrical criminalization was first introduced in Sweden in 1999 in the *Sex Purchase Act*.⁶¹ Both the Swedish government,

⁵⁷ *Ibid* at Preamble.

⁵⁸ See note 13.

⁵⁹ *C-36*, *supra* note 3 at s 286.2(5)(e).

⁶⁰ *Ibid* at s 286.1

⁶¹ *Sex Purchase Act*, Sweden 1999. (Government offices of Sweden, Legislation on the Purchase of Sexual Services, Last updated January 5, 2015, online: <www.sweden.gov.se/sb/d/4096/a/119861> accessed 9 February 2015 [*Sex Purchase Act Summary*]).

and now the Canadian government cited the objective of ending demand for sexual services in support of asymmetrical criminalization.⁶²

The *Bedford* Court was clear that the safest way to sell sex was from a fixed indoor location.⁶³ While the Department of Justice has stated that sex workers will not be precluded from working from fixed indoor locations⁶⁴, the reality is that prohibitions on purchasing and advertising will make this incredibly difficult.⁶⁵ While the new legislative objectives propose “to protect human dignity and the equality of all Canadians by discouraging prostitution”⁶⁶, *Bedford* lawyer Alan Young and the Canadian Bar Association have raised questions of gross disproportionality, overbreadth and arbitrariness.⁶⁷ Although Young concedes that it will take time to amass the necessary evidence on the effects of the provision, he asserted that: “[t]he law has to achieve its goal. Well, if we find out in five years that everyone’s been pushed out to the street because the johns won’t come indoors, then it’s an arbitrary law that undercuts its very purpose”.⁶⁸

While the evidence will take time to gather, an evidentiary basis for the harms of criminalizing the clients of sex workers is already growing. The UN Commission on HIV

⁶² C-36, *supra* note 3 at preamble; *Sex Purchase Act Summary*, *supra* note 58; *DOJ Technical Paper*, *supra* note 47.

⁶³ *Bedford*, *supra* note 1 at para 63; *Bedford v. Canada (Attorney General)* 2010 ONSC 4264, 102 OR (3d) 321 at para 300.

⁶⁴ Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 15 (9 September 2014) (Nathalie Levan), online: < http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/15ev-51557-e.htm?Language=E&Parl=41&Ses=2&comm_id=11 > accessed 30 September 2014 [*Levan*].

⁶⁵ Sandra Ka Hon Chu et al, *Reckless Endangerment: Q & A on Bill C-36, Protection of Communities and Exploited Persons Act* (Vancouver: Pivot Legal Society, 2014), online: < https://d3n8a8pro7vhm.cloudfront.net/pivotlegal/pages/737/attachments/original/1415296321/BILLC36_info_english-Amendments.pdf?1415296321 > at 10 [*Reckless Endangerment*]; *Pacey*, *supra* note 11; *CBA Brief*, *supra* note 13 at 10.

⁶⁶ C-36, *supra* note 3 at preamble.

⁶⁷ *Young*, *supra* note 13; *CBA Brief*, *supra* note 11 at 14.

⁶⁸ *Young*, *supra* note 13.

and the Law found that the adoption of the Swedish law, both in Sweden and elsewhere “has resulted in grave consequences for the workers”.⁶⁹ Their report details the harms of criminalization:

police harassment and violence push sex work underground, where it is harder to negotiate safer conditions and consistent condom use, [...] rape and assault are difficult to report, [...] sexual violence heightens exposure to HIV, [...] and working in the informal sector reduces sex workers’ access to education and housing, thus increasing their dependence on others, including pimps.⁷⁰

The research of Sandra Ka Hon Chu and Rebecca Glass found client-targeted policing creates similar harms to sex workers being criminalized by provisions prohibiting communicating.⁷¹ Under the new law, communicating remains largely prohibited as well and is examined in detail below. Should these harms become reality in the wake of Canada’s decision to criminalize the clients of sex workers, the Supreme Court could be required to once again weigh in.

COMMUNICATING

The new communicating provision found in s. 213(1.1) raises issues similar to the ones that caused the *Bedford* Court to strike down its predecessor.⁷² Beyond a new legislative intent, the new provision is different in that it explicitly targets sex workers (and potentially third parties) by prohibiting communication “for the purpose of offering or providing sexual services” and that it limits the prohibited communication to “a public

⁶⁹ *HIV & the Law*, *supra* note 9 at 36: “Since its enactment in 1999, the law has not improved—indeed, it has worsened—the lives of sex workers”. The commission found that rather than reduce sex work, it has been driven underground where the risk of violence is greater. They also criticize the law for redirecting money from social work to policing.

⁷⁰ *Ibid* at 39.

⁷¹ Sandra Ka Hon Chu & Rebecca Glass, “Sex Work Law Reform in Canada”, (2013) 51 Alb L Rev at 119.

place, or in any place open to public view, that is next to a school ground, playground or daycare centre”.⁷³ Communication by clients for obtaining sexual services, regardless of location, remains prohibited but is now captured under s. 286.1(1).⁷⁴ While the words have changed, the effects remain the same: “the law on communicating would not be substantially different from what the law was before *Bedford* in its impact on sex workers’ right of prosecution for communicating with their clients”.⁷⁵ The Canadian Bar Association found that “this section seems to suffer from arbitrariness and gross disproportionality”.⁷⁶

While the government asserted that the goal was to immunize sex workers from prosecution⁷⁷, the revised communicating provisions shows that they can still be charged with an offence. Pivot Executive director, Katrina Pacey, who also acted as an intervener in *Bedford*, told the Senate Committee on Legal and Constitutional Affairs that maintaining the communicating law “will continue to displace marginalized street-based workers to dangerous locations, give them little time to negotiate or screen clients and will place them at odds with the police”.⁷⁸ The *Bedford* Court could not have articulated the importance of screening more clearly than when McLachlin CJC wrote: “if screening could have prevented one woman from jumping into Robert Pickton’s car, the severity of the harmful effects is established”.⁷⁹ While the law does not technically prohibit sex

⁷² *C-36*, *supra* note 3 at s 213(1.1); *Bedford*, *supra* note 1 at 159; *CBA Brief*, *supra* note 13 at 10.

⁷³ *C-36*, *supra* note 3 at s 213(1.1); *Reckless Endangerment*, *supra* note 65 at 4.

⁷⁴ *C-36*, *supra* note 3 at s 286.1(1).

⁷⁵ *Reckless Endangerment*, *supra* note 65 at 4.

⁷⁶ *CBA Brief*, *supra* note 13 at 11.

⁷⁷ Canada, Parliament, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 15 (9 September 2014) (Hon. Peter MacKay), online <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/15ev-51557-e.htm?Language=E&Parl=41&Ses=2&comm_id=11> accessed 30 September 2014.

⁷⁸ *Pacey*, *supra* note 13.

⁷⁹ *Bedford*, *supra* note 1 at 158.

workers from screening their clients, the criminalization of clients will impact how and where they interact. As Young told the Senate committee, “sex workers will once again be forced to work in most dangerous of forums, on the streets”.⁸⁰

COMMERCIAL ENTERPRISE – CONSIDERATIONS FOR MUNICIPAL LAW

The living on the avails provision struck down in *Bedford* has been replaced by a prohibition on “receiving a material benefit”.⁸¹ The intent of the Court, in striking down the previous provision, was that sex workers should not be precluded from hiring those who could make their work safer.⁸² The material benefit provision makes a number of exceptions, including those in “legitimate living arrangements”⁸³, those who benefit as a result of a “legal or moral obligation”⁸⁴ (ie. dependents), those who provide goods or services to the public on the same conditions⁸⁵ (ie. a landlord or an accountant), and those who provide services specifically for sex workers, so long as they have in no way encouraged the provision of sexual services from which the material benefit is derived.⁸⁶ This permits sex workers to hire security, drivers and receptionists, so long as they are paid proportionately for their services.⁸⁷ However, there is no guidance as to how remuneration will be determined to be proportionate, which means compliance is difficult to conclude, and ultimately left to the courts.

⁸⁰ *Young*, *supra* note 13.

⁸¹ *C-36*, *supra* note 3, s 279.02.

⁸² *Bedford*, *supra* note 1 at para 142.

⁸³ *C-36*, *supra* note 3 at s 286.2(4)(a).

⁸⁴ *Ibid* at s 286.2(4)(b).

⁸⁵ *Ibid* at s 286.2(4)(c).

⁸⁶ *Ibid* at s 286.2(4)(d).

⁸⁷ *Ibid*.

The potential issue for municipalities is that the provision introduces a prohibition on receiving a material benefit in the context of a “commercial enterprise”.⁸⁸ A definition of what constitutes a commercial enterprise is not provided.⁸⁹ Instead, the Department of Justice states: “Courts would likely take into account considerations such as the number of persons involved, the duration of the activities and the level of organization surrounding the activities”.⁹⁰ While explicitly stating that this section is not intended to criminalize the earnings of sex workers working “independently or cooperatively”, it leaves it to the courts to determine if the nuances of the organization of their work, “including informal ones” rises to the level of a commercial enterprise.⁹¹ The new material benefit provision, as part of a larger regime, aims to prevent the “institutionalization of prostitution through commercial enterprises, such as strip clubs, massage parlours and escort agencies in which prostitution takes place”.⁹² This could have serious impacts on businesses that are already operating and licensed by municipalities.

The Canadian Bar Association submitted that the material benefit clauses are likely unconstitutional because they: “undermine the ability of prostitutes to work indoors; prohibit prostitutes from benefiting from non-exploitive relationships which are vital to ensuring their safety, and prohibit prostitutes from taking advantage of the benefits associated with organized forms of prostitution”.⁹³ While the bawdy-house

⁸⁸ *Ibid* at s 286.2 (5)(e).

⁸⁹ *DOJ Technical Paper, supra* note 50 at Material Benefits.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *CBA Brief, supra* note 13 at 15.

provision no longer exists, sex workers are left without the ability to operate in any organized manner for fear of criminal charges, even when no exploitation occurs.⁹⁴

While the title of the Act indicates that communities are a priority, no consultation with cities occurred during the creation of the provisions.⁹⁵ The City of Vancouver explicitly asked the House of Commons Standing Committee on Justice and Human Rights to consult with municipalities, as well as provincial health authorities.⁹⁶ In response to the passing of the bill, Vancouver issued a statement indicating that their priority continues to be the “health and safety of sex workers and the communities that they live and work [in]”.⁹⁷ The statement makes it clear that the city will not be abandoning previous commitments to harm reduction strategies.⁹⁸

The CBA found that the new criminal provisions throw municipal licensing and zoning of adult services into “uncertainty”.⁹⁹ The CBA is of the opinion that cities should have been given the opportunity to discuss the new law before it was passed because “municipalities have jurisdiction over zoning and business licensing, and an important role in mitigating neighbourhood impacts through effective law enforcement”.¹⁰⁰ The new criminal law regime, with all of its uncertainties creates an environment where lawyers will have trouble providing “clear legal advice, which is damaging to municipal governments and the communities they serve”.¹⁰¹

The passing of Bill C-36 is already raising concerns in Edmonton where a task

⁹⁴ *Ibid* at 15.

⁹⁵ *Ibid* at 19; British Columbia, City of Vancouver, *Our response to the passing of Bill C-36* (Vancouver: City of Vancouver, 2014) online: <<http://vancouver.ca/news-calendar/city-response-to-passing-of-bill-c-36.aspx>> accessed 12 November 2014 [*Vancouver Statement*].

⁹⁶ *Vancouver Brief*, *supra* note 12 at 3.

⁹⁷ *Vancouver Statement*, *supra* note 95.

⁹⁸ *Ibid*.

⁹⁹ *CBA Brief*, *supra* note 13 at 18-19.

¹⁰⁰ *Ibid* at 19.

force has been studying the city's massage parlours.¹⁰² Councilor and task force member, Scott McKeen said: “[w]hile the task force may make recommendations to improve the safety of sex trade workers, the new laws might tie the city's hands”.¹⁰³ The city was prepared to commit almost \$300,000 to make the recommendations of the task force a reality but that contribution is being reconsidered because of the new laws.¹⁰⁴ One body rub parlour owner and practitioner stated that plans to implement measures such as fire plans, and industry-exit programs should still go ahead.¹⁰⁵ The task force will have to carefully tailor their recommendations so that they do not run afoul of the new laws but still enhance the safety of workers. They may also have to move quickly to ensure that the funds to implement the plans are still available.

Just as was the case with the former provisions, the new laws are intended to work in tandem, but now the intent is to suppress the demand for paid sex.¹⁰⁶ Even if this is a laudable goal, it is likely unachievable:

Three consensuses already exist: first, on the need to better protect female sex workers; second, on the failure of the laws in force to do away with “prostitution” and third, on the fact that the current laws essentially harm female sex workers.¹⁰⁷

¹⁰¹ *Ibid* at 18.

¹⁰² Leah Holoiday “Not a good time to fund recommendations from city's body rub parlour task force: Edmonton councilor”, *Metro* (9 November 2014) online: <<http://metronews.ca/news/edmonton/1207795/not-a-good-time-to-fund-recommendations-from-citys-body-rub-parlour-task-force-edmonton-councillor/>>.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*; A Body rub is defined under the Toronto Licensing bylaw as: “Includes the kneading, manipulating, rubbing, massaging, touching, or stimulating, by any means, of a person's body or part thereof but does not include medical or therapeutic treatment given by a person otherwise duly qualified, licensed or registered so to do under the laws of the Province of Ontario”. *Toronto Municipal Code*, C 545, Licensing, § 545-1.

¹⁰⁶ *Department of Justice Technical Paper*, *supra* note 50.

¹⁰⁷ *Corriveau*, *supra* note 51 at 51.

It is a summation of how the debate on regulating sex work finds there is much to debate but little consensus. Despite the change in the law, this statement remains accurate. There are two main positions in the debate over sex work regulation, created from a multitude of groups and individuals who all take their position for different reasons. On one side, there is the group which seeks to prohibit prostitution through criminal law. On the other, a group which seeks a repeal of the criminal laws and extension of protections under existing labour, human rights and business frameworks. This thesis advocates for the latter. Laws, regulations, bylaws and policies, created in conjunction with sex workers are the most effective solution available. By considering the municipal response now, cities can best adapt to the changing legal landscapes. The best course of action is to develop a clear understanding of the impacts of municipal bylaws on sex workers and how the situation can be achieved. Given the chorus of voices who believe the regime is as unconstitutional as the one struck down by the Court, there is every indication that another constitutional challenge will be mounted.

THE WORK POSITION

This discussion will frame sex work as work, and use the reasoning of the Supreme Court, along with other resources, to provide direction for municipal lawmakers who may not be comfortable or informed about the realities of sex work. Sex workers are asking that their occupation be permitted to abide by the same labour regulations as any other industry.¹⁰⁸ While lawmakers may not understand the nuances of the sex trade, they do understand how to regulate businesses. Both municipalities and sex workers have specific expertise and if sex work is viewed as work then the conversation that results

could easily move towards how best to create a municipal licensing regime for decriminalized brothels. Moving beyond morality and opinion is required if this is to occur and this section will set out the importance of recognizing the *work* in sex work.

Looking past the associated stigma and treating sex work like any other job allows the trade to be examined in a different light. When sex work is viewed as work, the voices of the workers can be heard because the focus shifts from sex to work.¹⁰⁹ As Jeffery and MacDonald posit:

[b]y understanding sex work as a resistant form of labour rather than simply as a survival mechanism, we both see the lives of sex workers more clearly from their perspective and make room for a politics that includes them as agents of change rather than objects of intervention.¹¹⁰

Sex workers speak in terms of work, not in terms of criminal behavior and municipalities should respect this stance.

Classifying sex work as a crime is a matter of opinion. Removing it from the *Criminal Code* does not mean leaving the industry lawless; it means imposing a different set of rules. Using heavy-handed criminal prohibitions to control the sex trade only creates more problems than it solves. As Brock explains, a crime-centric approach has been repeatedly proven as ineffective:

legislators, the courts, and the police cannot make prostitution disappear. All that can be done is to create new patterns of enforcement that ultimately accomplish

¹⁰⁸ *van der Meulen, supra* note 10 at 153.

¹⁰⁹ *Parent & Bruckert, supra* note 16 at 24..

¹¹⁰ Leslie Ann Jeffery & Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Vancouver: UBC Press, 2006) at 20.

little except to make life more difficult for sex workers.¹¹¹

Decriminalizing voluntary adult sex work and allowing municipal licensing for brothels ends the ineffectual criminalization. Framing sex work as work allows for a more focused discussion as to how the bylaws should be written.

Sex workers do not all speak with the same voice: “[s]ome state that they enjoy their work; others consider it a lesser evil or describe it as a very difficult experience”.¹¹² This is simply because “there is no such thing as a *representative* sex worker”.¹¹³ As Emily van der Meulen states: “Over simplistic anti-prostitution analyses that advocate for the eradication of the sex industry thus tend to ignore the complex and multi-faceted organization of labour within the sex industry as well as sex worker’ diverse experiences working within it”.¹¹⁴ Whether a person sells sexual services for a lifetime, as an on-again, off-again job, or as a temporary solution, sex workers express opinions about their work just like any other employee talks about work.¹¹⁵ Setting aside the stigma and morality often associated with sex allows sex work to be examined as a job.

Just as sex workers vary, so do the working conditions. Street based sex workers are the most prevalent image associated with sex work. In reality, street-based work only encompasses approximately twenty percent of the industry.¹¹⁶ Street-based workers are merely more visible, while the majority of the industry is unseen. Parent and Bruckert use labour theory to examine sex work separately from the associated stigma: “[l]abour

¹¹¹ Deborah R. Brock, *Making Work, Making Trouble: The Social Regulation of Sexual Labour*, 2d ed (Toronto: University of Toronto Press, 2009) at 147 [Brock].

¹¹² *Ibid* at 24-5.

¹¹³ Celine Bisette, “What does a 'representative' sex worker look like?”, *rabble.ca* (13 May 2014), online: <<http://rabble.ca/blogs/bloggers/views-expressed/2014/05/what-does-representative-sex-worker-look>>.

¹¹⁴ *van der Meulen*, *supra* note 10 at 152.

¹¹⁵ *Parent & Bruckert*, *supra* note 16 at 25.

¹¹⁶ *Challenge of Change*, *supra* note 51 at A(1).

theory enables us to step outside of the traditional criminological analysis of deviance in order to examine these jobs as *jobs*".¹¹⁷ They found that working for a third party, as a sex worker is similar to "many other service-sector workers".¹¹⁸ Sex workers who work for a third party are "managed like employees". Like employees they are expected to comply with scheduling, perform duties related to the business and adhere to the rules set by management.¹¹⁹ In return, management may provide advertising, security, drivers and reception. By looking through the labour lens where sex is removed from the equation, it is clear that working for a third party in a massage parlour is not that different from a hairdresser who works for a third party. Both would convey stories about clients they liked or disliked, shifts they preferred, co-workers they liked or disliked, as well as complaints and advantages of the employer.

There are expectations of service, knowledge and skill in both jobs: "[I]ike waitresses, hair stylists, and sales clerks, sex workers have to be sociable, patient, courteous, polite and capable of dealing with a variety of people".¹²⁰ Sex workers have a host of other skills that would add up to an impressive resume – "money management, communication and listening, conflict resolution, marketing and business administration, assertiveness, and creativity" – but their skills are devalued because of the nature of their work.¹²¹ Sex workers also must possess specific skills that relate to their work and these may vary depending on which facet of the industry they work in. For example, an independent escort may develop web design and social media skills to attract clients,

¹¹⁷ *Bruckert & Parent, supra* note 16 at 58 Emphasis in original.

¹¹⁸ *Ibid* at 59.

¹¹⁹ *Ibid*.

¹²⁰ *Ibid* at 61.

¹²¹ *Ibid*.

where a worker employed by an agency may not need to. Even when highly skilled, sex workers often have difficulty transferring these skills to other occupations.¹²²

The labour lens allows for sex work to be treated and regulated like other businesses. Sex workers state: “[c]onceptualizing sex work as a form of sexual labour could lead to a social context where sex industry establishments are more likely to abide by labour legislation”.¹²³ In fact, this is supported by the comparison of “social control” and “neutral” licensing models in Chapters 3 and 4.¹²⁴ The language shift that occurs when sex work is considered labour gives sex workers greater legitimacy because there is a forum for dealing with occupational health and safety issues, like safer sex and violence.¹²⁵ Instead of being “blinded by moralism”¹²⁶, the labour position “is based on a recognition of the need for broad social rights for all”.¹²⁷

The main advantage in working for a third party is that not everyone is capable of or interested in being an entrepreneur.¹²⁸ While it may be difficult for many people to put themselves in the shoes of a sex worker, everyone – sex workers included – could name at least one job they would never want to do. Classing a profession as undesirable is not a sufficient reason for devaluing it.

¹²² Frederique Chabot, ed, *The Toolbox: What works for sex workers* (Ottawa, Prostitutes of Ottawa/Gatineau Work, Educate & Resist, 2012) online: < http://www.powerottawa.ca/POWER_Report_TheToolbox.pdf> at 7.

¹²³ *van der Meulen, supra* note 10 at 154.

¹²⁴ Thomas Crofts & Tracey Summerfield, “The Licensing of Sex Work in Australia and New Zealand” (2007) *Murdoch University eLaw Journal* 269, online: <<http://apo.org.au/node/2539>> at 270 [*Crofts & Summerfield*].

¹²⁵ *van der Meulen, supra* note 10 at 154.

¹²⁶ *Ibid.*

¹²⁷ *Brock, supra* note 111 at 154.

¹²⁸ *Ibid* at 60; For more on independent escorts see Leah McLaren, “The Secret Life of a Bay Street Hooker”, *Toronto Life Magazine* (8 December 2010), online: < http://www.torontolife.com/informer/features/2010/12/08/the-secret-life-of-a-bay-street-hooker/?page=all#tlb_multipage_anchor_1>.

FROM THE *CRIMINAL CODE* TO THE MUNICIPAL CODE

The criminal law is “the most powerful tool at Parliament’s disposal”.¹²⁹ However, Binnie J. also reminds us that the criminal law is a “blunt instrument”.¹³⁰ The *Criminal Code* is not the best tool available for regulating sex work.¹³¹ The main argument this thesis will advance is that the proper place for regulating brothels is at the municipal level because municipalities are already licensing businesses that provide adult services and because they are in the best position to adopt local solutions. This is not to suggest that the current licensing regimes for other adult services should be replicated and applied to license brothels. They merely represent a starting point.

The *Constitution Act, 1867*, places municipalities under provincial jurisdiction.¹³² This limits the authority of municipalities to the powers that are “expressly delegated in provincial legislation”¹³³ and places strict parameters on what actions cities are permitted to take. Chapter 2 will explore the limits of municipal authority and how cities are using their authority to license adult services such as escort services and massage parlours. This discussion will also highlight how cities license adult workers and then turn a blind eye to the difficulties that workers face by being caught between the legitimacy of municipal licensing and having their work prohibited by the *Criminal Code*. This chapter will argue that municipal licensing is the best option for decriminalized brothels but that the current licensing regimes will not be adequate.

¹²⁹ *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4, 1 SCR 76 at para 60.

¹³⁰ *Ibid.*

¹³¹ *Pacey*, *supra* note 13.

¹³² *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 s 92 (28).

¹³³ Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (Saskatoon: Purich Publishing, 1996).

After establishing that municipalities have the requisite authority and experience to regulate brothels, the discussion will turn to the best practices for doing so. Chapter 3 will explore the benefits and drawbacks of the current licensing regimes for adult businesses. While workers have said that holding a license increases the legitimacy of their employment to allow them the benefits of verifiable employment¹³⁴, offers improved health and safety¹³⁵ and has contributed to programming for adult workers¹³⁶, these benefits come at a significant cost. Workers cite onerous conditions for obtaining a license¹³⁷, privacy concerns¹³⁸ and the expense as drawbacks to licensing.¹³⁹ The effectiveness of licensing regimes is also impacted by the goals it seeks to achieve.¹⁴⁰ The discussion of the benefits and drawbacks of Canadian licensing regimes will be undertaken with a view to the “social control” model of licensing. The social control model demonstrates that a license to operate does not necessarily equate with approval.¹⁴¹ This adds depth to the discussion by showing how the approach to licensing can replicate the conditions of criminalization, thus negating potential benefits.

¹³⁴ Jacqueline Lewis & Eleanor Maticka-Tyndale, “Licensing Sex Work: Public Policy and Women’s Lives” (2000) 26 Can Pub Pol 439 at 445 [*Lewis & Maticka-Tyndale*].

¹³⁵ *Ibid* at 441.

¹³⁶ *Ibid* at 446; Ryan Tumilty “Sex Ed: city run class all about knowledge”, *Metro* (16 April 2014) 14.

¹³⁷ Emily van der Meulen and Mariana Valverde, “Beyond the Criminal Code: Municipal Licensing and Zoning Bylaws” in Emily van der Meulen, Elya M. Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada* (Vancouver: UBC Press, 2013) 314 at 317-20 [*van der Meulen & Valverde*].

¹³⁸ M. Laing, “Regulating adult work in Canada: the role of criminal and municipal code”, in Johnson, P. and Dalton, D. ,eds, *Policing Sex*. (London: Routledge, 2012) 166-184, online: <http://www.academic-freedom.ca/regulating_sex/docs/Regulating_adult_work_in_Canada.pdf> at 7-8, [pagination to online version] [*Laing*].

¹³⁹ *van der Meulen & Valverde, supra* note 137; John Lowman, *Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness* (Ottawa: John Lowman, 1997) online: <http://184.70.147.70/lowman_prostitution/HTML/SCJHPE/Submission_to_the%20Subcommittee_on_Solicitation%20Laws_Brief.pdf> at Appendix A, page 14 [*Lowman Submissions*].

¹⁴⁰ *Crofts & Summerfield, supra* note 124 at 270.

¹⁴¹ *Ibid*.

In chapter four, I will discuss how consideration of the experience of decriminalization in New Zealand can advance our understanding of both municipally controlled brothels and decriminalized sex work. With the passing of the *Prostitution Reform Act (PRA)* in 2003, New Zealand became the first country in the world to decriminalize voluntary adult sex work both indoors and out.¹⁴² This chapter will begin with a brief overview of the New Zealand Act to establish how Territorial Authorities became responsible for the regulation of brothels. It will then examine the types of licensing bylaws that they have enacted. Research, including the Report of the Prostitution Law Reform Committee¹⁴³, as well as reports of the experiences of workers will highlight how municipalities have been successful in incorporating brothels into municipal regimes with a view to benefiting sex workers. In contrast to the “social control” model which underlies Canada’s licensing regimes, New Zealand has adopted a “neutral” stance to licensing.¹⁴⁴ Consideration of the New Zealand model will assist in developing the guiding principles that should be considered when creating a licensing regime.

Using current Canadian licensing regimes for adult service businesses as a starting point and drawing from research conducted with sex workers, the *Bedford* decision, and from New Zealand, this thesis will provide municipal lawmakers with the guidance necessary to develop fair and effective licensing bylaws. Chapter five offers municipalities a basic framework to avoid the problems that exist in the current municipal regimes licensing adult work, and to ensure that workers benefit from licensing. Although the *Protection of Communities and Exploited Persons Act* is now law, the speculation

¹⁴² *Prostitution Reform Act 2003 (NZ)*, 2003/28 [PRA].

¹⁴³ *PLRC Report*, *supra* note 5 at at 6.1.1.

around the constitutionality of the new provisions shows the need for municipal lawmakers to be prepared to address decriminalized sex work.¹⁴⁵ This thesis proposes recommendations regarding: reasonable fees, exemptions from licensing, ensuring those with past convictions for prostitution related offences are not precluded from obtaining licenses, protection of the privacy of workers, and consultation with those in the industry to create the details of licensing regimes. Consultation is critical as “[s]ex workers are in the best position to describe what it is like to work and live under the current social and legal framework” and to recommend the ways in which circumstances should be improved.¹⁴⁶ In addition, to attain maximum benefits to workers and compliance with the licensing regime, these recommendations should be undertaken in conjunction with a “neutral” stance on licensing.¹⁴⁷

CONCLUSION

The debate over how sex work should be regulated remains unsettled. With the striking down of the former provisions and the questionable constitutionality of the provisions designed to replace them, there is ample room for a discussion of alternative measures. This paper presents municipal regulation as the solution to balance the interests of both sex workers and communities. The chapters that follow will establish that municipalities have the requisite authority, the experience in creating licensing regimes and that benefits can flow to both cities and sex workers if the regimes are developed in consultation with workers. The guidance from sex workers who sell sex in criminalized

¹⁴⁴ *Crofts & Summerfield, supra* note 124 at 270.

¹⁴⁵ *C-36, supra* note 3.

and decriminalized countries lends considerable insight into what licensing regimes need to address so that sex workers can work safely and reap the benefits those in all other occupations take for granted.

¹⁴⁶ Allinott, S. et al., *Voices for dignity: Call to End the Harms Caused by Canada's Sex Trade Laws* (Vancouver: Pivot Legal Society, 2004) online:
<<http://www.pivotlegal.org/sites/pivotlegal.org/files/voicesfordignity.pdf>> at 12.

¹⁴⁷ *Crofts & Summerfield*, *supra* note 124 at 270.

CHAPTER 2 – MUNICIPALITIES CAN REGULATE DECRIMINALIZED BROTHELS

INTRODUCTION

Evidence has repeatedly shown that the safest way to sell sex is from a “fixed indoor location”.¹ The *Bedford* decision affirmed that laws aimed at maintaining orderly streets cannot do so at the expense of the health, safety and security of sex workers.² This must be taken into consideration when constructing municipal regimes to license sex work.³ The new legislation introduced by the Federal Government in response to *Bedford* leaves little room for decriminalized brothels but it remains to be seen if this legislation will withstand constitutional scrutiny.⁴

In this chapter, I advance the proposition that municipal governments are in the best position to regulate decriminalized brothels using licensing regimes because cities are already licensing adult businesses that are closely aligned with the sex trade.⁵ To set up this discussion, I will provide an overview of municipal authority and the current

¹ *Bedford v. Canada (Attorney General)* 2010 ONSC 4264; 102 O.R. (3d) 321 (SC) at para 300; *Canada (Attorney General) v. Bedford*, 2013 SCC 72; 3 SCR 1101 at para 63 [*Bedford*].

² *Bedford*, *supra* note 1 at para 148.

³ Elaine Craig, “Sex Work By Law: *Bedford*’s Impact on Municipal Approaches to Regulating Sex Work” (2011) 16 Rev Const Stud 205 at 219.

⁴ See Chapter 1, page 11 for discussion of Bill C-36.

⁵ *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 (asserted to 6 November 2014) [C-36]; Examples of Cities that license massage parlours, body rub parlours and escorts: City of Toronto, by-law No 514-2002, Chapter 545, Licensing (20 June 2002) [*Toronto Licensing Bylaw*]; City of Vancouver, by-law No 4450, License By-Law (23 September 1969) [*Vancouver Licensing Bylaw*]; City of Calgary, by-law No 48M2006, Dating and Escort Service Bylaw (17 October 2006) [*Calgary Escort Bylaw*]; City of Edmonton, by-law No 12452, Escort Licensing Bylaw; City of Windsor, by-law No 131-2011, Body-Rub Parlours (4 July 2011). Escorts, Massage and Body Rub Parlours are not the only adult businesses that are municipally licensed. For example, in Vancouver, licenses are also required for Dating Services (By-laws 5283-1979; 6038-1986; 6646-1990) and Health Enhancement Centres (By-laws 6830-1991; 7052-1992).

bylaws that license escort services and body rub parlours.⁶ After establishing how the adult services industry is licensed, the discussion will move to highlight how cities are already licensing sex work within the businesses that purport to be offering companionship and massage, and the complications that are caused for workers who are licensed municipally but criminalized under federal laws. This chapter will argue that instead of being forced to pretend that sex work is not occurring through these channels, cities should develop licensing regimes specifically for brothels to alleviate legal concerns, denial of adequate health and safety measures and to facilitate better relationships with enforcement officers, which represent the most frequent concerns of workers.⁷

This chapter will highlight how cities have turned a blind eye to sex work that is occurring in municipally licensed adult service businesses,⁸ while at the same time drafting bylaws that appear to contemplate the exchange of sex for money.⁹ While licensed by cities, owners and workers in the adult industry are burdened by the federal criminal provisions on prostitution: workers struggle from a lack of information;¹⁰ they

⁶ The licensing regimes presented are as they were prior to the passing of Bill C-36. The potential impacts of the new criminal provisions are not yet known but the potential impacts are highlighted in Chapter 1 at page 11.

⁷ M. Laing, "Regulating adult work in Canada: the role of criminal and municipal code", in Johnson, P. & Dalton, D., eds, *Policing Sex*. (London: Routledge, 2012) 166-184, online: <http://www.academic-freedom.ca/regulating_sex/docs/Regulating_adult_work_in_Canada.pdf> at 12-13, 19, pagination to online version [Laing]; Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform*, (Vancouver: Pivot Legal Society, 2006) online: <http://www.pivotlegal.org/beyond_decriminalization> at 46 [Laing]; Jacqueline Lewis & Eleanor Maticka-Tyndale, "Licensing Sex Work: Public Policy and Women's Lives" (2000) 26 Can Pub Pol 439 at 443 [Lewis & Maticka-Tyndale].

⁸ Laing, *supra* note 7 at 12-13, 19; *Beyond Decriminalization*, *supra* note 7 at 46; Lewis & Maticka-Tyndale, *supra* note 7 at 443.

⁹ John Lowman, *Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness* (Ottawa: John Lowman, 1997) <http://184.70.147.70/lowman_prostitution/HTML/SCJHPE/Submission_to_the%20Subcommittee_on_Solicitation%20Laws_Brief.pdf>, accessed 9 February 2015 at Appendix A, page 14 [Lowman Submissions].

¹⁰ Laing, *supra* note 7 at 7; Lewis & Maticka-Tyndale, *supra* note 7 at 441.

are confused that cities are allowed to profit from license fees while the criminal law (as it then was) prohibits living on the avails; and relationships with enforcement officers are strained.¹¹ This chapter will underscore not only that municipalities are capable of licensing sex work, but also that licensing regimes could work more effectively with the repeal of the criminal provisions.

THE LIMITS OF MUNICIPAL AUTHORITY

In 1839, Lord Durham advanced the argument that local governments were in the best position to serve local needs and that if municipalities were not recognized in the constitution as a formal level of government from the outset, other levels of government would never relinquish control.¹² *The Constitution Act, 1867* did not entrench municipalities as a separate order of government. Instead, municipalities were placed under provincial jurisdiction.¹³ This limits the authority of municipalities to the powers that are “expressly delegated in provincial legislation”.¹⁴ It places strict parameters on what actions cities are permitted to take, as they are powerless save for the authority granted by the province.

¹¹ Sex Trade Advocacy and Research, *Safety, Security and the Well-Being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR)* (Ottawa: Sex Trade Advocacy and Research, 2005), online: <http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf> at 20 [*Safety, Security & Well-Being*]; Laing, *supra* note 7 at 17.

¹² Parliamentary Information and Research Service Canada, *Background Paper: Municipalities, The Constitution and the Canadian Federal System*, by Michael Dewing, William R. Young & Erin Tolley, (Ottawa: Library of Parliament Canada, 2006) at 2.

¹³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 s 92 (28) [*Constitution Act, 1867*].

¹⁴ Felix Hoehn, *Municipalities and Canadian Law: Defining the Authority of Local Governments* (Saskatoon: Purich Publishing, 1996) [*Hoehn*]; Stanley M. Makuch, Neil Craik, & Signe B. Leisk, *Canadian Municipal and Planning Law*, 2nd ed (Toronto: Thomson Carswell, 2004) at 75 [*Makuch et al.*].

The actions of municipalities must also be *Charter* compliant.¹⁵ The Supreme Court reaffirmed this principle in *R v Guignard* stating: “[a]part from the legislative framework and the general principles of administrative law that apply to them, municipal powers must be exercised in accordance with the principles of the *Charter*, as must all government powers”.¹⁶

Each province and territory sets the boundaries of municipal authority through delegating legislation.¹⁷ Municipalities have only the powers that are granted through legislation, usually in the form of a municipal act or a city charter.¹⁸ For example, the Nova Scotia *Municipal Government Act* confers “broad authority” to municipalities to: “provide good government; provide services, facilities and other things that, in the opinion of the council, are necessary or desirable for all or part of the municipality, and develop and maintain safe and viable communities”.¹⁹ Not unlike constitutions, municipal delegating legislation needs to be anticipatory because “the precise powers a municipality may require cannot be known in advance”.²⁰ While the powers of municipalities have the

¹⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *Re McCutcheon and Toronto (City) et al.* [1983] 41 OR (2d) 652; 147 DLR (3d) 193 at 663.

¹⁶ *R v Guignard*, 2002 SCC 14, 1 SCR 472 at para 17.

¹⁷ *Makuch et al*, *supra* note 14 at 75; Federation of Canadian Municipalities, *Assessment of the Municipal Acts of the Provinces and Territories*, by Donald Lidstone (Vancouver: Federation of Canadian Municipalities, 2004) at 3 [*Lidstone*]. Lidstone notes that other pieces of legislation may impact municipalities: “Many financial and accountability provisions affecting local governments are found in other provincial and territorial statutes”.

¹⁸ *Makuch et al*, *supra* note 14 at 75; In Nova Scotia, the *Municipal Government Act*, SNS 1998, c 18, governs municipalities outside of the Halifax Regional Municipality [*NS Municipal Act*]. The Halifax Regional Municipality derives its authority from a city charter: *Halifax Regional Municipality Charter*, SNS 2008, c 39. For more generally on the various municipal instruments, see *Lidstone*, *supra* note 17.

¹⁹ *NS Municipal Act*, *supra* note 18, s 2. The *Halifax Regional Charter* uses almost identical language.

²⁰ *Hoehn*, *supra* note 14 at 2.

ability to adapt as needs arise, cities must be cautious not to legislate in contradiction to provincial statutes or venture into powers granted to the Federal Government.²¹

Although municipalities are limited by the “express authority doctrine”²², “the rule against delegation”²³, and “provincial paramountcy”²⁴, a gradual shift began in *Greenbaum*²⁵ that would move municipalities from being considered merely “administrators of provincial authority”²⁶ to acknowledging that municipal politicians are accountable to the electorate to represent local interests. Writing for the court in *Greenbaum*, Iacobucci J. determined that while it is important for courts to “be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing ultra vires by-laws”,²⁷ where there is more than one possible interpretation of a by-law, it should be “read to fit within the parameters of the empowering provincial statute”.²⁸ This balancing act recognizes the authority of municipalities who are governed by elected officials but ensures that they do not act outside of their jurisdiction.

²¹ *Ibid*; In *Morrison v. Kingston (City)* [1937] 4 DLR 740, [1938] OR 21, the Ontario Court of Appeal was tasked with interpreting s 259 of *The Municipal Act* (RSO 1927, c 233.) which gave municipalities the authority to legislate in matters “for the health, safety, morality and welfare of inhabitants”. The Court held: “[a] municipality can not set up a code of morality different from that established by *The Criminal Code*” [*Morrison*].

²² Express Authority was defined by the Supreme Court in *R v Greenbaum* [1993] 1 SCR 674, 100 DLR (4th) 183 at para 22, where Iacobucci J. wrote: “Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute” [*Greenbaum*].

²³ *Passutto Hotels (1984) Lt. v Red Deer (City)*, 2006 ABQB 641, 407 AR 83, at para 83: “[A]s a recipient of delegated authority itself, a municipality may not, in the absence of express authority in its enabling statute, further delegate its authority”.

²⁴ *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 171, 138 DLR (3d) 1 – “the constitutional doctrine of paramountcy operates so as to invalidate provincial legislation where it duplicates valid Federal legislation in such a way that the two provisions cannot live together and operate concurrently”.

²⁵ *Greenbaum*, *supra* note 22.

²⁶ *Makuch et al*, *supra* note 14 at 75.

²⁷ *Greenbaum*, *supra* note 22 at 26

²⁸ *Ibid*.

When a court has determined that a municipality has acted within its delegated authority, their enactments are evaluated “upon a deferential standard”²⁹, a long-standing principle that was first articulated in *Kruse v. Johnson*.³⁰ In this case, a dispute over a bylaw prohibiting music in residential areas, Lord Russell stated:

A bylaw (*sic*) is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the country, who have the right to choose whom they think best to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.³¹

The modern restatement of this principle is expressed in *Shell Canada Products Ltd. v. Vancouver (City)*, where McLachlin J. (as she then was) writing in dissent, advocated for “a broader more deferential approach” when undertaking judicial review of municipal enactments.³² She stated:

Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the “benevolent construction” which this Court referred to in *Greenbaum*, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.³³

²⁹ *Nanaimo (City) v Rascal Trucking Ltd* [2000] 1 SCR 342, 183 D.L.R. (4th) 1 at para 35.

³⁰ *Kruse v Johnson*, [1898] 2 QB 91 (Div Ct).

³¹ *Ibid* at p 100.

³² *Shell Canada Products Ltd v Vancouver (City)* [1994] 1 SCR 231, 110 DLR (4th) 1, [Shell] at para 5.

³³ *Ibid* at para 19.

Sopinka J., took a more narrow approach to resolve the issue in *Shell*.³⁴ However, in *Spraytech*³⁵, the Court was again asked to determine the appropriate standard of deference to municipal decision-making. The majority recognized the principle of “subsidiarity”. L’Heureux-Dubé J., explained the concept as:

the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity”.³⁶

With this principle underlying the approach of the courts, it becomes clear that courts are hesitant to overturn municipal enactments that are within its legislative authority because they represent local interests.

MORALITY IN BYLAWS – A CRIMINAL INTENT OR A LICENSING REGIME

The waters become somewhat muddy when provisions that appear to be wading into federal powers appear in licensing regimes. While the courts have been clear that cities cannot directly combat sex work because it is a criminal law matter³⁷, licensing schemes for adult industries often contain provisions and rules that, on their face, seem to

³⁴ *Ibid* at para 98, Sopinka J., writing for the Majority used the two-part approach set forward in The Law of Canadian Municipal Corporations: “a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government”.

³⁵ *114957 Canada Ltd (Spraytech) v Hudson (Town)* 2001 SCC 40, 200 DLR (4th) 419.

³⁶ *Ibid* at para 3.

³⁷ In *Westendorp*, [1983] 1 SCR 43, 144 DLR (3d) 259, the authority of the Calgary bylaw that prohibited “being on the streets for the purposes of prostitution” was challenged as being ultra vires and the Supreme Court agreed. The Court held: “[h]owever desirable it may be for the municipality to control or prohibit prostitution, there has been an overreaching in the present case which offends the division of legislative powers”. The Supreme Court similarly dispatched the case of *Goldwax v Montreal (City)*, [1984] 2 SCR 525, 16 DLR (4th) 667. These decisions rendered street solicitation bylaws in several cities, including Vancouver, Niagara Falls, Regina and Halifax, of no force and effect because of their criminal law purpose.

evoke morality. Within the confines of a licensing regime, issues that might otherwise be considered morality-based, such as provisions that prohibit nudity, become permissible.

In *Morrison*,³⁸ the court was clear that “matters of morality are generally dealt with by the Parliament of the Dominion”.³⁹ The Supreme Court’s ruling in *Westendorp* confirmed that bylaws that aimed at “establishing or enforcing public morality” would be found *ultra vires*.⁴⁰ Within the confines of a licensing regime, the courts have appeared to be more lenient when bylaws contain a “moral aspect”.⁴¹ In *Re Try-San International Ltd.*, the owners of a body-rub parlour and a model studio challenged amendments made to the Vancouver licensing bylaw.⁴² They argued that the city was attempting to regulate morality by adding provisions to the by-law that restrict the hours of operation and prohibit body-rub attendants from working nude.⁴³ The British Columbia Court of Appeal upheld the bylaw because they had not been presented with evidence indicating that morality was a factor in the changes to the licensing bylaw.⁴⁴

In *McNeil*, the Supreme Court clarified the difference between the *Criminal Code* and a provincial act that regulated business (in this instance, theatres): “one is directed to regulating a trade or business where the other is concerned with the definition and punishment of crime; and in the second place, one is preventive while the other is

³⁸ *Morrison*, *supra* note 21.

³⁹ *Ibid* at 744; *Beyond Decriminalization*, *supra* note 7 at 226: “Because of the [F]ederal authority over crime, provinces are not permitted to regulate morality and public order”.

⁴⁰ *Hoehn*, *supra* note 14 at 12.

⁴¹ *Ibid* at 13.

⁴² *Re Try-San International Ltd and Vancouver*, (1978) 83 DLR (3d) 236 (BCCA), [1978] B.C.J. No. 1188(QL) [*Try-San*]; *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law 4957 (23 March 1976) and by-law 4969 (27 April 1976).

⁴³ *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law 4957 (23 March 1976) and by-law 4969 (27 April 1976) ss 7-8.

penal”.⁴⁵ The Supreme Court dismissed the appeal in *Rio Hotel* using similar reasoning.⁴⁶

Dickson CJ. distinguished *Rio Hotel* from *Westendorp* and found no intrusion into federal domain.⁴⁷ In concurring reasons, Estey J. wrote:

[w]here the program is founded on a licensing system with regulations and conditions related to the provision of a licence, and where the province does not purport to establish an offence that is criminal in character, it is clearly constitutionally legitimate.⁴⁸

The courts have seemingly drawn a line in the sand that allows for the inclusion of restrictions that may be considered morality based so long as the objective is sufficiently tailored to facilitating a licensing regime and no conflict with federal law is created.

CURRENT LICENSING BYLAWS REGULATING ADULT BUSINESSES

The authority to create business licensing regimes is under the jurisdiction of municipalities because the regimes are aimed at controlling business and not controlling prostitution.⁴⁹ Each city creates its own licensing requirements which means that the licensing requirements can vary greatly by city and according to the sector of the adult

⁴⁴ *Try-San*, *supra* note 42 at para 25. In *Cal Investments Ltd. (c.o.b. Scientific Massage) v Winnipeg (City)* [1978] 84 DLR (3d) 699, [1978] 2 ACWS 88, similar provisions in a Winnipeg by-law were challenged with an identical result. The Court held: “In our view the City in enacting By-law No. 979/75 was doing no more than attempting to regulate the trade or business of massage parlours - something which the governing Act clearly empowered it to do”.

⁴⁵ *Nova Scotia (Board of Censors) v McNeil*, [1978] 2 SCR 662, 84 DLR (3d) 1 at 691; *Siemens v Manitoba*, 2000 MBQB 140, 151 Man.R. (2d) 49 was decided in a similar manner. The court held: It is accepted that the province cannot prohibit conduct for the simple purpose of combating public evil, or public morality. That is a criminal law purpose which falls under federal jurisdiction. But there is no such purpose to the VLT Act. The VLT Act, by way of local option, recognizes the input of the community as a means to legislate the operation of VLT's in the province. Although there is a prohibition in the VLT Act, the purpose of the prohibition is simply to regulate gaming. There is no evidence before me that there is any "public morality" aspect to this legislation.

⁴⁶ *Rio Hotel v New Brunswick (Liquor Licensing Board)* [1987] 2 SCR 59, 44 DLR (4th) 663.

⁴⁷ *Ibid* at 7.

⁴⁸ *Ibid* at 41.

⁴⁹ Federal/Provincial/Territorial Working Group on Prostitution, *Report and recommendations in respect of legislation, policy and practices concerning prostitution related activities* (Ottawa: Department of Supply and Services, 1998) at (iv) - Authority to Regulate Prostitution [*Working Group Report*].

industry that is being licensed. One city may require escorts to be licensed, while another may not. A recent study found that massage parlours are likely to be required to have a municipal license to operate.⁵⁰ The study included 55 managers of sex industry businesses, of which 47% held a municipal license.⁵¹ A majority of those who were unlicensed were not required to have a license (64%), while others preferred operating without a license (22%) because of privacy.⁵² The piecemeal approach means that there is no universal licensing scheme and it falls to owners and workers to determine what license is needed and how to meet the conditions to acquire it.

Even though the current municipal licensing regulations are inconsistent, they demonstrate that municipalities have the authority and competence to create such regimes for adult service providers. The discussion that follows shows that while the current licensing regimes are imperfect, and their effectiveness is hampered by the criminal law, that municipalities, given the opportunity to openly discuss licensing brothels, could enact better licensing bylaws. This section will detail escort licensing in Vancouver and the licensing of body rub parlours in Toronto as examples of licensing bylaws.

With over 2.4 million residents, Vancouver is Canada's third largest city.⁵³ Sex work in Vancouver has been well documented from the opening of the first brothel in

⁵⁰ Cecilia Benoit, Chris Atchison et al, *A 'working paper' prepared as background to Building on the Evidence: An International Symposium on the Sex Industry in Canada* (Ottawa: Institute of Gender and Health, 2014), online: <
<http://www.understandingsexwork.com/sites/default/files/uploads/Team%20Grant%20Working%20Paper%201%20CBenoit%20et%20al%20%20September%2018%202014.pdf>> at 13 [*Benoit et al*].

⁵¹ *Ibid* at 3,13.

⁵² *Ibid* at 13.

⁵³ Statistics Canada, *Population of census metropolitan areas* (Ottawa: Statistics Canada, 2014) <
<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo05a-eng.htm>> accessed 9 February 2015 [*Census*].

1867.⁵⁴ It is estimated that there are between 1500 and 2000 people working in Vancouver's sex trade.⁵⁵ Toronto is Canada's largest city, and with a population fast approaching the three million mark, the fourth largest in North America.⁵⁶ There are no reliable estimates on how many are working within the city's sex trade but there seems to be no shortage of talk about the trade and how it should be managed.⁵⁷ This allows for insight into both the object and the effect of the bylaws, which is critical for developing recommendations for future regulation.

VANCOUVER'S SOCIAL ESCORTS

Just as with any other business, the operators of escort agencies in Vancouver are required to obtain a business license from the city.⁵⁸ The *Licensing bylaw*⁵⁹ covers all businesses in Vancouver but details the specific requirements for each type. A social escort is defined as: "any person who, for a fee or other form of payment, escorts or accompanies another person, but does not mean a person providing assistance to another person because of that person's age or handicap".⁶⁰ A license for a social escort agency allows an operator to carry on "the business of providing, or offering to provide, the

⁵⁴ Susan Davis, "The Early Years of Vancouver" in Trina Ricketts et al, eds, *The History of Sex Work* (Vancouver: Simon Fraser University, 2007) online: <http://www.sfu.ca/content/dam/sfu/continuing-studies/forms-docs/cep/History_SexWork_final.pdf> at 8.

⁵⁵ Federation for the Humanities and Social Sciences, *Vancouver sex workers improve their lives by being organized* (Ottawa: Federation for the Humanities and Social Sciences, 2014) online: <<http://www.ideas-ideas.ca/media/media-releases/vancouver-sex-workers-improve-their-lives-being-organized>>.

⁵⁶ *Census*, *supra* note 53; Paul Moloney, "Toronto's population overtakes Chicago", *Toronto Star* (5 March 2013) online: <http://www.thestar.com/news/city_hall/2013/03/05/torontos_population_overtakes_chicago.html>.

⁵⁷ Sarah Fulford, "Editor's Letter (February 2013): public sex, massage parlours and bawdy houses", *Toronto Life* (21 January 2013) online: <<http://www.torontolife.com/informer/features/2013/01/21/editors-letter-sex-issue-february-2013/>>.

⁵⁸ *Vancouver Licensing Bylaw*, *supra* note 5, as amended by by-law No 6367 (14 July 1988) as amended by by-law No 6466 (21 March 1989).

⁵⁹ *Ibid.*

⁶⁰ *Ibid* at s 1(b).

services or the names of persons to act as escorts for other persons”.⁶¹ The bylaw sets out the requirements for applying for and maintaining a license, including: keeping the city informed of all names used for operations and advertising⁶², age requirements for those employed⁶³, license requirements for employees⁶⁴, and providing city staff with a detailed list of staff, and informing the city of any changes to the provided list within 24 hours.⁶⁵ Those seeking a license must apply in person and submit to a criminal record check.⁶⁶ A license can be denied on the basis of the criminal record check and may prevent those with previous prostitution convictions from obtaining a license.⁶⁷

In July 1988, Vancouver updated the social escort section of the licensing bylaw.⁶⁸ The expanded section added the condition that “an operator, or a licensee or employee shall be present on the premises” during business hours.⁶⁹ This effectively prohibits an escort from operating independently. The update also changed the record keeping requirements. The former bylaw compelled a written record of all inquiries for services, including the client’s name and address, as well as the name of the service provider and the event to be attended.⁷⁰ The amendment required that the fee charged for the service also be recorded. Under the amended bylaw, business records must be

⁶¹ *Ibid* at s 2.

⁶² *Ibid* at s 24(1)(2).

⁶³ *Ibid* at s 24(3).

⁶⁴ *Ibid* at s 24(4).

⁶⁵ *Ibid* at s 24(1)(a)(b).

⁶⁶ *Ibid* at s 4(2); *Beyond Decriminalization*, *supra* note 7 at 37.

⁶⁷ *Vancouver Licensing Bylaw*, *supra* note 5 at s 4(2); *Beyond Decriminalization*, *supra* note 7 at 37.

⁶⁸ *Vancouver Licensing Bylaw*, *supra* note 5, as amended by by-law no 6373 (14 July 1988).

⁶⁹ *Ibid* at s 24(5).

⁷⁰ *Ibid* at s 24(1)(c).

produced for police review upon request.⁷¹ Fines and penalties greater than \$1000 can be imposed for non-compliance.⁷²

International Escort Services Inc. challenged the record keeping provision days after it came into force.⁷³ They argued that the provision violated their right to unreasonable search and seizure guaranteed by the *Charter*.⁷⁴ In the alternative, International Escort Services contended that the provision was *ultra vires* for going beyond the authority to make bylaws granted by the *Vancouver Charter*.⁷⁵ It was the Court's finding that while the impugned provision did not rise to the level of search and seizure, the onerous record keeping requirements were beyond the scope of municipal authority.⁷⁶ The city argued that they were merely "regulating", a power conferred by s. 271(1)(f), despite not being able to point to any specific bylaw or rule that would require the information.⁷⁷ The Court held that "inspection must be directed toward ensuring compliance with some lawfully established requirement or standard".⁷⁸ As argued, the City was asking for *carte blanche* to gather information from the businesses they licensed, without being able to point to a specific purpose. Justice Lysyk could not accept

⁷¹ *Ibid* at s 24(5)(c).

⁷² *Ibid* at s 24(1)(c).

⁷³ *International Escort Services Inc v Vancouver (City)*, [1988] 55 DLR (4th) 194, 33 BCLR (2d) 202 (BCSC) [*International Escort Services*].

⁷⁴ *Charter*, *supra* note 15 at s 8: "Everyone has the right to be secure against unreasonable search or seizure".

⁷⁵ *Vancouver Charter*, SBC 1953, c 55 [*Vancouver Charter*]; *International Escort Services*, *supra* note 73 at 205.

⁷⁶ *International Escort Services*, *supra* note 73 at 205, 211.

⁷⁷ *Vancouver Charter*, *supra* note 75, s 271(1)(f): "for regulating every person required to be licensed under this Part, except to the extent that he is subject to regulation by some other Statute".

⁷⁸ *International Escort Services*, *supra* note 73 at 209.

that that “inspecting” should be construed so broadly and struck down the provision.⁷⁹

Vancouver amended the licensing bylaw to reflect the judgment.⁸⁰

The licensing fee for a social escort service in Vancouver is \$1180 per year (in addition to a \$50.00 application fee which is applied to the cost of a license if the applicant is successful).⁸¹ The licensing fee is considerable when compared to the cost of licensing for other service providers. For example, a dating service can be licensed for \$159 per year, while a beauty salon license costs \$240 per year.⁸²

TORONTO’S BODY RUB PARLOURS

While Toronto does not require that escorts be licensed, a license is required for owners and operators of body rub parlours. The *Toronto Licensing bylaw* defines a body rub as including:

the kneading, manipulating, rubbing, massaging, touching or stimulating, by any means, of a person’s body or part thereof but does not include medical or therapeutic treatment given by a person otherwise duly qualified, licensed or registered to do so under the laws of the Province of Ontario.⁸³

Much like the social escort licensing in Vancouver, a license is required of both operators and individual employees.⁸⁴

The application process for an operator’s license is detailed and the requirements vary according to the corporate structure of the proposed enterprise.⁸⁵ Like other potential

⁷⁹ *Ibid* at 210.

⁸⁰ *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law No 6373 (14 July 1988), as amended by by-law No 6466 (21 March 1989).

⁸¹ *Vancouver Licensing Bylaw*, *supra* note 5, Schedule A.

⁸² *Ibid*.

⁸³ *Toronto Licensing Bylaw*, *supra* note 5 at 545-29.

⁸⁴ *Ibid* at s 328.

⁸⁵ *Ibid*.

licensees, all the necessary forms, fees and photographs (one for the license, and one to be kept on file with the city) must be filed in person.⁸⁶ Body Rub licenses require pre-payment. The payment is applied to the cost of a license for a successful applicant or returned to an unsuccessful applicant.⁸⁷ This provision applies solely to those seeking to operate a body rub parlour.⁸⁸ Those applying for a license are also expected to provide a list of their anticipated employees.⁸⁹ Operators and individuals also require medical clearance to obtain a license or for a renewal.⁹⁰ The medical form is provided by the city and must be completed by a physician who certifies that the applicant is free from communicable diseases and is “medically fit to perform or receive body-rubs”.⁹¹ License applications are subject to review by both medical officials and the police, and other government agencies.⁹² The bodies that review the application are given the opportunity to include a report on the favourability or unfavourability of granting the license.⁹³ In the case of a negative report, the applicant has a right to a hearing before the city’s licensing tribunal.⁹⁴

The initial cost of a license to operate a body-rub parlour is \$12,214.64.⁹⁵ The annual renewal fee is \$11,802.76.⁹⁶ Each attendant in a body rub parlour must also obtain an initial license at a cost of \$367.36, which is subject to an annual renewal cost of

⁸⁶ *Ibid*; Other Licensees that must file paperwork in person include tow truck drivers (s 73), holistic healers (s 159) and the operators of adult entertainment venues (s 363).

⁸⁷ *Toronto Licensing Bylaw, supra* note 5 at 545-4.

⁸⁸ *Ibid* at 545-4 A(2).

⁸⁹ *Ibid*.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at s 333.

⁹² *Ibid* at s 334.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ Ontario, City of Toronto, *Business, Trades and Professions Licence and Permit Fees*, online: <<http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=878415e205641410VgnVCM10000071d60f89RCRD&vgnextchannel=b3467729050f0410VgnVCM10000071d60f89RCRD>> accessed 9 February 2014 [*Toronto – License Fees*].

\$258.70.⁹⁷ Body Rub Parlours are also among the classes of businesses which require a Preliminary Property Review.⁹⁸ The review is completed by Toronto's building division and costs \$215.17.⁹⁹ This one time evaluation takes six to eight weeks to complete and potential operators must provide 2 copies of a survey or site plan as well as a floor plan (drawn to scale).¹⁰⁰ The licensing of body rub parlours generates almost \$1 million in revenue for the city each year.¹⁰¹ For the sake of comparison, the cost of a license for a business falling into the category of *Personal Service Setting*, which includes hair salons, tattoo parlours, and aesthetic services, is \$331.37 for the initial license and can be renewed annually for \$217.79.¹⁰²

The Vancouver Social Escort licensing bylaw and the Toronto Body Rub provisions are examples of the regimes that cities have put in place to regulate adult-oriented businesses. Although conditions vary by city, these illustrations assist in explaining why cities are the best source of regulation for decriminalized brothels. Changes would be necessary to design a new licensing regime to address the specific needs of sex workers. These licensing regimes represent a starting point, the details of which will be critiqued in Chapter 3.¹⁰³ These licensing regimes also provide insight into how those involved in adult service businesses are affected and how changes to the

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Ontario, City of Toronto, *How to Apply for a Business or Trades Licence or Permit*, online: <<http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=52dd9ec1e9013410VgnVCM10000071d60f89RCRD&vgnextchannel=b3467729050f0410VgnVCM10000071d60f89RCRD>> accessed 9 February 2015.

Other Businesses that require the *PPR* are holistic centres, adult entertainment parlours, places of amusement, billiard halls, public garages, restaurants and entertainment establishments/nightclubs.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* The necessary documents to initiate a *PPR* are the expense of the business operator.

¹⁰¹ CBC News, "Toronto collects nearly \$1 million per year from body rub licences", *CBC News Toronto*, (23 August 2013), online: <<http://www.cbc.ca/news/canada/toronto/toronto-collects-nearly-1m-per-year-from-body-rub-licenses-1.1175120>>.

¹⁰² *Toronto – License Fees*, *supra* note 95.

¹⁰³ See Chapter 3 beginning at page 57.

licensing schemes that acknowledge that sex is for sale, could make their work safer and more consistent with the occupational standards that apply to other professions.

Criminalization currently prevents that from occurring, leaving workers caught between the federal and municipal regimes.

TURNING A BLIND EYE

The strongest argument for allowing municipalities to license sex work in brothels is that they are already licensing sex work within other types of adult businesses. It is well known that behind the closed doors of many adult service businesses, there is more for sale than companionship.¹⁰⁴ An escort interviewed for one study confirmed that cities are turning a blind eye to the real nature of adult businesses: “[t]his is ridiculous. How can anyone imagine that escort work is about anything but sex? How are we supposed to work?”¹⁰⁵ The same study also found that police too, were well aware of the realities: “[e]scorting isn’t about prostitution...it *is* prostitution. But we can’t say that,” stated one officer.¹⁰⁶ Elizabeth, or Roxy, as her clients know her, is a sex worker who operates out of a massage parlour in Edmonton. She described her appointments as beginning with a massage, but leading “to sexual services that both she and the client agree to”.¹⁰⁷ She adds that, “[w]e offer anything from hand jobs, blow jobs to sex. Every girl offers different stuff”.¹⁰⁸ Refusing to acknowledge the true nature of adult businesses “allows

¹⁰⁴ *Benoit et al, supra* note 50.

¹⁰⁵ *Lewis & Maticka-Tyndale, supra* note 7 at 443.

¹⁰⁶ *Ibid.*

¹⁰⁷ Stephanie Dubois, “Massaging the Law”, *Metro* (15 April 2014) 12.

¹⁰⁸ *Ibid.*

municipalities to control and profit from sex industry businesses while simultaneously maintaining the façade that they do not know what takes place inside them”.¹⁰⁹

As cities “maintain a veneer of ignorance”,¹¹⁰ they have also made strategic decisions to control sex work using bylaws, while the legitimacy of licensing remains tempered by the need for workers to remain covert to avoid attracting the scrutiny of the criminal law.¹¹¹ For workers to truly be able to access the safety and security envisioned in the *Bedford* decision, it is imperative that the criminal law governing adult sex work be repealed to allow for municipal licensing that acknowledges sex is for sale. Given that cities are already tasked with licensing a variety of businesses, adding decriminalized brothels would be a natural extension of the licensing power they already have. This would also allow sex workers greater “control over their working conditions and the same rights and responsibilities as other political subjects and citizens”.¹¹²

Determining the best way to regulate the sex trade has been a struggle for municipal governments, committees and advocacy organizations.¹¹³ When the Fraser Committee released its final report in 1985, it recommended allowing sex work to occur in private homes and in “small-scale, non-residential commercial prostitution establishments”.¹¹⁴ Another bold recommendation of the committee was that:

¹⁰⁹ *Beyond Decriminalization*, *supra* note 7 at 46.

¹¹⁰ Emily van der Meulen & Mariana Valverde, “Beyond the Criminal Code: Municipal Licensing and Zoning Bylaws” in Emily van der Meulen, Elya M. Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada* (Toronto: UBC Press, 2013) 314 at 315 [*Van der Meulen & Valverde*].

¹¹¹ *Lewis & Maticka-Tyndale*, *supra* note 7 at 443.

¹¹² Deborah R. Brock, *Making Work, Making Trouble: The Social Regulation of Sexual Labour*, 2d ed (Toronto: University of Toronto Press, 2009) at 148 [*Brock*].

¹¹³ See generally the *Working Group Report*, *supra* note 49; Canada, Department of Justice, *Report of the Special Committee on Pornography and Prostitution, Volume 2* (Ottawa: Department of Justice, 1985) [*Fraser Report*].

¹¹⁴ *Fraser Report*, *supra* note 113 at 538; James R. Robertson, *Prostitution* (Ottawa: Department of Justice, 2003) online: <<http://publications.gc.ca/Collection-R/LoPBdP/CIR/822-e.htm#cthefrasertxt>> at C Accessed 9 February 2015.

“prostitution establishments be permitted to be licensed and operated in accordance with regulatory schemes established by a provincial or territorial legislature”.¹¹⁵ The committee recommended liberalizing the laws around sex work as they presently “operate in a way which victimizes and dehumanizes the prostitute”.¹¹⁶ While brothels remained prohibited by the *Criminal Code* and therefore unable to be licensed by municipalities, other adult businesses where sex is on offer covertly, are licensed. By emphasizing the legal aspects of the adult services provided and downplaying the fact that sex is for sale, some businesses are able to operate with the permission of cities.

The Federal Provincial Working Group on Prostitution, created in 1992 focused largely on youth involved in sex work and street prostitution.¹¹⁷ They noted the contradiction created by the municipal licensing provisions and suggested:

since many municipalities already regulate indirectly what could be considered to be bawdy-houses, it would be preferable to drop the fiction and simply allow bawdy-houses to carry on business exempt from prosecution under the *Criminal Code*, but subject to regulation by the municipality.¹¹⁸

The consultations and research conducted by the Working Group found that complaints about massage parlours and escort agencies were infrequent and that “labour-intensive, costly” investigations were not justified by the insignificant penalties.¹¹⁹ They reported: “many feel that these non-enforcement practices ought to be formalized and that certain prostitution activities should be allowed by establishing zones of tolerance or limited

¹¹⁵ *Ibid* at 538.

¹¹⁶ Canada, Department of Justice, *Report of the Special Committee on Pornography and Prostitution, Summary* (Ottawa: Department of Justice, 1985) at 34.

¹¹⁷ *Working Group Report, supra* note 49.

¹¹⁸ *Ibid* at s (iv) Authority to Regulate Prostitution.

¹¹⁹ *Ibid*.

legitimate bawdy-house operations”.¹²⁰ The main justification behind the now unconstitutional bawdy-house provision was to “prevent community harms in the nature of nuisance”.¹²¹ It is evident that not only are municipalities turning a blind eye and licensing adult businesses where sex work is occurring, but that the concerns that bawdy-houses create nuisance in the community are often put forward to those with moral objections to sex work.¹²²

Beyond just turning a blind eye to sex being sold in massage parlours and escort services, Dr. John Lowman’s analysis of municipally licensed adult businesses noted specific provisions within the rules that show the sale of sex is already being contemplated by municipal bylaws, even in the face of criminal prohibitions.¹²³ His examination of the Vancouver bylaws controlling adult businesses revealed that “the City is attempting to limit prostitution to two venues: body-rub parlours and escort services”.¹²⁴ He cites the differences in conditions of licensing, advertising restrictions and fees as proving that the city is both aware that sex is being sold and that the bylaws were specifically crafted to restrict the sale of sex to these two venues.¹²⁵ Regardless of whether municipalities are turning a blind eye or explicitly confining paid sex to specific places, it is evident that municipalities, or in the very least, Vancouver, is already regulating brothels, just under a different name. It is also not limited to Vancouver:

Most Canadian cities currently license businesses that are similar, if not identical to Vancouver’s escort

¹²⁰ *Ibid.*

¹²¹ *Bedford, supra* note 1, at para 131.

¹²² New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) online: <<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report>> accessed 3 February 2014 at 8.6.1 [*PLRC Report*].

¹²³ *Lowman Submission, supra* note 9 at 13.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

agencies, massage parlour services, health enhancement centres or steam baths and, in many cases, but not all, these types of businesses offer sexual services.¹²⁶

The use of a social control model to regulate demonstrates that municipalities have turned their minds to regulating sex work but in the most passive way possible: making the rules onerous and expensive to discourage but profiting when a business is able to comply.

Lowman's conclusion on Vancouver's bylaws begins with the observation that only the operators of body-rub parlours and escort agencies are compelled to provide the names and addresses of their employees to the police.¹²⁷ Toronto also requires all applicants for body-rub licenses to undergo a police check and that their names be submitted to the City (Municipal Licensing and Standards Division); however, the city does not license escorting.¹²⁸ Lowman argues that Vancouver has made deliberate choices because the body-rub bylaw "does not expressly prohibit acts of prostitution", while the bylaw governing health enhancement centres explicitly states that no one on the premises is permitted to "offer or engage in acts of prostitution".¹²⁹ For Lowman, the silence in the body-rub provision indicates a more permissive stance since it was obviously contemplated in the creation of the health enhancement provision.¹³⁰

The licensing fees also indicate preferential treatment for some adult businesses over others. Lowman asserts: "that if any doubt remains that the City Council overseeing these by-laws knows that it is licensing prostitution, consider the fees the City charges for

¹²⁶ *Beyond Decriminalization*, *supra* note 7 at 36.

¹²⁷ *Ibid*; *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law 4957 (23 March 1976); *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law 6373 (14 July 1988).

¹²⁸ *Toronto License Bylaw*, *supra* note 5 s 545-328 (d); *van der Meulen & Valverde*, *supra* note 110 at 318.

¹²⁹ *Vancouver Licensing Bylaw*, *supra* note 5 as amended by by-law 6830 (14 May 1991) s 17.1(5).

¹³⁰ This conclusion is also affirmed by *Beyond Decriminalization*, *supra* note 7 at 42.

different categories of businesses”.¹³¹ The annual fee for a dating service in Vancouver is \$159 compared to an escort service that costs \$1180.¹³² The cost for a license to operate a body-rub parlour in Vancouver is \$9987, and among the most expensive licenses the city offers.¹³³ The cost has risen significantly since Lowman’s submissions to the subcommittee on Solicitation laws were written, when the cost of a license to operate a body-rub parlour was \$6527.¹³⁴

While sex workers who operate from massage parlours or escort agencies have always had to do so covertly, the new criminal provisions could have serious implications for municipally licensed adult service providers. As mentioned in Chapter 1, working within a “commercial enterprise” is now an aggravating factor that increases the penalty for anyone providing services to a sex worker.¹³⁵ Restrictions on advertising “sexual services” in s. 286.4 could also impact municipally licensed adult service providers.¹³⁶ Owners and operators of massage parlours and escort agencies will undoubtedly come under increased scrutiny as new research shows that 25% of sex sellers are working in these types of venues.¹³⁷ The terms “commercial enterprise” and “sexual services” are not

¹³¹ *Lowman submissions, supra* note 9 at 14.

¹³² *Vancouver Licensing Bylaw, supra* note 5 at Schedule A, Year 2014 Business License Fees.

¹³³ *Ibid; Lowman Submissions, supra* note 9 at 14. The only licensing fees that are higher than that of a Body Rub in Vancouver are The Pacific National Exhibition (\$16,011), a casino - class 2, Horse or Motorcycle racing (all at \$11,433).

¹³⁴ *Ibid.*

¹³⁵ *C-36, supra* note 5, s 286.2 (6). Commercial enterprise is undefined and it remains uncertain if this could be used as an aggravating factor if the services were provided for an independent sex worker.

¹³⁶ *Ibid* s 286.4

¹³⁷ Gender, Violence and Health, *Brief to the Senate Committee for Legal and Constitutional Affairs* (Ottawa: Gender, Violence and Health, 2014) online:

<http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/SM_C-36_brief_Cecilia_Benoit_et_al_E.pdf> accessed 30 October 2015.

fully defined and the provisions have not yet been tested in court so the ramifications remain unknown.¹³⁸

The repeal of the criminal provisions would allow cities to provide better information to workers who are granted licenses both to operate and to work in adult service businesses. Instead of using the criminal law to condemn sex work, allowing brothels to be licensed by municipalities provides an opportunity to furnish workers with information that will enhance their health and safety, and let them know about support and services that are available to them.

The full impact of the new criminal regime remains to be seen, but it has already had a chilling effect. Toronto's largest escort agency recently announced that escorts would no longer be providing sexual services.¹³⁹ Not wanting to be caught by the vague 'commercial enterprise' prohibitions, the agency's owner has replaced the scantily dressed escort photos with ones featuring escorts in cocktail dresses and employees have signed contracts indicating they will not provide sexual services.¹⁴⁰ While escort services in Toronto are not subject to municipal licensing, Vancouver and other cities do require licenses. The change in the criminal law could compound the difficulties of workers who are trying to ascertain what is permitted and what is not under the new law.

While Cupid's is just one agency, it could be a sign of what is to come. Cupid's owner has public stated she will no longer be providing condoms to her escorts. Even

¹³⁸ Canadian Bar Association, National Criminal Justice Section and Municipal Law Section, *Bill C-36, Protection of Communities and Exploited Persons Act*, (Ottawa, Canadian Bar Association, 2014), online: <<http://www.cba.org/CBA/submissions/pdf/14-57-eng.pdf>> at 19-20 [*CBA Brief*]; Alberta, City of Calgary, *Submission to the Senate Committee for Legal and Constitutional Affairs* (Ottawa: City of Calgary, 2014), online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/Briefs/C-36/SM_C-36_brief_City_of_Calgary_E.pdf> [*Calgary Brief*].

¹³⁹ Andrea Houston, "Cupid's Escorts leaves the Sex Trade" NOW Toronto (13 December 2014) Online: <<https://nowtoronto.com/news/cupids-escorts-leaves-the-sex-trade/>>.

¹⁴⁰ *Ibid*

before the change in the criminal law, workers in adult service businesses were not necessarily provided with safe sex supplies or information from their employers. Like municipal staff, owners and managers of adult service businesses cannot openly acknowledge that sex occurs. This hampers efforts to ensure safe sex supplies are used and to connect workers with services that could provide free supplies.

The confusion over how cities could profit from licensing while the criminal provision prohibiting living on the avails of prostitution was in effect has been settled as that provision is no longer part of the *Criminal Code*. The new provision enacted in the Protection of Communities and Exploited Persons Act will bring new confusion. Not only could it be criminal for cities to profit from licensing fees but employees within licensed adult service providers could also be at risk. The wording of the new provision allows sex workers to pay for security, reception and other services but the service providers must also furnish the same service to the public. This could mean that instead of hiring drivers dedicated to chauffeuring workers to and from appointments, escort agencies may be limited to using taxis and driver services that are also available to the public. Instead of hiring or contracting security guards, agencies will have to ensure they use security services with multiple clients. There are many potential problems with this change in the law. A taxi driver would be unable to wait for an escort during her date, or to provide security. The cost of hiring drivers could increase by paying multiple individuals instead of salaried employees or contracted individuals. There is also the potential that drivers (or security guards) who are not employees of the agency may not exercise the same discretion to maintain the privacy of workers who do not wish their occupation to become public. Until the courts test the new provisions, speculation looms.

The environment surrounding municipally licensed adult service businesses is caught in a state of uncertainty. The prohibitions on purchasing sexual services have already made it difficult for sex workers to confirm the identity of their clients, which has been a longstanding method of screening.¹⁴¹ Valerie Scott, one of the litigants in *Bedford*, stated the new law “isolates sex workers and makes them more vulnerable”.¹⁴² The enhanced safety of working indoors is threatened by unclear criminal laws that could see the closure of many adult service businesses – either because of being deemed ‘commercial enterprises’ under the material benefit clause, clients’ fears of being caught in a sting or a raid, or because attracting business is too difficult because of the new advertising prohibitions. With so many questions about the new law left unanswered, it will be for the courts to determine how to interpret the provisions. This thesis seeks to illuminate some of the hardships that workers endure by being governed by regimes that are permissive on one hand and prohibitive on the other. Although this discussion is largely based on the experiences of sex workers under the former laws, it appears that the new ones will create equal, if not more difficulties for workers.

LICENSED BUT STILL ILLEGAL – THE PRECARIOUS SITUATION FOR ADULT SERVICE PROVIDERS

Having established that municipalities are already, knowingly, licensing sex work, it is important to appreciate how that affects those who work in licensed massage parlours, body-rub parlours and escort services. While they have paid the fees to the municipality to obtain a license, the services they provide remain prohibited by the

¹⁴¹ Antonella Artuso, “Sex Workers urge Premiers not to enforce new Prostitution Law” Toronto Sun (17 December 2014) Online: <<http://www.torontosun.com/2014/12/17/sex-workers-says-bill-c-36-leaves-them-vulnerable>>.

criminal law. The juxtaposition of these two regimes creates confusion and jeopardizes the health and safety of sex workers.¹⁴³

Adult service providers, licensed by cities, describe the conflict with the criminal law as a lack of information about the law; an inability to benefit from health and safety measures; confusion over the proceeds of licensing; and fragile relationships with those tasked with bylaw enforcement.¹⁴⁴

In many cases, the removal of the federal criminal provisions could help improve working conditions for municipally licensed workers by allowing municipalities to provide information without condoning sex work, to make health and safety a priority and to foster better relationships with enforcement officers simply by acknowledging that sex work is occurring.

NEED FOR INFORMATION

For municipally licensed adult workers, clear and accurate information on the law can be difficult to obtain. As one worker stated: “[t]he City knows what escorting is but they just brush it under the carpet, so they don’t have to give us any protection or information”.¹⁴⁵ It appears that because of the federal prohibitions and municipal restrictions of certain actions, neither level of government is willing to clearly detail how to work and remain compliant with the laws. Lewis and Maticka-Tyndale found: “[i]nterviewees complained that when the license was purchased they were not offered any information about what is legal and what was not under the terms and conditions of

¹⁴² *Ibid*

¹⁴³ *Safety, Security & Well Being, supra* note 11 at 20; *Lewis & Maticka-Tyndale, supra* note 7 at 441-445; *Laing, supra* note 7 at 7.

¹⁴⁴ *Laing, supra* note 7 at 7.

their license by the police or bylaw authorities”.¹⁴⁶ While most applicants appreciate the nature of the work in massage parlours, rarely is it expressed in explicit terms.¹⁴⁷ If it were, it would be clear that cities are already licensing sex work.

Owners and workers in licensed adult industries are responsible for knowing what laws apply to their business and how to conduct themselves within the law.¹⁴⁸ Being governed by both federal and municipal law complicates their ability to find the answers they need. Lewis and Maticka-Tyndale interviewed one municipal employee who indicated that the criminal law hindered the city’s ability to provide information or services and suggested: “the assumption is that the provision of services and information encourages individuals to participate in the exchange of sex for money.”¹⁴⁹ This means that instead of municipalities providing literature, or even offering to facilitate information sessions (which for the privacy of workers, could also be internet-based), owners and workers need to source the information on their own because cities fear that providing guidance could be mistaken for condoning sex work.¹⁵⁰

¹⁴⁵ *Ibid* at 13.

¹⁴⁶ *Ibid* at 12.

¹⁴⁷ Rosie DiManno, “DiManno: Stop the morality policing and regulate the rub ‘n’ tug industry”, Toronto Star (16 October 2011), online: <
http://www.thestar.com/news/gta/2011/10/16/dimanno_stop_the_morality_policing_and_regulate_the_rub_n_tug_industry.html>.

¹⁴⁸ *Criminal Code*, RSC 1985, c C-46, s 19: “Ignorance of the law by a person who commits an offence is not an excuse for committing that offence” [*Criminal Code*]

¹⁴⁹ *Lewis & Maticka-Tyndale*, *supra* note 7 at 441.

¹⁵⁰ *Ibid*.

A MATTER OF HEALTH AND SAFETY

Not being permitted to acknowledge that sex is for sale in municipally licensed adult businesses means that information on safe sex education programs for workers and the rights of employees in these businesses (for example, the right to refuse a client), are also not being addressed. Workers who sell sex must not only do so covertly, but also accept the responsibility for obtaining their own safe sex supplies, as their employer cannot be expected to provide it or advocate for its use. This applies equally to employees and clients, as neither can benefit from safe sex education. The problem created by the two sets of laws means that promoting safe sex within the industry cannot be done openly. This was affirmed by a study which found: “[b]ylaws restrict labour-management practices, including safety measures and provision of occupational safety and safety information and supplies since owner operators have to pretend there is no sex work involved.”¹⁵¹ Without the criminal provisions, municipalities could mandate that safe sex supplies be available. The current challenge is that while municipalities know that sex is for sale, the federal law prohibits them from taking action to encourage safe sex.

PROFITING FROM THE AVAILS

The *Bedford* case was successful in having s. 212 (1)(j) of the *Criminal Code*, which prohibited receiving a financial benefit from the prostitution of others, overturned. However, the new criminal provisions have to a large degree reinstated it and explicitly

¹⁵¹ *Safety, Security & Well Being, supra* note 11 at 20.

criminalized receiving a “material benefit” through a “commercial enterprise”.¹⁵² While cities turn a blind eye to how profits are made, licensees pointed to the obvious contradiction:

Owners were confused about how they could be charged with “living off the avails”, but the city, which makes money through licensing the agencies and workers, and Revenue Canada, which makes money through taxing the industry, could not be similarly charged.¹⁵³

Confusion over what is caught by the criminal provision of living on the avails, led to changes in how Calgary licenses escorts. In 2006, a city firefighter was convicted of keeping a common bawdy-house, two counts of living on the avails of prostitution, and use of a cell phone while prohibited, all in relation to an escort service he was managing.¹⁵⁴ He was successful in having the convictions for living on the avails stayed by arguing “officially induced error”.¹⁵⁵ The trial judge found that his belief that: “the license to escort superseded any *Criminal Code* provisions around prostitution, and that the women providing sexual services were therefore working legally” was reasonable.¹⁵⁶

¹⁵² *Criminal Code*, *supra* note 148, s 212 (1)(j): Every one who lives wholly or in part on the avails of prostitution of another person, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; *Bedford*, *supra* note 1 at 164; *Bill C-36*, *supra* note 3.

¹⁵³ *Lewis & Maticka-Tyndale*, *supra* note 7 at 443.

¹⁵⁴ See generally: The Calgary Herald, “Ruling raises doubts on Escort Law”, *The Calgary Herald* (22 February 2006), online: <<http://www.canada.com/calgaryherald/story.html?id=7a3d644a-9bd6-445d-8109-7d9b43b0f348>>; Patrick C. Fagan, “Accused says he concluded Sex for Money was Legal in Calgary” *Patrick C. Fagan* (18 November 2005), online: <<http://www.patrickfagan.com/index.php?page=cases/indcase.php&catid=2&indid=86>>.

¹⁵⁵ *Eastaugh v Halat*, 2009 ABCA 122 at para 5, 306 DLR (4th) 256: “I find that officials of the City of Calgary erroneously induced the accused to reasonably believe that deriving an income from an escort agency, where escorts engaged in sex for money, was not contrary to the criminal law”.

¹⁵⁶ *Ibid*; Laing, *supra* note 7 at 4.

In December 2006, Calgary enacted a new *Dating and Escort Service Bylaw* with reduced fees for licensing.¹⁵⁷ The cost of obtaining a license to operate an escort agency or to work as an escort within an agency is \$170 for the initial application and \$130 to renew a license.¹⁵⁸ This brought the licensing fees for escorts in line with the fees for other businesses or service providers so that if the city was indeed profiting from licensed sex work, it was doing so at a rate that was identical to every other licensed business.¹⁵⁹ Chapters three and four demonstrate why setting fees akin to other businesses is desirable.

ENFORCEMENT

The other major conflict between municipally licensed adult businesses and the federal law is the enforcement of bylaws. Having already established that workers are unsure of their rights, bylaw enforcement, either by city officials or police, creates additional tension. Both police and city officials have acknowledged their awareness that sex is for sale and this creates tenuous relationships between licensees (owners and workers alike) and those tasked with inspections.

Workers found: “[i]nspections and enforcement related to sex work are conducted disproportionately to other forms of licensed work.”¹⁶⁰ As mentioned, inspections and

¹⁵⁷ *Calgary Escort Bylaw*, *supra* note 5. The City of Calgary asked the government for more clarification on the definition of “sexual services” prior to the passing of Bill C-36. While supporting a legislative response, the city holds concerns that the Dating and Escort Service Bylaw may be impacted. See Calgary Brief at note 138.

¹⁵⁸ *Calgary Escort Bylaw*, *supra* note 5 at Schedule A – License Fees, online: <http://www.calgary.ca/_layouts/cocis/DirectDownload.aspx?target=http%3a%2f%2fwww.calgary.ca%2fPDA%2fDBA%2fDocuments%2flicence%2fbusiness_licence_bylaw.pdf&noredirect=1&sf=1> accessed 30 January 2014.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Safety, Security & Well Being*, *supra* note 11 at 20.

investigations are typically driven by complaints so it is natural that an escort agency or massage parlour may be the target of more frequent inspections than a hair salon, which does not face the same stigma as an adult services business. The nature of adult work also puts these businesses at an increased risk of being part of a sting operation when police attempt to ascertain if any of the *Criminal Code* provisions on sex work are being broken. Visits from bylaw enforcement officers can be stressful as “[t]he limited knowledge sex workers have of bylaws and penalties for bylaw infractions make it difficult for them to defend or affirm their rights”.¹⁶¹ This has an effect on relationships between businesses and enforcement. As Laing noted: “relationships with officers were fragile and dependent on the wider political climate of the municipality”.¹⁶² The power imbalance between enforcement and licensed workers only adds to the tension of the relationship.

Being forced to pretend sex is not for sale creates significant hardships for workers. Workers turn over their personal information to be licensed but in return receive little information on how to work legally, enhance their safety or assert their rights. They are also left wondering why it is permissible for cities to profit from licensing fees, all the while knowing that sex work is occurring. Instead of making adult service providers feel confident about working in a licensed industry, enforcement is seen as intimidating. The imposition of both the federal and municipal laws needlessly add frustration, health risks and stress to an already demanding occupation.

Bylaw enforcement is a significant stressor for municipally licensed adult workers. While they have the relative safety of an indoor location, by selling sex, they remain at risk of being caught and losing their license. The vicious circle that is created

¹⁶¹ *Ibid.*

¹⁶² *Laing, supra* note 7 at 15.

means that losing a license, or being charged with prostitution offences under the *Criminal Code* can mean turning to other forms of sex work where there is less security, for example street based work.¹⁶³ Without the federal prohibitions, the relationship between enforcement officers and workers could facilitate better working conditions, and better rules for health and safety, and help to establish relationships of trust so that exploitation can be exposed. As it stands, workers are unsure of their rights and suspicious of the motives of enforcement officers.

CONCLUSION

The courts have gradually allowed for more purposive interpretation of municipal enactments, as municipal lawmakers are democratically elected and responsible to the communities that they serve. Municipalities must only legislate within the realm of the authority delegated to them by the provinces, or risk having their bylaws struck down. This also means that encroaching on powers assigned to the Federal Government is forbidden. While the courts have designated moral issues as the domain of the Federal Government, within the confines of a licensing regime, provisions that might otherwise be deemed issues of morality have been accepted as permissible so long as they were enacted for the purpose of regulating business.

The licensing bylaws for Vancouver's social escorts and Toronto's body rub practitioners provide examples of how adult service providers are licensed in two of Canada's largest cities. The conditions are strict and the licensing fees are high, which is indicative of the cities' desire to control the industries, while collecting the profits. As

¹⁶³ *Safety, Security and Well-Being*, *supra* note 11 at 20.

between cities there is no uniformity between what is licensed and how; bylaws are localized responses. In one city a license may be required for escorting, while in another a license may not be necessary as no regulation exists. The same could be said for body rub parlours, massage parlours, health enhancement centres and other businesses that offer adult services. Each city must address adult services in a manner that is both within their authority and reflects local needs. While the repeal of the criminal law will not quell the desire of cities to profit from licensing, it would facilitate a means for the acknowledgement that sexual services are in fact being licensed and allow for open conversations with workers to develop more appropriate licensing regimes.

Although it is common knowledge that sex is for sale in municipally licensed adult businesses, the federal law forces cities to turn a blind eye. Cities have limited means of raising revenue but licensing fees are allowable.¹⁶⁴ In the case of adult service providers, those fees are high. The implications of the new criminal regime on municipally licensed adult service providers are still unknown but early analysis indicates that it could have serious repercussions.¹⁶⁵ Municipalities may be forced to reconsider licensing bylaws, which could drastically alter the ability of these businesses to operate.¹⁶⁶

Adult service providers are caught between municipal licensing regimes that seek to make their work lawful and the federal criminal law that seeks to condemn them. While licensing adds “legitimacy”, it also “appears to increase police presence” and “disempower escorts and their employers from taking action to enhance their own health

¹⁶⁴ *NS Municipal Act*, *supra* note 18, s 72.

¹⁶⁵ *CBA Brief*, *supra* note 138; *Calgary Brief*, *supra* note 138.

¹⁶⁶ *Calgary Brief*, *supra* note 138.

and safety”.¹⁶⁷ City officials accept payments and hand over licenses but are reluctant to provide information that would help workers understand the legal parameters of their work. Workers are responsible for discerning how to work legally, or how to work within a licensed environment and avoid raising the suspicions of enforcement officials.

The imposition of the two regimes also has repercussions for health and safety. Operators of adult services cannot promote safe sex – to employees or clients – because they must not acknowledge that sex is occurring. While Federal prohibitions remain in place, municipal licensing cannot be used as effectively as a tool to address health and safety concerns. Allowing municipalities to license brothels outright would not only allow for the creation of better, more tailored licensing regimes, but it would provide added protection for workers.

Allowing municipalities to use their business licensing authority to regulate brothels is far more preferable to additional criminal prohibitions that leave workers caught in limbo between licensed adult services and the criminal law. The confusion created comes at the expense of the health, safety and security of workers. *Bedford* resolved any mystery that remained about how to sell sex in a safer manner. Allowing workers more control over their businesses, by acknowledging that sex is being exchanged for money, also can aid municipalities in developing better licensing regimes. The new criminal provisions will only ensure that confusion over what is legal and what is not persists.

While licensing has been presented as a better alternative to the criminal law, in the case of regulating sex work, it is by no means beyond critique. In addition to the complications for workers addressed in this chapter, there are provisions within the

¹⁶⁷ *Lewis & Maticka-Tyndale, supra* note 7 at 445.

licensing bylaws that raise concerns for workers. There are also many positive aspects of licensing. Having presented representative provisions from Vancouver and Toronto, and explored the difficulties of complying with both municipal and Federal law, chapter three will expand on the licensing regimes and analyze the benefits and drawbacks of the systems that are in place.

CHAPTER 3 - BENEFITS AND DRAWBACKS OF LICENSING

INTRODUCTION

While cities license massage parlours and escort services, it should not be assumed that this permission equates with approval. The previous chapter established that municipalities are the proper authority for business licensing, which has enabled them to create licensing regimes for adult service providers. The Federal criminal law control of prostitution requires cities to tread carefully to avoid having their bylaws struck down as *ultra vires*.¹ While the federal and municipal regimes attempt to co-exist, sex workers are left in a precarious position: they are required to obtain a license to work legally but their *actual* work leaves them vulnerable to criminal charges. For these workers, the high fees paid for a license still preclude them from many of the health and safety benefits that a licensing regime can enhance and relationships with police and other enforcement officials remain strained. This chapter highlights the experiences of workers within these license regimes and how they are impacted, for better or for worse.

While street-based sex work is often the focus of media reports, the majority of commercial sex transactions take place in other venues.² Massage parlours and escort services are among the top choices of those who purchase sexual services.³ With sex work already occurring in municipally licensed adult businesses, workers are already in a position to speak to the benefits and drawbacks of licensing regimes, even if the

¹ *Westendorp v the Queen*, [1983] 1 SCR 43, 144 DLR (3d) 259.

² Cecilia Benoit et al, *A working paper prepared as background to Building on the Evidence: An International Symposium on the Sex Industry in Canada*, (Victoria: University of Victoria, 2014) online: <<http://communications.uvic.ca/releases/tip.php?date=19092014>> at 5 [*Benoit et al*].

effectiveness of the regimes are currently hampered by criminalization. The views of sex workers offer insight into what aspects of licensing regimes are good for them as workers, and what hardships are caused for workers beyond the imposition of the criminal law.

The type of licensing regime a city enacts also influences the benefits and drawbacks to licensing. Crofts and Summerfield argue that the effectiveness of licensing regimes depends on “the underlying principles and processes”, and the extent to which sex work remains criminalized.⁴ The underlying goals of a licensing regime can enhance or undermine the efficacy of licensing.⁵ When considered as a continuum, a licensing regime that proscribes different conditions on sex industry businesses and takes a “negative moral stance to sex work” is deemed one of “social control”.⁶ This echoes the assertion of Dr. John Lowman, noted in the previous chapter, that cities are trying to control where sex is sold by imposing different conditions on different venues.⁷ At the opposite end of the spectrum is a neutral licensing regime that “licenses the sex industry in a similar way to other areas of business”.⁸ New Zealand is representative of the neutral-model and will be compared in the following chapter. The underlying goal of a licensing regime has a significant impact on how workers feel about licensing, working

³ *Ibid.* The most frequent venue or type of sexual service provider visited by sex buyers during the previous 12 months: Massage Parlours (2nd) at 55%, Escort Agencies (4th) at 31%.

⁴ Thomas Crofts & Tracey Summerfield, “The Licensing of Sex Work in Australia and New Zealand” (2007) Murdoch University eLaw Journal 269, online: <<http://apo.org.au/node/2539>> at 270 [Crofts & Summerfield].

⁵ *Ibid.*

⁶ *Ibid.*

⁷ John Lowman, *Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness* (Ottawa: John Lowman, undated) <http://184.70.147.70/lowman_prostitution/HTML/SCJHPE/Submission_to_the%20Subcommittee_on_Solicitation%20Laws_Brief.pdf>, accessed 9 February 2015 at Appendix A, page 14 [Lowman Submissions].

⁸ Crofts & Summerfield, *supra* note 4 at 270.

conditions and the participation in the regime.⁹ The contrast between the social control model and the neutral model makes it evident that the policy influencing the bylaws can be as impactful as the words that are used.

Any regulatory scheme, regardless of intent, has benefits and drawbacks. Sex workers operating out of massage parlours and escort services are simultaneously criminalized and controlled by licensing regimes. Despite those burdens, municipal licensing has brought a measure of legitimacy to the adult services industry and has also allowed for better risk management practices for workers. The improvements, although tempered by efforts to discourage and control the industry, show ways in which licensing has great potential to benefit workers.

Current licensing regimes, beyond the hardships imposed by criminal law, also raise significant concerns for workers. Adult service providers cite a lack of privacy and cost as the biggest drawbacks to licensing regimes controlling massage parlours and escort services. These factors are the result of a *social control* licensing regime. This illuminates the need for a change in the policy behind licensing, in addition to changes to the criminal law, if licensing regimes are to benefit workers and encourage their participation in the regime.

The conversation about decriminalized brothels began with *Bedford* but it does not end there. The Supreme Court was clear that the law should not exacerbate the vulnerabilities of sex workers.¹⁰ In response, the Federal government drafted Bill C-36 which aims to:

reduce the demand for prostitution by targeting the consumer, the pimps and the johns who are the

⁹ *Ibid.*

¹⁰ *Canada (Attorney General) v Bedford*, 2013 SCC 72 at 60, 3 SCR 1101 [*Bedford*].

enablers; making prostitution itself illegal, which is a move away from simply criminalizing certain aspects or parts of the practice; and discouraging entry into prostitution itself.¹¹

Opponents of the bill have been clear that bolstering the *Criminal Code* with new provisions does not enhance the safety of sex workers. Speaking before the House of Commons Justice Committee, Jean McDonald, Executive Director of Maggie's in Toronto explained: “[c]riminalization breeds isolation and isolation, in turn, breeds vulnerability to violence, exploitation and abuse”¹² These are the very things the *Bedford* Court held were an affront to the guarantee of security of the person under s. 7 of the *Charter*.¹³ The provisions in *Bill C-36* became law on December 6, 2014. While they may be law, they may not withstand constitutional scrutiny by the Courts.¹⁴ This suggests that the conversation about how to regulate sex work in Canada is still a long way from concluding.

This chapter builds on the understanding of Canadian municipal licensing regimes established in Chapter 2 by highlighting the perspective of the workers. It demonstrates that the benefits of licensing are closely tied to the intent of the licensing regime and how, particularly with continued criminalization, the benefits will be virtually cancelled

¹¹ Canada, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 15 (9 September 2014) (Hon Peter MacKay), online: <http://www.parl.gc.ca/Content/SEN/Committee/412/lcjc/15ev-51557-e.htm?Language=E&Parl=41&Ses=2&comm_id=11>; *Protection of Communities and Exploited Persons Act*, SC 2014, c 25 [C-36]

¹² Justin Ling, “A Law with New Purpose”, *CBA National Magazine* (14 July 2014) online: <<http://www.nationalmagazine.ca/Articles/July-2014-Web/A-law-with-new-purpose.aspx>>.

¹³ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act* 1982 (UK), 1982, c 11 at s 7.

¹⁴ Canada, Senate, Standing Committee on Legal and Constitutional Affairs, *Proceedings*, 41st Parl, 2nd Sess, No 16 (17 September 2014) (Alan Young): “The communication provisions are so clearly unconstitutional. Just read the decision; you can’t simply replace the same verb and say it’s constitutional. That could be challenged immediately and should go to the Supreme Court. But the other stuff is more complicated, and the evidentiary foundation that is before the Supreme Court in *Bedford* – the 88 volumes, 27,000 pages – helps but the focus has shifted...Some homework has to be done.”

by the drawbacks of participating in the licensing regime. The views of workers are instructive for drafting licensing bylaws for decriminalized brothels. In expressing both the benefits and the drawbacks of licensing, sex workers emphasize fairness and the need for a policy shift in the goals of licensing.

In this chapter the opinions of workers on licensing show what aspects of licensing are beneficial and what aspects should be reconsidered when designing regulations tailored to brothels. It will also underscore how policies of *social control* hinder the advantages that licensing can foster. For the sake of simplicity, the two systems will be examined side by side instead of co-mingling the provisions and their effects. This chapter will focus on Canadian sex workers who currently operate in a system that is reminiscent to that of New Zealand prior to decriminalization.¹⁵ This discussion of the pros and cons of municipal licensing as practiced in Canada under a criminalized regime will be juxtaposed, in the following chapter, with an exploration of licensing in New Zealand - a jurisdiction where, as mentioned previously, the sex trade was decriminalized in 2003.¹⁶

BENEFITS

Current municipal licensing schemes were not explicitly designed to regulate the selling of sex because that would be an intrusion into the Federal criminal law powers. Despite that, massage parlours and escort services are among the top choices for those seeking out sexual services. Even in the face of the onerous conditions described in the previous chapter, workers in municipally licensed adult service businesses have

¹⁵ *Massage Parlours Act 1978* (NZ), 1978/13.

¹⁶ *Prostitution Reform Act 2003* (NZ), 2003/28 [PRA].

expressed some positive aspects of licensing, even while it was not designed to meet their needs. Although these benefits could be more fully harnessed without the imposition of the criminal law, they indicate where licensing can potentially improve working conditions for sex workers. The main benefits that sex workers operating within the municipally licensed regime express are: improved legitimacy and a better capability to manage the risks of the profession.¹⁷ It would be wholly unfair to suggest that there is nothing beneficial about licensing and then to assert that cities should issue licenses for brothels. *Bedford* co-applicant, Valerie Scott, had hoped the case would pave the way for “fair business regulations” and as Mariana Valverde points out, “Canadian cities are not starting from zero”.¹⁸ Part of determining the best practices for licensing brothels is to examine what works and what does not work about the system that is already in place for other adult businesses. The first step should not be to try and reinvent the wheel.

LICENSED LEGITIMACY

There is a well-entrenched stigma attached to working in the sex trade.¹⁹ In fact, the stigmatization from being a sex worker “is one of the strongest societal stigmas an individual may ever face”.²⁰ Even though sex workers earn a living, “social discredit” means they are often precluded from many of the benefits that those working in straight

¹⁷ Jacqueline Lewis & Eleanor Maticka-Tyndale, “Licensing Sex Work: Public Policy and Women’s Lives” (2000) 26 Can Pub Pol 439 at 440 [*Lewis & Maticka-Tyndale*]; Patrice Corriveau, “Regulating Sex Work: Between Victimization and Freedom to Choose” in Colette Parent et al, eds, *Sex Work: Rethinking the Job, Respecting the Workers* (Vancouver: UBC Press, 2013) at 42 [*Corriveau*].

¹⁸ Mariana Valverde, “A New Sin Tax for Municipal Coffers”, *Toronto Star* (22 Nov 2010) online: <http://www.thestar.com/opinion/editorialopinion/2010/11/22/a_new_sin_tax_for_municipal_coffers.html> [*Valverde*].

¹⁹ New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) online: <<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report>> accessed 30 January 2014 at 152 [*PLRC Report*]

²⁰ *Benoit et al, supra* note 2 at 9.

jobs take for granted.²¹ While stigma has many sources, criminal laws that govern sex work rooted in notions of “nuisance”, “neighbourhood disruption” and “protection”²² make it difficult for sex work to be viewed as a rightful profession. While the decriminalization of sex work has shown promise in reducing stigma²³, having municipal regulations that license adult service providers is also a step towards combatting the negative stigma faced by sex workers. Even while the criminal law prohibits adult businesses from acknowledging that sexual services may be offered behind closed doors, requiring such businesses to be licensed allows the workers the benefit of recognized work.

For some workers, holding a municipal license offers a sense of legitimacy that counters some of the negative effects of stigmatization.²⁴ Workers are more self-assured because the license represents “the privilege to operate a sex business”.²⁵ Although far from perfect, it is a step in the right direction for changing attitudes towards sex businesses: “[m]unicipal licensing provides a semblance of legitimacy for the occupation, potentially combatting the negative emotional and social effects of stigmatization”.²⁶

²¹ Chris Bruckert & Stacy Hannem, “Rethinking the Prostitution Debates: Transcending Structural Stigma in Systemic Responses to Sex Work” (2013) 28 CJLS 43 at 49 [*Bruckert & Hannem*].

²² *Criminal Code*, RSC 1985, c C-46, ss 210, 212(1)(j), 213(1)(c) [*Criminal Code*]; The legislative intent of each provision is detailed in: *Bedford*, *supra* note 10. The intent of the Bawdy-house provision is at para 131; the intent of the living on the Avails provision is at para 137; The intent of the communicating provision is at para 146.

²³ *C-36*, *supra* note 11 at Preamble.

²⁴ Gillian Abel & Lisa Fitzgerald, “Decriminalisation and Stigma” in Gillian Abel et al, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers’ Fight for Decriminalisation* (Bristol, UK: Policy Press, 2010) 239 at 241 [*Decriminalisation & Stigma*]. For more on how sex workers deal with stigma see Gillian Abel, “Different stage, different performance: The protective strategy of role play on emotional health in sex work” (2011) 72 *Social Science & Medicine* 1177.

²⁵ *Lewis & Maticka-Tyndale*, *supra* note 17 at 440.

²⁶ Emily van der Meulen & Mariana Valverde, “Beyond the Criminal Code: Municipal Licensing and Zoning Bylaws” in Emily van der Meulen, Elya M. Durisin & Victoria Love, eds, *Selling Sex: Experience, Advocacy and Research on Sex Work in Canada* (Toronto: UBC Press, 2013) 314 at 320 [*van der Meulen & Valverde*].

²⁶ *Lewis & Matrika-Tyndale*, *supra* note 17 at 445.

The work position, as detailed in Chapter 1, demands that sex work be treated as a profession. Corriveau hypothesizes that the key to improving the lives of sex workers is the legitimization of the industry. She states: “[p]rohibiting the professionalization of sex work will not make it possible to control abusers and swindlers and to improve female sex workers’ working conditions, living conditions and safety”.²⁷ A license to operate or work in the adult services industry serves as a recognition of labour. It offers the opportunity to capitalize on the benefits that come with being a worker, including the ability to contribute to programs provided through taxation, access credit and other banking services, and to rent accommodations.²⁸

Some licensed workers found a sense of confidence by having their work recognized as permissible employment. One worker expressed her views on licensing by highlighting the independence it provided her:

A lot of people are still going to be prejudiced against us, but now that we have our license, we’re self-employed. It shows we are legally working ...So, if I want to lease a car, I can say, I’m an escort, here’s my license. It’s easier that way because before...there was no proof that you were doing it”.²⁹

The benefit for this worker was both in her confidence and her ability to provide for herself. Another worker found that licensing was a benefit for clients. While their own legitimacy was increased, the license also put their clients more at ease. One worker described it as follows: “[A] lot of guys like the license because well they know I’m

²⁷ Corriveau, *supra* note 17 at 42.

²⁸ Bruckert & Hannem, *supra* note 21 at 54.

²⁹ Lewis & Matrika-Tyndale, *supra* note 17 at 440

legal and don't have a criminal record".³⁰ The legitimacy that workers feel also helps shift the power to them. Adult service providers expressed more confidence because the work they do is recognized and allows them more control over their environment:

The bottom line is, it's licensed, it's legal, it's a business that people have to treat as such. So, before we were licensed anybody that was working got ripped off all the time – customers stole everything, customers got ripped off, the girls got beat up, there was nothing you could do about it".³¹

This escort's description shows how the balance of power has shifted in favour of the workers because they are not just providing adult services; they are licensed and running a business where it becomes easier to demand payment for services, enforce rules and assert control over services and clients. While there will always be customers who attempt to garner more services or who request discounts, municipally licensed facilities are in a better position to refuse to provide services.³² Sex workers are frequently cast as victims, but when asked whether the seller or the buyer is ultimately in control of the transaction, a strong majority of sex workers responded that it is the seller who is in control; the clients echoed that finding.³³

Licensing allows qualified persons in, but also keeps unlicensed workers out of the market.³⁴ This is both a benefit and a drawback. A hierarchy is created in the market place because some workers are ineligible for a license, often because of a criminal record involving past charges for prostitution or because of their residency status.

³⁰ M. Laing, "Regulating adult work in Canada: the role of criminal and municipal code", in Johnson, P. and Dalton, D, eds, *Policing Sex* (London: Routledge, 2012) 166-184, online <http://www.academic-freedom.ca/regulating_sex/docs/Regulating_adult_work_in_Canada.pdf> at 10, pagination to online version [Laing].

³¹ Lewis & Matrika-Tyndale, *supra* note 17 at 440

³² Stephanie Dubois, "Massaging the Law", *Metro* (15 April 2014) at 12.

³³ Benoit *et al*, *supra* note 2 at 15.

³⁴ Laing, *supra* note 30 at 13.

Workers in licensed adult businesses may have more power to control the transactions that they enter into, whereas a worker who is unable to obtain a license may be forced to accept whatever business they can attract.³⁵ The disparity between licensed and unlicensed workers can result in unsafe conditions for unlicensed workers. This needs to be taken into consideration when creating licensing regimes for decriminalized sex work so that the bylaws do not needlessly exacerbate this situation. How to precisely do this will be examined further in chapter five. However, the need for a better understanding of how the sex trade operates is necessary to ensure that bylaws do not create more harm than good.

While even decriminalization cannot instantly erase the long-held stigma attached to the sex trade, perhaps time and the legitimizing of sex professions can.³⁶ Allowing sex workers to operate under municipally licensed regimes provides them with the benefit of work, and also the ability to participate in other facets of society that those in *straight* professions take for granted. Being able to obtain a mortgage, lease a vehicle, or know that savings can be accrued in bank accounts without the fear they will be confiscated as the proceeds of crime, all contribute to the financial freedom that sex workers are seeking to attain.³⁷ While people enter the sex trade for a variety of reasons, the bottom line for most is: “it’s the money, honey”.³⁸ This is also supported by new research that found

³⁵ Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: Pivot Legal Society, 2006) online:

<http://www.pivotlegal.org/beyond_decriminalization> at 51 [*Beyond Decriminalization*].

³⁶ *PLRC Report*, *supra* note 19 at 7.12.1; *Corriveau*, *supra* note 17 at 42; Leslie Ann Jeffery & Gayle MacDonald, *Sex Workers in the Maritimes Talk Back* (Vancouver: UBC Press, 2006) at 20 [*Jeffery & MacDonald*].

³⁷ *Lewis & Matrika-Tyndale*, *supra* note 17 at 440.

³⁸ *Jeffery & MacDonald*, *supra* note 36 at 18.

“potential income and the freedom to be independent” were key factors in one’s decision to sell sex.³⁹

RISK MANAGEMENT

Workers in municipally licensed adult businesses have not only the benefit of increased legitimacy, but also an increased ability to practice risk management strategies. Municipalities use licensing as a means to control adult service businesses by limiting their locations, hours and making licenses expensive. However, indoor venues still provide safer workplaces for those who provide sexual services, when compared to other places sex workers operate.⁴⁰ Working from a fixed location also enhances the safety of adult service providers because it “shifts the power” to the worker.⁴¹

There is wisdom in the phrase *safety in numbers*. It holds especially true for sex workers. While criminal provisions largely prevent street-based workers from working together, working in a municipally licensed adult service business allows, and in some cases requires, working with others.⁴² Many cities have developed licensing regimes that make it difficult, or impossible to work as an independent.⁴³ For example, in Vancouver, the licensing requirements for escorts dictate that an employee must be present during business hours.⁴⁴ This means that someone is present at the agency while the escorts are

³⁹ *Benoit et al*, *supra* note 2 at 5.

⁴⁰ *van der Meulen & Valverde*, *supra* note 25 at 317, *Lewis & Matrika-Tyndale*, *supra* note 17 at 440

⁴¹ Sex Trade Advocacy and Research, *Safety, Security and the Well-Being of Sex Workers: A Report Submitted to the House of Commons Subcommittee on Solicitation Laws (SSLR)* (Ottawa: Sex Trade Advocacy and Research, 2005) online:

<http://web2.uwindsor.ca/courses/sociology/maticka/star/pdfs/safety_and_security_report_final_version.pdf> at 24 [*Safety, Security and Well-Being*].

⁴² *Beyond Decriminalization*, *supra* note 35 at 22.

⁴³ City of Vancouver, by-law No 4450, License By-Law (23 September 1969) as amended by by-law No 6373 (14 July 1988) s. 24(5) [*Vancouver Licensing Bylaw*].

⁴⁴ *Ibid*.

working, and aware of which escorts are out on dates and with whom. Managers of sex businesses reported that in 90% of transactions, there is either someone nearby as a safety mechanism or a call is placed to “check-in” with a worker who is on an *out-call*.⁴⁵

The *Bedford* case repeatedly cited the importance of screening clients for a propensity of violence as being paramount to the safety of workers.⁴⁶ Not only are transactions occurring within municipally licensed businesses likely to be less rushed, the ability to mitigate risk is much greater. The latest Canadian research indicates that for sex workers and managers of sex businesses, access to phones, screening, obtaining payment prior to services and remaining sober while working, remain their key safety strategies.⁴⁷ Managers reported using these tools with virtually every transaction.⁴⁸ Sex workers working for third parties were also more likely to employ the services of a driver, as opposed to those who worked independently.⁴⁹ These safety measures are vital for the health and safety of sex workers. Within the more structured setting of a massage parlour or escort service, these risk management strategies have a greater chance of becoming part of the normal operating procedures.

Licensing allows for minimum standards of light, cleanliness and facilities.⁵⁰ For sex workers operating from municipally licensed businesses, having regulations that dictate what constitutes an acceptable working environment means better conditions in which to work. While selling sex remains covert, the environment in which they operate is significantly improved. For example, Toronto’s licensing for body rub parlours

⁴⁵ *Benoit et al, supra* note 2 at 13.

⁴⁶ *Bedford, supra* note 10 at paras 6, 18.

⁴⁷ *Benoit et al, supra* note 2 at 13.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ City of Toronto, by-law No 514-2002, Chapter 545, Licensing (20 June 2002) at 545-345.

prohibits facilities from having locking doors in rooms where body rubs are provided⁵¹, thus allowing immediate access if a worker is faced with a violent or uncontrollable client. While violent clients are not the norm, conflict can arise in a situation where one person in the transaction does not have the ability to seek recourse and is not limited to sex work.⁵²

Not every workplace is equal and the risk management strategies of some may be better than others. Sex workers are also not a homogenous group and individual opinions can vary. The rules that are put in place by licensing regimes are unlikely to ever win unanimous support but they show considerable promise in enhancing the safety of sex workers.

That sex workers benefit from greater legitimacy and better risk management practices should also not come as a surprise. These are also factors that were advanced by the Canadian Organization for the Rights of Prostitutes (CORP, the precursor organization to Sex Professionals of Canada) during the Fraser committee hearings.⁵³ CORP advocated for decriminalization stating that the ability to work indoors would offer women “increased security for the prostitutes by reducing the potential for

⁵¹ *Ibid* at 545-343.

⁵² *Benoit et al, supra* note 2 at 18.: “Most sex workers do not feel exploited and most sex buyers are not oppressors. Over-simplifications do not contribute to meaningful discussion or to effective policy. While there are a small number of people who prey on the vulnerable in the sex industry, just as there are in almost any other industry, most of the buyers we surveyed are simply individuals seeking to purchase a service they feel they need. The evidence is clear that most do not see themselves, nor are they perceived by those they pay, as exploiters or even as enjoying a position of power in the transaction. The evidence also suggests that many workers engage in sex work because it provides a level of freedom and self-determination not available to them in other available occupational settings”.

⁵³ Canada, Department of Justice, *Report of the Special Committee on Pornography and Prostitution, Volume 2* (Ottawa: Department of Justice, 1985) at 360 [*Fraser Report*].

exploitation by customer, police and pimp” and “a sense of dignity and self worth”.⁵⁴

Even with imperfect licensing regimes, these are the benefits that sex workers articulated.

DRAWBACKS

The current situation of Canadian sex workers plying their trade in licensed adult businesses is not unlike the situation that sex workers in New Zealand were in prior to decriminalization of the sex trade in that country. New Zealand’s *Massage Parlours Act 1978* allowed for the licensing of massage parlours, but frequent police inspections and record keeping made the situation tenuous for sex workers.⁵⁵ The criminal laws prohibited prostitution, so those who worked covertly behind the doors of massage parlours were under the control of massage parlour owners.⁵⁶ Just as in Canada, the juxtaposition of the criminal and municipal law prevented sex workers from exercising their agency and being in control of their own labour.

Criminalization and a regulatory framework that discourages the adult services industry from flourishing diminish the benefits of licensing. Even repealing the criminal laws surrounding sex work does not mean that the current bylaws that regulate adult service businesses could be re-issued and applied to decriminalized brothels because these regimes are still based on the social control model. Crofts and Summerfield state that “complex, intrusive and administratively opaque licensing systems” may cause harms to sex workers that are akin to criminalization.⁵⁷

⁵⁴ *Ibid.*

⁵⁵ Catherine Healy, Calum Bennachie & Anna Reed, “History of the New Zealand Prostitutes’ Collective” in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers’ Fight for Decriminalisation* (Bristol: The Policy Press, 2010) at 45 [Healy et al].

⁵⁶ *Ibid* at 46.

⁵⁷ *Crofts & Summerfield, supra* note 4 at 271

This section will highlight two of the major drawbacks to municipal licensing that sex workers have expressed: privacy and the cost of licensing.⁵⁸ Municipally licensed sex industry businesses are treated differently than other businesses as a means of controlling them. Two conclusions can be drawn from the discussion of privacy and cost: current licensing bylaws for massage parlour and escort agencies are inadequate for regulating brothels if sex work is decriminalized and “cumbersome” regulation only frustrates compliance.⁵⁹

PRIVACY

Privacy for sex workers is multi-faceted. Some do not disclose their work to family or friends.⁶⁰ Others worry that their work in the sex trade will become a bar to future opportunity.⁶¹ Personal privacy and the ability to separate work and home lives is also crucial to sex workers.⁶² These are all valid reasons, given that the stigma attached to sex work is so pervasive.⁶³ A licensing regime should take these factors into consideration and be designed to respect the privacy concerns of sex workers.

⁵⁸ *Beyond Decriminalization*, *supra* note 35 at 57; *van der Meulen & Valverde*, *supra* note 25 at 318-319.

⁵⁹ *Valverde*, *supra* note 18

⁶⁰ *Beyond Decriminalization*, *supra* note 35 at 57.

⁶¹ Miriam Weeks (aka Belle Knox) is a Duke University student who works in the adult film industry to pay her tuition. She was outed by a classmate. She wrote this article describing her experiences. Belle Knox, “I’m The Duke University Freshman Porn Star And For The First Time I’m Telling The Story In My Words”, *xoJane* (21 Feb 2014) online: <<http://www.xojane.com/sex/duke-university-freshman-porn-star>> ; An intimacy coach in this article describes the services she provides but asks not to be named because of concern for losing her other job: Emily Lazatin, “Vancouver Service Helps People With Disabilities Have Better Sex Lives”, *The Huffington Post* (30 October 2014), online: <http://www.huffingtonpost.ca/2014/10/30/sex-disabled-people-escort-vancouver_n_6077972.html?1414700636&utm_hp_ref=canada-british-columbia>.

⁶² *Decriminalisation and Stigma*, *supra* note 23 at 248.

⁶³ Ingrid Peritz, “Montreal teacher, 73, loses job over film nudity more than 40 years ago”, *Globe and Mail* (20 October 2014) online: <<http://www.theglobeandmail.com/news/national/montreal-teacher-73-loses-job-over-film-nudity-more-than-40-years-ago/article21183669/>>.

The current Canadian licensing regimes require individual workers to be licensed. While sex workers could agree to the licensing of businesses under certain conditions, they do not agree with licenses for individual escorts because they find that it would be “impractical and would reduce the autonomy of independent workers”.⁶⁴ Licensing creates a paper trail that workers fear will have future consequences.⁶⁵ Given the transitory nature of sex work, adult service providers often use the work as a means of financing education or as a temporary means of earning an income.⁶⁶ For workers, once licensed, the lingering evidence of having worked for a massage parlour or escort agency means that the stigma could have consequences if they are subjected to background checks.⁶⁷ Many workers maintain strict boundaries between their job and their home life that licensing could compromise.⁶⁸ As one worker stated: “I don’t want my name associated with this”.⁶⁹ Not all adult service providers are able to be open about their profession because of the stigma, which makes the current municipal provisions problematic. Requiring each individual worker to have a license means that even if they work in the industry temporarily, doing so legally means a record has been created.

From providing for families to financing education, there are a plethora of reasons why people work in the adult service industry. Municipal licensing raises privacy concerns for workers because government departments could access the paper trail of

⁶⁴ *Beyond Decriminalization*, *supra* note 35 at 50.

⁶⁵ *Ibid* at 56.

⁶⁶ *Ibid* at 52.

⁶⁷ *Lewis & Matricka-Tyndale*, *supra* note 17 at 441.

⁶⁸ *Decriminalisation and Stigma*, *supra* note 23 at 248.

⁶⁹ *Laing*, *supra* note 30 at 8

their employment.⁷⁰ For example, in Vancouver, the bylaw still requires social escorts to provide the names of employees and customers to police on demand.⁷¹

While this is less of a concern for those who are diligent about reporting their income for tax purposes, the records “may be subpoenaed in legal proceedings, such as child custody and criminal cases”.⁷² Workers fear that working as an adult service provider will taint their reputations and put them at risk of charges or losing custody or access to their children. While these represent potentially the most serious consequences, there is also the possibility that they will be denied other employment or opportunities. Workers are usually uncertain of when their former employment will show up in background checks:

So whenever an employer says they are going to do a background check, now I always ask them what kind, and it’s a little frustrating because you don’t know what they are looking for, and you don’t know where it’s posted.⁷³

This fear could lead some workers to resist working in licensed businesses or prevent them from leaving licensed work.

Many street-based workers acknowledge that they would rather work from an indoor location because massage parlours and escort services provide an indoor environment that is not only safer but also keeps them out of public view.⁷⁴ Licensing means that adult service providers have a slightly different privacy concern. Instead of being worried about being spotted by someone who could out him or her, they fear that

⁷⁰ *Lewis & Matricka-Tyndale, supra* note 17 at 441.

⁷¹ City of Vancouver, by-law No 4450, License By-Law (23 September 1969)

⁷² *Ibid.*

⁷³ *Laing, supra* note 30 at 8.

⁷⁴ *Beyond Decriminalization, supra* note 35 at 19.

their employment history could be used against them.⁷⁵ These privacy concerns are very real and workers have advised that: “regardless of any social or legal reforms, there will always be a street-level industry because of the anonymity and convenience for some workers”.⁷⁶ The fact that workers would choose to remain street-based instead of applying for a municipal license represents not only a drawback to the current licensing regimes, but also highlights an issue that must be addressed in licensing regimes designed for decriminalized brothels.

Even with legal reform that makes sex work permissible, the stigma does not disappear with the criminal provisions. Privacy will remain a concern for sex workers.⁷⁷ It has been demonstrated that stigma is the reason many adult service providers and sex workers guard the nature of their professions with vigilant secrecy. Crofts and Summerfield, while not directly addressing privacy, do note that “the right to privacy is severely jeopardised by the power of some bodies to require any information they see fit”.⁷⁸ To accommodate licensing for decriminalized brothels, municipalities will need to find a way to address these privacy concerns.

COST

Licensing schemes can be effective and beneficial to both workers and municipalities, but only if workers can afford the cost of a license. John Lowman’s critique of the cost structure for licensing in Vancouver, detailed in Chapter 2, highlights

⁷⁵ *Ibid.*

⁷⁶ *Ibid*; Valverde, *supra* note 18.

⁷⁷ *Decriminalisation & Stigma*, *supra* note 23 at 239.

⁷⁸ *Crofts & Summerfield*, *supra* note 4 at 272, New Zealand spelling.

the price differential between the various businesses that are licensed.⁷⁹ A license for a body rub parlour is the third most expensive license offered by the city. Lowman also contends that the difference between the cost of operating a dating service and an escort service “is to clarify which business is involved in commercial sex”.⁸⁰ The inflated prices for licensing can only be explained as an instrument of control. The requirement for each worker to obtain a license is not only an invasion of privacy but it compounds the amount of money that a city can make through licensing.

Workers express concerns over the cost of licensing in three main ways: the cost is higher in comparison to other licenses;⁸¹ the cost is prohibitive to the point of being exclusionary;⁸² the cost restricts their mobility⁸³. Workers are willing to participate in licensing schemes but the current costs for licensing adult service providers can increase the vulnerability of sex workers. Under a criminalized regime, adult service providers who are required to be licensed will continue to be excluded from most of the benefits licensing could provide, while being forced to pay licensing fees that amount to little more than a sin tax.⁸⁴ The Supreme Court was clear in *Bedford* that laws are arbitrary when there is no link between the object of the law and its effect.⁸⁵ Bylaws which purport

⁷⁹ *Vancouver Licensing Bylaw*, *supra* note 71 at Schedule A, Year 2014 Business License Fees; *Lowman Submissions*, *supra* note 7 at 14. The only licensing fees that are higher than that of a Body Rub in Vancouver are The Pacific National Exhibition (\$16,011), a casino - class 2, Horse or Motorcycle racing (all at \$11,433).

⁸⁰ *Lowman Submissions*, *supra* note 7 at 14.

⁸¹ *van der Meulen & Valverde*, *supra* note 25 at 318.

⁸² *Ibid* at 319.

⁸³ *Ibid*.

⁸⁴ A Sin tax is when a higher fee is levied upon a product or service to discourage its use. For more on sin taxes see generally: Adam J. Hoffer, “Sin Tax Costs Outweigh Benefits” *Economic Intelligence* (5 February 2013), online: US News <<http://www.usnews.com/opinion/blogs/economic-intelligence/2013/02/05/sin-tax-costs-outweigh-benefits>>.

⁸⁵ *Bedford*, *supra* note 10 at para 98.

to license while increasing the vulnerabilities of sex workers may not only be at risk of being challenged but should not be replicated to license decriminalized brothels.

HIGHER COST COMPARED TO OTHER LICENSES

Some adult service providers do not dispute paying for licenses so much as they find it unfair that licenses to work as adult service providers are disproportionately higher than the costs for licensing in other industries.⁸⁶ The disproportionately high fees have been the subject of court challenges but none have been successful in having the license fees quashed or re-evaluated.⁸⁷

In *Re Try-San International Ltd.*⁸⁸ fees, among other provisions, were challenged as being prohibitive, discriminatory, and *ultra vires* of council's authority in its attempt to legislate morality.⁸⁹ The appellants were unsuccessful in their bid to have the bylaw struck down as the court deemed the bylaw to be regulatory.⁹⁰ Taggart JA did not close the door to future challenges. Instead, he clarified what evidence that may assist the court in reaching a determination that a bylaw is overreaching and should be struck down. He stated that more evidence pertaining to the "economic effects" of the bylaw on body rub parlours generally would be necessary to advance the argument that the fees are prohibitory.⁹¹

⁸⁶ *Beyond Decriminalization*, *supra* note 35 at 45.

⁸⁷ *International Escort Services Inc v Vancouver (City)*, [1988] 55 DLR (4th) 194, 33 BCLR (2d) 202 (BCSC); *Re Try-San International Ltd and Vancouver*, (1978) 83 DLR (3d) 236 (BCCA), [1978] B.C.J. No. 1188(QL) (sub nom. *Re Vancouver License By-law 4957*) [*Try-San*]

⁸⁸ *Ibid.*

⁸⁹ *Ibid* at para 22.

⁹⁰ *Ibid.*

⁹¹ *Ibid* at 15.

PROHIBITIVE COSTS

The cost of licensing for adult service providers also keeps many from seeking a license in the first place. The cost of licensing has become a barrier for many who would move off the street to the relative safety of indoor work.⁹² As one worker stated: “what would compel a person to go indoors at those prices?”⁹³ For those who use sex work as a means of survival, to top up social assistance earnings, or who work in the trade from time to time, licensing not only creates a record of their employment in adult services but the cost can prevent them from opting for the safety of indoor locations.⁹⁴ Many find the cost of licensing puts them between a rock and a hard place:

The escort license is prohibitive...\$1500 for an independent escort license...which is really out of reach for a lot of girls out there, a lot of them are single parents and we are doing this part time. So I mean it's either get a license or they are back out on the street.⁹⁵

There are many reasons workers choose sex work over traditional jobs and the need for better pay, flexible hours and not wanting to resort to social assistance are unchanged, regardless of how onerous it is to obtain a license.⁹⁶ If a person chooses to enter into sex work and prefers working for a third-party over independent work and the responsibility of finding their own clients, that choice should not be negated by the high cost of licensing. Ideally, all sex workers who want to move into safer work environments should not be hindered by criminal law or cost.

⁹² *Beyond Decriminalization*, *supra* note 35 at 25.

⁹³ *Ibid* at 45.

⁹⁴ *Ibid*.

⁹⁵ *Ibid* at 51.

⁹⁶ *Jeffery & MacDonald*, *supra* note 36 at 19.

The high costs of licensing do not only affect the cost of doing business for sex workers, it also affects their mobility. Many escorts travel to different cities to meet clients because it allows for increased anonymity. Working outside of the city where they reside is not uncommon: “42% of sex workers said that more than 20% of their past-year sexual transactions took place in an area outside of their current municipality”.⁹⁷ While the new advertising prohibitions threaten to have a chilling effect that will have the greatest impact on those who travel for work⁹⁸, the cost of obtaining a license to remain compliant with municipal bylaws is also prohibitive.

This business model becomes especially expensive when a license is required for each location, even though an escort’s presence in that location is temporary.⁹⁹ “If a female escort wanted to tour five Canadian cities, crossing municipal boundaries, and at all times be operating ‘legally’ under a license, the fees could top \$10,000”.¹⁰⁰ Imposing fees in each city where an escort works makes the work more onerous because of the continuous need to maintain licenses, which may be denied because the escort is not a resident, or because she works independently. This denial of mobility means that a worker who travels for work may remain outside of the licensing regime.

Thus the cost remains one of the main drawbacks to licensing. This issue could be solved if the fees for adult service providers were comparable to that of other businesses and the requirement for individual workers to hold licenses was re-evaluated. Sex workers take the position that: “the number and type of restrictions, and the licensing fees

⁹⁷ *Benoit et al, supra* note 2 at 5.

⁹⁸ *C-36, supra* note 11 s 286.4.

⁹⁹ *van der Meulen & Valverde, supra* note 25 at 319.

¹⁰⁰ *Laing, supra* note 30 at 11.

for sex industry businesses should be equivalent to those for other businesses”.¹⁰¹

Licensing fees for escorts in Calgary were lowered in 2006, proving that it is feasible for cities to license adult services at rates comparable to other businesses.¹⁰² One of the features of a *social control* licensing regime is that “many workers will not be able or willing to participate in the framework” making licensing less effective.¹⁰³

CONCLUSION

By all indications, the adult services industry is one that municipalities love to hate. Through licensing cities can control these types of businesses while maintaining the position that they are unsavory. The businesses are left to pay high fees in hopes that maintaining a valid license convinces enforcement officials to look the other way. Any benefits that sex workers garner from working in a municipally licensed sex business are subsequently quashed by the drawbacks of obtaining a license. The use of the *social control* model is evident in Canadian licensing regimes. In combination with continued criminalization, the situation is unlikely to improve. With the passing of Bill C-36, the situation of sex workers working within municipally licensed businesses could become much worse as police begin targeting their clients.

Sex workers have been clear in their desire to be treated like any other business owner or service provider. They are not asking for an absence of rules, but instead they want a set of rules that is both fair and addresses their concerns over cost and privacy, which are often interconnected. “[T]hose sex workers who felt that such businesses

¹⁰¹ *Beyond Decriminalization*, *supra* note 35 at 45; *van der Meulen & Valverde*, *supra* note 25 at 317.

¹⁰² City of Calgary, by-law 48M2006, Dating and Escort Service Bylaw (17 October 2006).

should be licensed felt that licensing provisions should match those of non-sex industry businesses in terms of the types of requirements and level of restrictiveness; sex industry businesses should not be subject to more restrictive licensing requirements or levels of enforcement than other businesses”.¹⁰⁴ The result of imposing more restrictive conditions is to suppress the positive benefits that licensing regimes can provide and encourage workers to remain outside the licensed industry. “Workers who cannot work within the confines of the legalized regime or do not want to do so are criminalized and subject to the same repression imposed by a criminalized system”.¹⁰⁵

A municipal license helps sex workers prove their employment, which affords them a greater ability to participate in financial arrangements that are usually difficult for those unable to document their work. The ability to rent an apartment or finance a car are among the things that can easily be taken for granted. The professionalization of adult services through licensing also improves their risk management strategies. The ability to access safer working conditions was why the *Bedford* case was launched and informed the Supreme Court decision to strike down the criminal provisions that made sex work more dangerous. The dignity and freedom from exploitation that were envisioned in CORP’s recommendations to the Fraser committee have tenuously occurred in municipally licensed businesses but the benefits remain offset by the invasion of privacy and expense of licensing.

¹⁰³ *Crofts & Summerfield, supra* note 4 at 270.

¹⁰⁴ *Beyond Decriminalization, supra* note 35 at 50

¹⁰⁵ *Bruckert & Hannem, supra* note 21 at 57. The authors cite those who cannot meet the criteria for a license, those with criminal records or those without citizenship as persons who are shut out of licensing regimes. Those who prefer to work independently, or do not want the stigma of having a license for the adult industry on their file are examples of those who do not want to be licensed.

Municipal licensing requires sex workers to provide personal information that will connect them to the adult services industry but without being able to know who can access it and under what conditions it may be accessed. Stigma causes sex workers to be vigilant about their privacy, often keeping their work secret from even those closest to them. The stigma of having a record of employment in adult service could have an unfavourable impact on future goals.

Licensing adult services is a windfall for cities but it comes from those who can least afford it. In virtually all Canadian cities, the cost of licensing for a massage parlour or an escort service ranks among the highest of the licenses offered. Further enhancing licensing's moneymaking potential for cities, is the requirement of individual employees to be licensed. The cost is prohibitively high for some who would prefer to work in a managed environment. The requirement for individual licenses also limits the ability of travelling escorts to work legally in each city they visit. Most cities prohibit adult service industry employees from working for more than one sex industry business and the cost of obtaining a license for each city costs thousands per year. The drawbacks continue to outweigh the benefits because of criminalization and an underlying policy to discourage adult service businesses.

Exploring the benefits and drawbacks from the perspective of sex workers shows immediately the compounding effect of federal and municipal policies and pronouncements that seek to suppress the adult services industry and the sex workers who ply their trade covertly within it. Criminalization coupled with goals of *social control* do not allow licensing to benefit workers. To more fully respect the personal autonomy of sex workers, their needs must be taken into consideration. Sex work has

continued even as the criminal law as become more onerous. Valverde reminds us that we should learn from mistakes instead of repeating them:

One thing that the long history of temperance movements teaches us is that governments can encourage healthy behaviour but cannot use coercive law to ban behaviours that many do not like but that have always been with us. Criminalizing smoking would just not work, for example.¹⁰⁶

This is why the criminal law is not the best tool for regulating the sex trade. In a similar vein, municipalities that treat sex industry businesses as undesirable and attempt to discourage them with high-priced licenses also won't succeed in suppressing the industry. It merely leaves workers vulnerable as they are forced to work outside of the legalized regime. Cohesion in policy from all levels of government is the only feasible solution, and that policy must put the health and safety of sex workers ahead of a desire to eliminate vices.

While the parliamentary debates over Bill C-36 still resonate, it almost seems hard to consider that less law could effectively regulate decriminalized sex work. More so that such law reform could address privacy concerns, allow sex workers more control over their business, improve health and safety and not require an expensive license. These are the hallmarks of a *neutral* licensing regime where sex work is decriminalized. In the next chapter, New Zealand's experience with decriminalization and licensing will be held up in contrast to the Canadian regime. While licensing offers little benefit under current conditions in Canada, the New Zealand regime shows how a move to neutral licensing under decriminalization can foster the exact benefits that *Bedford* sought to achieve.

¹⁰⁶ Valverde, *supra* note 18.

CHAPTER 4 – LESSONS FROM NEW ZEALAND

INTRODUCTION

In 2003, New Zealand became the first country in the world to decriminalize voluntary adult sex work in all venues.¹ Prior to the passing of the *Prostitution Reform Act (PRA)*, selling sex was not illegal but “soliciting, brothel keeping, living on the earnings of prostitution and procuring” were all prohibited.² Sex workers operating out of massage parlours in New Zealand faced similar hardships to the ones currently being experienced by Canadian sex workers because “most female sex workers worked disguised as *masseuses*”.³ While Canada is moving towards tougher criminal provisions to control the sex trade through Bill C-36, the *PRA* took New Zealand in the opposite direction. Repealing the criminal provisions has resulted in praise from multiple UN bodies who advocate that other countries consider recognizing sex work as work and providing those in the industry with the same occupational health and safety protections

¹ *Prostitution Reform Act 2003* (NZ), 2003/28 [*PRA*].

² *Crimes Act 1961* (NZ) 1961/43 ss 147-149; *Summary Offences Act 1981* (NZ) 1981/113 s 26. Gillian Abel & Lisa Fitzgerald, “Introduction” in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers’ Fight for Decriminalisation* (Bristol: The Policy Press, 2010) at 1.

³ Catherine Healy, Calum Bennachie & Anna Reed, “History of the New Zealand Prostitutes’ Collective” in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime out of Sex Work: New Zealand sex workers’ fight for Decriminalisation* (Bristol: The Policy Press, 2010) at 45 [Healy et al]. *Massage Parlours Act 1978* (NZ), 1978/13. The passing of the *PRA* repealed this Act.

as other workers.⁴ New Zealand's experience with law reform holds valuable lessons from which Canada could learn.

While many of the activities that allow a person to make a living from sex work remain criminalized in Canada, New Zealand has taken the position that a brothel is a business and should be treated accordingly. Having established in chapter two that Canadian municipalities would be the appropriate authorities for licensing decriminalized brothels, this chapter details the experience of decriminalization in New Zealand in order to develop guiding principles that could assist Canadian cities in developing effective licensing regimes. As chapter three demonstrated, the licensing bylaws for massage parlours and escort services should not be replicated and applied to decriminalized brothels because they fail to address the privacy needs of sex workers and cause undue financial hardship. New Zealand's simple but well-reasoned approach allows sex workers and their communities to coexist. In comparison to the Canadian municipal bylaws that license massage parlours and escort agencies, the New Zealand legislation, at both national and local levels, is concise, less onerous and easy to understand.⁵ The cost of licensing is also much lower.⁶ While it would not be possible to replicate New Zealand's decriminalization legislation in its entirety, owing to different government structures,

⁴ Global Commission on HIV, *HIV and the Law: Risks, Rights & Health* (New York: UNDP, HIV/AIDS Group, 2012) online: <<http://www.hivlawcommission.org/index.php/report>> at 43 [*HIV & the Law*]; UN Development Programme, *Sex Work and the Law in Asia and the Pacific* (Bangkok, UN Development Programme, 2012), online: <http://asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/hiv_aid/rbap-hhd-2013-sex-work-and-the-law-in-asia-and-the-pacific-web.pdf>; International Labour Organization, *Recommendation Concerning HIV and AIDS and the World of Work (No. 200)* (Geneva, International Labour Organization, 2010), online: <http://ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aid/documents/normativeinstrument/wcms_194088.pdf>; "UN Praises NZ's Prostitution Laws", *3 News* (24 October 2012), online: <<http://www.3news.co.nz/nznews/un-praises-nzs-prostitution-laws-2012102409>>.

⁵ *PRA*, *supra* note 1, ss 34-41.

municipalities could easily adopt the framework of the New Zealand licensing regime to regulate brothels in Canada. This chapter details the relevant sections of the *Prostitution Reform Act* and advances the proposition that a similar regime would be appropriate for enactment by Canadian municipalities. New Zealand has a simple regulatory regime that allows sex workers greater control over their work environments while protecting their privacy. This chapter will demonstrate not only why such a system is well reasoned but also why it is precisely the type of system that Canada should consider.

PUSHING FOR THE DECRIMINALIZATION OF SEX WORK IN NEW ZEALAND

New Zealand's decriminalization movement began as an informal gathering of sex workers in 1987.⁷ They were frustrated by the conditions in massage parlours where they worked covertly, not unlike the current situation of Canadian sex workers. The *Massage Parlours Act 1978* authorized police to apply for a court order to have any masseuse's employment terminated for committing an act of prostitution so that sex workers working in massage parlour were forced to operate in a clandestine manner.⁸ Under the *Act*, employees of massage parlours could not have past convictions for drug or prostitution offenses and police frequently checked staff listings to ensure compliance.⁹ Despite having the enhanced safety of an indoor location, the power imbalance created between the owners and the workers became untenable. With growing concerns over the spread of AIDS, the police use of condoms as evidence to support prostitution charges and an inability to exercise control over their work environment, the

⁶ New Zealand, Auckland Council, *Licenses and Registration Fees* online: <<http://www.aucklandcouncil.govt.nz/EN/licencesregulations/healthlicencefees/Pages/home.aspx>> accessed 9 February 2015 [*Auckland Licensing Fees*] accessed 9 February 2015.

⁷ *Healy et al, supra* note 3 at 46-47.

New Zealand Prostitutes Collective (NZPC) began to organize to lobby for law reform.¹⁰ The NZPC, from its humble beginnings would grow to become the driving force behind decriminalization.

The NZPC remained largely informal because of the laws that criminalized sex work, however the Ministry of Health saw them as a potential asset in delivering specific health care initiatives for sex workers.¹¹ For sex workers, the Ministry of Health represented a potential ally: “a more benign government agency than the ones sex workers were used to, that is, the police and justice system”.¹² The NZPC was able to present the issues that sex workers faced in a non-confrontational manner and the Ministry of Health saw the NZPC as an organization that sex workers could trust. The mutual benefits led to the NZPC becoming a publically funded organization to develop an HIV prevention strategy tailored to the sex industry. For the government, it was an opportunity to reach a vulnerable population. For the NZPC, it was an opportunity for sex workers to take the lead on HIV prevention and ensure that “programs remained relevant and sex-worker driven”.¹³ This unlikely alliance would provide sex workers with the necessary leverage not only to improve their health, but also their working conditions.

Beginning in 1988, the NZPC received an annual grant of \$50,000 NZD¹⁴ to establish drop-in centres for sex workers, publish a magazine and distribute safe sex supplies.¹⁵ The government funding offered considerable legitimacy to the NZPC and

⁸ *Massage Parlours Act 1978* (NZ), 1978/13, s 32 (1)(a).

⁹ *Healy et al, supra* note 3 at 45.

¹⁰ *Ibid* at 46.

¹¹ *Ibid* at 47.

¹² *Ibid*

¹³ *Ibid*.

¹⁴ This amount converts to slightly more than \$40,000 Canadian dollars at present day exchange rates, as of 9 February 2015.

¹⁵ *Healy et al, supra* note 3 at 48.

strengthened their ability to demand legal reform to improve the health and well being of sex workers. The funding to pursue HIV prevention initiatives was a positive first step, but their efforts were being hindered by the criminal law. The NZPC was instrumental in dispensing condoms and information to sex workers but police were confiscating these items and using them as evidence to arrest and charge sex workers.¹⁶ It meant that sex workers were still reluctant to carry the one item that could protect them against HIV infection. Criminalization also limited the number of sex workers who would otherwise “step forward and act as peer educators and leaders in safe-sex programmes”.¹⁷

With the law defeating their mandate to facilitate HIV prevention, the NZPC began the campaign that would eventually change the criminal law surrounding sex work. The Ministry of Health was presented with an ultimatum – the NZPC would return the funding that sustained HIV prevention programs unless an intergovernmental committee was struck to examine the impact of the provisions criminalizing sex work.¹⁸ In an affirmation of the important work that the NZPC was accomplishing, the Ministry of Women’s Affairs, the police, the Ministry of Health and the Ministry of Justice came together to produce a report. This collaboration brought all the stakeholders to the table and the result was that “the decriminalisation of sex work was going to be taken seriously”¹⁹, although law reform was still over a decade away. It also established a relationship between the NZPC and the police that ended police collection of condoms as

¹⁶ *Ibid* at 52.

¹⁷ *Ibid* at 53.

¹⁸ *Ibid* at 53.

¹⁹ *Ibid* at 53.

evidence of prostitution.²⁰ Coming full circle from its initial attempt to curtail venereal disease, New Zealand accepted the presence of sex work and made safe sex the law.²¹

IMPORTANT PRINCIPLES OF THE PRA

It is not the liberal nature of the PRA that makes it effective; it is the ease with which people can understand the law and what is required to comply with it. In the following section, three key principles of the legal regime are explored in detail. They are: simplicity, privacy and cost. All of these principles are multi-faceted because efficacy depends on the underlying purpose of a legal regime. Simplicity becomes moot when the purpose of a law continues to moralize the sex industry instead of recognizing it as work. Privacy is compromised when lawmakers fail to recognize the realities of the stigma that sex workers face. Finally, cost can prevent sex workers from accessing safer working conditions even when they are available.

New Zealand has struck a careful balance that Canadian lawmakers should take note of because the law is designed to regulate sex work, not to condone it. Generations of Canadian lawmakers have stuck to abolitionist rhetoric because they are befuddled over how to regulate sex work without condoning it.²² The *PRA* denotes explicitly in its

²⁰ *Ibid* at 53; Gillian Abel & Lisa Fitzgerald, “Risk Management in sex work post-Prostitution Reform Act” in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime Out of Sex Work: New Zealand Sex Workers’ Fight for Decriminalisation* (Bristol: Policy Press, 2010) 217 at 219.

²¹ New Zealand, Parliamentary Library, *Prostitution Law Reform in New Zealand* (July 2012) online: <<http://www.parliament.nz/NR/rdonlyres/B1D8651B-D929-4620-836B-DDFF4D5ACEDF/246410/RP201205ProstitutionLawReforminNewZealand3.pdf>> at 1 [NZ Parliamentary Library].

²² John Lowman, *Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness*, (Ottawa: John Lowman, undated) online: <http://184.70.147.70/lowman_prostitution/HTML/SCJHPE/Submission_to_the%20Subcommittee_on_Solicitation%20Laws_Brief.pdf>, accessed 9 February 2015 at Appendix A, page 1 [Lowman Submission].

purpose that the intent of the Act is not to endorse or moralize.²³ The *PRA* is an Act about health and allowing sex workers to access the same scheme of occupational and human rights as all other workers.²⁴

While Canada's political structure is different from New Zealand's, the simplicity of the *PRA*, the protection of privacy and setting fees that are on par with other businesses, are all considerations that would enhance not only compliance with a regime decriminalizing sex work in Canada, but also address the main concerns that sex workers, currently working out of municipally licensed adult service businesses have raised. This discussion will now broadly discuss how the New Zealand legislation and bylaws have taken these concerns into consideration before moving to the more narrow discussion of the provisions and how they are applied. While a 'made in Canada' approach to decriminalization could become reality should the provisions of Bill C36 be found unconstitutional, adopting these three notions from New Zealand's experience can foster a smoother transition into a new legal regime.

SIMPLICITY

Although there was considerable debate before the passing of the *PRA*, the simplicity of New Zealand's Brothel Operator's certification under the Act was deliberate, as it was intended to "encourage compliance".²⁵ The certification program was not initially part of the *Act* but was developed by the Justice and Electoral Reform Committee out of concern that decriminalization alone would not facilitate improved

²³ *PRA*, *supra* note 1 at s 3.

²⁴ *Ibid.*

²⁵ New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) online: <<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report>> at 6.1.1 [*PLRC Report*].

conditions for sex workers. Ultimately, the Committee did not propose an amendment to the Bill but they reported their concerns, and suggested that a licensing regime would help prevent power imbalances in the employer-employee relationship and would discourage organized crime from infiltrating the industry.²⁶ Although the committee only included their conclusions on licensing, the Minister of Justice, Phil Goff, proposed an amendment to the bill that added the requirement of the operator's certificate.²⁷ The Brothel Operator's Certificate became part of the Act when it was passed in June 2003.²⁸

The Brothel Operator's Certificate is not linked to any additional business licensing requirements. This was deliberate. However, the Prostitution Law Reform Committee did consider the desirability of linking the Brothel Operator's Certificate with municipal licensing. While a majority of the committee found that this would allow for crosschecking those who hold certificates and business licenses, some members of the committee felt that it would disadvantage operators of smaller enterprises.²⁹ The committee found that any measures taken to create a register of brothels could jeopardize compliance with the certificate requirement and were, therefore, undesirable. The majority view, however, was that the list of certificate holders should be accessible to other government departments to allow for inspections.³⁰

The Prostitution Law Reform Committee made only three other recommendations, in addition to the one noted above. They found that requiring a certificate to be renewed annually was inefficient, and suggested that certificates be valid

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *PRA, supra* note 1 at s 34.

²⁹ *PLRC Report, supra* note 25 at 6.4.4.

³⁰ *Ibid* at 6.4.4, 6.7.

for a period of three years.³¹ It also recommended that more information should be provided to operators when a certificate is issued.³² Having considered the feedback from certificate holders, the Committee saw that while certificate holders would welcome a knowledge-based requirement to obtain a certificate, the preferred option of the committee was to endorse information packs that would accompany an Operator's Certificate.³³ The Committee found that a test may be more onerous and that providing information about the law and an operator's obligations was more feasible and would not discourage applicants.³⁴ They likened the information package to the ones already provided to those obtaining a license to sell alcohol.³⁵ The distribution of resources to certificate holders does increase the costs but the Committee recommended that these costs not be used as justification for increasing the fee; instead it should be borne by the Department of Labour.³⁶ The final recommendation was that inspections should be a condition of issuing a certificate.³⁷ This suggestion was largely in response to those who were required to obtain a certificate but indicated that no checks were ever done to ensure they had one.³⁸ The Committee saw the Ministry of Labour as the appropriate body to conduct inspections to ensure compliance. As with the information packages, the Committee found that the cost should not be passed on to certificate holders.³⁹

The recommendations of the Committee indicate that the main priorities with operator's certificates are improving administrative efficiency and providing better

³¹ *Ibid* at 6.7.

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid* at 6.6.3.

³⁵ *Ibid* at 6.6.3.

³⁶ *Ibid.*

³⁷ *Ibid* at 6.7.

³⁸ *Ibid* at 6.4.4.

³⁹ *Ibid* 6.6.7.

resources for sex workers. These are not indicative of problems with the system but enhancements that can be made to improve the efficiency of the system.

Licensing at the local level has been more piecemeal, as not every territorial authority has felt compelled to enact bylaws to regulate sex work. For some, it is simply not an issue.⁴⁰ For others, bylaws were passed in the event that regulating sex work becomes necessary.⁴¹ Larger centres have adopted more robust regimes, some of which include licensing, but have used broad and accessible criteria similar to the licensing requirements for other businesses.⁴² There are no limits on the number of available licenses so long as the proposed business complies with district plans, fees are paid and any necessary inspections are passed. Once these conditions are met a business license will be issued. The cost of additional licenses, beyond the operator's certificate, has discouraged some from entering the brothel business – or at least in an official capacity. The PLRC reported that health and hygiene bylaws and the cost of a license, particularly in Auckland, “has led some to remain *massage parlours*”.⁴³ While this shows that onerous regulation deters participation, the call for more rigorous monitoring of the PRA and the bylaws of the territorial authorities came from participants in the certification and licensing regimes.⁴⁴ The lack of enforcement is largely owing to a “complaint driven” system facilitated by multiple authorities.⁴⁵

⁴⁰ *Ibid* at 9.4.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Ibid* at 9.5.5. Emphasis in original.

⁴⁴ Elaine Mossman, “Brothel operators’ and support agencies’ experiences of decriminalisation” in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime Out of Sex Work: New Zealand Sex Workers’ Fight for Decriminalisation* (Bristol: Policy Press, 2010) at 137 [Mossman]

⁴⁵ *Ibid* at 137-138; Officials from Police, Ministry of Justice, Ministry of Health, Department of Labour and Immigration, Inland Revenue and Territorial Authorities all play a role in regulation and could inspect brothels for compliance with the rules under their corresponding jurisdiction.

The New Zealand system attempts to strike the delicate balance between allowing only those certified to operate brothels and not dissuading potential operators from opening legal brothels by imposing too-rigorous conditions. One study found that credentials are rarely checked, and operators would be agreeable to a more onerous set of conditions.⁴⁶ The New Zealand Prostitutes Collective does not endorse adding conditions to obtain an operator's certificate because "making the system too onerous may result in fewer operators applying for certification".⁴⁷ Should other countries seek to adopt a similar system, New Zealand's experience indicates that streamlining enforcement and inspection is preferable. This would ensure that inspections are conducted more regularly, and that sex industry businesses know which authority they will be dealing with.

Any government can create a licensing regime but for it to be successful the goals must align with the needs of those it seeks to regulate. In New Zealand, the goal was to enhance the health and safety of sex workers and the licensing system that was created is "neutral", in that it "licenses the sex industry in a similar way to other areas of business".⁴⁸

The alternative "social control" method of licensing is embodied in licensing of massage parlours and escort services in Canada and for the regulation of brothels in parts of Australia.⁴⁹ Indeed, the success of New Zealand's "neutral" stance on licensing can be best highlighted when compared to the "social control" model used in Queensland, Australia. Brothels in Queensland were legalized by the *Prostitution Act 1999*.⁵⁰ While

⁴⁶ *Mossman, supra* note 44 at 131.

⁴⁷ *Ibid.*

⁴⁸ PRA, *supra* note 1 at s 3; Thomas Crofts & Tracey Summerfield, "The Licensing of Sex Work in Australia and New Zealand" (2007) Murdoch University eLaw Journal 269, online: <<http://apo.org.au/node/2539>> at 270 [*Crofts & Summerfield*].

⁴⁹ *Ibid.*

⁵⁰ *Prostitution Act 1999* (Qld).

New Zealand's licensing regime is premised upon protecting and improving the health and safety of sex workers, Queensland has taken the approach of controlling and ultimately hoping to discourage brothels by making it difficult for them to obtain a license.⁵¹ When the Queensland law was reviewed in 2004, there was great concern over the two-tier system that had emerged.⁵² Illegal, unlicensed brothels were more prevalent than licensed, legal brothels.⁵³ Obtaining a license was an onerous process, and local councils made securing planning approval so difficult that a majority of sex workers remained outside the licensing regime.⁵⁴ It was estimated that 75% of the sexual services being provided in Queensland were illegal, owing largely to difficulty in obtaining a license from the Prostitution Licensing Authority.⁵⁵ Crofts and Summerfield found that the Queensland system, being "administratively complex, intrusive and open to morality-based decision making, as indicated by their lack of adherence to established protocols for fair decision-making", replicated the impacts of criminalization.⁵⁶ While brothels had the ability to operate as licensed businesses, the difficulty in achieving that status made it less attractive. The aim to control commercial sex businesses in Queensland thus failed, as they continued to operate illegally rather than engage with the complex network of regulations.

⁵¹ New Zealand, Ministry of Justice, *Central Government Aims and Local Government Responses: The Prostitution Reform Act 2003* by Elaine Mossman & Pat Mayhew, (Wellington: Ministry of Justice, 2007) at 25 [Mossman & Mayhew].

⁵² *Ibid* at 25, 9.

⁵³ *Ibid* at 25.

⁵⁴ *Ibid* at 26.

⁵⁵ Crofts & Summerfield, *supra* note 48 at 271; Queensland, Crime and Misconduct Commission, *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (Qld)* (Brisbane: Crime and Misconduct Commission, 2004) <<http://www.ccc.qld.gov.au/research-and-publications/browse-by-topic-1/legislation-reviews/2011-review-of-the-prostitution-act-1999-qld-1/2011-review-of-the-prostitution-act-1999-qld>> at 80.

⁵⁶ Crofts & Summerfield, *supra* note 48 at 271.

Queensland passed the *Prostitution Amendment Act*⁵⁷ in 2001. Included were the recommendations of the Crime and Misconduct Committee, who had assessed the prior *Act*, and determined the legislation should be simplified.⁵⁸ The amendment also sought to prevent local councils from making morality-based decisions, as those decisions limited the ability of commercial sex businesses to obtain the planning permissions required to operate legally.⁵⁹

The comparison of the two regimes clearly indicates that onerous regulation discourages businesses from operating lawfully, even where they are permitted to do so. Many who argue that licensing cannot be effective, fail to consider that the principles used to develop the licensing regime can have a drastic impact on its effectiveness. While the New Zealand licensing system remains simple, this is not an indication that it is not a well-considered plan. In reality, the simplicity of the system is a result of considering all the possible options and implications of making licensing more expensive and more onerous, and rejecting them in favour of a system that is easy to participate in.

Anyone could read the *PRA* and understand with relative ease and precision what is expected to comply with the law. While it is not above judicial scrutiny, and there is certainly plenty about the changes created by the Act that the Courts can consider, the language and organization of the *PRA* is designed to be accessible. Councils have created licensing bylaws for businesses generally rather than singling out brothels for differential treatment. The change in legal regime was supported with an occupational health and

⁵⁷ Provisions are incorporated into the *Prostitution Act 1999* (Qld).

⁵⁸ *Mossman & Mayhew, supra* note 51 at 26.

⁵⁹ *Crofts & Summerfield, supra* note 48 at 271.

safety guide written for sex workers.⁶⁰ The guide was a collaborative effort between the Department of Labour and the NZPC, and a majority of sex workers surveyed indicated that they had read it.⁶¹ New Zealand's combination of plain language legislation and easy to follow process had shaped the decriminalization of sex work in a way that other countries should note. Not only is it simplistic, it works.

PRIVACY

Owing to the continued stigma attached to working in the sex trade, sex workers are cautious about creating a paper trail that could later connect them to employment in the sex industry. A licensing regime that considers the needs of sex workers is preferable to one that treats them differently from other workers. The *PRA* protects the privacy of sex workers in three ways: Small Owner-Operated Brothels are exempt from the requirement to hold an operator's certificate. The records for certificate holders, applicants, and applicants for waivers of disqualification are only accessible by the Registrar, police and the applicant.⁶² At the local level, not all territorial authorities require an additional business license, none of which require licenses or registration of individual workers.

As noted earlier, the *PRA* created two distinct classifications for brothels: the Small Owner-Operated Brothel (SOOBs) which allows up to 4 sex workers to work

⁶⁰ New Zealand, Department of Labour, Occupational Safety and Health Service, *A Guide to Occupational Health and Safety in the New Zealand Sex Industry* (Wellington: Department of Labour, 2004) online: <<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>> [*Occupational Health & Safety*].

⁶¹ Gillian Abel, Lisa Fitzgerald, & Cheryl Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety Practices of Sex Workers* (Christchurch: University of Otago, 2007) online: <<http://www.otago.ac.nz/christchurch/otago018607.pdf>> [*Abel, Fitzgerald & Brunton*].

⁶² *PRA*, *supra* note 1 at s 41(1).

together out of a residence so long as each worker retains the money they make from selling sexual services, and the commercial brothels which require operator's certificates and in some cases, a business license. While the SOOBs have created contentious zoning issues⁶³, more often, they operate in a manner that goes unnoticed by the community around them.⁶⁴ SOOBs give sex workers more control over their work by allowing them autonomy over their work. SOOBs provide the enhanced safety of working collectively but sex workers still retain their earnings, and set the times and terms of their transactions. By not requiring the SOOBs to be licensed or hold certificates, workers can remain anonymous, work without fear that a record of their work in the sex trade will scuttle future employment or educational pursuits, and they can exit the industry whenever they choose. The removal of criminal law prohibitions on the sex trade is a considerable help to those who wish to preserve their privacy. This is further enhanced by New Zealand's decision to classify smaller brothels as distinct from larger, commercial operations.

While concern from the community was generally expressed in terms of moral objection to the sex trade or the establishment of brothels, the picture that is painted of dens of sin, red lights and associated behaviours has not been the reality under decriminalization. Of the 53 territorial authorities that responded to the questionnaire sent out by the PLRC, 30 admitted that no complaints had been received about brothels and only 5 had received more than 10 complaints.⁶⁵ A 2012 survey conducted in Australia

⁶³ For more on zoning sex work in New Zealand see generally, Dean Knight, "Brothels, bylaws, prostitutes and proportionality" (2005) NZLJ 423; Dean Knight, "The (continuing) regulation of prostitution by local authorities" in Gillian Abel, Lisa Fitzgerald & Catherine Healy, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol: The Policy Press, 2010) at 141.

⁶⁴ Felicity Boyd, "SOOBs in Christchurch: Go or Whoa?" (2010) Lincoln Planning Review 2 at 20.

⁶⁵ *PLRC Report*, *supra* note 25 at 9.4.

also showed that brothels do not necessarily make bad neighbours. The results found that “44% of those surveyed were unaware that they lived near a brothel” and more than half “stated that the business had no impact (positive or negative) upon the local area”.⁶⁶

With the requirement to hold an operator’s certificate limited to only those who are in positions of power in commercial brothels, sex workers are exempt from providing their personal information in this regard as well. What information is gathered from applicants for an Operator’s Certificate is tightly controlled. There are strict conditions under which the records of applicants and certificate holders can be accessed. Police powers to search the register are limited to the investigation of crimes.⁶⁷ Other than general information for statistical purposes about the industry broadly, it is an offense to obtain or use the information contained in the applications.⁶⁸ The penalty is a fine of up to \$2000.⁶⁹ The New Zealand government has taken great care to ensure that sex workers are able to have confidence in the security of the system if they choose to participate in management activities. This is far preferable to the conditions that prevailed prior to decriminalization where police “kept a record of those working in the industry”.⁷⁰

COST

Unlike the massage parlours and escort services in Canada, New Zealand does not require individual licenses for those who work in brothels. A brothel is legal so long as management acquires the requisite certificates, and a business license where required.

⁶⁶ Penny Crofts, “Not in my Backyard: who wants a brothel as a neighbour?”, *The Conversation* (25 Dec 2013) online: < <http://theconversation.com/not-in-my-backyard-who-wants-a-brothel-as-a-neighbour-21034>>.

⁶⁷ *PLRC Report*, *supra* note 25 at 6.2.5.

⁶⁸ *PRA*, *supra* note 1 at s 41 (2).

⁶⁹ *Ibid* at s 41 (3).

While this allows anyone (over the age of 18) to engage in sex work, as previously noted, it has not led to an explosion in the number of sex workers.⁷¹ Sex workers are also free to leave the industry at any time. Not having to pay for a license means that no sex worker feels compelled to work until the expiration of a license because of the cost incurred to obtain it. The goal of the PRA was to protect the health and safety of workers, not to condone the sex trade. By keeping fees low, the best interest of workers continues to be the focus of efforts to regulate the trade.

The cost of an operator's certificate is also not set prohibitively high. Keeping the price affordable for those who require a certificate, and a municipal license, allows sex workers the freedom to be entrepreneurs if they so choose. This also serves to help prevent organized crime from infiltrating the industry, which can occur when licensing costs are set prohibitively high.⁷²

While the cost of a business license in Auckland is among the more expensive licenses offered by the city, it remains well below the cost of comparable licenses in Canada, such as those for massage parlours and escort services.⁷³ For Canadian sex workers who operate out of massage parlours and escort services, the requirement for a license can also limit mobility. To work legally, a license is required in most cities. The cost of the license, coupled with the conditions that require sex workers to work exclusively for one employer, mean that travelling from city to city for work is virtually impossible to do legally in Canada. In contrast, New Zealand, by not licensing individual workers, permits them the freedom of mobility not only to work from various locations,

⁷⁰ *PLRC Report, supra* note 25 at 5.3.

⁷¹ *PLRC Report, supra* note 25 at 13, Executive Summary.

⁷² *PLRC Report, supra* note 25 at 6.1.1.

⁷³ *Auckland Licensing Fees, supra* note 6; For Canadian licensing comparisons see page 41.

but also the freedom to work in multiple locations. A New Zealand sex worker could easily work from a commercial brothel while continuing to see clients independently, because there are no rules that prevent this.

While money often plays a role in a person's decision to work in the sex industry,⁷⁴ this should not make the cost more onerous than other professions. New Zealand has adopted a system that takes cost into consideration. By assessing the effects of the high cost of licensing, New Zealand has determined that it is preferable for sex workers, the state and communities to have participation in a licensing regime, rather risk having a two-tier system of legal and illegal brothels.

New Zealand's simplistic scheme – one that respects the privacy of sex workers and governs brothels akin to all other businesses - addresses the key concerns raised by Canadian sex workers who work in municipally licensed adult businesses. This broad discussion offers principles that could easily be adopted by Canadian lawmakers. These three principles will be further illuminated in the section that follows, which will offer a more detailed look at the licensing functions in both the PRA and through Auckland Council's local bylaws.

BROTHELS & LICENSING UNDER THE PRA

The *PRA* lays out a majority of the rules for how sex work is permitted to occur under a decriminalized regime. While some predicted an explosion in the number of sex workers post-decriminalization, this assertion cannot be supported by research conducted

⁷⁴ *PLRC Report, supra* note 25 at 5.4.1; Leslie Ann Jeffery & Gayle MacDonald, *Sex Workers in the Maritimes Talk Back*, (Toronto: UBC Press, 2006) at 19.

after the enactment of the law.⁷⁵ In fact, the conclusions of the Prostitution Law Reform Committee, which was created by s. 43 of the *PRA* to study the effects of decriminalization, found that decriminalization had improved working conditions, facilitated better relationships with police and better protects the rights of sex workers.⁷⁶ From human rights, to labour, to health, sex workers in New Zealand now operate within the same framework as workers in other sectors.⁷⁷

The positive impacts of the New Zealand legislation are not only encouraging, but should also prompt any country attempting sex work law reform to consider adopting a similar model, as well as the reasoning behind it. As Brock asserts:

[h]aving a labour rights framework in place means that, should decriminalization actually occur, there is already an existing mechanism for organizing sex work, thereby making sex workers less unprepared for and vulnerable to new forms of legal regulation.⁷⁸

New Zealand's choice to focus more on *work*, rather than *sex*, has actually facilitated greater compliance with the reforms enacted by the *PRA*.

Under the *PRA*, a brothel is defined as a place customarily used for prostitution. However, this exempts “premises at which accommodation is normally provided on a commercial basis if the prostitution occurs under an arrangement initiated elsewhere”.⁷⁹ This effectively ensures that hotels are not classified as being in the business of prostitution and exempts them from the regulations required of commercial brothels.

⁷⁵ *PLRC Report*, *supra* note 25 at 13, Executive Summary.

⁷⁶ *Ibid.*

⁷⁷ Max Harris, “Sex Workers Equally Protected from Sexual Harassment as Other Workers – Says New Zealand Case” Oxford Human Rights Hub (5 April 2014) Online: < <http://ohrh.law.ox.ac.uk/sex-workers-equally-protected-from-sexual-harassment-as-other-workers-says-new-zealand-case/>>; see also *Occupational Health & Safety*, *supra* note 60; *Abel, Fitzgerald & Brunton*, *supra* note 61.

⁷⁸ Deborah R. Brock, *Making Work, Making Trouble: The Social Regulation of Sexual Labour* (Toronto: University of Toronto Press, 2009) at 154.

The *PRA* also divides brothels into two distinct categories, the main differences being size and licensing requirements. Small owner-operated brothels allow for up to four sex workers to work together in one location, usually a private residence, so long as each sex worker retains the money received for sexual services rendered.⁸⁰ Small Owner-Operated Brothels (SOOBs) are not required to have an operator's certificate because none of the workers is considered an operator.⁸¹ Larger, commercial brothels are managed venues where more than 5 sex workers can be employed. The operators of commercial brothels are required to be licensed by obtaining an operator's certificate. However, there are no licensing requirements for individual workers.⁸²

When compared to some of the municipal licensing regimes adopted by Canadian cities to regulate massage parlours and escort services, New Zealand's system of operator's certification is quite simple. Under the *PRA*, anyone who "operates, controls or manages" a commercial sex business must apply for a certificate. This includes anyone with the authority to determine: "when or where a sex worker works, the conditions under which they work and remuneration for their work".⁸³ Applicants for operator's certificates must apply to the Registrar of the District Court with the prescribed form, fee, a photocopy of their identification, and a photo for the certificate.⁸⁴ So long as the aforementioned items are presented, and the applicant is over 18 and not disqualified under the conditions in s. 36 of the *PRA*, the Registrar is obliged to issue the operator's certificate.⁸⁵ An operator's certificate can be denied only where the applicant

⁷⁹ *PRA*, *supra* note 1 at s 4(1).

⁸⁰ *Ibid.*

⁸¹ *Ibid* at s 5 (2).

⁸² *Ibid* at s 5 (1).

⁸³ *Ibid* at s 5(1)(a)-(c).

⁸⁴ *Ibid* at s 35 (3).

⁸⁵ *Ibid* at s 35(5).

has been convicted of one or more of the criminal offenses listed in s. 36.⁸⁶ The crimes that could lead to a denial are primarily related to violence, organized crime, drugs, and money laundering, which carry sentences of imprisonment of more than 2 years.⁸⁷ Those who do not qualify because of past crimes can apply for a waiver of disqualification, which will be issued at the discretion of a District Court Judge and the Commissioner of Police upon review of the application.⁸⁸

An operator's certificate is subject to annual renewal.⁸⁹ The cost and application process remains the same as the initial application.⁹⁰ For a renewal that is delayed or otherwise does not arrive before the expiration of the previous certificate, the previous certificate remains valid until the renewal is processed.⁹¹ Those who are required to hold certificates must be able to produce them upon request of the Police, be it immediately, or within 24 hours.⁹² Failure to show a license can result in a fine of up to \$2000.⁹³ The fine for operating a brothel without a certificate can be as high as \$10,000. Operators have largely complied with the certification requirement. The Prostitution Law Reform Committee noted that only three charges had been laid, one of which resulted in a conviction while the other two were withdrawn.⁹⁴

⁸⁶ *Ibid* at s 36 (1)-(2).

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at s 37.

⁸⁹ *Ibid* s 38.

⁹⁰ *Ibid* s 38 (1)(2).

⁹¹ *Ibid* s 38(3).

⁹² *Ibid* s 40(1).

⁹³ *Ibid* s 40(2).

⁹⁴ *PLRC Report, supra* note 35 at 6.2.4.

TERRITORIAL AUTHORITY LICENSING BYLAWS

New Zealand has a “unitary system of government” which delegates powers to local governments through legislation.⁹⁵ While this arrangement may seem straightforward, the structure of local authority varies throughout the country. There are 78 local authorities that consist of “eleven regional councils, twelve city councils, 54 district councils and the Auckland Council”.⁹⁶ To complicate matters further, they do not all have the same authority. Only the Auckland Council, the City Councils and the District Councils are considered territorial authorities.⁹⁷ Of the 67 territorial authorities, six also hold regional council authority, which means that legislation must be specific in delegating powers to the correct source.⁹⁸ The territorial authorities derive a majority of their powers from the *Local Government Act 2002*.⁹⁹ Other acts, such as the *Prostitution Reform Act 2003*, contain sections that also delegate specific matters to be dealt with at a local level.¹⁰⁰

In addition to obtaining an operator’s certificate, seven of New Zealand’s territorial authorities have enacted bylaws that require brothels to acquire a business license.¹⁰¹ The *Local Government Act 2002* (LGA), which repealed many of the provisions of the predecessor Act of 1974, holds public participation in local democracy

⁹⁵ *Mossman & Mayhew, supra* note 51 at 5.

⁹⁶ Government of New Zealand, Department of Internal Affairs, *About Local Government*, online: <<http://www.localcouncils.govt.nz/lgip.nsf/wpgurl/About-Local-Government-Index>> accessed 9 February 2015.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Local Government Act 2002/84* (NZ).

¹⁰⁰ *PRA, supra* note 1 ss 14-16.

¹⁰¹ *PLRC Report, supra* note 25 at 6.2.6.

as one of its core values.¹⁰² Bylaws cannot be made without “extensive consultations with its community and other affected parties”.¹⁰³ In addition, all bylaws enacted are required to be reviewed after five years.¹⁰⁴ The Prostitution Law Reform Committee (PLRC) found that even though the *PRA* delegated the specific responsibilities of regulating the location and permissible signage for brothels to local authorities, much of the debate that occurred “revolved around questions of morality, and was often expressed in terms of strong emotion”.¹⁰⁵ Despite the public outcry, “seven territorial authorities have established a licensing regime for brothels by way of bylaws under the *LGA* and the *Health Act 1956*”.¹⁰⁶

Auckland Council is the largest regional council, and governs a population of 1,415,550 people.¹⁰⁷ The council consists of “two complementary decision making parts”.¹⁰⁸ The mayor (elected at large) is the head of the governing body, which also includes a complement of members elected from twenty wards.¹⁰⁹ There are also 21 local boards, each with five to nine elected representatives.¹¹⁰ The governing body focuses on “big picture” issues and decisions affecting the region, while the local boards handle issues in their respective communities.¹¹¹ Auckland Council is currently reviewing bylaws for brothels and commercial sex premises and some local boards have passed

¹⁰² *Ibid* at 9.2.1.

¹⁰³ *Ibid* at 9.2.1.

¹⁰⁴ *PRA*, *supra* note 1 s 42(1)(b).

¹⁰⁵ *PLRC Report*, *supra* note 25 at 9.2.1.

¹⁰⁶ *Ibid* at 9.5.1

¹⁰⁷ New Zealand, Auckland Council, *Census in Auckland*, online:

<<http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/reports/Pages/censusinaucklandhome.aspx>> accessed 9 February 2015. Auckland now represents 33.4 per cent of New Zealand’s population and was the fastest growing region in New Zealand.

¹⁰⁸ New Zealand, Auckland Council, *Auckland Council Explained*, online:

<http://www.aucklandcouncil.govt.nz/EN/AboutCouncil/HowCouncilWorks/auckland_council_explained/Pages/Home.aspx> accessed 9 February 2015.

¹⁰⁹ *Ibid*.

¹¹⁰ *Ibid*.

licensing bylaws, which means the rules for operating a brothel legally are closely tied to location.¹¹² Under the umbrella of Auckland Council, local boards in the North Shore, Manukau, Auckland City and Rodney have bylaws requiring brothels to obtain a license.¹¹³

Those seeking to operate a brothel require an Operator's Certificate from the Ministry of Justice, as detailed above. Auckland Council requires that all potential businesses consult with a planning officer to ensure that the proposed business falls within a permitted zone and to ascertain the "operating requirements in the area, including parking and lighting".¹¹⁴ If a new building is to be constructed, or an existing one altered, building consent is also required.¹¹⁵ These steps are required of all businesses. They are not specific to brothels. Additional licenses are required for serving food or alcohol, but Auckland Council no longer requires brothel operators to obtain a "health protection" license.¹¹⁶

With the correct forms and required fees, Auckland City has made the process of licensing a brothel akin to opening any other business. The cost of a brothel license is a one-time application fee of \$181 and an annual fee of \$708.¹¹⁷ Auckland City also permits the transfer of an existing brothel license for a fee of \$99.¹¹⁸ Auckland's Brothel and Commercial sex premises bylaw indicates that a license will be granted upon satisfaction of the application and payment of the fee so long as the conditions of the

¹¹¹ *Ibid.*

¹¹² New Zealand, Auckland Council, *Brothel and Commercial Sex Premises Licenses*, online: <<http://www.aucklandcouncil.govt.nz/EN/LICENCESREGULATIONS/HEALTHLICENCES/Pages/brothelsandcommercialsexpremises.aspx>> accessed 9 February 2015.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.* Health Protection licenses are not required as of July 1, 2014.

¹¹⁷ *Auckland Licensing Fees*, *supra* note 6. Prices quoted in New Zealand Dollars.

bylaw are met.¹¹⁹ There is no proscribed limit on the number of brothel licenses that can be issued. Before a new license is issued, or an existing license is transferred or renewed, an inspection must be completed by an “authorised officer” to ensure compliance with city bylaws, as well as “the *Health Act 1956*¹²⁰, the *Building Act 1991*¹²¹ and the *Building Regulations 1992*”.¹²²

Auckland’s brothel bylaw also sets out the rules for signage¹²³ and operational health and safety.¹²⁴ Signage was delegated to the territorial authorities by the PRA.¹²⁵ In addition to the specific signage rules for brothels in the brothel bylaw, they must also comply with the rules about signage in Part 27 of Auckland’s signage bylaw that applies to all signs in the city.¹²⁶ The health and safety requirements in the bylaw compel brothel owners to provide clean, safe working environments for sex workers and their clients. To be in compliance with the bylaw (echoing the PRA), operators must make an effort to provide health information and safe sex supplies for workers and clients.¹²⁷

Auckland’s brothel bylaw, like the *PRA*, is primarily concerned with ensuring that the operation of brothels is undertaken in a safe, unobtrusive manner. Local governments do not have the authority to prohibit brothels or sex work because they are not permitted

¹¹⁸ *Ibid.*

¹¹⁹ City of Auckland, by-law No 30, Brothels and Commercial Sex Premises Bylaw (2003) at 30.6.4 [*Auckland Brothel Bylaw*].

¹²⁰ *Health Act 1956* (NZ) 1956/65.

¹²¹ *Building Act 1991* (NZ) 1991/150.

¹²² *Building Regulations 1992/150, Schedule 1; Auckland Brothel Bylaw, supra* note 119 at 30.6.5.

¹²³ *Ibid* at 30.5.

¹²⁴ *Ibid* at 30.7.

¹²⁵ *PRA, supra* note 1 s 12.

¹²⁶ City of Auckland, by-law No 27, Auckland City Signage Bylaw (2007).

¹²⁷ *Auckland Brothel Bylaw, supra* note 119, 30.7.1 (a)-(g)

to enact bylaws that contravene the intention of the PRA to make sex work safer.¹²⁸ The policies and bylaws are currently undergoing review in an attempt to create a more unified strategy for regulating brothels throughout Auckland Council's jurisdiction.¹²⁹

The dynamics of the sex trade are complicated. The regulation does not have to be. More than a decade of decriminalization in New Zealand has shown that simple rules, that consider the privacy concerns and fees that are not punitive in nature, can successfully encourage compliance with the law, while advancing the rights of sex workers. The certification regime has allowed brothels to open legally without setting strict conditions. Exempting SOOBs from licensing provides anonymity from the state and autonomy for sex workers. The registry of who holds and applies for an Operator's Certificates is protected from being easily accessed and the requirement to hold a business license varies by location, with some not requiring one at all. This is instructive to lawmakers elsewhere. Sex work can be decriminalized and regulated at the local level to provide individualized solutions for communities without creating a hierarchy of legal and illegal enterprises.

CONCLUSION

When it comes to regulating decriminalized brothels, New Zealand has proven that less is more. The PRA's carefully considered structure for the decriminalization of sex work has resulted in better conditions for sex workers because the Act puts the rights

¹²⁸ PRA, *supra* note 1; New Zealand, Auckland Council, *Proposed policy for Auckland's Commercial Sex industry*, online: <<http://www.aucklandcouncil.govt.nz/EN/planspoliciesprojects/councilpolicies/commercialsexindustry/policy/Pages/home.aspx>> accessed 9 February 2015.

¹²⁹ *Ibid.*

of sex workers at the forefront of its intent.¹³⁰ The doomsday scenarios that were predicted by those who opposed decriminalizing the sex trade have not come to fruition.¹³¹ Much of the success of the PRA comes from what it does not do. The PRA does not condone or encourage sex work, but nor does it prohibit it. The PRA does not make sex work more dangerous; it does not create a system so complex or expensive that workers are unable to comply with its requirements; it does not jeopardize future endeavors by linking sex workers to a paper trail indicating employment in the sex trade; and it does not treat sex work differently from other forms of employment or business. By taking a “neutral” position in licensing, instead of the “social control” stance, New Zealand has created a regime that encourages brothels to operate legally and avoids the pitfalls that allow a two-tier system of legal and illegal brothels to flourish as has occurred elsewhere.

This chapter shows that New Zealand has managed to address the concerns that sex workers in Canada have about their work. It has done so through both the decriminalization of sex work and the carefully constructed rules that now govern the industry. The principles of the New Zealand licensing regime, including both the operator’s certification and local licensing requirements, have used simple and accessible rules to engage sex workers while respecting their privacy, and not using them as a means to raise revenue to fill municipal coffers. The recommendations of the Prostitution Law

¹³⁰ Abel, Fitzgerald & Brunton, *supra* note 61 at 139; Tracey Tyler, “Legalized Brothels Fantastic for New Zealand, Prostitutes Say”, *Toronto Star* (29 Sept 2010) online: <http://www.thestar.com/news/gta/2010/09/29/legalized_brothels_fantastic_for_new_zealand_prostitutes_say.html>.

¹³¹ Dave Crampton, “New Zealand: Christians Divide Over Sex-Worker Law”, *Christianity Today* (3 Sept 2001) online: <<http://www.christianitytoday.com/ct/2001/september3/29.39.html>>.

Reform Committee indicating that more resources should be provided but without passing on the additional costs should be instructive to lawmakers elsewhere.

The different systems of government that New Zealand and Canada have mean that it would be difficult to simply copy the provisions of the *PRA* for Canada. What is clear, is that the system that New Zealand has created under the *PRA* and the bylaws of the territorial authorities is functional, encourages compliance and improves conditions in the sex trade. The principles of the system should not be overlooked by Canadian legislators at all levels, particularly in light of the questionable constitutionality of Bill C-36.

CHAPTER FIVE - CONCLUSION

INTRODUCTION

The contrast between the regulatory regimes in Canada and New Zealand highlights the disparities in working conditions for sex workers. In Canada, municipalities are “eager to control the indoor sex trade through a myriad of zoning and licensing requirements aimed at being prohibitive in one sense and restrictive in another”.¹ New Zealand’s experience with legal reform shows that professionalizing the sex industry and permitting brothels to operate can bring about more positive results than attempts to control and suppress the sex trade. Canada’s struggle to regulate the sex trade, both overtly at the federal level and covertly at the municipal level, has been debated by committees, courts and parliament, but has led to little meaningful change. That sex workers and their advocates were largely ignored in the creation of the new criminal provisions means that we have not yet reached a satisfactory solution. As Cheryl Auger wrote: “Bill C-36 treats anyone involved in sex work as though they are a social problem and ignores sex workers' right to security of person”.²

The answer to protecting rights, community cohesion and ensuring health and safety standards begins with treating sex work as work. In *Hrabchak*³, Devine J. pointed to the language used in by-laws as being “laboured”, as if using the language of work

¹ Steven A. Kohm & John Selwood, “Sex Work and City Planning: Winnipeg’s Red Light District Committee and the Regulation of Prostitution” (2004) University of Winnipeg, Institute of Urban Studies at 1.

² Cheryl Auger, “Bill C-36: No safety or security for sex workers”, *rabble.ca* (17 October 2014) online: <<http://rabble.ca/news/2014/10/bill-c-36-no-safety-or-security-sex-workers>>.

³ *R v Hrabchak* [1999] MJ. No 554 (QL).

could distinguish adult services from the criminal prohibitions on prostitution.⁴ In that case, the owner of an unlicensed escort agency successfully argued that offers of sexual services were not within the ambit of the bylaw regulating businesses providing companionship, and therefore he could not be convicted of running a dating and escort service without a license.⁵ The short decision details the limits of municipal authority but points to the “Alice-in-wonderland state of the law”.⁶ To avoid venturing further down this rabbit hole, reform at the federal level is necessary to allow municipalities the ability to license (and zone) brothels.

The *Bedford* Court was clear that the laws should not put sex workers at greater risk and this must be taken into account by municipal lawmakers. Adopting new regulations should always involve those most affected: “[s]ex workers have a unique insight and expertise regarding their industry, the role it plays in Canadian society, and the ways in which regulatory regimes will impact their business”.⁷ The process of creating new bylaws aimed at regulating brothels should involve sex workers, in the same way that legal reform around any other issue would consult with those most affected. The labour of sex workers should not be devalued as an excuse for excluding their voices. Municipal lawmakers need to move beyond morality and address the labour that is really at stake.

These five recommendations are drawn from the research showing that municipalities are capable of creating licensing regimes which, when devised in

⁴ *Ibid* at para 19.

⁵ *Ibid* at para 14.

⁶ *Ibid* at para 19.

⁷ Pivot Legal Society, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: Pivot Legal Society, 2006) online: <http://www.pivotlegal.org/beyond_decriminalization> at 9.

conjunction with workers, facilitate compliance and protect the rights affirmed by the Supreme Court in *Bedford*. These recommendations offer guidance on how to strike the careful and necessary balance between sex workers and the communities in which they live. Sex workers and their communities will benefit from licensing regimes that set reasonable fees, allow specific exemptions from licensing, protect privacy, deal with past criminal history of license applicants and consult with sex workers throughout the process. Creating regulations that sex workers can abide by not only makes their work safer, but also avoids discord in the community.

In evaluating Canada's criminal laws on sex work, the Fraser Committee weighed all possible options to determine the advantages and disadvantages. The following statement was made in relation to decriminalization coupled with municipal licensing:

Among the advantages seen in this approach were the relative ease of enforcement; the acceptance of prostitution as a business and an improved self-image of prostitutes operating such enterprises; an attendant reduction of the reliance of pimps and other exploiters; better maintenance of public health; and increased revenue to municipal governments from license fees.⁸

While recognizing that leaving the design of such regulations solely to municipalities would result in piecemeal regulation, with adequate consultation this is not an insurmountable challenge. New Zealand's experience demonstrates that it is possible to achieve effective regulation even if it is inconsistent across jurisdictions.

⁸ Canada, Department of Justice, *Report of the Special Committee on Pornography and Prostitution, Volume 2* (Ottawa: Department of Justice, 1985) at s 2.3, page 519.

REASONABLE FEES

In setting the cost of a license, municipalities need to be cognizant of the delicate balance that needs to be struck. Fees that are too high discourage or impede those who would otherwise participate in the licensing regime. As *Bedford* applicant Valerie Scott explained following the Ontario Court of Appeal decision: “[m]unicipalities need to ensure that licenses are a reasonable fee. If they charge thousands of dollars per year, sex workers will not be able to afford a license but organized crime will”.⁹ As demonstrated in Chapter 2, high licensing fees for the adult service sector are very much a reality in Canada.¹⁰ Using the same philosophy to set fees for brothels would be a mistake, as shown by the development of the two-tier system of legal and illegal brothels that occurred in Queensland, Australia. When fees are too high, the prevalence of illegal brothels will flourish. This is an undesirable outcome of licensing that can be avoided.

The sex trade will continue to exist under a licensing regime designed for social control. The fact that sexual services are being provided in licensed massage parlours is evidence of this. While municipalities have profited from the licensing fees for adult service businesses and their individual workers, at the same time they impose harsher conditions on these same businesses. Montreal Mayor Denis Coderre, has been vocal in his opposition to crackdown on massage parlours, while Toronto amended their bylaw to

⁹ Chris Hannay, “What will Ontario's legalized brothels be like? Your questions answered”, *The Globe and Mail* (27 March 2012) online: < <http://www.theglobeandmail.com/news/national/what-will-ontarios-legalized-brothels-be-like-your-questions-answered/article4096161/>>.

¹⁰ See Chapter 2 at page 41 for the costs of Canadian licenses.

restrict the number of licenses issued.¹¹ Charging these businesses higher licensing fees has not stopped them from opening, but it has created hardships for those who work in the industry. Adopting a neutral standpoint for licensing and encouraging participation yields better results for both workers and the community.

Licensing fees should be set at a level that is comparable to other businesses of a similar size.¹² We have seen that sexual service providers continue to persist even when fees are set punitively high and despite the denial of health and safety regulation. The ability of municipalities to raise revenues is severely constrained.¹³ While this can be appreciated, it is also concerning that municipalities have used social control methods to regulate adult services so that the most marginalized are seen as a source of profit.

EXEMPTIONS FROM LICENSING

The desire to exert control over the adult services industry is evident in Canadian municipal bylaws. By limiting the number of available licenses, and requiring each individual employee to also be licensed, it is clear that cities want to discourage the growth of the adult services industry. For example, Toronto limits the number of licenses available to owners of body-rub parlours to 25.¹⁴ In contrast, New Zealand has taken a neutral stance to licensing adult businesses and has opted for less restrictive regulations.

¹¹ Giuseppe Valiante, “Hundreds of erotic massage ‘brothels’ flourishing in Montreal despite federal anti-prostitution law”, National Post (1 March 2015), online: <<http://news.nationalpost.com/2015/03/01/hundreds-of-erotic-massage-brothels-flourishing-in-montreal-despite-federal-anti-prostitution-law/>>; *Toronto Municipal Code*, C 545, Licensing, § 545-361 [*Toronto Licensing Bylaw*].

¹² Frances Shaver, “Prostitution: A Critical Analysis of Three Policy Approaches” (1985) 11 Can Pub Pol 493 at 497.

¹³ Don Richmond, *Puppets on a Shoestring: The Effects on Municipal Government of Canada’s System of Public Finance*, (Unpublished: 1976) online: <<http://www.chba.ca/uploads/Policy%20Archive/1997/Puppets%20on%20a%20Shoestring%20-%20Effects%20on%20Municipal%20Government%20of%20Canadas%20System%20of%20Public%20Finance%201976.pdf>> accessed 9 February 2015..

The permissive attitude focuses on health and safety, and sets no limits on the number of sex industry businesses, including brothels.¹⁵ The distinction between Commercial brothels and Small Owner-Operated Brothels (SOOBs) allows for regulations that are better tailored to the actual nature of the business. While an unlimited number of available licenses could lead to a proliferation of brothels, this has not been the case. In fact, many commercial brothels have closed because they were unable to compete for business.¹⁶

To create a municipal licensing regime for brothels that sex workers can and will participate in, there need to be reasonable exemptions from licensing. While it may sound counter-intuitive to have less stringent regulation, the New Zealand system shows how it can function effectively. All of New Zealand's commercial brothels require an Operator's Certificate, however, there are no license requirements for individual sex workers in their employ or for SOOBs. The territorial authority where the brothel seeks to operate determines business licensing requirements for brothels; and in some cases, the territorial authorities have not felt the need to enact licensing regimes for brothels.

The primary exemption for licensing should be for individual workers.¹⁷

Regardless of the location in which they work, individual licenses are costly and provide

¹⁴ *Toronto Licensing Bylaw*, *supra* note 11 at s 361.

¹⁵ Gillian Abel et al, "The Prostitution Reform Act" in Gillian Abel et al, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol, UK: Policy Press, 2010) 75 at 81.

¹⁶ Elaine Mossman, "Brothel operators' and support agencies' experiences of decriminalization" in Gillian Abel et al, eds, *Taking the Crime out of Sex Work: New Zealand Sex Workers' Fight for Decriminalisation* (Bristol, UK: Policy Press, 2010) 119 at 124 [Mossman].

¹⁷ Frances Shaver, *Recommendations for Sex Work Policy: An Integrated Approach*, (Ottawa: Presentation at the SSLR Roundtable, 2005) online: <<http://web2.uwindsor.ca/courses/sociology/maticka/star/presentations/sslr-presentation-text-may30.html>> at 2 [Shaver].

little value to workers in return.¹⁸ Not requiring individual workers to obtain a license also addresses many of the privacy concerns sex workers have by providing them with the anonymity to work in the industry without the paper trail. Individual workers in New Zealand are not required to obtain a license and the PRA carefully considered multiple options with the input of workers. It was preferable to have safe, regulated brothels than to control and monitor individuals who may choose to sell sex.

PRIVACY PROTECTION

Municipal licensing should strive to protect the privacy of each person, regardless of the reason for providing personal information. For sex workers, the stakes are often higher. The stigma associated with sex work, which does not automatically disappear under decriminalization, means that workers have more nuanced reasons for secrecy around their profession. Not requiring that individual workers be licensed to work in brothels dramatically improves their privacy.

For those required to obtain licenses to operate commercial brothels, personal information should be subject to strict requirements. Sex workers should know up front who can access their application and for what reasons. The PRA carefully lays out guidelines on personal information and this should be replicated within a municipal licensing regime so that anyone applying for a license has confidence in the integrity of the system. Having all this information in advance is the only fair way to ask a person to submit personal information that will associate them with having worked in the sex trade.

¹⁸ Cheryl Auger, *After Bedford v. Canada: What Next? Panel Discussion* (Toronto: University of Toronto Faculty of Law, 2014) online: <http://www.law.utoronto.ca/utfl_file/count/media/AFTER%20BEDFORD%20V.%20CANADA%20PAN EL%20JAN%2024%202014%20transcription.pdf> at 8 [*After Bedford Transcript*].

DEALING WITH PAST CONVICTIONS

Opportunities for workers to move from street-based work to the better security of an indoor venue should not be thwarted for past prostitution convictions. In addition to not requiring licenses for individual workers, sex workers who wish to operate their own sex industry businesses should not be barred from doing so. This requires careful consideration of which *Criminal Code* offenses should prevent a business license from being issued. Both police and sex workers should play a role in determining what offences should disqualify a person. These two groups should also advise on how to create a process for appeals or for having a personalized assessment in the case of past convictions.

The current practice of licensing body rub parlours in Toronto appoints the Chief of Police as a decision maker on all license applications.¹⁹ There are no indications of what kind of criminal record would preclude a successful license application or how discretion is exercised. This means each applicant must be scrutinized instead of allowing them the benefit of a list of disqualifying offences that would indicate grounds on which their application will be refused.

New Zealand developed a list of criminal convictions that make a person ineligible for a Brothel Operator's Certificate.²⁰ The crimes that can disqualify an applicant mainly pertain to offences of violence, drugs and fraud.²¹ By providing a detailed list with section numbers, applicants are able to know in advance if they may be

¹⁹ *Toronto Licensing Bylaw*, *supra* note 11 at s 334.

²⁰ New Zealand, Ministry of Justice, *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) online: <<http://www.justice.govt.nz/policy/commercial-property-and-regulatory/prostitution/prostitution-law-review-committee/publications/plrc-report>> at s 6.2.2 [*PLRC Report*].

²¹ *Ibid*; *Prostitution Reform Act 2003* (NZ), 2003/28 at s 37: Waivers of disqualification can be obtained under certain circumstances by applying to the Registrar of the Auckland District Court.

refused. The system provides clarity for applicants and is more administratively efficient because applicants are better informed about whether or not they will qualify for a certificate or not. New Zealand may have devised an effective solution, or perhaps sex workers and police could suggest improvements. Regardless, both groups need to be involved and the assessment criteria should be laid out in full for applicants, before they apply.

CONSULTATION WITH THE INDUSTRY

It would be unimaginable for a government to create regulations for an industry without consulting with those who work within it. Failing to acknowledge sex work as work has meant years of criminal laws that have only made the sex trade more dangerous. The voices of sex workers were largely ignored in the creation of the *Protection of Communities and Exploited Persons Act*.²² By failing to listen to sex workers, the enacted law fails to acknowledge the realities of the sex trade.

The benefit of municipal law is that it can be crafted to reflect the unique needs of the community. While the risk is of piecemeal policy that varies from city to city, the creation of brothel licensing bylaws represents an opportunity to craft individual solutions in conjunction with community stakeholders and sex workers. Effective brothel licensing regimes cannot be created without the input of sex workers and the

²² Kerry Porth, “Justice Committee on Bill C-36 ignored sex workers”, *Pivot* (14 July 2014) online: <http://www.pivotlegal.org/justice_committee_ignored_sex_workers>; Katrina Pacey, “Canadian politicians ignoring sex workers”, *Pivot* (27 August 2014) online: <http://www.pivotlegal.org/canadian_politicians_ignoring_sex_workers>; Kady O’Malley, “Peter MacKay’s justice roundtables didn’t set a place for sex workers”, *CBC News* (27 August 2014) online: <<http://www.cbc.ca/news/politics/peter-mackay-s-justice-roundtables-didn-t-set-a-place-for-sex-workers-1.2747403>>; Luke Simcoe, “Ottawa ‘ignored’ research when crafting new prostitution laws, say academics”, *Metro* (5 June 2014) online: <<http://metronews.ca/news/victoria/1055340/ottawa-ignored-research-when-crafting-new-prostitution-laws-say-academics/>>.

organizations that advocate for their rights. The goal is to create a licensing regime that sex workers can and will participate in, so they should have a say in the creation of the regulations so that regulation reflects the reality of the industry. This means not only allowing sex workers to have a voice in the conversation but also that their voices be heard. It is vital that they be consulted: “[s]ex workers must be at the centre of planning and decision-making about the criminal law, as well as zoning and licensing issues, employment law and other regulatory issues that will impact their work and their lives”.²³ It is not enough to merely consult, but to consult effectively.

Sex workers deserve an opportunity to express their views to municipal lawmakers and consideration should be given to their unique needs for privacy. Municipalities should schedule consultations with sex workers and their advocacy organizations that are closed to the public. This will facilitate both participation and frank discussion. This will also provide municipalities to acquire first-hand knowledge of how the sex trade operates within the community and ask for solutions from those most affected. Sex workers should be able to attend such meetings without fear of judgment or reprisal, and without having to give their names. Consultations that are open to the public may draw some members of the sex work community but they may choose not to identify themselves or to speak up because of the stigma that is attached to their work.

Public consultation is also necessary and vital to balancing the concerns of the community with the needs of sex workers. Municipalities should involve sex workers who are comfortable speaking publicly as well as ally organizations to address community concerns. Misconceptions about the sex trade may be at the heart of

²³ Sex Workers United Against Violence et al, *My Work Should not Cost Me my Life* (Vancouver: Pivot, 2014) online: <http://www.pivotlegal.org/my_work> at 18 accessed 15 February 2015.

resident's concerns and having those concerns addressed by those with extensive knowledge of the sex trade and research on the industry could foster better policy and community cohesiveness. While it is critical that "[s]ex workers, sex worker advocacy groups, and other community organizations providing services to sex workers are consulted in formulating legal and policy changes that affect sex workers", they can also serve as valuable liaisons to the community.²⁴ Introducing decriminalized, municipally licensed brothels into a community, as New Zealand has shown us, can be done without disrupting neighbourhood cohesion.

Criminalizing sex work is easy. Building inclusive communities that involve sex workers in the policy-making that affects them requires effort. While New Zealand offers a simple and successful example of how the decriminalization of sex work can be enacted, it is because much time and consideration went into crafting the laws, regulations and bylaws that now govern the sex trade. Given the constitutionally questionable criminal regime that was recently enacted in Canada, municipalities should prepare themselves for how they will engage with sex workers should the new law have a short tenure. It is certainly possible that an even stricter form of criminalization could be enacted, however, the evidence clearly indicates that the regulation of sex work, beginning at the municipal level, could have the most positive impact on the lives of sex workers.

If the current criminal regime is rejected and sex work is decriminalized in Canada, not all the work will be done at the municipal level. While it falls outside of the scope of this thesis, it is important to acknowledge that provincial governments will also have a role to play. The groundwork that needs to be done by municipalities around to

²⁴ *Shaver, supra* note 17 at 1.

develop licensing and zoning regulations is merely the beginning. As Cheryl Auger of Maggie's points out: "licenses do not replace labor laws".²⁵ Labour, health and safety regulations all fall within provincial jurisdiction so co-operation will be necessary to create a cohesive, easy to navigate system that protects the rights of sex workers.

There is little reason that consultation and the lowering of fees could not be contemplated now. Building relationships between city counsels and the sex work community will take an effort on the part of both parties. There is little reason why this dialogue should not commence sooner rather than later. It serves to put municipalities in a better position to create bylaws with a clear, local perspective. It also allows sex workers to provide their municipalities with input as to their needs and concerns. Keeping high licensing fees in place cannot be justified, particularly in cities which restrict the number of licenses they grant. It reinforces the stigma that adult service businesses are undesirable, cause nuisance and require strict controls. It is undeniable that it is easier to do a lot of work over time instead of trying to manage an abundance of work in a short period. If cities undertake to foster relations and lower fees now, they will be more successful at balancing the concerns of the community with needs of sex workers if the legal landscape changes again.

CONCLUSION

Even with the *Protection of Communities and Exploited Persons Act* now included in the *Criminal Code*, now is the time for planning the municipal regulation of decriminalized brothels. With such "grave concerns" over the new law it is precisely the

²⁵ *After Bedford Transcript, supra* note 18 at 9.

right time to have discussions about how to improve sex work policy in Canada.²⁶ This thesis has established why municipal regulation of decriminalized brothels is the most effective way forward; how current licensing regimes for adult service providers are insufficient and would need to adapt; and how New Zealand changed their legal regime and analysis of the decriminalized system. From this, we can draw guiding principles to assist municipalities in creating local licensing solutions that are tailored to the specific needs of each community. With the proper regulation at both the municipal and provincial levels, sex workers can benefit from legislation that treats sex work as work and affords the benefits of recognized employment. In the meantime, municipalities could start by consulting with sex workers and those in the adult service industry to improve the current licensing bylaws based on these same principles.

Allowing the professionalization of the industry, treating it the same as other industries garners more compliance and a less disruptive way for the sex trade to operate. For this to occur, this thesis has promoted two closely linked principles: the recognition of labour as it applies to sex work, and neutral licensing regimes that treat sex work akin to other industries. If Canada is to achieve the success of New Zealand in decriminalizing sex work, decriminalization must be coupled with a neutral stance in regulation. This will allow for the same strong perception of rights that empowers workers in New Zealand.²⁷ Although it is a dramatic shift from the status quo, “a galvanizing force in support of labour legitimacy could effect lasting social change”.²⁸

²⁶ Statement of Ontario Premier Kathleen Wynne in Andrea Houston, “Premier Wynne Blasts New Federal Anti-Prostitution Law”, *NOW Toronto* (7 December 2014) online: <<https://nowtoronto.com/news/premier-wynne-blasts-bill-c36/>> accessed 9 December 2015 [*Wynne Statement*].

²⁷ *PLRC Report*, *supra* note 20 at s 3.1.2: 92% of workers believed they had employment rights; 93.8% perceived their Occupational Health and safety rights; 95.6% of workers believed they have legal rights.

²⁸ Emily van der Meulen, “When Sex is Work: Organizing for Labour Rights and Protections” (2012) 69 *Labour/Le Travail* 147 at 167.

The situation in New Zealand was similar prior to decriminalization. In interviews with community agencies following the change in legal regime a church leader described the New Zealand situation in a manner that accurately reflects the current situation in Canada:

The public morality and public discourse had previously been a double standard. On the one hand, this was saying this [sex work] is illegal and they [sex workers] are criminals. On the other hand, everyone knew and almost accepted it was going on behind closed doors. I think it is better for it to be honestly recognised as happening, whether people like it or not.²⁹

New Zealand managed to strike the proper balances without the benefit of example.

Canada only benefits from the experiences of this legal change.

It is also abundantly clear that the current bylaws regulating adult service businesses are creating hardships that can be alleviated by providing better information to workers, particularly given the potential implications of the new criminal provisions. The issues of cost and privacy should also be addressed. This provides municipalities the opportunity to open communication within the industry that can foster better understanding and better working relationships.

Stigma is an issue that will not disappear with decriminalization and that is why it is important to ensure both adult service providers and sex workers are assured privacy protections. Municipal licensing creates a paper trail linking a person with their employment in the sex industry. Workers fear that this will have consequences that will impact future goals. Careful attention to privacy concerns is key to creating a licensing regime that sex workers will participate in. Clear guidelines that establish who can access

²⁹ *Mossman, supra* note 16 at 124.

the information, under what circumstances and the penalty for inappropriate access would also allow workers to be better informed.

A licensing regime can only be effective if there is participation. Current municipal licensing fees for both the owners/operators of adult service businesses and for individual employees are disproportionate to the fees charged to other businesses. While the discussion has highlighted that this is a hallmark of a social control licensing regime, it creates significant hardships for those working in the adult industry. First, the costs are higher than other industries. Second, the cost of a license is simply too expensive for some. Third, the cost and structure of licensing regimes can restrict the mobility of those who travel for work.

The experiences of New Zealand provide a roadmap of how sex work can be decriminalized and regulated without the situation dissolving into chaos or leading to significant growth of the sex industry. While the courts have weighed in over matters of zoning, the licensing regime, administered through the Ministry of Justice and at the local level, has been successful in creating better work environments, facilitating the rights of workers and respecting the autonomy of those who sell sex for a living.

GUIDING PRINCIPLES FOR REFORM AT THE MUNICIPAL LEVEL

The comparison of how Canada and New Zealand regulate sex work shows the stark contrast of the situations endured by workers. While the removal of criminal sanctions is primary, the introduction of neutral municipal licensing is equally important. The current social control licensing regime used for body rub parlours and escort services would continue to replicate the conditions of criminalization even if the criminal provisions were removed. Striking the right balance means not just decriminalizing the

sex trade, but allowing it to professionalize and operate just like any other business. Canada has significant challenges to face if this is to occur but New Zealand can serve as a touchstone, not just for decriminalization but for the carefully constructed regulations that were put in place to govern the sex trade.

By contrasting the two regimes, five guiding principles can be drawn that will assist Canadian municipalities in developing licensing regimes for brothels should decriminalization occur. The creation of an effective licensing regime will provide for: reasonable fees; exemptions from licensing; privacy protections; does not exclude workers based on past prostitution charges; and extensive consultation with sex workers.

More law is not the answer. The nuances of the sex industry, which are discussed throughout this thesis, indicate that too much regulation will not lead to an effective solution. If the desire to place strict parameters on the sex trade informs the creation of licensing bylaws, they will be doomed to fail. At the very heart of what can be learned from New Zealand is that neutral licensing regimes have proven more effective. If municipalities commit to treating sex work akin to other businesses, then the principles that follow should lead them to the development of a licensing regime that sex workers will participate in and will not cause undue community discord.

Setting reasonable fees is critical. As Lowman warns: “The unintended consequence is a pattern of law enforcement that allows the municipalities and the entrepreneurs who pay their license fees to corner the sex trade market, and exact higher prices”.³⁰ Keeping the cost of a license for a brothel consistent with the pricing for other

³⁰ John Lowman, *Submission to the Subcommittee on Solicitation Laws of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness* (Ottawa: John Lowman, undated) <http://184.70.147.70/lowman_prostitution/HTML/SCJHPE/Submission_to_the%20Subcommittee_on_Solicitation%20Laws_Brief.pdf>, accessed 9 February 2015 at 15.

licenses allows sex workers to be in control of their industry. It allows them to participate without the need for a third party to finance them.

Allowing exemptions from licensing protects privacy and autonomy for workers who wish to work in smaller, informal venues, while not excluding them from the safety measures such as working with others. To further protect the privacy of workers, municipalities should not institute a requirement for individual licenses. As workers indicate that licenses are poor value and they receive little in return for their fee and furnishing their personal information. This is indicative of an area where municipalities can improve immediately and instead of waiting to adopt new policies for brothels. Since municipalities have no need to identify who is employed in the sex trade, there should be no requirement for an individual license, which satisfies the concerns of workers over the cost of licensing and their personal information being collected.

For sex workers, it is imperative that previous convictions for sex work not become barriers to licensing a brothel under decriminalization. While some criminal offenses should preclude a person from operating a brothel, there must be a clear indication of which offences will disqualify an applicant. There should also be a clear process for appeal or obtaining special permission to obtain a license when a person has a past conviction. A criminal record check is permissible for someone who seeks a license to operate a brothel, however only predetermined offenses should have no bearing on whether or not a person qualifies to work in a brothel. Perhaps most critically, sex workers should be involved in the creation of the rules that will be imposed on them.

The guidance that sex workers can provide about their industry and how it operates needs to inform municipal lawmakers so that the licensing regime that is created,

reflects the reality of the industry. Sex workers are very experienced in working under a set of rules that are not designed for them. They are in the best position to “define how their trade should be supervised”.³¹ Municipalities would be best served to consider this in light of current bylaws for body rub parlours and escort services. Instead of one side holding the power and the other holding the knowledge, cities and workers need to cooperate to find the right solutions.

These principles reflect recommendations made by previous studies, concerns of sex workers about municipal regulation and lessons from New Zealand’s experience of decriminalization. If municipalities can approach the licensing of brothels with an open mind to the experiences of workers and the guidance from lawmakers in New Zealand, there is no reason why municipalities could not enact licensing regimes that respect both workers and the communities in which they live.

CONCLUDING REMARKS

Even before Bill C-36 was introduced, it was clear that any attempt to replicate the Swedish law criminalizing the clients of sex workers was going to be met with resistance. Brenda Cossman criticized the notion in the month following the *Bedford* decision: “[t]he idea that the Nordic model is some fantastic alternative, that it's going to uphold and protect the rights of prostitutes while going after their evil clients and pimps is a fallacy”.³² This is the exact *fallacy* that the Federal Government has enacted. The *Protection of Communities and Exploited Persons Act* is now part of the *Criminal Code*

³¹ Patrice Corriveau, “Regulating Sex Work: Between Victimization and Freedom to Choose” in Colette Parent et al, eds, *Sex Work: Rethinking the Job, Respecting the Workers* (Vancouver: UBC Press, 2013) at 45.

but the provisions it adds remain contentious and the passing of the bill into law does not appear to have quelled the debate. The newly sworn-in Toronto city council wasted no time in speaking out against the Federal Government's new criminal provisions. On their first day in office, 25 Councilors, representing all areas of the city and a wide array of political views, signed a letter urging Ontario Premier Kathleen Wynne to refer the legislation to the Ontario Court of Appeal to determine if it passes constitutional muster.³³

The Premier responded with a statement indicating she was also concerned about the new criminal laws.³⁴ The Premier wrote: "I am left with grave concern that the so-called Protection of Communities and Exploited Persons Act will protect neither exploited persons nor communities".³⁵ While stopping short of referring the legislation to the Ontario Court of Appeal, Wynne has instructed Attorney General, Madeleine Meilleur to provide advice "on the constitutional validity of this legislation, in light of the Supreme Court's decision in the *Bedford* case, and our options as a government in the event that the legislation's constitutionality is in question".³⁶ Political columnist John Ivison has interpreted this to mean that if the law is deemed to be constitutionally suspect, the Ontario government will refuse to enforce it.³⁷ A letter from members of the

³² Brenda Cossman, *After Bedford Transcript*, *supra* note 18 at 16.

³³ Kristyn Wong-Tam, *Letter to Premier Kathleen Wynne from Toronto City Councilors* (Toronto: Wong-Tam, 2014), online < <http://www.scribd.com/doc/249162927/Letter-from-Councillors-to-Kathleen-Wynne-re-Bill-C-36>>; Jessica Cross Smith, "Behind the Scenes of Toronto City Councilors' Opposition to Prostitution Law", *Metro* (8 December 2014) online: <<http://metronews.ca/news/toronto/1234074/behind-the-scenes-of-toronto-city-councillors-opposition-to-prostitution-law/>>.

³⁴ *Wynne Statement*, *supra* note 26.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ John Ivison, "Provinces Could Kill New Prostitution Law by Refusing to Enforce it", *National Post* (8 December 2014) online: <<http://fullcomment.nationalpost.com/2014/12/08/john-ivison-provinces-could-kill-new-prostitution-law-by-refusing-to-enforce-it/>>.

legal profession urged precisely that, however the Premier has indicated that the law will be enforced for the time being.³⁸

All that is clear is that the conversation on how sex work is regulated in Canada is far from over. This thesis has provided a possible way forward and a means to structure a vital discussion that needs to occur at the municipal level. As Lowman, and others have stated: “The Canadian political solution to the problems created by prostitution has been to say one thing and do another”.³⁹ It is time for the political solution to be the acknowledgement of the labour in the sex trade and to regulate it in accordance with the rights sex workers so justly deserve. At the heart of the *Bedford* decision was the instruction that “Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes”⁴⁰, and evidence amply supports that regulation, rather than criminalization, is the only means to achieve a safer sex trade.

³⁸ Keith Leslie, “Ontario will follow prostitution law despite concerns, says Kathleen Wynne”, *Toronto Star* (19 December 2014) online: <http://www.thestar.com/news/canada/2014/12/19/ontario_will_follow_prostitution_law_despite_concerns_says_kathleen_wynne.html>.

³⁹ John Lowman, “Prostitution Law Reform in Canada” in Nihon Hikakuhō Kenkyūjo ed, *Toward Comparative Law in the 21st Century*, (Tokyo: Chuo University Press, 1998) at 2.

⁴⁰ *Canada (Attorney General) v. Bedford* 2013 SCC 72, 3 SCR 1101 at para 136.

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