SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Sheehan v. Samuelson*, 2023 NSSM 27

Date: 20230411
Docket: Claim No. SCCH 515264
Registry: Halifax

Between:

Brogan Leigh Sheehan

Claimant

v.

Bradley Samuelson

Defendant

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated July 21, 2023.

Adjudicator:	Darrel Pink
Heard:	February 15, 2023 in Halifax, Nova Scotia
Decision	April 11, 2023
Counsel:	Jessica D. Rose and Matthew Moir, for the Claimant Ian Hutchison, for the Defendant

By the Court:

Decision and Order

[1] Can a sex worker sue to recover unpaid fees from a client? That is the issue in this case. For the reasons outlined below, based on the facts as I find them, I have concluded the answer is ‘yes’. I rule in favour of the Claimant.

Introduction

[2] The Claimant is 23 years old. She is a sex worker and a peer support counselor for those engaged in sex work. She carries on business under the name Brogan Leigh Sheehan, a business registered with the Canada Revenue Agency.

[3] The Defendant was a client of the Claimant.

[4] The Claimant charged $2100 for her services. The Defendant paid the Claimant $300, a portion of the charges and refused to pay the remainder.

Facts

[5] The Claimant charges for her services on an hourly basis, with rates varying depending on where she works and the nature of the activities involved. She lists

the availability of her services on LeoList, an advertising and social media/messaging website used by sex workers and their clients.

[6] On January 26th, 2022, at 1:29 a.m. the Defendant contacted the Claimant though a message on LeoList. The parties were not known to each other. The Claimant indicated she was “available close" and messaged the Defendant she was “free now”, her address and her rates. At his request, she sent him a photograph of herself. He inquired if she would do “outcall”, meaning if she would come to him. Her reply was “I can do outcall. 300$/plus transportation”. This meant she could attend at his residence at an hourly rate of $300. Transportation cots are extra.

[7] The Defendant replied he could provide transportation. The Claimant said a deposit is required and noted “I'm verified on LeoList list if you want the link”. The Defendant replied, “no, it's OK I trust you. I'll also pay your Uber before you leave too”, indicating he would send her home in an Uber. No deposit was paid.

[8] The exchange arranging for the Claimant to attend the Defendant's apartment, lasted until 2:01 a.m. when the Claimant requested an Uber be sent to her home. While the Claimant waited for her ride, there was an exchange of messages between the parties, including information about other clients of her

business. In one message the Defendant said, “I have party and two bottles of wine and have liquor too”.

[9] At 2:23 a.m. the Claimant advised she was in the Uber on her way to the Defendant’s apartment.

[10] While on route to the Defendant's there was a constant banter between the parties. The Defendant gave the Claimant his buzzer number and told her if his front desk staff asked questions, she should say she was “coming to see B. on 12”. He told her if they inquired, ”... you can say where (sic) married with kids for all I care haha”. At 2:34, he messaged his apartment door was open.

[11] The Claimant stayed with the Defendant until about 9:30 that morning. They drank alcohol. They used cocaine provided by the Defendant. They engaged in various forms of oral and vaginal sex. She fell asleep and slept for about two hours.

[12] On awaking the Defendant gave the Claimant his bank card to allow her to attend at an ATM to withdraw funds to pay for her services, which she established as $2100.00 for seven hours of companionship.

[13] When the Claimant attended the designated ATM, the bank card did not allow access to the Defendant's account. She called the Defendant. He sent her a message "Give me a few. I'll see if you locked out my card I'll call in".

[14] He tells the Claimant she has the right PIN and that there is "lots of money in there".

[15] When the Claimant said she did not have money to take a cab home, the Defendant says, "I'll get the card unlocked for you. And then come grab the card after I'm done work" and "As you seen when have lots of money on card just on hold with BMO..."

[16] The bank card did not work. At 9:54, the Claimant asked the Defendant to send her money through PayPal. The Defendant responded to that request, saying "OK let me see what I can do. I'm driving and trying to it!" "trying all my Visa to PayPal just waiting for some code to verify it".

[17] Over the next hour, there were several exchanges in which the Defendant says he was trying to make a payment. The Defendant said, "I will figure it out for you... but I will make it work dear" (10:23 a.m.).

[18] At 10:52 the Claimant writes "…I've been ripped off this way so many times". The Defendant immediately replies, "You won't be this time. I'm responding to you..."

[19] At 11:34 the Claimant tells the Defendant if payment isn't made within 12 hours, she will contact 'law enforcement". The Defendant's reply was "I'm not

worried or concerned. Nor do I take it as a threat dear I have the means and ability to pay you and I will".

[20] The Defendant affirmed several times he would pay the Claimant and at 12:17 p.m. he confirmed he sent her $300.00 via PayPal. He indicated then that a second amount of $300.00 was sent via PayPal. The Claimant did not receive that payment.

[21] The Claimant did not recall some parts of her time with the Defendant. She says she blacked out for awhile. She recalls no discussions with the Defendant about a different total charge for her services than what was proposed by her before she agreed to visit the Defendant.

[22] The Defendant did not testify. The only oral evidence available is from the Claimant. She was cross examined by counsel for the Defendant. Her evidence regarding the details of her time before, during and after being with the Defendant and their contractual arrangement did not change.

Findings

[23] The Claimant, in business as a sex worker, advertised her availability to clients through a website designed to facilitate her work. The Defendant initiated

contact with her in the early hours of January 26, 2022. In response to his inquiry, she quoted him a rate of $300.00 per hour for an outcall to his residence. Her charges encompassed a variety of sexual services and companionship.

[24] By arranging for an Uber to pick up the Claimant and deliver her to his location, the Defendant signified his agreement to pay the Claimant's hourly rate.

[25] The Claimant spent seven hours with the Defendant, until about 9:30 a.m. and expected to be paid $2100. The Defendant gave her his bank card to enable the withdraw of funds from his account to pay for her services.

[26] The card did not work, so the Claimant was not paid immediately as she expected.

[27] In the following hours the Defendant confirmed he intended to pay the Claimant. He sent her $300.00 via PayPal.

[28] Based on these facts, I find the parties contracted for the provision of and payment for companionship and other services. The Defendant, by replying to the Claimant's offer through her posting on LeoList, initiated contact and accepted what the Claimant offered to provide at $300.00 per hour. Acceptance of the Claimant's offer to provide services and her hourly rate was through the Defendant's conduct. When the offer was accepted, the nature and extent of the

companionship was not specified. What was agreed upon was the payment of $300.00 per hour for the time the Claimant spent with the Defendant.

[29] There was an offer, acceptance and consideration in the form of a promise to pay based on a quoted hourly rate. The acceptance was evidenced by the Defendant's behavior before and after the services were provided. The value of the Claimant services was $2100. The amount paid was $300.00, leaving a balance of $1800 owing.

[30] If this was a normal matter involving payment of an account for services, it would conclude here with an order against the Defendant. However, given the nature of this claim and the Defendant's position it includes an illegal contract for sexual services, a further analysis is required.

[31] Both parties advise this appears to be the first case in Canada where enforceability of a contract for sexual services has been considered.

Position of the Defendant

[32] The Defendant argues

(a) Section 286.1 of the *Criminal Code of Canada* makes it an offence to "obtain for consideration…the sexual services of a person"; and

(b) Any contract which sanctions doing an act forbidden by statute will always be regarded as contrary to public policy and void and unenforceable by either party.

In other words, a contract to commit a criminal offence is illegal and unenforceable.

Position of the Claimant

[33] The Claimant argues the law on enforceability of illegal contracts has evolved and there are many exceptions to the old rule that illegal contracts were void *ab initio*. Relying on the Federal Court of Appeal judgment in *Still* v. *Minister of National Revenue* 1997 CanLII 6379, the Claimant asserts "the modern approach (to illegal contracts) is that enforceability of a contract is dependent upon an assessment of the legislative purposes or objects underlying the statutory prohibition."

[34] The legislation adopting the statutory provision cited by the Defendant was a response by Parliament to the Supreme Court of Canada's decision in *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72, which declared the then existing laws about prostitution to be unconstitutional.

[35] In responding to the requirement to establish constitutionally compliant legislation, Parliament enacted Bill C-36, *Protection of Communities and Exploited Persons Act* to allow individual sex workers to conduct business. The selling of sexual services by a single sex worker is not illegal. The Claimant thus argues, individual sex workers carry on business and as businesses and participants in Canada's economy they should have access to the same legal mechanisms to enforce agreements as do other service providers.

[36] In the alternative, the Claimant proposes an outcome, not based on contract, but rather on the equitable principles of restitution or unjust enrichment. Using this approach, the Claimant says the Defendant was enriched and benefiting from seven hours of the Claimants's companionship and services without compensating her. The Claimant consequently has been deprived from earning other income during those hours spent with the Defendant. Specifically, the Claimant relies on the British Columbia Court of Appeal case in *Kim* v *Choi*, 2020, BCCA 98 supporting this position.

Analysis

[37] The legal framework for considering prostitution and sex work stems from the Supreme Court of Canada's decision in *Bedford*. That decision, which struck

down then existing provisions of the Criminal Code, started from the principle that selling sex or financial gain is not illegal (paragraph 1).

[38] In evaluating the constitutional status of the challenged provisions, the Supreme Court acknowledged sex work is an economic activity from which a sex worker derives income. Chief Justice McLaughlin noted the challenged provisions of the *Criminal Code* prevented sex workers from establishing the protections they would require, such as bodyguards and security monitoring, to safely carry on their business (paragraph 64, 66 and 67). This contributed to the risks and exploitation inherent in sex work.

[39] Recognition that sex work involves carrying on a business is significant in the Supreme Court's analysis.

[40] The Government of Canada’s response to *Bedford* was the enactment of Bill C-36, *The Protection of Communities and Exploited Persons Act*. In discussing the purposes of the Act, the Government identified a prime purpose of the legislation was to protect from exploitation those who sell their sexual services. Though the legislation prohibited clients from purchasing sexual services from sex workers, it protected those workers from the risks and dangers inherent in their work.

[41] *Bedford* noted one of the most common forms of sex work is performed through “outcalls”, where the sex worker attends at a client's abode. To do so, the sex worker travels. To minimize risk and acknowledge how the work is carried out, the legislative amendments removed the criminal penalty from those, such as drivers and security personnel, who support sex workers “in a non exploitative way”. This change could minimize the risks inherent in sex workers’ livelihood.

[42] It follows if the work is legal and if the business arrangements supporting the work are legal, then normal commercial law benefits, afforded by civil law, should be available to sex workers. Arrangements between a sex worker and a client are contractual. The worker offers a service. The client agrees to pay for that service. The remuneration is payable by clients under the terms of that contract. It thus follows that to allow a sex worker to pursue a business and not to allow that worker, as a business enterprise, to have access to a civil claim in contract, in the event the client breaches the contract, is logically inconsistent. Not allowing recovery would not be in the public interest and may bring the law into disrepute as it would preclude recovery for breach of contract for services that are perfectly legal for the provider of the services to perform.

[43] An analogous situation would arise if in the course of providing services the client committed an assault or battery in the person of the worker. There would be

access to the civil courts to pursue a remedy for the intentional tort. Or if the sex worker was injured by a fall at a client's premises resulting from negligence of the client, the worker would have a civil claim in tort law. In neither case would the law protect the tortfeasor client from liability to a plaintiff, just because the client was violating the criminal law in purchasing the services he procured? My answer to that hypothetical question is 'no'.

[44] Whether in contract or tort, failure of the courts to provide a remedy for a wrong or a breach of a duty owed by a client would contribute to the very exploitation the legislation was designed to prevent.

[45] Sex workers must collect and remit GST/HST on the income they earn above the statutory threshold. They must report income and pay income taxes. The client testified, as a registered business with the Canada Revenue Agency, she reports and pays income tax on her business earnings. Breach of the Income Tax or Excise Tax provisions could result in the full range of sanctions, including civil penalties.

[46] If civil aspects of federal tax law are applied to sex workers regarding their business earnings, as they are for all businesses, then the full range of legal principles applicable to a business, including the law of contract, apply to sex

workers, along with the remedies for a breach of commercial or contractual obligations.

[47] Because the Defendant, the Claimant's client, is potentially committing a criminal offence when he "obtains for consideration…sexual services" (Criminal Code, section 286.1)1) he argues the contract with the Claimant is an illegal contract and not enforceable. His argument does not address the broad range of obligations placed on the Claimant's business by other federal legislation but is limited to this proposition - if the contract for him involves illegality it must be unenforceable.

[48] *Still* v. *Minister of National Revenue*, 1997CanLII 6779 (FCA) reviews the evolution of the law about contracts that might be considered illegal. The Court notes historically the law evolved from an approach where flexibility was applied to illegal contracts in the 18th century to a more rigid or doctrinal approach in the 19th and early 20th centuries.

[49] In *Still*, Robertson J.A., writing for a unanimous court, rejected the doctrinal and rigid approach when he stated at paragraph 21:

> Generally, it is not difficult to make a finding that a contract is either expressly or impliedly prohibited by statute. Nonetheless, there are instances where it is improper to imply such a prohibition. In 1957,

> Lord Devlin cautioned that: "the courts should be slow to imply the statutory prohibition of contracts and should do so only when the implication is quite clear." This advice was proffered in *St. John Shipping Corp*. v. *Joseph Rank Ltd* [1956]3 ALL E.R. 683 (Q.B), a high point in English law. For the first time a clear distinction is drawn between contracts illegal in their formation and those illegal as performed.

[50] At paragraph 24, Robertson, J.A. notes when parties may be relieved of the consequences of illegality and when it is appropriate. He lists three circumstances where that might occur, including "when the client has an independent right to recover (for example, a situation where recovery in Tort might be possible despite an illegal contract)". The Court then looks at the "classical model of illegality which states that illegal contracts are void *ab initio*, and the "modern approach" to illegal contracts. Following a review of the relevant cases, the Federal Court of Appeal states "**the classical model has long since lost its persuasive force and is no longer being applied consistently.**" (Para 42). There is jurisdiction to refuse relief, to "**those in breach of a statutory prohibition, the grounds of refusal being on a principled and not arbitrary basis".** (Emphasis added)

[51] In *Still*, the Court was addressing an employment contract, ostensibly illegal because the employee did not have a work permit. The Court reflects on the permutations that would apply in various provinces to an analysis of legality when

provincial statutes, such as the Employment Standards legislation, and common law might be considered. In paragraph 46, the Court concludes:

> As the doctrine of illegality is not a creature of statute but of judicial creation, **it is incumbent on the present judiciary to ensure that its premises accord with contemporary values**. One need only look at the Supreme Court's now infamous decision in *Christie* v. *York Corp.* (1939), [1940] SCR 139 to appreciate the significance of this observation. In that case, the classical principles of contract supported the right of a merchant to refuse to accept an offer from a person of colour. Even without human rights legislation we know that the case would not be decided the same today". (Emphasis added)

[52] Applying a principled approach to recovery in tort, as it respects the implications of illegal conduct has been considered by the Supreme Court of Canada in *Hall v. Herbert* [1993] SCR 159. At page 169, Justice McLaughlin noted the duty of the courts to preserve the integrity of the legal system so that only in limited circumstances should recovery be barred in the face of illegality.

[53] In *Still*, in paragraph 48, the Court concludes:

> …the doctrine of statutory illegality in the federal context is better served by the following principle (not rule): **where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party when, in all the circumstances of the case, including regarding the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claim, to do so**. (Emphasis added)

[54] The approach of this analysis of illegal contracts in *Still* has been widely adopted[1]. It has been endorsed by the Supreme Court of Canada in *Chandos Construction Ltd*. V. *Deloitte Restructuring Inc.*, 2020 SCC 25.

[55] When the modern approach to considering enforceability of illegal contracts is applied to the facts, I conclude that the public policy considerations articulated in *Bedford* and by the Government of Canada in its explanation to the legislation amending the Criminal Code requires the contract between the Claimant and the Defendant to be enforceable.

[56] Rather than refusing to grant the Claimant relief, I conclude because:

1. Sex work is not illegal, and the amendments protected those who sell sexual services from exploitation, which includes commercial exploitation by those refusing to pay for services willingly bargained for;

2. Other legislation applies to sex workers, such as the Excise and Income Tax Acts involving GST/HST and the payment of income tax;

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[1] A list of 96 cases dealing with *Still* v *MNR* can be found at https://www.canlii.org/en/ca/fca/doc/1997/1997canlii6379/1997canlii6379.html?autocompleteStr=Still&autocompletePos=2#citing

3. Contact with the Claimant was initiated by the Defendant who voluntarily procured her services and agreed to pay for them. He reiterated after those services were provided, his intention to pay; and

4. Public policy, requires the courts not to increase or contribute to exploitation of sex work, and thus favours a regime that gives aggrieved sex workers access to the civil courts when they have a civil claim

the contract between the parties, even if it is illegal for the Defendant, should be enforceable

[57] On this basis, the Claimant is entitled to an order for $1800 plus interest of 4% for 14 months from January 2022 to this date or $84.

Unjust Enrichment

[58] If I am wrong in my analysis of the enforceability of the contract, I would find for the Claimant on the alternate grounds of restitution or unjust enrichment.

[59] This Court has considered recovery under the equitable principles in many cases. The most often referred to is the decision of Adjudicator Parker in *Whacky's Carpet and Floor Centre* v. *Maritime Project Management Inc*, 2006 NSSM 4.

[60] The Nova Scotia Court of Appeal recently considered how unjust enrichment is to be approached in *Canada (Attorney General)* v. *Geophysical Services Incorporated*, 2022 NSCA 41. In para 91, the Court stated:

> In *Kerr*, Cromwell J., for the Court, noted the wide variety of situations where the law of unjust enrichment has been used to provide redress for claims of inequitable distribution on the breakdown of domestic relationships. He commented on the law's recognition of categories where retention of a conferred benefit had been considered unjust, but the Canadian law of unjust enrichment was not limited to those categories. He explained:
>
> > [31] At the heart of the doctrine of unjust enrichment lies the notion of restoring a benefit which justice does not permit one to retain: *Peel (Regional Municipality) v. Canada*, 1992 CanLII 21 (SCC), [1992] 3 S.C.R. 762, at p. 788. **For recovery, something must have been given by the plaintiff and received and retained by the Defendant without juristic reason**. A series of categories developed in which retention of a conferred benefit was considered unjust. These included, for example: benefits conferred under mistakes of fact or law; under compulsion; out of necessity; as a result of ineffective transactions; or at the Defendant's request: see *Peel*, at p. 789; see, generally, G. H. L. Fridman, *Restitution* (2nd ed. 1992), c. 3-5, 7, 8 and 10; and Lord Goff of Chieveley and G. Jones, *The Law of Restitution* (7th ed. 2007), c. 4-11, 17 and 19-26
> >
> > [32] Canadian law, however, does not limit unjust enrichment claims to these categories. **It permits recovery whenever the plaintiff can establish three elements: an enrichment of or benefit to the Defendant, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment**: *Pettkus*; *Peel*, at p. 784. By retaining the existing categories, while recognizing other claims that fall within the principles underlying unjust enrichment, the law is able "to develop in a flexible way as required to meet changing perceptions of justice": *Peel*, at p. 788. (emphasis in original).

[61] Applying this approach to the facts as I have found them, the Defendant received a benefit from the Claimant. There is no juristic reason (one based on or justified by a legal principle) that would cause a court to conclude he should not have to compensate her for that benefit, when she has been deprived of the opportunity to generate income from other clients while she was with him..

[62] The Claimant relies on the recent decision of the British Columbia Court of Appeal in *Kim* v. *Choi*, 2020 BCCA 98. That case analyzes the application of unjust enrichment in the context of an illegal contract. The Court found a claim for restitution based on unjust enrichment, that derives from an illegal contract, will not be barred by illegality unless the restitution will defeat or frustrate policy underlying the illegality.

[63] The British Columbia Court of Appeal analyzes the cases referred to earlier in these reasons, including *Still* v. *MNR* and *Hall* v. Herbert. The decision of the United Kingdom Supreme Court in Patil v. *Merza* [2016] UKSC 42, is discussed as are recent decisions in Australia.

[64] In *Kim*, the Court focuses on the benefit of having a consistent approach to considering the civil consequences that might arise from illegal behavior, and

whether the claim is advanced in contract, tort, or restitution. In paragraph 47 the court states:

> Where a party has paid money to enter into an illegal contract which has failed, the party might seek to enforce the contract and realize the benefits bargained for or might seek to unwind the contract to the *status quo ante*, thereby placing the parties in the position they would have been in had the contract never been entered into. The former claim is analogous to the "profit from an illegal act" that McLaughlin J. explained would introduce inconsistency into the law, thereby undermining the integrity of the legal system. On the other hand, restitution for unjust enrichment, like compensation for personal injuries, merely places the plaintiff in the position he or she would have been in had the illegal act not occurred. A restitutionary order based on unjust enrichment does not permit a plaintiff to profit from an unlawful act, but rather to unwind the transaction that was tainted by illegality. This analysis would suggest that illegality will seldom bar a claim in unjust enrichment.

[65] As in the application of the modern approach to the analysis of illegal contracts, the public policy considerations must be considered. In *Kim*, the claim was allowed to restore the plaintiff to the position she had been in, but for the contract, though she was not awarded any profit she might have realized from the contact conduct based on the illegal contract.

[66] Here, applying this approach, the Claimant could not provide her services to other clients when she was engaged with the Defendant. The Defendant agreed to the hourly rate she charged and benefited from the time spent and the services she provided.

[67] The public policy factors outlined above in the analysis of the application of contract law equally apply here. There is no policy reason to prevent the Claimant from receiving restitution for the value of the services she provided.

[68] Applying the approach used in *Kim*, the Claimant should receive restitution for the benefit provided to the Defendant for $1800 plus interest.

[69] It is ordered, the Defendant paid to the Claimant:

- Damages - $1800
- interest - $84
- costs - $99.35.

[70] If an Order is required, it should be prepared by counsel for the Claimant, with the form consented to by counsel for the Defendant, and sent to the Court for signature.

Dated at Halifax, Nova Scotia, April 11, 2023

Darrel Pink, Small Claims Court Adjudicator

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ERRATUM

Adjudicator:	Darrel Pink
Heard:	February 15, 2023 in Halifax, Nova Scotia
Decision:	April 11, 2023
Erratum Date:	July 21, 2023
Counsel:	Jessica D. Rose and Matthew Moir, for the Claimant Ian Hutchison, for the Defendant
Erratum Details	The Claimant's name was misspelled on the title page and in paragraph 2