IN THE SUPREME COURT OF CANADA

(On Appeal from the Appeal Division
of the Supreme Court of Nova Scotia)

BETWEEN:

HER MAJESTY THE QUEEN,
as represented by the
Attorney General of Nova Scotia,

APPELLANT
(Respondent)

- and -

DORMAN THOMAS SKINNER,

RESPONDENT
(Appellant)

- and -

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THE ATTORNEY GENERAL FOR ONTARIO
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I N D E X

PART I

STATEMENT OF FACTS

1. On the evening of Thursday, January 2, 1986, Constable Aileen Richardson, a member of the Halifax Police Department, was working in an undercover capacity in the area of Cornwallis Park in the south end of Halifax, posing as a prostitute. The park lies in an area of the city near convention hotels and the waterfront that is frequented by prostitutes. Richardson strolled back and forth on the sidewalk adjacent to the park. Two police officers occupied an unmarked cruiser parked nearby. Richardson was fitted with a bodypack voice recording device, and any conversations in which she engaged could be overheard by the officers in the cruiser. At 10:25 p.m., the Respondent walked across Hollis Street from the Nova Scotian Hotel and approached Richardson. They exchanged greetings. The Respondent asked Richardson what she charged for an act of fellatio. The officers in the cruiser arrived and the Respondent was placed under arrest.

2. The Respondent was charged in an Information sworn January 10, 1986 (Case on Appeal, p.1) that he:

> At or near Halifax, in the County of Halifax, Nova Scotia, on or about the 2nd day of January, 1986, did unlawfully in a public place communicate with Aileen Richardson for the purpose of obtaining the sexual services of a prostitute, contrary to Section 195.1(1)(c) of the Criminal Code of Canada.

Facts

The Respondent pleaded not guilty to the charge and he was tried by His Honour Judge G. Hughes Randall in Provincial Court at Halifax on June 5, 1986. Constable Richardson and another police officer gave evidence for the Crown. The Respondent testified on his own behalf. Counsel for the Respondent challenged the constitutional validity of s.195.1(1)(c) of the Criminal Code, arguing the provision infringed the freedoms of expression and association declared in s.2 of the Canadian Charter of Rights and Freedoms. Judge Randall reserved decision.

3. On June 25, 1986, Judge Randall dismissed the constitutional challenge to s.195.1(1)(c) of the Criminal Code, convicted the Respondent, and sentenced him to a fine of $100.00 and, in default, to imprisonment for ten days (Case on Appeal, pp.53-59).

4. By Notice of Summary Appeal dated July 22, 1986 (Case on Appeal, pp.3-4), the Respondent appealed against conviction to the Appeal Division of the Supreme Court under s.762(1) of the Criminal Code. The appeal was heard on December 11, 1986, and judgment was reserved. By Order dated May 20, 1987 (Case on Appeal, p.5) and Reasons for Judgment delivered the same date (Case on Appeal, pp.62-98),[1] the Appeal Division, by a majority, allowed the appeal, set aside the conviction, and dismissed the charge. The Court ruled that s.195.1(1)(c) of the Criminal Code is inconsistent with the freedoms of expression and association in s.2 of the Charter, and that the provision was not demonstrated to be a

1 Reported: Regina v. Skinner (1987), 79 N.S.R. (2d) 8, 35 C.C.C. (3d) 203, 58 C.R. (3d) 137.

reasonable limit under s.1 of the Charter. Pursuant to s.52(1) of the Constitution Act, 1982, the Court declared s.195.1(1)(c) of the Code to be of no force or effect.

5. By Notice of Application for Leave to Appeal dated May 26, 1987 (Case on Appeal, pp.6-8), the Attorney General of Nova Scotia applied for leave to appeal to this Honourable Court under s.41 of the Supreme Court Act. By Order dated October 2, 1987 (Case on Appeal, pp.9-10), this Court granted leave to appeal.[2] Notice of Appeal dated October 5, 1987 (Case on Appeal, pp.11-13) was served on the Respondent and filed in this Court. The Attorneys General of Canada, British Columbia, Alberta, Saskatchewan, and Ontario have been granted leave to intervene in this case.

2 [1987] 2 S.C.R. ix.

PART II

POINTS IN ISSUE

6. By Order of the Chief Justice of Canada dated November 2, 1987 (Case on Appeal, pp.14-15), the following constitutional questions were stated for this appeal:

1. Does s.195.1(1)(c) of the Criminal Code, R.S.C. 1970, c.C-34, as amended, infringe the freedom of expression guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms?

2. Does s.195.1(1)(c) of the Criminal Code, R.S.C. 1970, c.C-34, as amended, infringe the freedom of association guaranteed by s.2(d) of the Canadian Charter of Rights and Freedoms?

3. If s.195.1(1)(c) of the Criminal Code infringes rights guaranteed by ss.2(b) or 2(d) of the Canadian Charter of Rights and Freedoms, is s.195.1(1)(c) justified by s.1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

PART III

BRIEF OF ARGUMENT

FIRST AND SECOND CONSTITUTIONAL QUESTIONS

1. Does s.195.1(1)(c) of the Criminal Code, R.S.C. 1970, c.C-34, as amended, infringe the freedom of expression guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms?

2. Does s.195.1(1)(c) of the Criminal Code, R.S.C. 1970, c.C-34, as amended, infringe the freedom of association guaranteed by s.2(d) of the Canadian Charter of Rights and Freedoms?

CHARTER INTERPRETATION

7. A purposive approach must be taken in the interpretation of the provisions of the Charter. The meaning of a particular freedom or right guaranteed by the Charter is ascertained by an analysis of the purpose of the guarantee. A particular freedom or right is interpreted in light of the interests it was meant to protect.

> Regina v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, per Dickson, J. (as he then was), at p.344

8. Essential to the interpretation of a Charter right or freedom are the character and larger objects of the document, the language used to articulate the specific right or freedom, the historical origins of the concepts enshrined, and

the meaning and purpose of the other rights or freedoms with which the provision in question is associated within the Charter. A legalistic interpretation should be avoided in order to fulfil the purpose of the guarantee and secure for individuals the full benefit of Charter protection.

> At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linquistic, philosophic and historical contexts.
>
> [Big M Drug Mart, supra, per Dickson, J., at p.344.]

VALIDITY OF LEGISLATION

9. Both the purpose and the effect of legislation are relevant in determining its constitutional validity. Legislation can be struck down under s.52(1) of the Constitution Act, 1982 if it is found to embody either an unconstitutional purpose or an unconstitutional effect. Purpose and effect are linked. In determining the objective of legislation and, therefore, its validity, both the intended and actual effects are examined. Vital to the protection of rights and freedoms is the assessment of the object of legislation. The aims and objectives of the legislature are scrutinized to ensure their compatibility with the freedoms and rights guaranteed by the Charter.

Big M Drug Mart, supra, per Dickson, J., at pp.331-32.

SECTION 2 OF THE CHARTER

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

10. The concept of "freedom" was broadly defined by Chief Justice Dickson in the Big M Drug Mart case thus, at pp.336-37:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> [Emphasis added.]

11. The Appellant respectfully submits the freedoms of expression and association declared in s.2 and guaranteed by s.1 of the Charter are not absolute values. Their exercise by the individual is limited by the rights and freedoms of others. This is not a novel proposition, but one founded on authority and common sense.

Big M Drug Mart, supra, per Dickson, J., at p.337

Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, per Wilson, J., at pp.488-89

Regina v. Zundel (1987), 31 C.C.C. (3d) 97 (Ont.C.A.), at pp. 114-19; leave to appeal refused, [1987] 1 S.C.R. xii

A.G. Man. v. Groupe Quebecor Inc. (1987), 37 C.C.C. (3d) 421 (Man.C.A.), per Twaddle, J.A., at p.435

Regina v. Reid, [1988] 3 W.W.R. 162 (Alta.C.A.), at p.167

Although the freedom of speech and expression has long been recognized as an essential element of Canadian democratic tradition, it has never been regarded as an unqualified freedom.

O.P.S.E.U. v. A.G.Ont., [1987] 2 S.C.R. 2, per Dickson, C.J.C., at pp.24-25

Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, at pp.462-63, 467-68

12. The Appellant submits the freedoms enumerated in s.2 are subject to those limitations referred to by the Chief Justice in the Big M Drug Mart case. It is, of course, difficult to envisage external control of such freedoms as conscience, thought and opinion, except when the individual gives expression to them. However, were it determined all freedoms in s.2 are absolute values and subject only to limitation under s.1, then all offences created by penal statutes enacted by Parliament in the exercise of its criminal law power under the Constitution Act, 1867 would be prima facie unconstitutional and could only be saved by recourse to s.1 of the Charter. This, in the Appellant's view, is an absurd proposition.

13. Section 1 of the Canadian Bill of Rights declares the right of the individual to the enjoyment of property. The Charter, on the other hand, does not specifically enshrine any freedom or right to property.

14. The offering of sexual favours for money by a prostitute and the bargaining between a prostitute and a prospective customer are essentially commercial transactions. With the possible exception of s.6(2)(b) and s.6(4), the Charter does not declare a specific right or freedom to commercial or economic activity.

> Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, per McIntyre, J., at pp.405, 412

Indeed, s.6(2)(b) has been held not to establish a free standing right to work.

> Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p.380

15. The issue, therefore, is whether the conduct proscribed by s.195.1(1)(c) of the Criminal Code falls within the scope of the freedom of expression or the freedom of association, or both, declared in s.2 of the Charter.

SCOPE OF FREEDOM OF EXPRESSION

16. As noted, supra, freedom of speech and expression has long been recognized as an essential feature of parliamentary democracy in Canada.

> Reference re Alberta Statutes, [1938] S.C.R. 100, per Duff, C.J.C., at pp.132-34, per Cannon, J., at pp.145-46

Boucher v. The King, [1951] S.C.R. 265, per Rand, J., at p.288

Saumur v. City of Quebec, [1953] 2 S.C.R. 299, per Rand, J., at p.330

Switzman v. Elbling, [1957] S.C.R. 285, per Rand, J. , at p.306, per Abbott, J., at pp.326, 328.

Indeed, it can be said the decisions of this Court in the Alberta Statutes, Boucher, and Switzman cases gave constitutional status to the freedom of speech and expression.

R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre, J., at p.584

17. According to Hogg, Constitutional Law of Canada (2nd. ed.), at p.713, the most compelling rationale for the freedom of expression is its vital role in democratic government.

> Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy and have sought to protect it with the limited tools that were at their disposal before the adoption of the Charter of Rights. It is obvious that political speech is at the core of s.2(b) of the Charter, and could be curtailed under s.1 only in service of the most compelling governmental interest.

Hogg suggests that a second and broader basis for constitutional protection of the freedom of expression is its role as an instrument of truth. After referring to the celebrated dissent of Holmes, J., in Abrams v. United States, 250 U.S. 616 (1919), at p.630, Hogg postulates, at pp.713-14:

> This "marketplace of ideas" rationale for freedom of expression would include political speech, of course, but would also extend to the ideas of philosophy, history, the social sciences, the natural sciences, medicine and all the other branches of human knowledge. It is obvious that the expression of all these ideas is also protected by s.2(b) of the Charter.

Hogg goes one step further and proposes as a rationale for the protection of freedom of expression its role as an instrument of personal fulfillment (p.714).

18. What types of expression fall within the ambit of s.2 of the Charter? As noted by Hogg, supra, "political speech" lies at the core of the constitutionally protected freedom. The Appellant submits it follows that "political speech" must be accorded the greatest measure of protection by constitutional guarantee against legislative intrusion.

19. Based on pre-Charter jurisprudence, it is logical to assume that s.2(b) now extends constitutional protection to discussion and diffusion of ideas on subjects other than politics. In Dolphin Delivery, supra, McIntyre, J. stated at p.583:

> Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

20. According to Finkelstein, Laskin's Canadian Constitutional Law (5th. ed.), v.II, one of the "fundamental premises" of western democracy is that "the free exchange of ideas is essential to the functioning of democracy" (p.1030).

21. In the Zundel case, supra, the Court was of the view (p.123) wilfully spreading falsehoods is a form of expression devoid of social or moral value and,

therefore, not deserving of constitutional protection under s.2(b) of the Charter.

22. It has been determined that the expression of honestly held beliefs on matter of public interest relating to public institutions falls within the freedom of expression. Such expression will be protected by s.2 of the Charter, as long as the comments are not libellous or obscene.

Regina v. Kopyto (1987), 39 C.C.C. (3d) 1 (Ont. C.A.)

23. The Appellant submits the historical development of the freedom of speech and expression in Canada does not support the view that s.2(b) extends constitutional protection to pesonal fulfillment. Any consideration of "personal fulfillment" is probably more appropriate in the context of s.7 of the Charter.

24. Furthermore, the freedom of association is grouped in s.2 of the Charter with other freedoms which were described by the late Chief Justice Laskin as political civil liberties associated with the operation of parliamentary institutions in Canada.

Laskin, B., "An Inquiry into the Diefenbaker Bill of Rights", 37 Can. Bar Rev. 77 (1959), at p.80

See also, Big M Drug Mart, supra, per Dickson, J., at p.246

COMMERCIAL EXPRESSION

25. Does s.2(b) extend protection to commercial or economic speech (advertising)? To date, the weight of authority appears to fall on the side favouring the inclusion of commercial expression within the scope of freedom of expression.

Irwin Toy Ltd. v. A.G.Que. (1986), 32 D.L.R. (4th) 641 (Que.C.A.); leave to appeal granted, [1986] 2 S.C.R. viii.

Re Grier and Alta. Optometric Assn. (1987), 42 D.L.R. (4th) 327 (Alta.C.A.).

Rocket and Price v. Royal College of Dental Surgeons (1988), 27 O.A.C. 52 (Ont.C.A.).

However, judicial opinion has not been unanimous.

Re Klein and Dvorak and L.S.U.C. (1985), 16 D.L.R. (4th) 489 (Ont.Div.Ct.).

Griffin v. College of Dental Surgeons, [1988] 3 W.W.R. 60 (B.C.S.C.).

Regina v. Pinehouse Plaza Pharmacy Ltd., [1988] 3 W.W.R. 705 (Sask.Q.B.).

26. The rationale advanced for the inclusion of commercial speech in freedom of expression is that the dissemination of product information is a valued activity in democratic society.

27. The Appellant submits commercial expression does not fall within s.2(b) of the Charter. It will be recalled that, unlike the Bill of Rights, the Charter does not contain an express reference to a right of enjoyment of property. Similarly, the Charter does not expressly guarantee a freedom or right to

commerce. It is submitted the the framers of the Charter for whatever reason, chose to exclude commercial activity from constitutional protection.

28. The Appellant submits that haste in finding, for every conceivable activity in society, a corresponding right or freedom under the Charter should be avoided. The Appellant refers to the counsel of McIntyre, J., in Re Public Service Employee Relations Act, supra, at p.394:

> It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.

And further, at p.405, Mr. Justice McIntyre states:

> For obvious reason, the Charter does not give constitutional protection to all activities performed by individuals. There is, for instance, no Charter protection for the ownership of property, for general commercial activity, or for a host of other lawful activities.
>
> [Emphasis added.]

29. Proponents of the view commercial expression falls within s.2(b) of the Charter point to the Dolphin Delivery case as supporting authority. The Appellant submits that a close examination of this case, including the factual background, does not support this view.

30. One of the issues in Dolphin Delivery was whether secondary picketing fell within freedom of expression. The unanimous judgment of this Court on this

point was delivered by Mr. Justice McIntyre who, in finding picketing involved the exercise of the freedom of expression, held at p.588:

> There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. Action of the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct.

31. The Appellant has already emphasized the point made by Mr. Justice McIntyre in Re Public Service Employee Relations Act (at p.405) that there is no Charter protection for general commercial activity.

32. In one commentary on Dolphin Delivery, the author submits the judgment is not conclusive authority for the proposition that commercial speech falls within freedom of expression. Picketing on the part of striking workers, in communicating information concerning their dispute to the public, may be taken as representing "the most overtly political activity" in which the workers will probably take part in their lifetimes and, as a result, "labour picketing may be viewed as a form of political speech".

> Etherington, B., "Notes of Cases", 66 Can. Bar Rev. 818 (1987), at pp.825-26

In addition, the Appellant submits the following passage from the judgment of McIntyre, J., in the Public Service Employee Relations Act case, supra, at p.407, may be taken as explaining the judgment in Dolphin Delivery.

> Group Advocacy, which is at the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression directed at educating or informing the public would be protected from government interference (see the judgment of this Court in Dolphin Delivery, supra).

Therefore, the Appellant respectfully submits the judgment of this Court in Dolphin Delivery is not authority for the proposition that commercial expression falls within s.2(b) Charter protection.

REGULATION OF COMMERCIAL EXPRESSION

33. The following submissions are made in the event this Court is persuaded freedom of expression under s.2(b) includes commercial speech.

34. In Canada, commercial expression is subject to all manner of regulation by federal, provincial and municipal governments. In Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713, Dickson, C.J.C., in dealing with a business holidays statute in the context of s.7 of the Charter, stated at p.786:

> Whatever the precise contours of "liberty" in s.7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.

And at p.759, in considering the statute in relation to the freedom of religion in s.2(a), Chief Justice Dickson held:

> This does not mean, however, that every burden on religious practices is offensive to the constitutional guarantee of freedom of religion.

35. In Regina v. Videoflicks Ltd. (1984), 15 C.C.C. (3d) 353 (Ont.C.A.), the case which formed the basis for this Court's ruling in Edwards Books, the Court held that freedom of expression extends to all forms of expression, including commercial speech. However, in holding that a provincial statute requiring businesses to close on Sundays and holidays did not offend s.2(b), the Court held that, generally speaking, mere regulation as to time and place could not be considered an infringement of the freedom of expression (pp.388-89).

36. In "Commercial Expression and The Charter", 37 U.T.L.J. 229 (1987), Sharpe concludes his analysis of s.2(b) by submitting that commercial expression should not be excluded from the protection of freedom of expression, and that the freedom extends to both advertiser and listener. Although qualifying for constitutional protection, Sharpe contends, commercial expression differs significantly from those forms of expression closer to the core of the constitutional guarantee. Consequently, commercial expression should attract a significantly lower level of constitutional protection than that appropriate for other forms of expression (p.259).

SCOPE OF FREEDOM OF ASSOCIATION

37. Freedom of association has been described as the most fundamental of the fundamental freedoms in the Charter.

> ...[F]reedom of association is of the very essence of democracy itself, wherein political parties, trade unions, professional associations, religious organizations and the like may not only "lead their own lives and exercise within

> the area of their competence an authority so effective as to justify labeling it...sovereign", but "no legislator can attack it without imparing the very foundations of society".
>
> [Tarnopolsky and Beaudoin (eds.), Canadian Charter of Rights and Freedoms, at pp.154-55.]

38. The Appellant respectfully submits the freedom of association extends constitutional protection to such organizations as political parties, trade unions, professional and proprietory associations, and religious and charitable groups. Indeed, in the context of the case at bar, prostitutes are free to form an association to advocate repeal of the Code provisions proscribing public prostitution and to lobby government for this purpose.

39. The scope of s.2(d) was considered by this Court in the Public Service Employee Relations Act case, supra. By a majority, this Court held that s.2(d) protects an individual's freedom to establish, belong to, maintain and participate in the lawful activities of an association. On the other hand, s.2(d) does not extend constitutional protection to specific activities of the group which may be essential to its meaningful existence. Specifically, this Court held that the right of a trade union to both bargain collectively and to strike did not fall within the constitutional guarantee of the freedom of association.

40. In his concurring judgment in this case, Mr. Justice McIntyre held it was important to consider the crucial role played by freedom of association in the functioning of a democracy. The purpose of the freedom would be realized by

an interpretation which provided for the protection of the collective exercise of the rights enumerated in the Charter. At pp.409, McIntyre, J. concluded:

> It follows from this discussion that I interpret freedom of association in s.2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.

THE LEGISLATION

41. Section 195.1 of the Code is the concluding section of Part V (Disorderly Houses, Gaming and Betting) and provides:

> 195.1 (1) Every person who in a public place or in any place open to public view
>
> (a) stops or attempts to stop any motor vehicle,
>
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
>
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.
>
> (2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.

[Emphasis added.]

42. The legislative and judicial history of Parliament's efforts at suppressing street solicitation is discussed in argument on the third constitutional question.

43. The purpose of the section was declared by the then Minister of Justice to the House of Commons on September 9, 1985.

> The purpose of this Bill is to help the citizens of this country who live in certain of our major urban areas and the police forces of the country to regain the streets because they have lost control of the streets and neighbourhoods in certain urban areas of this country...[The legislation] on purports to deal with one aspect of the problems that prostitution can create, which is the nuisance to others created by street soliciting not only by the prostitutes but by the customer of the prostitute.
>
> [Quoted in Regina v. McLean; Regina v. Tremayne (1986 , 28 C.C.C. (3d) 176 (B.C.S.C.), at p.180.]

44. The section proscribes "street prostitution". Money passes through hands and the commodity is sex. The Appellant respectfully submits that, based on the foregoing analysis of fundamental freedoms in general and the scope of freedom of expression in particular, this conduct does not fall within the freedom of expression guaranteed by the Charter. Freedom of expression is not invoked merely because words are spoken and gestures made. Commercial speech simply does not fall within the purview of the constitutional guarantee to freedom of expression.

45. Should it be determined, however, that commercial expression lies within the scope of s.2(b), the Appellant respectfully submits the regulation for control of public prostitution as to place by means of s.195.1(1)(c) of the Code is not offensive to the Charter guarantee. Such regulation serves to protect the general public from the deleterious effects of public prostitution. Both the prostitute and the prospective customer, the vendor and the purchaser of sex, cannot carry on their respective pursuits in public. However, prostitution per se is not a criminal offence and the section does not make criminal that conduct in relation to prostitution which is carried on in private. The section regulates the place where sex can be bartered.

46. The Appellant respectfully submits the judgment of this Court in the Public Service Employee Relations Act case precludes any notion that the one-on-one bargaining between a prostitute and a customer in public falls within the grand concept of freedom of association under the Charter. The scope of the freedom rests on a much higher plane.

47. In the Appellant's view, a prostitute standing on a street corner asking passersby whether they wish to engage in sexual activity for money is surely not an exercise in the prostitute's freedom of association within the scope of s.2(b). Similarly, a seeker of sex for sale is not exercising his freedom of association when importuning passersby in the hope one will be a prostitute. Finally, the bargaining in public between a prostitute and a

customer does not become an aspect of the freedom of association merely because the two individuals meet on a city street.

48. In the Court below, the majority found s.195.1(1)(c) of the Code offended s.2(d) by inhibiting the association of a prostitute and a customer, and that s.2(d) extended constitutional protection to the "sexual association" between consenting adults (Case on Appeal, at p.73). In his annotation to the judgment of the Court below (58 C.R. (3d) 137, at pp.138-40), Trotter points out the error in this reasoning. He submits the Court "misses the point". At p.139, Trotter states:

> The issue is not whether it is permissible for one person to pay another for sex, but whether one is guaranteed the right to impede the flow of pedestrian and vehicular traffic for the purposes of entering into that form of association.

Indeed, Trotter found, the judgment of this Court in the Public Service Employee Relations Act case is not kind to the view expressed by the Court below on the scope of s.2(d) of the Charter. In the Appellant's respectful view, s.195.1(1)(c) of the Code is not inimical to the freedom of association. It is the Appellant's position that the section has nothing to do with s.2(d) of the Charter.

THIRD CONSTITUTIONAL QUESTION

3. If s.195.1(1)(c) of the Criminal Code infringes rights guaranteed by ss.2(b) or 2(d) of the Canadian Charter of Rights and Freedoms, is s.195.1(1)(c) justified by s.1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

SECTION 1 OF THE CHARTER

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

INTRODUCTION

49. This argument is advanced in anticipation of the possibility that this Honourable Court will confirm the finding of the Court below that s.195.1(1)(c) violates s.2(b), "freedom of expression" and 2(d), "freedom of association" under the Charter. It is the position of the Appellant that should this Honourable Court arrive at the same conclusion, then it is s.1 of the Charter that should be applied and not s.52 of the Constitution Act, 1982.

SUMMARY OF SECTION 1 ANALYSIS

SCOPE OF SECTION 1

Guarantees rights and freedoms

Limits rights and freedoms

ONUS

On the party seeking its application.

CRITERIA OF JUSTIFICATION FOR LIMITS

1. Prescribed by Law
2. Demonstrably Justified
3. Reasonable Limit
   - (a) Valid objective
   - (b) Means
     - (i) Rational Connection, Clearly Designed and Not Arbitrary
     - (ii) Minimum Impairment
     - (iii) Proportionality - Objectives and Effects

SCOPE OF SECTION 1

50. Section 1 of the Charter has two parts, the first confirms the "guarantee" of the rights and freedoms set out therein, and the second provides

a limit to the application of the Charter.

ONUS - PREPONDERANCE OF PROBABILITY

51. Before a limitation will be placed on any right or freedom guaranteed by the Charter, the onus falls on the party requesting the limit to satisfy the Court by a "preponderance of probability" that the requirements of s.1 have been met (Regina v. Oakes, [1986] 1 S.C.R. 103, at pp.136-37; Edwards Books and Art Ltd., supra, at p.768 of [1986] 2 S.C.R.).

CRITERIA OF JUSTIFICATION FOR LIMITS

52. Section 1 sets out three basic requirements and they are as follows:

(1) the limit is one prescribed by law;

(2) the limit can be "demonstrably justified in a free and democratic society"; and

(3) the limit is reasonable.

1. Prescribed by Law

53. Section 195.1(1)(c) is part of the Criminal Code, a federal statute, and is thus a limit "prescribed by law". This statutory provision need not recite the protected right or freedom which it limits.

2. Demonstrably Justified

54. The common meaning for the word "demonstrable" is "that which can be logically proved", and these words place an onus for the justification on the party seeking to limit the right (Oakes, supra, at pp.136-37).

55. The backdrop for the words "demonstrably justified" and for all of s.1 are the very important words "in a free and democratic society". These latter words provide a standard and context for both the rights and freedoms guaranteed as well as the limitation of these rights and freedoms.

56. This context was aptly described by Chief Justice Dickson in Oakes at p.136 as follows:

> A second contextual element of interpretation of s.1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

3. Reasonable Limit

57. The question thus becomes: Does s.195.1(1)(c) prescribe a "reasonable limit" on the fundamental freedoms of expression and association?

58. The two central criteria for proof of a reasonable limit have been set out in Oakes and Edwards Books, and are as follows:

(a) The objective of the law "must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'" (Oakes, p.138); and "must bear on a 'pressing and substantial concern'" (Edwards Books, p.768) and,

(b) ". . . the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test . . ." (Oakes, p.139); ". . . the means chosen to attain those objectives must be proportionate or appropriate to the ends . . ." (Edwards Books, p.768).

(a) Objective of the Law

59. The background is extensive and well focussed in the debates of the House of Commons and in particular Documents #12, 14 (Debate on Second Reading

of Bill C-49 at p.6373) and Document 15 (Speech of John Crosbie on Third Reading of Bill C-49 at pp.8610-8612). These documents are Exhibits from volume 1 of the materials filed in Lina Maria Stagnitta v. The Queen (S.C.C. file #20497).

60. It is the position of the Appellant that this area of legislation is one which the House of Commons took care to monitor judicial decisions and respond accordingly. The House of Commons also took the precaution of appointing a Standing Committee on Justice and Legal Affairs to examine these issues as well as appointing a Legislative Committee on Bill C-49 to receive public input.

61. It is further the position of the Appellant that Parliament has responded in a most careful, informed, and meaningful way to deter "public prostitution" and its undesirable side effects.

61. It is acknowledged by the Appellant that prostitution in itself is not an offence. It is submitted that s.195.1(1)(c) is not intended to eradicate prostitution but focuses on the undesirability of bringing prostitution into the public forum.

62. This legislation is an attempt to eliminate the public nuisance aspect caused by prostitution and the related activities being carried out in a "public place". This valid objective is seen throughout the Exhibits filed in Stagnitta:

House of Commons Debates,
Vol I Doc #6 pp.18-21, #12, #14 and #15

Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, Vol I Doc #17, #18, #19 and #20

Report of the Special Committee on Pornography and Prostitution, (Fraser Report), Vol II Doc #27 pp.346-350

Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, Vol III Doc #29 pp.460-466, #31 pp.558-564 (Halifax Downtown Residents' Association).

63. It is submitted that the Parliament of Canada has the legislative authority to protect the public including protection from: impeded pedestrian and vehicular traffic, the indignity of being propositioned, exposure of children to the vices of adults, viewing the actions and hearing the communications related to prostitution "in a public place".

64. It is submitted, therefore, that both the test in Oakes (of the law being "of substantial importance") and the Edwards Books test (that the objective "must bear on a 'pressing and substantial concern'") have been met.

65. The lengthy debates in the House of Commons and the active participation of the citizens of Canada in the process of amending the criminal law in 1985 clearly indicate both the importance of the issue and the need for amendment at that time.

(b) Means of Applying Objective

66. This criterion is "a form of proportionality test" and has three separate components:

(i) the means must be rationally connected to or clearly designed for the objective and not arbitrary;

(ii) the minimum of impairment of the right necessary to meet the objective;

(iii) a proportionality between effects of the law and its objective must be met, as indicated in Edwards Books at p.768 as follows:

> ". . . their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nonetheless outweighed by the infringement of rights . . .".

and in Government of Saskatchewan v. R.W.D.S.U., [1987] 1 S.C.R. 460, at p.477:

> ". . . calls for a weighing of the legislative objective against the deletorious effects of the measures which limit the enjoyment of the Charter right or freedom."

(i) Rational Connection, Clear Design, and Not Arbitrary

67. It is submitted that there is a rational connection between s.195.1(1)(c) and the objective of curtailing public prostitution and its undesirable side effects.

68. The design was clear and well enunciated both in the House of Commons and by citizens of Canada before the Standing Committee and the Legislative Committee.

69. There is no suggestion that this legislation is arbitrary and it is submitted that the development of this legislation would counter any such suggestion.

70. It is the position of the Appellant therefore that there is a rational connection between s.195.1(1)(c) and the social harm to which it was directed, that there is a clear design for that intention founded in the legislation, and there is no element of arbitrariness.

71. The clear design can be seen from the House of Common Debates, the Proceedings before the Standing Committee on Justice and Legal Affairs, and the Proceedings before the Legislative Committee on Bill C-49.

72. Part of this clear design is also illustrated by the case law which has been discussed in the exhibits which cases often founded the basis for debate.

73. A brief summary of a few cases will illustrate the "rational connection and clear design".

74. The use of the word "solicits" in the predecessor to the present s.195.1 rendered the section virtually unenforceable.

Hutt v. The Queen, [1978] 2 S.C.R. 467, and

Regina v. Whitter; Regina v. Galjot, [1981] 2 S.C.R. 606.

(The latter case was referred to by the Honourable Jean Chrétien, Minister of Justice and Attorney General for Canada, in the Exhibits Vol I Doc #6 p.35.)

75. Efforts on the part of municipal governments to suppress street prostitution also failed.

Westendorp v. The Queen, [1983] 1 S.C.R. 43.

(Referred to by the Honourable Ray Hnatyshyn and the Honourable Mark McGuigan, Minister of Justice and Attorney General for Canada, Vol 1 Doc #10.)

76. The case of Goldwax v. City of Montreal, [1984] 2 S.C.R. 525 also thwarted the attempts of municipal government to deal with this problem.

77. The civil remedy of injunction also led to failure in Nova Scotia as evidenced by the case of A.G.N.S. v. Beaver et al. (1984), 66 N.S.R. (2d) 419 (N.S.S.C.T.D.); affirmed on appeal, 18 D.L.R. (4th) 287 (App.D.).

78. It is the position of the Appellant therefore that this legislation was clearly designed to accomplish the purpose of reducing public nuisance and public exposure to bartering for sexual services, and that the development of the law was monitored closely both by the House of Commons and the citizens of Canada in an attempt to develop a law that would satisfy both the needs of the general public and the requirements of the Charter.

(ii) Minimum Impairment

79. It is submitted that the onus should not be on the Appellant to show that the legislation has been drafted with a needle sharp pencil and with such precision that the right or freedom being limited is limited only to the exact degree required in order to accomplish the objective. The English language and the field of law do not permit such precision and the standard to be met should not be exacting.

80. It is submitted that the previous legislation which used the word "solicits" was clearly not adequate to accomplish the objectives of the Parliament of Canada and the citizens of Canada. There was, therefore, a need to draft legislation to cast a broader net.

81. After lengthy debate in the House of Commons, reviews of the Standing Committee on Justice and Legal Affairs, the Report on and Prostitution and Pornography (Fraser Report), the evidence of the Legislative Committee on Bill

C-49, as well as a close monitoring of prior legal decisions, the federal government drafted legislation to delete the word "solicits" and substitute the words . . . "stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person . . .".

82. Two points are clear. One is that there was a need for broader legislation than that found in the 1972 amendment and, secondly, that this issue was given very serious consideration and attention in order to resolve a pressing and substantial concern.

83. The question remains whether Parliament has gone further than required in order to accomplish the purpose.

84. It is the position of the Appellant that the majority in Parliament was of the opinion this legislation was required to curtail the adverse effects of public prostitution and therefore did not go further than was required to meet this objective.

85. By way of contrast, one option open to Parliament was to consider the drastic measure of making prostitution per se illegal. The House of Commons, as evidenced by the debates, clearly did not wish to go to that extreme and a less intrusive option was chosen. In conclusion, therefore, it is the position of the Appellant that Parliament went no further than it felt necessary in order to accomplish its valid legislative objective.

86. It is also noteworthy that Parliament, at the time of amending s.195.1(1) of the Criminal Code, provided for a review to be undertaken three years after the coming into force of this section (December 20, 1985), which report is to be submitted to the House of Commons within one year from December 20, 1988.

87. It is submitted therefore that the Parliament of Canada has not only given close scrutiny to the subject matter by balancing the rights and freedoms of individuals against the need to protect society, but has also built in the safeguard of a review to determine whether the section is properly balancing the freedoms of individuals and the need to protect society.

88. This legislative safeguard confirms the fact that not only has the House of Commons chosen a less intrusive route than it could have but it has also built in a safeguard to review whether the section accomplishes the purpose in the way in which it was intended.

89. It is the position of the Appellant, therefore, that this legislation and the approach taken by Parliament meet the test of "minimum impairment".

(iii) Proportionality -- Objective and Effects

90. The principle has been stated and restated that . . . "the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved": Morgentaler, Smoling and Scott v. The Queen, [1988] 1 S.C.R. 30, at p.74. The limitation on the freedom of expression under s.2(b) and the freedom of association under s.2(d) of the Charter limits the freedom of citizens of Canada to communicate in a public place for the purpose of engaging in prostitution or obtaining sexual services of a prostitute. These freedoms therefore are limited to the degree that one cannot negotiate sexual services in public.

91. This limitation is not an absolute limitation in that citizens of Canada are not prohibited from this type of communication, so long as they are not in a public place or in any place open to public view.

92. It is the position of the Appellant that this limitation is a reasonable one, that there is ample opportunity to exercise these freedoms in private, and that the limitation on public negotiation is reasonable.

93. In light of the importance of the objective of protecting the public from the adverse effects of public prostitution, and the effects on those rights, it is submitted that the limiting effects are proportionate to this objective.

94. It is important to note the nature of the expression and association which is involved with this case as not all categories of communication are equally protected. This point is made by Finkelstein where he states:

> Not all categories of speech are protected. The degree of constitutional protection of any category should depend upon its importance to the function of society. Political speech has always been considered essential and it accordingly has rested in the Anglo-American constitutional system's most favorite place.
>
> [Laskin's Canadian Constitutional Law, v.2, p.1030.]

95. It is important to note, therefore, that the communication to which s.195.1 is directed is the negotiation of sexual services for a fee. Although prostitution per se is not illegal, the right to negotiate sexual services should not be given a high priority on our list of rights to be protected in a "free and democratic society". The thrust of the legislation is not to eliminate the right but merely control the exercise thereof and remove it from the public forum.

96. It is submitted therefore that when examining the principle of proportionality that the objective of the legislation is a legitimate objective and one which protects individuals as well as society as a whole. The effects on the other hand are not prohibitive of the act of negotiating sexual services, merely a reasonable control.

97. In Edwards Books, supra, Chief Justice Dickson in examining proportionality stated at p.768 that . . . "their effects must not so severely

trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights".

98. It is the position of the Appellant that the limitation on negotiating sexual services in public does not "so severely trench on individual or group rights" that the legitimate objective of the Parliament of Canada is outweighed by the abridgment of those rights. Prostitutes and their prospective clients are free to negotiate services in other than the public forum and therefore their rights are not curtailed, merely controlled.

99. Another factor that must be considered when reviewing proportionality is whether there is some reasonable alternative which Parliament could have used to accomplish its objective. The history of this section and the development of the law in this area is unique in that close scrutiny has been given to various alternatives, all of which have failed to date. Whatever this Honourable Court might decide, it is clear Parliament has tried other alternatives, considered other alternatives, and has after lengthy debate come to the conclusion that s.195.1 as it presently exists is the answer to accomplishing its legitimate legislative objective.

100. It is submitted therefore that if there is "better" reasonable alternative, it has not yet been identified by our legislative branch of government after a conscientious review of what alternatives were available.

101. This Honourable Court has acknowledged that..."it is not the role of this court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable": Edwards Books, p.783. It is necessary, however, to consider whether there is some reasonable alternative, which to this point has not yet been identified by the Appellant or by Parliament.

102. It has been further acknowledged by this Honourable Court that it is not the role of the judiciary to draw the precise line for legislation which is reasonable. However, it is appropriate to examine the history of the legislation and the care which has been demonstrated in the "tailoring of this legislative garment".

103. It is submitted that Parliament has carefully tailored this legislative garment in response to both the needs of society and the jurisprudence in order to accomplish a valid social objective and in doing so has considered what alternatives were available. By implication, there is no other obvious reasonable alternative scheme for accomplishing this purpose. The effect upon prostitutes and prospective clients of limiting their freedoms is a reasonable one and is proportionate to the objective of society as expressed through the Parliament of Canada.

CONCLUSION

104. It is the position of the Appellant therefore that the limitation on the freedom of association and expression imposed by s.195.1 of the Criminal Code is a reasonable limit prescribed by law addressing an objective which is a "pressing and substantial concern", the means for which are rationally connected and clearly designed to that objective. Parliament has chosen the least intrusive legislative garment which properly balances the effects of the limitations of the rights of prostitutes and prospective clients against the valid social objective.

105. It is submitted, therefore, that if required, this Honourable Court should apply s.1 to preserve this valid social objective captured in s.195.1.

PART IV

NATURE OF ORDER SOUGHT

The Appellant respectfully submits the first and second constitutional questions be answered in the negative, the appeal accordingly allowed, the Order of the Appeal Division of the Supreme Court set aside, and the conviction entered and sentence imposed by the Provincial Court Judge restored.

In the alternative, should this Honourable Court answer the first or second constitutional question, or both of them, in the affirmative, the Appellant respectfully submits the third constitutional question be answered in the affirmative, the appeal accordingly allowed, the Order of the Appeal Division of the Supreme Court set aside, and the conviction entered and sentence imposed by the Provincial Court Judge restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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Halifax, Nova Scotia

August 8, 1988

PART V

TABLE OF AUTHORITIES