20428

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 -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL FOR ONTARIO
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE ATTORNEY GENERAL OF ALBERTA
THE ATTORNEY GENERAL FOR SASKATCHEWAN,

INTERVENERS

RESPONDENT'S FACTUM

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PART I

STATEMENT OF FACTS

1. The Respondent respectfully suggests that a complete and accurate statement of the facts by counsel for the Attorney General of Nova Scotia appears in its Factum to the Supreme Court of Nova Scotia, Appeal Division, rather than those put forward in this Court. These complete facts indicated that:

> On the evening of Thursday, January 2, 1986, Constable Aileen Richardson, a member of the Morality Squad of the Halifax Police Department, was working in an undercover capacity in the area of Cornwallis Park in the City of Halifax, posing as a prostitute. Constable Richardson dressed in slacks and a fur coat, was strolling back and forth on the sidewalk adjacent to the Park. Seated in an unmarked police cruiser parked nearby were Sergeant Ronald Mosher, the head of the Morality Squad, and Constable Bill MacLeod. Constable Richardson was fitted with a body pack voice recording device. Any conversations Constable Richardson engaged in could be heard by Sergeant Mosher in the police cruiser.
>
> At approximately 10:25 p.m., the Appellant, a resident of Dartmouth, walked across Hollis Street from the area of the Nova Scotian Hotel and approached Constable Richardson. They exchanged greetings. The Appellant walked past Constable Richardson a distance of approximately twelve feet, stopped, and walked back to her.
>
> As they strolled side by side on the sidewalk, Skinner and Richardson engaged in the following conversation.
>
> S.:"How much do you charge?"
>
> R.:"For what?"

S.:"For a blow job."

R.:"What do you have?"

S.:"Ooh, you charge by how much the person has. Do you have a place?"

R.:"No."

S.:"Where do you live?"

R.:"Not close to here."

S.:"Well, how much do you charge for a blow job?"

At this point, Constable Richardson turned and walked away from the Appellant. Sergeant Mosher and Constable MacLeod pulled up to the curb in the police cruiser and got out. Sergeant Mosher advised the Appellant that he was under arrest, told him the reason for the arrest, and advised him of his right to counsel.

2. Important additional facts are indicated by the trial evidence. There is no evidence that anyone other than the undercover police officer and Mr. Skinner were within unaided hearing when their conversation took place. There is no evidence to suggest that this incident occurred in a residential area.

3. The facts are otherwise accurately set out in paragraphs 2 to 5 inclusive of the Factum of the Appellant in this Court.

PART II

POINTS IN ISSUE

4. 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

THE MEANING AND INTENT OF THE LEGISLATION

5. This Honourable Court has framed three questions concerning the constitutional validity of s.195.1(1)(c) of the Criminal Code. The intent of this legislation and the factual underpinning of the stated constitutional questions relate to public street contacts between street prostitutes, customers of street prostitutes, and others.

6. The Respondent refers to the history of legislation in Canada dealing with this issue contained in Tab 1 of the Supplementary Agreed Case on Appeal. It is respectfully submitted that this historical review suggests the following interpretation being applied to the current s. 195.1(1)(c) of the Criminal Code:

1. "Every person who" - male or female, prostitute, or customer, or other individual;

2. "In a public place or in any place open to public view" - any place to which the public have access as of right or by invitation, expressed or implied, and any motor vehicle located in a public place or in any place open to public view (s. 195.1(2)); which include places of public meeting or gathering of people; and streets and other public areas;

3. "In any manner communicates or attempts to communicate" - any act or any words or any posture or combination of acts, words

and postures, which can be construed as intended to convey the prohibited message [seeking or offering sexual services];

4. "With any person" - male or female, prostitute, customer, or other individual;

5. "For the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute" - the offering of the body to the use of another for hire, the trading of personal (usually sexual) services for money or other compensation from someone whether or not any of the parties has a particular status as "common prostitute".

The offence can fairly be interpreted as a specific intent offence. In the absence of express words as to intent, intention would have to be inferred from the non-verbal communication of acts or postures. Upon proof of status as a prostitute, conviction could follow as an inference from presence in a public place.

7. The history of street soliciting legislation in Canada, and the reasonable interpretation of the offence currently in issue, indicate that traditional methods of describing the nuisance aimed at have been discarded. The offence does not require the proof of any element of "moral abjectness". Unlike previous legislative provisions, the offence under s. 195.1(1)(c) does not rely upon any notion of nuisance from the inherent character of the offender (as with vagrants), nor is there any requirement of a course of cumulative conduct specifically related to the person who will be accused. Finally, no presumptive nuisance from pressure or persistence is required.

8. The law merely requires attempts to communicate about potential transactions involving sexual favours for some kind of consideration. Indeed, a person may scarcely need to be accosted for the offence to have been committed. No acts are required on

the part of anyone which would contribute to public inconvenience or unrest in an objective sense.

9. We respectfully submit that this legislation continues to have the same purpose as all of the previous Criminal Code provisions dealing with soliciting. It is to rid public places of nuisances. This has been conceded by the Appellant, but is also apparent from the Debates in Parliament when this section was enacted, from the text of s. 195.1 read as a whole, and from the location of this offence in Part V of the Criminal Code.

FIRST CONSTITUTIONAL QUESTION: FREEDOM OF EXPRESSION

> The guarantee of freedom of expression in s. 2(b) of the Charter encompasses the prima facie right to communicate with another in words on a public sidewalk out of sight and hearing of third persons, without being punished by the State for the content of that conversation.

10. The Respondent respectfully submits that s. 195.1(1)(c) of the Criminal Code constitutes a prima facie infringement of freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. Section 195.1 (1) (c) prohibits, on pain of criminal sanction, person-to-person private conversations. It creates an offence to in any manner communicate or attempt to communicate for the purpose of prostitution. Such communications link sexual services and money or money's worth. No criminal sanction exists in relation to communications or attempts to communicate in person-to-person private conversations about any other subject. Thus, it is the content of the communication which is the gravamen of the offence.

11. This Honourable Court has recognized the importance of freedom of expression to the political and social life of Canada and of Western society. The Charter of Rights and Freedoms recognizes this as a fundamental freedom.

> Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery, [1986] 2 S.C.R. 573, and authorities referred to therein.
>
> Canadian Charter of Rights and Freedoms, s. 2(b).

12. In the interpretation of Charter rights, reference should be had to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which a right is associated within the text of the Charter.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295, at 344

13. The Respondent acknowledges that freedom of expression, like other Charter rights and freedoms, may contain internal definitional limits. In whatever way "expression" may be defined, the core of this freedom will at least consist in the conveyance of the spoken or written word from one person to another person. It is respectfully submitted that once it is conceded that expression is involved, no internal definitional limit based on the content or subject-matter of communication is appropriate.

(i) Character and larger objects of the Charter

14. This Honourable Court has emphasized that Charter guarantees are to be interpreted in a manner consistent with the inherent dignity and the inviolable rights of the human person.

R. v. Big M Drug Mart, supra, at 336.

Reference re Section 94 (2) of the B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at 503.

R. v. Oakes, [1986] 1 S.C.R. 103, at 136.

Regardless of how much one may disapprove of the views, pursuits or actions of an individual person, the dignity of self-directing

human persons requires toleration where that individual's views, pursuits and actions cause no harm to anyone else. It is respectfully submitted that to uphold s. 195.1 (1) (c) without requiring the State to justify the intrusion as a reasonable limit, would not be consonant with the values of dignity and autonomy inherent in the human person.

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(ii) The Language of Section 2 (b)

15. Section 2 rights are introduced by the heading "Fundamental Freedoms/Libertes fondamentales". Section 2 uses the term "freedoms" [or, in the French version, "libertes"], indicating that the underlying value is libertarian. This
20 heading may be contrasted with that of "Democratic Rights" preceding ss. 3 to 5. Sections 3 to 5 refer to "rights/droits". "Fundamental freedoms" accordingly encompass more than the rights of participation in the democratic process.

16. The matters addressed in s. 2 are the only ones in the Charter to be introduced as "freedoms". The other substantive
30 guarantees of the Charter are referred to as "rights". Moreover, the freedoms guaranteed in s. 2 are "fundamental". The concern of s. 2, as reflected in the words fundamental "freedoms/libertes", is for the constitutional protection of certain thresholds between the individual and the State. It is submitted that s. 2 respects individual autonomy in matters of expression, religion, association, conscience, belief, opinion, and assembly.

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17. Section s. 2 (b) employs the term "expression". By contrast, s. 1 (d) of the Canadian Bill of Rights refers to freedom of "speech". The more expansive language of the Charter indicates a concern for more than oral expression as well as a concern for more than "persuasive" speech.

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18. The linking of freedom of expression in s. 2 (b) with other fundamental freedoms and with thought, belief and opinion, supports a broad, rather than a restrictive, approach. Thus s. 2 (b) has been drawn in such a fashion as to eliminate the possibility that interpreters might attempt to draw fine and value-laden distinctions around the term "expression". In the words of Professor Noel Lyon, s. 2 (b) "embraces the entire life of the mind in the community."

> N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague but Meaningful Generalities" (1982), 4 Sup. Ct. L. Rev. 57, at 61.
>
> Irwin Toy v. Attorney General of Quebec (1986), 32 D.L.R. (4th) 641, at 651-652 (Que. C.A.).

19. For this particular case it is respectfully submitted that it only needs to be acknowledged that the freedoms contained in s. 2 of the Charter comprehend an individual's freedom to converse with others through oral utterances to shift this Honourable Court's inquiry to s. 1 of the Charter. Everyone should have, and would expect to have, a presumptive ability to verbalize or act (where there is no inherent harm to others) in accordance with personal and autonomous objectives. Such freedom of action is protected from creating harm to individuals particularly or society generally by being subject to reasonable limits which are justifiable under s. 1 of the Charter.

20. It is respectfully submitted that, when account is taken of the heading of s. 2 (b); of the word "expression" and the phrase "fundamental freedoms"; of the association in s. 2 (b) of freedom of expression with other fundamental freedoms; and, of the analysis of s. 2 in the broader context of the Charter, prima facie s. 2 (b) extends to the communication attacked by the State in s. 195.1 (1) (c) on the facts of this case.

(iii) Historical origins of the concept of freedom of expression

21. The Respondent respectfully submits that freedom of expession is founded in a concern for free and full communication within and outside the realm of political discourse. It is submitted that the general concern underlying the constitutional protection of freedom of expression is for the automomy of members of our society to freely express themselves, on whatever subject, without being unnecessarily or unduly interfered with by the State. The French Declaration of the Rights of Man sets forth the proposition that.

> La libre communication des pensees et des opinions est un des droits les plus precieux de l'homme; tout citoyen peut donc parler, ecrire, imprimer librement, sauf a repondre de l'abus de cette liberte dans les cas determines par la loi.
>
> (1789), Declaration des Droits de l'homme et du Citoyen, art. 11

22. The protection of fundamental freedoms, including the freedom of expression, has in this century been enshrined in several important Canadian human rights documents. The earliest of these, the Saskatchewan Human Rights Code provides the following protection:

> Right to Free Expression
>
> 5. Every person and every class of persons shall, under the law, enjoy the right to freedom of expression through all means of communication, including, without limiting the generality of the foregoing, the arts, speech, the press or radio, television or any other broadcasting device.

[S.S. 1979, c. S-24.1; first enacted as S.S. 1947, c. 35]

Also: Charter of Human Rights and Freedoms, R.S.Q. 1977, c. C-12, s. 3.

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 1 (d).

23. Related to the adoption of human rights and civil rights documents in Canada in the latter half of the twentieth century has been the development of a number of international guarantees of fundamental rights. Primary among these is the 1948 Universal Declaration of Human Rights which was adopted by resolution of the General Assembly of the United Nations without a dissenting vote and which is generally accepted to be reflective of customary international law. The Universal Declaration of Human Rights includes the following:

> Article 19: Every one has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

See: Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 Sup. Ct. L. Rev. 287, at 289.

Cohen and Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law" (1983), 61 Can. Bar Rev. 265, at 271-72.

See also: United Nations International Covenant on Civil and Political Rights (1966), Articles 1 and 2

24. It is submitted that the historical evolution of the concept of freedom of expression, in Canada, in other jurisdictions, and internationally, emphasizes the importance of giving broad scope to the freedom. The right to receive and impart information and ideas of all kinds is protected. The

ultimate basis of the concept of freedom of expression is tolerance. As was observed by Dickson C.J.C., regarding the views of Canadian courts on the issue of obscenity, "[I]t is the standard of tolerance, not taste, that is relevant." It is the value of tolerance and of respect for the dignity and autonomy of individuals that underpins s. 2 (b) of the Charter and the value of freedom of expression generally.

Towne Cinema Theatres Ltd. v. The Queen, [1985] 1 S.C.R. 494, at 508.

Saskatchewan Human Rights Code, supra, s. 3 ["objects"].

Boucher v. The King, [1951] S.C.R. 265, at 288.

(iv) Overall structure of the Charter

25. It is respectfully submitted that the structure of the Charter and its judicial interpretation favour a broad approach to the freedom of expression guaranteed by s. 2 (b). The opportunity for the State to justify restraints upon freedom of expression ought to arise through a s. 1 analysis, not through a reading down of s. 2.

R.W.D.S.U. v. Dolphin Delivery, supra.

R. v. Oakes, supra, at 134.

Hogg, Constitutional Law of Canada (2d ed., 1985), at 681-82.

(v) Commercial Expression

26. The Respondent respectfully submits that the communication which is the subject of this appeal does not constitute "commercial expression". Even if it did, commercial expression ought to be dealt with through the mechanism of s. 1

of the Charter and not through a categorical exclusion from s. 2 (b) of the Charter. Commercial expression has been defined as:

> [T]ypically the product of an activity carried out by groups of people organized in entities of an impersonal nature, with the sole purpose of advancing the financial interests of the entity.
>
> R.J. Sharpe, "Commercial Expression and the Charter" (1987), 37 U. of T.L.J. 229, at 236.

The Supreme Court of the United States itself defines commercial speech as:

> ...expression related solely to the economic interest of the speaker and its audience.
>
> Central Hudson Gas and Electric Corp. v. Public Service Commission of New York, 447 U.S. 557, at 561 (1980).

Commercial speech is accorded protection in American constitutional jurisprudence:

> Sharpe, ibid. at 255
>
> e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976).

American "time, place and manner" restrictions may be constitutional only where they are not content based, and ample alternative channels for communiation exist. However, in Canada such restrictions would be s. 1 concerns.

(vi) Conclusion on freedom of expression

27. The Respondent respectfully concludes, in response to the first constitutional question, that s. 195.1 (1) (c) of the Criminal Code interferes with the freedom of individ als to have private oral conversations. The only distinction between conversations proscribed by s. 195.1 (1) (c) and the conversations which one might have with a peanut vendor or a

neighbour would be in the subject matter which follows from the purpose of the conversation:

> As by the by-law stands and reads, it is activated only by what is said by a person, referable to the offer of sexual services. For persons to converse together on a street, as did the two women and the police officer here, and to discuss a recent or upcoming sporting event or a concert or some similar event would not attract liability. It is triggered only by an offer of sexual services or a solicitation to that end. There is no violation of s. 6.1 by congregation or obstructions per se; the offence arises only by proposing or soliciting another for prostitution.
>
> Westendorp v. The Queen, [1983] 1 S.C.R. 43, at 51-52.

28. The character and larger objects of the Charter, the language of s. 2 (b) of the Charter, the historic development of the concept of freedom of expression, and the overall structure of the Charter indicate that the guarantee of freedom of expression in s. 2 (b) includes the freedom to choose subjects of conversation which serve the purposes of the individual relying upon the freedom in s. 2 (b). Whatever definitional limits may be placed upon s. 2 (b) in future cases, it is respectfully submitted that there is no articulated or attractive definition of freedom of expression which would permit the State to prohibit simple talking - communication or an attempt to communicate - where the basis for the prohibition is that the State does not approve of the content or purpose of such communications in public places. Thus, it is submitted that the Criminal Code section under consideration violates our freedom of expression in the circumstances of this particular case.

THE SECOND CONSTITUTIONAL QUESTION: FREEDOM OF ASSOCIATION

The guarantee of freedom of association in s. 2 (d) of the Charter encompasses the prima facie right to contact or seek to make contact with others in public for personal reasons.

29. The Respondent respectfully submits that s. 195.1 (1) (c) of the Criminal Code also constitutes a prima facie infringement of the freedom of association as guaranteed by s. 2 (d) of the Canadian Charter of Rights and Freedoms. Section 195.1 (1) (c) prohibits, on pain of criminal sanction, contacts between autonomous individuals in any place to which the public has access by right or invitation. Realistically, citizens unknown to each other can only come into contact in such places.

30. This legislation does not prohibit, and indeed no legislation in the history of Canada has prohibited, citizens from arranging temporary associations for the purpose of engaging in acts of prostitution. Our law and society also respect the peaceable use by individuals of common or public areas. Society respects the fundamental liberty to walk public streets, or to visit public parks and squares. Since this legislation could result in conviction based merely upon appearance in a public place, it attacks an individual's motive for being in public. Individuals with the mutual desire to engage in the lawful activity of prostitution are prohibited from making contact with others through words, acts, gestures, or mere presence in public places. The gravamen of the offence is thus the motive which a particular individual may have for being in association with another in a public place.

(i) Interpretation of Fundamental Freedoms

31. The Respondent reiterates, with respect to the interpretation of s. 2 (d) of the Charter, the arguments that were presented at paragraphs 14-20, supra inclusive, with respect to the interpretation of s. 2 fundamental freedoms.

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(ii) Scope of the Fundamental Freedom of Association

32. This Honourable Court has fully reviewed the historical origins and the constitutional scope of the guarantee of freedom of association.

20 Reference Re Compulsory Arbitration, [1987] 1 S.C.R. 313

Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Saskatchewan, [1987], 1 S.C.R. 460

Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424

30 33. It is recognized, we submit, that the freedom of an individual to associate with others has no single purpose or value. At its core the freedom of association recognizes that it is generally impossible without the aid, co-operation or involvement of others to pursue a variety of individual objectives, exercise a variety of individual rights, or to reach a variety of individual goals.

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34. This variety in purposes and values served by the freedom of association historically have been suggested in international agreements to which Canada is a party:

e.g., United Nations International Covenant on Civil and Political Rights (1966), art. 22.

Such an inclusive approach is consistent with other international law documents as well:

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e.g., European Convention on Human Rights, art. 11.

35. The criminal prosecution of an individual for being in a public place with the motive of coming into contact with another individual for purposes of prostitution infringes an individual's freedom of association at a more elemental level as well. This Honourable Court in Reference Re Compulsory Arbitration, supra, decided that freedom of association includes at least the right to join with others in lawful, common pursuits.

36. Sexual activity, whether paid for or not, is a social activity which demonstrates the "associational character" of the coming together of individual interests. Sexual association has not been prohibited. Thus, it is respectfully submitted that freedom of association must at least include the right to come into contact with others (in places where individuals are generally permitted to be) for the purpose of engaging in that lawful, common pursuit.

> It is true, of course, that in this approach the range of Charter-protected activity could be reduced by legislation, because the Legislature has the power to declare what is and what is not lawful activity for the individual. The Legislature, however, would not be able to attack directly the associational character of the activity, since it would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity....[The] Legislature could prohibit golf entirely. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the Charter guarantee of freedom of association.
>
> Reference Re Compulsory Arbitration, supra, at 408.

To paraphrase, the Legislature could prohibit paid sexual activity entirely. Short of that, the Legislature could not constitutionally restrict those seeking to engage in paid sexual activity from making contact in pairs to pursue this activity. The legislation in issue prohibits association in the only place where such contact may realistically occur, thereby infringing prima facie the freedom of association.

(iii) Conclusion on Freedom of Association

37. There is nothing mala in se about a purpose of association being for paid or unpaid sexual activity. There is nothing mala in se about the contact between two individuals for that purpose in itself. It is respectfully submitted that there is nothing which would take this matter out of the general breadth of the freedom of association. The motives for associating or the conditions upon which individuals associate do not deprive their activity of its associational character. That being so, it is respectfully submitted that the inquiry of this Honourable Court ought to shift to s. 1 of the Charter for a demonstration by the Government why s. 195.1 (1) (c) is reasonable and justifiable in its prevention of contact between two independent individuals in public places.

THIRD CONSTITUTIONAL QUESTION: REASONABLE AND JUSTIFIABLE LIMITS

> 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?

38. In this case and in the appeal of Lina Marie Stagnitta v. The Queen (S.C.C. File No. 20497), the Courts below determined that the constitutional validity of s. 195.1 (1) (c) of the Criminal Code had to be determined through an appropriate s. 1 analysis because on its face that Criminal Code provision transgressed upon the fundamental freedoms of Canadians as established in s. 2 of the Canadian Charter of Rights and Freedoms. The Government, of course, bears the heavy onus of proof under s. 1 of the Charter, and if it fails to discharge this burden this Honourable Court ought to hold s. 195.1 (1) (c) of the Criminal Code as of no force and effect.

39. The limitation which Parliament has placed upon the fundamental freedoms of expression and/or association in this case is in the form of a summary conviction criminal offence. Those who choose to exercise their freedoms of expression and/or association in the areas prohibited by this legislation are exposed to fines of up to $2,000, or to the loss of liberty through imprisonment for up to six months, or to both the fine and the imprisonment. The fact that the limitation on this freedom is in the form of a criminal offence rather than some civil disability (as would occur, for example, with a statutory provision limiting the number of picketers in the course of industrial conflict), means that the standard of proof to which the Government is put is "a preponderance of probability ...

applied rigorously". This probability must be of "a very high degree", in order to be "commensurate with the occasion".

R. v. Oakes, supra, at 137-138

40. It is respectfully submitted that an approach which attempts to separate what is "demonstrably justified" and what is "reasonable" is not helpful. Instead, the characteristics of reasonableness and demonstrable justification permeate the two crucial issues raised by s. 1 of the Charter:

> A. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern".
>
> B. Second, the means chosen to attain those objectives must be proportional or appropriate to the ends sought to be achieved.
>
> Edwards Books and Art Limited v. The Queen, [1986] 2 S.C.R. 713, at 768.
>
> R. v. Oakes, supra.

(i) The Legislative Objective

41. The Appellant asserts that the Debates and proceedings in the Houses of Parliament indicate that this legislation has an objective of eliminating "the public nuisance aspect caused by prostitution and related activities being carried out in a 'public place'".

Appellant's Factum, p. 28

42. It is respectfully submitted that the legislative objective for this legislation is much narrower than that stated above. The Government's position in introducing the legislation was that it only purported to deal with "the nuisance to others created by street soliciting":

> These problems range from the slowing down or blockage of motor vehicle traffic...as well as the slowing down or blockage of pedestrian movement on the sidewalks to active behaviour in connection with the selling of drugs, with pimping and with being accosted while walking down the street by persons who ask if a pedestrian wants sex or is prepared to sell sex. The residents of neighbourhoods into which street soliciting has moved complain that their property values are lowered, they are harrassed by prostitutes or customers, there is noise and confusion and their children are exposed to the practice of buying and selling of sex as part of their daily routine. These are the incidents of nuisance from which we must protect the public and this is why we are asking House to deal with this Bill.
>
> Per Minister of Justice and Attorney General of Canada, Debates, House of Commons, pp. 6374-6376 (Tab 2, Supp. Case, Vol. 1, pp. 28-30).

Similar positions were put in Committee:

> Per Minister of Justice and Attorney General of Canada; e.g., House of Commons Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, pp. 1:13, 15-16, 24 (Tab 5, Supp. Case, Vol. 1, pp. 114, 116-117, 125).

Another Government representative indicated that:

> The people who are bothered by the problem of prostitution in my communities are not bothered by one prostitute on one occasion who disturbs the enjoyment of the dwelling. It is a cumulative process.
>
> Mr. Rob Nicholson (Niagara Falls), Debates, House of Commons, p. 6385 (Tab 2, Supp. Case, Vol. 1, p. 39).

Still another Government representative clarified that it was street soliciting as it has manifested itself since 1979 which this legislation sought to eradicate.

Minister of Energy, Mines and Resources, Debates, House of Commons, p. 6415 (Tab 2, Supp. Case, Vol. 1, p. 50).

43. The proponents of this legislation in Parliament supported passage with the apparently erroneous claim that mere presence supplemented by a casual wink or a gesture from a person otherwise established to be a prostitute or a customer would not be punished under the legislation.

Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, at pp. 1:28-29, 30 (Tab 5, Supp. Case, Vol. 1, pp. 129-30, 131).

Behrendt v. Burridge, [1976] 3 All E.R. 285 (Q.B.)

Weisz and Another v. Monahan, [1962] 1 All E.R. 664 (Q.B.)

Burge v. Director of Public Prosecutions, [1962] 1 All E.R. 666n (Q.B.)

The legislation was not intended to preclude communications for the purpose of prostitution in a public place which were silent, and perhaps, indirect:

> "I think that they will find all kinds of ways to ply their trade. I could suggest any number to them. There are the escort services. They can put a card up in a window and advertise the wonderful massages they might provide or French lessons. That was a favourite one, I remember, over in London. Michelle or whoever would give you some French lessons. I usually got the point as to what was being suggested when I saw that type of thing, so I do not think we need to worry about whether or not they will be able to ply their trade. I am sure that they will. (Emphasis Added)

Minister of Justice and Attorney General of Canada, Senate Committee on Legal and Constitutional Affairs, 1985, 30:18 (Tab 4, Supp. Case, Vol. 1, p. 88).

44. It is respectfully submitted that the Parliamentary proceedings show that the problems of substantial or pressing concern were:

> (a) Impeded pedestrian and vehicular traffic on public streets,
>
> (b) The indignity of being unwillingly propositioned repeatedly on public streets, and
>
> (c) As a third party, being regularly disrupted in the enjoyment of public residential areas by activities incidental to street soliciting for the purposes of prostitution.

The evidence from the Parliamentary record does not indicate any other pressing and substantial concerns to which this legislation was directed.

45. The substantial concerns of impeded traffic have been dealt with in s. 195.1 (1) (a) and (b), and these subsections are not in issue on this appeal. However, in dealing with impeded traffic Parliament has maintained an adherance to general nuisance principles which require one or more of the following elements to justify criminality: persistence of approach, the volume or extent of contact, or thirdly, undue interference with third persons.

46. The Respondent does not contest the fact that the existence of nuisances may consitute pressing and substantial concerns requiring criminal sanctions. The two specific nuisances identified in paragraph 43 (b) and (c), supra, could constitute a pressing and substantial concern for s. 1 purposes where the nuisance involved is genuinely disruptive. Nuisance requires some objective and reasonable level of disruption - not mere inconvenience or disapproval. An expectation to move about in public urban societies without being exposed to the

communications or activities of others is not a reasonable threshold for nuisance.

e.g., R. v. Schula (1956), 115 C.C.C. 382, 23 C.R. 403 (Alta. S.C., A.D.) and the authorities referred to therein.

(ii) Are the means chosen to attain the objectives reasonable and demonstrably justified as proportionate and appropriate?

Rational Connection/Clear Design

47. In the circumstances of this case, the question of whether there is a rational connection or clear design relates to whether the prohibition on all kinds of communications for the purpose of prostitution in all public places reasonably leads to the elimination of the identified specific nuisances from public streets and residential areas. The legislation in issue contains no express reference to nuisance. The assumption was made that the legislation would only criminalize communications or attempts at communication which produced the effects the legislation sought to eliminate. That this is not a rational assumption is plain from the facts of this particular case. This case involves a consensual conversation and discussion out of sight and out of the unaided hearing of third persons in a public place. No characteristics of nuisance were manifested at all.

48. The Parliamentary record is replete with expressions of concern about the criminalization through this legislation of non-nuisance behaviour. Indeed, it was recognized and feared that this provision would criminalize activity falling considerably short of nuisance.

e.g., Senate Committee Report, p. 1734 (Tab 3, Supp. Case, Vol. 1, p. 81)

Debates, Senate, pp. 1563-1564 (Tab 3, Supp. Case, Vol. 1, pp. 77-78)

Debates, House of Commons, pp. 6379, 6382-6383, 6409, 8642, 8646, 8648 (Tab 2, Supp. Case, Vol. 1, pp. 33, 36-37, 44, 60, 64, 66).

Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, at pp. 4:9-10; 5:42-43 (Tab 5, Supp. Case, Vol. 2, pp. 257-258, 360-361).

49. It is respectfully submitted that it is arbitrary for this law to equate elimination of all communication with the elimination of public nuisances. Certainly communications which in fact create a nuisance or contribute to a nuisance would be precluded by this legislation. However, this legislation precludes much more. The law is so written as to sweep within its scope any discussion between individuals about the exchange of sexual services for some consideration, no matter how quiet and limited their discussion. Liability is imposed without any touchstone based upon the persistence of the accused, the volume or extent of the contact made by the accused, or undue interference with third parties.

e.g., R. v. Swinimer (1978), 25 N.S.R. (2d) 512; 3 C.R. (3d) 165; 40 C.C.C. (2d) 432, at 435 per MacKeigan, C.J.N.S. (N.S.S.C.,A.D.) - considered in R. v. Hafey et al. (1985), 57 N.R. 321, at 335 (S.C.C.).

50. In addition to being overbroad in punishing all communication for the purpose of prostitution, s. 195.1 (1) (c) also goes beyond its stated objectives through an extended definition of public place. Different expectations as to appropriate conduct exist in different public places. That is why our law contemplates nuisance being some undue interference with the reasonable expectations of third persons. It is not rational, we submit, to punish as a criminal nuisance a quiet negotiation in the corner of a nightclub because of the nuisance created by someone hollering on a residential street corner at 2:00 a.m.. The Respondent therefore respectfully submits that s.

195.1 (1) (c) fails to meet even this first "rational connection" or "clear design" test.

51. It is respectfully submitted that the complete Parliamentary record also demonstrates the absence of any "clear design" in the drafting of s. 195.1 (1) (c) to deal with the objective of eliminating nuisances on public streets which are related to prostitution. A "clear design" is a design which is not vague, uncertain, or imprecise. It is respectfully submitted that such a "clear design" cannot be perceived in this case. As indicated earlier, s. 195.1 (1) is not even internally consistent in its design. While Parliament has, we suggest, made a rational connection between the impeding of pedestrian and vehicular traffic and undue interference with third persons when it is done for the purposes of prostitution under s. 195.1 (1) (a) and (b), no similar rationale or concept of nuisance exists with s. 195.1 (1) (c).

52. The Respondent therefore respectfully submits that insofar as it deals with simple communication, in circumstances such as the present case, s. 195.1 (1) (c) fails the rational connection or clear design test established by this Honourable Court. The Respondent respectfully refers this Honourable Court to the facts upon which the Crown's case was built against Mr. Skinner, and submits that those facts are a complete answer to suggestions that there is a rational connection between Mr. Skinner's circumstances and the nuisances which Parliament had the objective of eliminating.

Minimum Impairment

53. If there is a rational connection or some clear design to this legislation which passes constitutional muster, does the limitation which exists impair as little as possible the rights or freedoms in question? The Respondent respectfully submits

that there were avenues open to Parliament which could have achieved legislative objectives without creating the level of impairment caused by s. 195.1 (1) (c) to Charter freedoms.

54. The history of the legislation dealing with public contacts between street prostitutes and their customers indicates that legislative intent has consistently been to ensure that reputable citizens were not beseiged in places of public gathering by those seeking to engage in acts of prostitution. Originally dealt with as an offence of character, and later one of status, street prostitution nuisances have most recently become offences described by objectively observable conduct which demonstrates those nuisances. The process of reform leading up to the passage of s. 195.1 (1) (c) has been to maintain the basis for the offence as some objectively observable conduct which demonstrates the intolerable nuisance.

55. The Special (Fraser) Committee on Pornography and Prostitution recommended that a criminal offence be maintained dealing with street prostitution contacts. The Committee's conclusions were based on a reasonable rationale that perceptible interference with others through communication for the purpose of prostitution was required. In most circumstances this would require a physically obstructive component, occurring on more than one occasion. The Committee therefore recommended dealing with nuisances through amendments to the disturbance offences under s. 171 of the Criminal Code:

> Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution (The Fraser Commission); 1985, Minister of Supply and Services Canada, pp. 538-539.

The mere speaking of words, as in this case, or communication through gesture or posture alone, would not be an offence:

> What are the implications for law enforcement of these provisions, especially the

> recharacterization of the nuisance effects of street prostitution? First of all, the police will not be able to arrest and charge prostitutes or customers for merely being present in a public place. Nor will they be able to move against them for attempting to make contact with another individual, unless it is part of a sequence of intrusive conduct. Thirdly, they will not be able to proceed by setting up an individual prostitute or customer so that the individual makes an offer to sell or purchase sexual services. What the police will be able to do is to arrest and charge when they have sufficient evidence that the individual or individuals concerned have been guilty of more than one overture, or instance of obstruction whether to a particular member of the public or to the public in the area. This evidence can be obtained by visual surveillance, and/or by the use of unobjectionable plainclothes operations.
>
> Fraser Commission Report, supra, at 542.

Every objective stated to exist for the legislation in issue would be satisfied by the Fraser Commission recommendations, without the unnecessary harm to fundamental freedoms which is caused by s. 195.1 (1) (c).

56. There are examples of American states which find it sufficient to address the nuisances of street prostitution through offences implying some continuity to the activity beyond momentary contact.

New York Penal Law, section 240.37:

> Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article 230 of penal law, shall be guilty of a violation and

> is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.
>
> People v. Smith, 407 N.Y.S. 2d 462 (1978)

57. The English approach too has been to rely upon the persistence or volume of contact related to the accused person:

> Street Offences Act, 1959; U.K. 1959, s. 1 (1)
>
> It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution.

58. The Appellant suggests that the statutory provision for a Parliamentary review of the effect of the section after three years is a built in safeguard for properly balancing the freedoms of individuals and the need to protect society. This was the stated position of Government in passing the legislation.

> e.g., Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, 8:9-10, 16-17 (Tab 5, Supp. Case, Vol. 3, pp. 484-85, 491-92).

Such a safeguard does nothing to protect Mr. Skinner against an unwarranted stigmatization as a criminal offender. The argument that Canadians should not be experimented with in the criminal law was forcefully but unsuccessfully put by the Opposition in the House of Commons Committee.

> e.g., Mr. Svend Robinson; Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, 8:25 (Tab 5, Supp. Case, Vol. 3, p. 500).

59. It is respectfully submitted that the unprecedented provision for Parliamentary review indicates that the Government understood the excessive reach of its legislation and proposed the review as a way of deflecting immediate concerns and an immediate confrontation over the infringement of the freedoms of individuals.

e.g., Debates, House of Commons, 8645-8646, 8649 (Tab 2, Supp. Case, Vol. 1, pp. 63-64, 67).

Debates, Senate, 1564 (Tab 3, Supp. Case, Vol. 1, p. 78).

60. The Respondent's final submission with respect to the minimum impairment issue is that unlike s. 195.1 (1) (a) and (b), s. 195.1 (1) (c) does not appear to be based upon any acceptable threshold above personal intolerance reaching to criminal social interference. The Respondent reiterates its comments at paragraphs 43-48, inclusive. This Honourable Court will appreciate that many instances of the alleged objectives of this legislation are already criminalized through other provisions of the Criminal Code. Excuses of difficulty of proof or inefficiency and lack of resources to collect proof in relation to these other offences are scarcely any reason for further restriction of the freedoms of the individual. It is respectfully submitted that ease of police enforcement ought not to be given a higher value than Charter freedoms. To do so would make freedoms subject to undue police discretion.

61. Alternatives which could have met Parliament's objectives and which would have caused less impairment of freedoms do exist. Therefore, the Respondent respectfully suggests that the Appellant has failed to show that s. 195.1 (1) (c) passes the minimal impairment test.

Proportionality of Objectives and Effects

62. It is respectfully submitted that the legislative response in s. 195.1 (1) (c) is out of all proportion in its effects given the limited objectives of the legislation. At its most fundamental level, this legislation precludes any discussion at all about a lawful subject by persons in lawful association with each other pursuing a lawful purpose. The effect of this

legislation is to permit the State, and thereby its agents, to make a value choice about the contents of discussions engaged in by others without thereby achieving any necessary beneficial result for society.

cf., Saumur v. City of Quebec, [1953] 2 S.C.R. 299, at 336-339 per Kellock, J., and at 378-379 per Locke, J.

Police Department v. Mosley, 408 U.S. 92, at 95 (1982).

63: The effect of s. 195.1 (1) (c) is to impose upon any individual who frequents a public place the risk that s/he will be required to explain his or her conduct in Court, answering an inference from word, gesture or appearance that a communication was made for the purpose of prostitution. Canadians could be required to answer for loose talk despite the absence of even apparent harm. This is contrary to the general economy of our criminal law.

R. v. Nabis, [1975] 2 S.C.R. 485, at 492-493.

64. The effect of this legislation is that police investigation will be done through undercover or plainclothes agents luring and prompting citizens into criminality by consensual discussions, and where no public nuisance could even be apprehended.

Fraser Report, supra, at 540.

65. The effect of s. 195.1 (1) (c) is to provide the police agencies of this country with a basis upon which to interrupt virtually at will the lives and activities of Canadian citizens. The effect of this legislation is to provide a means by which the police forces of this country can intimidate citizens into unwilling assistance, as was admittedly done when the offence was one of status.

e.g., Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, 6:14, 16-17, 24ff (Tab 5, Supp. Case, Vol. 2, pp. 391, 393-394, 401ff).

Mr. Jim Fulton (Skeena); House of Commons Debates, at 6415-6419 (Tab 2, Supp. Case, Vol. 1, pp. 50-54).

66. The effect of this legislation is to prevent those who choose to engage in prostitution from functioning in a legal way. The restriction of street contacts for the purpose of prostitution, in the Fraser Commission's view, was necessarily tied to a relaxation of bawdy house laws. The effect of depriving prostitutes and their customers of the streets effectively prevents the safest and legitimate pursuit of their business.

Fraser Report, supra, passim.

e.g., Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49, at 2:7-8, 24,32-38, 43, 44-49; 4:5-24; 5:39-41; 7:7-12 (Tab 5, Supp. Case, Vol. 1, pp. 154-155, 171, 179-185, 190, 191-196; Vol. 2, pp. 253-272; 357-359; Vol. 3, pp. 414-419).

67. It is respectfully submitted that these legal and social costs are out of all proportion to the needs and objectives which prompted s. 195.1 (1) (c). It is respectfully submitted that it is unreasonable and unwarranted for the Government to impose these costs on all Canadians without having as a basis for such costs a consistent underpinning of either persistence in approach, volume of contact, or ultimately undue interference with third persons.

PART IV

NATURE OF ORDER SOUGHT

68. The Respondent respectfully submits that the first and second constitutional questions be answered positively, and that the third constitutional question be answered in the negative.

69. The Respondent respectfully submits that the Appeal should accordingly be denied, and that the Order of the Nova Scotia Supreme Court, Appeal Division, be confirmed that pursuant to s. 52 (1) of the Canadian Charter of Rights and Freedoms, it be ordered and declared that s. 195.1 (1) (c) of the Criminal Code, as amended, is of no force and effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Joel E. Pink, Q.C.

Donald C. Murray,
SOLICITORS FOR THE
RESPONDENT DORMAN THOMAS
SKINNER

HALIFAX, NOVA SCOTIA
September 8, 1988

N2062055

PART V

TABLE OF AUTHORITIES

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