

20428

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE APPEAL DIVISION
OF THE SUPREME COURT OF NOVA SCOTIA)

This is a copy
to the Clerk of
Sworn to before me
- 19 day of 1974

BETWEEN:

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

A Commissioner etc

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

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA

INTERVENER

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see inside following title page)

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SIGNIFICATION

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PART I
STATEMENT OF FACTS

1. As Intervener, the Attorney General of Alberta takes no position with respect to the parties' statements of facts.

PART II
POINTS IN ISSUE AND POSITION OF INTERVENER
WITH RESPECT THERETO

2. By order of Chief Justice Dickson dated November 2, 1987 the following constitutional questions were stated:

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?

3. It is the position of the Intervener that the questions should be answered as follows:

1. No
2. No
3. Yes

PART III

ARGUMENT

A. SECTION 2(b) OF THE CHARTER

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?

4. This constitutional question is the same as the first constitutional question stated in the appeal of Lina Maria Stagnitta v. The Queen (appeal no. 20497), which appeal will in all likelihood be heard together with the appeal herein. Accordingly to avoid unnecessary repetition, with respect to the constitutional question stated above the Intervener herein relies upon and refers this Honourable Court to the submissions made in the FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ALBERTA, filed in Stagnitta v. The Queen (appeal no. 20497): see paragraphs 1 - 43.

B. SECTION 2(d) OF THE CHARTER

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.

5. There are essentially two "associations" or relationships which the impugned provision impacts upon. Firstly, there is the "association" of buyer and seller contracting or attempting to contract for sexual services in public. Secondly, there is the "association" of two individuals

engaging in sexual activity for fee. This latter "association" is the one which the majority judgment of the Court below focused upon when it was rhetorically asked,

...does not s. 2(d) protect sexual association between consenting adults - whether the consent is freely given or paid for?

Reasons for judgment of McKeigan J.A., CASE ON APPEAL, p. 73

It is submitted that neither association for such purposes is protected by s. 2(d) of the Charter.

6. It is submitted that the word "association" as used in s. 2(d) of the Charter does not refer to such relationships as between buyers and sellers or commercial sexual partners. c.f. Omni Health Care Ltd. v. C.U.P.E. Local 1909 (unreported January 29, 1987, Ont. Div. Ct. at p. 3); Re Rio Hotel Ltd. and Liquor Licence Board (1986), 29 D.L.R. (4th) 662 at 669 (N.B.C.A.) appeal dismissed without considering the issue, [1987] 2 S.C.R. 59. Surely something more formalized than an encounter on the street or in the bedroom is necessary in order to constitute an "association" protected by the fundamental freedom of association guaranteed by s. 2(d) of the Charter.

7. Alternatively, even if such relationships do constitute "associations" it is submitted that the impugned legislation does not proscribe association per se, but only the activity for which they associate. With respect to the first form of association, prostitutes and their customers are free to associate provided

the purpose for which they associate is not to barter for sexual services.

8. Similarly with respect to the second form of association, the prostitute and customer are free to associate; although the ease with which they can associate for the purpose of commercial sexual relations is affected in that the legislation blocks one of the avenues leading to associations for such purposes.

9. Thus, at issue is whether association for such purposes or activities is protected by "freedom of association".

10. In the primary authority to date dealing with s. 2(d) of the Charter, to wit: Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 the majority held that s. 2(d) does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. It is submitted that in the reasons for judgment delivered by Mr. Justice Le Dain, Beetz and La Forest JJ. concurring, the proposition that the concept of freedom of association extends to protect the right to engage in any activity which is essential to give an association meaningful existence was rejected.

11. In the concurring judgment of McIntyre, J. which expanded upon the meaning of freedom of association such a proposition was also rejected. Mr. Justice McIntyre having previously noted that:

Freedom of association alone, however, is not concerned with conduct; its purpose is to

guarantee that activities and goals may be pursued in common. When this purpose is considered, it is clear that s. 2(d) of the Charter cannot be interpreted as guaranteeing specific acts or goals, whether or not they are fundamental in our society. (supra, p. 406)

summarized his interpretation of s. 2(d) as follows:

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. (supra, p. 409)

12. Thus, by this interpretation, at issue is whether the activity is either protected by another Charter provision when performed alone or lawful when performed alone. Accepting such an interpretation, the activities herein can be examined.

13. With respect to the first association, i.e. buyer-seller contracting for sexual services in public, it is submitted for the reasons urged in respect of the first constitutional question that such activity is not a form of expression protected by "freedom of expression". Nor, it is submitted, is it the exercise of any other right having Charter protection.

14. Additionally, it is submitted that the activity in question i.e. contracting or attempt to contract for sexual

services is not lawful when performed by an individual and accordingly s. 2(d) does not protect the first "association".

15. However, were this Honourable Court to hold that contracting for sexual service is a form of Charter protected expression it is accepted that an association for the exercise of such an activity would be protected by s. 2(d). In such event, s. 1 of the Charter would then have to be considered.

16. With respect to the second association, i.e. two individuals associating for the purposes of sexual activity for fee, it is submitted that such an activity is not the exercise of a right having Charter protection.

17. The remaining branch to be considered is whether the activity is one which is lawful when performed alone. It is submitted that it is debatable whether or not this branch of Mr. Justice McIntyre's interpretation of s. 2(d) can be applied to this activity where the activity is one which is incapable of individual performance.

18. If this branch is applicable at all, it is submitted that what should be examined is the activity when performed by the smallest unit possible: in this case, two individuals. When so examined it is noted that the impugned provision does not legally treat two individuals differently than groups of individuals numbering three or more and accordingly there is no violation of s. 2(d) of the Charter. The situation would doubtless be different were it to proscribe sexual activity

between three or more adults but not sexual activity between two adults, e.g. s. 158 of the Criminal Code.

19. In summary it is submitted that the two types of "associations" which the impugned provision impacts upon are not the types of association protected by freedom of association as guaranteed by s. 2(d) of the Charter. Furthermore, even if such associations are of the type protected by s. 2(d) the activities exercised by them are not protected by s. 2(d) of the Charter.

20. With respect to the first association of buyer and seller contracting for sexual services in public, such activity is neither Charter protected nor lawful when performed individually. If such activity is in fact Charter protected by virtue of s. 2(b) of the Charter, it is conceded that resort must be had to s. 1 of the Charter.

21. With respect to the second association of two individuals for the purposes of commercial sexual activity it is submitted that the activity is neither Charter protected nor lawful when performed by the smallest number possible.

C. SECTION 1 OF THE CHARTER

If s. 195.1(1)(c) of the Criminal Code infringes rights guaranteed by ss. 2(b) or s. 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?

22. This constitutional question is the same as the first constitutional question stated in the appeal of Lina Maria

Stagnitta v. The Queen (appeal no. 20497), which appeal will in all likelihood be heard together with the appeal herein. Accordingly to avoid unnecessary repetition, with respect the constitutional question stated above, the Intervener herein relies upon and refers this Honourable Court to the submissions made in the FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ALBERTA, filed in Stagnitta v. The Queen (appeal no. 20497): see paragraphs 58-111.

PART IV

NATURE OF ORDER SOUGHT

That the constitutional questions be answered as follows:

- 1. No
- 2. No
- 3. Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Richard F. Taylor
Counsel for the Intervener
The Attorney General of Alberta

September, 1988
Edmonton, Alberta

PART V

LIST OF AUTHORITIES

	Page Referred to in Factum
1. <u>Omni Health Care v. C.U.P.E. Local 1909</u> (unreported, Jan. 29, 1987, Ont. Div. Ct.)	3
2. <u>Re Public Service Employee Relations Act,</u> [1987] 1 S.C.R. 313	4
3. <u>Re Rio Hotel Ltd. and Liquor Licence Board</u> (1986), 29 D.L.R. (4th) 662 (N.B.C.A.)	3