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SIGNIFICATION

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 -

DORIAN THOMAS SKINNER

RESPONDENT
(APPELLANT)

FACTUM OF THE ATTORNEY GENERAL FOR SASKATCHEWAN
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COUR SUPREME
DU CANADA
PROQUIT

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PART I

STATEMENT OF FACTS

1. The Attorney General of Saskatchewan accepts the Statement of Facts as set out in the Factum of the Appellant, at pp. 1-3.

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PART II
POINTS IN ISSUE

10 2. The points in issue in this appeal are set out in the Constitutional Questions stated by Dickson C.J.C., by Order dated November 2, 1987:

1. Does section 195.1(1)(c) of the Criminal Code infringe the freedom of expression guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms?

20 2. Does section 195.1(1)(c) of the Criminal Code infringe the freedom of association guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms?

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

40 3. The position of the Attorney General of Saskatchewan is that Questions 1 and 2 should be answered in the negative. If it becomes necessary to answer Question 3, it should be answered in the affirmative.

PART III

ARGUMENT

QUESTION 1: IS SECTION 195.1(1)(c) OF THE CRIMINAL CODE INCONSISTENT WITH SECTION 2(b) OF THE CHARTER?

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4. The issues raised in this Appeal with respect to the application of section 2(b) of the Charter to section 195.1(1)(c) of the Criminal Code are similar to those considered in Stagnitta v. R. (Appeal No. 20497). The Attorney General of Saskatchewan relies on the submissions made at paragraphs 4 to 18 of the Factum which he filed in the Stagnitta appeal.

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QUESTION 2: IS SECTION 195.1(1)(c) OF THE CRIMINAL CODE INCONSISTENT WITH SECTION 2(d) OF THE CHARTER?

10 5. The Attorney General of Saskatchewan submits that section 195.1(1)(c) of the Criminal Code does not trigger the operation of section 2(d) of the Charter. Section 2(d) says:

2. Everyone has the following fundamental freedoms:

...
(d) freedom of association.

20 6. A purposive interpretation of this provision leads to the conclusion that what is guaranteed is the freedom to join together with others to pursue a common purpose. To hold that section 2(d) applies to the simple sale of goods or services, in particular, the services of a
30 prostitute, would clearly overshoot its purpose.

40 7. This proposition is supported by the analysis of section 2(d) of the Charter undertaken by this Honourable Court in Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313. After rejecting the argument that section 2(d) extends "to the right to engage in a particular activity on the ground that the activity is

essential to give an association meaningful existence", Le
Dain J. said, at p. 391:

10 Freedom of association is particularly
important for the exercise of other
fundamental freedoms, such as freedom of
expression and freedom of conscience and
religion. These afford a wide scope for
protected activity in association. Moreover,
the freedom to work for the establishment of
an association, to belong to an association,
to maintain it, and to participate in its
lawful activity without penalty or reprisal is
not to be taken for granted.

8. In his assessment of the purpose of the guarantee
20 of freedom of association, McIntyre J. said, at p. 395:

30 While freedom of association like most other
fundamental rights has no single purpose or
value, at its core rests a rather simple
proposition: the attainment of individual
goals, through the exercise of individual
rights, is generally impossible without the
aid and co-operation of others. "Man, as
Aristotle observed, is a 'social animal,
formed by nature for living with others',
associating with his fellows both to satisfy
his desire for social intercourse and to
realize common purposes." (L.J. MacFarlane,
The Theory and Practice of Human Rights
(1985), p. 82.) This thought was echoed in
the familiar words of Alexis de Tocqueville:

40 The most natural privilege of man, next
to the right of acting for himself, is
that of combining his exertions with
those of his fellow creatures and of
acting in common with them. The right
of association therefore appears to me
almost as inalienable in its nature as
the right of personal liberty. No
legislator can attack it without
impairing the foundations of society.
(Democracy in America (1945), Vol. I, at
p. 196.)

The increase in complexity of modern society, which has diminished the power of the individual to act alone, has greatly increased the importance of freedom of association.

See also: Reasons for judgment of Dickson C.J.C., at p. 365.

10 9. Similarly, though dissenting in the application of section 2(d) in Re Public Service Employee Relations Act, supra, Dickson C.J.C. defined the purpose of the provision in a manner consistent with that set out in the majority judgments. The learned Chief Justice said, at p. 366:

20 What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the very activities in which they choose to engage.

And further, at p. 367:

30 The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

40 10. The offer of a service by a prostitute, or the request for that service by the prostitute's customer clearly falls beyond the ambit of freedom of association as interpreted in Re Public Service Employee Relations

Act, supra. Section 195.1(1)(c) of the Criminal Code is directed at a single, purely business transaction which has nothing to do with the fundamental freedom of association entrenched in the Charter. It follows that the impugned provision does not engage section 2(d).

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QUESTION 3: SECTION 1 OF THE CHARTER

11. Justification of a limitation on a Charter-guaranteed right consequent upon the operation of section 195.1(1)(c) of the Criminal Code has been dealt with in detail in the factum filed by the Attorney General of Alberta in Stagnitta v. R. The Attorney General of Saskatchewan agrees with those submissions.

See: Factum of the Respondent, the Attorney General of Alberta, filed in Stagnitta v. R., Appeal No. 20497, paras. 58 to 111.

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PART IV

NATURE OF ORDER SOUGHT

12. The Attorney General of Saskatchewan respectfully
requests that the constitutional questions be answered as
follows:

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- (a) Question 1: no;
- (b) Question 2: no;
- (c) Question 3: yes.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Regina, Saskatchewan, this 14th day of
November, 1988.

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B. Gale Welsh

Counsel for the Attorney General
of Saskatchewan

LIST OF AUTHORITIES

Page

1. Re Public Service Employee Relations Act,
[1987] 1 S.C.R. 313.

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