

20428

IN THE SUPREME COURT OF CANADA
(On Appeal from the Appeal Division Nova Scotia)

B E T W E E N:

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SIGNIFICATION

HER MAJESTY THE QUEEN, as represented by
THE ATTORNEY GENERAL OF NOVA SCOTIA

Appellant

A N D:

DORMAN THOMAS SKINNER

Respondent

A N D:

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

Intervenors

FACTUM OF THE ATTORNEY GENERAL OF ONTARIO
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COUR SUPREME DU CANADA
PRODUIT

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PART I

THE FACTS

1. The Attorney General of Ontario relies on the facts as found in the Factums of the parties.

PART II
POINTS IN ISSUE

2. By order of the Chief Justice of Canada, the following constitutional questions have been stated.

1. Does Section 195.1(1)(c) of the Criminal Code R.S.C. 1970 C.-34 as amended, infringe the freedom of expression guaranteed by Section 2(b) of the Canadian Charter of Rights and Freedoms?
2. Does Section 195.1(1)(c) of the Criminal Code R.S.C. 1970 C.-34 as amended, infringe the freedom of association guaranteed by Section 2(d) of the Canadian Charter of Rights and Freedoms?
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 Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

3. It is the position of the Attorney General of Ontario that the constitutional questions stated in the instant case should be answered as follows:

1. No.
2. No.
3. To the extent that Section 195.1(1)(c) of the Criminal Code of Canada contravenes either Section 2(b) or 2(d) of the Canadian Charter of Rights and Freedoms, any inconsistency which may exist is justified under Section 1 of the Charter.

PART IIIARGUMENTSECTION 2(b)

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

5. The Attorney General of Ontario has addressed this question in his Factum filed in Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code (File No. 20581), a copy of which is attached hereto as an Appendix. For the reasons advanced in paragraphs 13 to 21 of that Factum, it is respectfully submitted the question should be answered in the negative.

6. With particular reference to the majority decision of the Nova Scotia Court of Appeal, it is respectfully submitted that the Court erred in treating Section 2(b) as absolute. The Court also erred in interpreting Section 2(b) in a manner inconsistent with its historical and philosophical roots. Perhaps, most importantly, the majority of the Nova Scotia Court of Appeal erred in failing to recognize that Section 2(b) of the Charter does not extend to protect conduct which seriously undermines public safety, order, health, morals, decency and the fundamental rights and freedoms of others. The Nova Scotia Court of Appeal also failed to recognize the genuine cumulative harm caused by sexual street soliciting.

Reference:

Case on Appeal, Judgment of the Nova Scotia Supreme Court, Appeal Division, pp.63-72

SECTION 2(d)

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

7. It is respectfully submitted that the right to freely associate is not absolute. Section 2(d) of the Charter guarantees individuals the freedom to act in groups in furtherance of activities which they would otherwise be lawfully entitled to pursue as individuals. Freedom of association does not vest independent rights in a group to pursue objects which as individuals they would not be entitled to undertake. It does not immunize group participation in otherwise unlawful conduct.

Reference:

Re Public Service Employees Act (Alta.) [1987]
S.C.R. at 390, 391, 409

People v. Johnson, 376 NE (2nd) 381 at 385 (1978)

8. It is respectfully submitted that Section 195.1(1)(c) of the Criminal Code prohibits individuals from communicating for the purposes of obtaining the services of a prostitute. It does not prohibit prostitutes, their pimps or customers from associating for any other legitimate purpose. It is, of course, the position of the Attorney General of Ontario that Section 195.1(1)(c) does not contravene other fundamental freedoms and rights guaranteed by the Charter. Accordingly, the mere fact of association does not otherwise constitutionally shelter the proscribed conduct in issue.

Reference:

Regina v. McLean; Regina v. Tremayne, (1986) 28 C.C.C. (3d) 176 at p. 185

Regina v. Smith, unreported judgment, November 4, 1988, Ontario Supreme Court, pp. 158-169

9. It is respectfully submitted that the association of prostitutes and their customers for the purpose of arranging for the sale of sex in public, does not advance any social value which enjoys constitutional protection. Sexual street soliciting causes genuine harm to persons and property. The congregation of groups on the street or other public places for this purpose, seriously undermines public order, health, morality and the fundamental rights and freedoms of others. Section 195.1(1)(c) of the Criminal Code does not contravene Section 2(d) of the Charter. It is respectfully submitted that the Nova Scotia Court of Appeal erred in finding that it does.

Reference:

Regina v. McLean; Regina v. Tremayne, supra at p. 185

Regina v. Smith, supra pp. 158-169

Case on Appeal, "Judgment Nova Scotia Supreme Court Appeal Division", p. 73

SECTION 1

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

10. The Attorney General of Ontario has addressed this question in his Factum in Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code (Appeal No. 20581), a copy of which is attached hereto as an Appendix. For the reasons outlined in paragraphs 22 to 56 of that Factum, it is respectfully submitted that in the event that questions 1 or 2 or both are answered in the affirmative, then question 3 should be answered in the affirmative.

PART IVORDER REQUESTED

11. The Attorney General of Ontario requests that questions 1 and 2 should be answered in the negative, but in the event that either or both of these questions are answered in the affirmative, the Attorney General of Ontario requests that question 3 should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

M Bernstein

Michael Bernstein
Of Counsel for the Intervenor,
The Attorney General of Ontario

LIST OF AUTHORITIES

Re Public Service Employees Act (Alta.) [1987]
S.C.R.

People v. Johnson, 376 NE (2nd) 381 (1978)

Regina v. McLean; Regina v. Tremayne, (1986) 28
C.C.C. (3d) 176

Regina v. Smith, unreported judgment, November 4,
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