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IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Nova Scotia)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

DORMAN THOMAS SKINNER

Respondent

-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

-and-

THE CANADIAN ORGANIZATION FOR
THE RIGHTS OF PROSTITUTES

Intervener

SERVED COPY
SIGNIFICATION

FACTUM OF THE CANADIAN ORGANIZATION FOR THE RIGHTS OF PROSTITUTES

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PART I
STATEMENT OF FACTS

The Intervener

1. CORP, the Canadian Organization for the Rights of Prostitutes, is an association of prostitutes for promoting prostitutes' safety, status, liberty and mobility, and advancing public education and research about prostitution. CORP has wide domestic and international affiliations and accumulated expertise. CORP is a member of the National Action Committee on the Status of Women, which by resolutions in 1986, adopted CORP's aims and objectives as its own. CORP provides social services and counselling to prostitutes, submits briefs to federal, provincial and muncipal governmental bodies, and disseminates its expertise through participation in public fora, conferences, university classes and feminists' meetings.

Affidavit of Valerie Scott, pp. 1-4

The Intervention

2. This appeal impacts directly on the safety and security of Canadian prostitutes, a large class of persons socially and economically marginalized. The exploitation of Canadian prostitutes is widely recognized to occur directly as a result of the prostitution-related laws (Fraser Committee Report, vol. 2, p. 350). CORP is the only public interest intervener in the prostitution cases now before the Court, the only public interest intervener which represents the views and interests of prostitutes, the only public interest intervener directly affected by the Court's decision, and the only party making the free association and privacy arguments contained in this factum.

CORP applied for and was granted intervener status in these proceedings. On the intervention motion there was no discussion of CORP's right to address oral argument to the Court. The order

granting intervener status does not grant this right.

In these circumstances, therefore, the Court is placed in the position of having to decide the security and status of Canadian prostitutes in a contest between seven governments and a male customer (Skinner) and between seven governments and a government appointed "contradictor" (Manitoba Reference). In CORP's respectful submission, the interests of justice and the appearance of fairness require that CORP have equal rights to all other parties and interveners to make its case in these proceedings. The Court has reserved two days for seven governments to attempt to persuade it to continue the status quo. Pursuant to Rule 7, CORP respectfully requests the right to address twenty minutes of contrary oral argument to this Court.

Facts

3. Intervener, CORP, adopts the statement of facts contained in the Contradictor factum.

PART II
POINTS IN ISSUE

1. Intervener, CORP, adopts the points in issue as stated in the Respondent's Factum.

Intervener's Position

Question 1: yes

Question 2: yes

Question 3: no

PART III
ARGUMENT

The Equality Perspective

1. Canadian prostitutes are socially and economically marginalized. Their lives are endangered and dehumanized. They are victims of murder, physical abuse and verbal ridicule propagated by customers, pimps and the police; they bear a special stigma fortified by the criminal law; their net incomes are very low and they have little opportunity for movement up the status ladder. Prostitutes come largely from vulnerable groups, women and youth, and from vulnerable, exploitative backgrounds. Prostitutes lack access to basic governmental services of health, social services, counselling and policing available to others. Government applies little or nc resources or encouragement to the special problems of prostitutes.

> J.P.S. MacLaren, Prostitution in Canada in Ismael and Thomlison (eds), "Perspectives on Social Servies and Social Issues" (Canadian Council on Social Development, 1987, pp. 123-7, 132
>
> H.W. MacLauchlan, Of Fundamental Justice: Equality and Society's Outcasts (1986), 32 McG. L.J. 213
>
> C. Boyle and S. Noonan, Prostitution and Pornography: Beyond Formal Equality (1986), 10 Dal. L.J. 225, 248
>
> F.M. Shaver, Prostitution: A Critical Analysis of Three Policy Approaches (1985), 11 Can. Pub. Pol. (no. 3) 493, 501

2. This Court has emphasized that "a commitment to social justice and equality" underlies all Charter guarantees (R. v. Oakes, [1986] 1 S.C.R. 103, 136). Oakes establishes that

equality values pervade all Charter rights and freedoms, requiring that each specific right be interpreted against the Charter's broad equality commitment.

3. The equality perspective means that Parliament cannot deliberately or recklessly worsen the condition of an already disadvantaged and vulnerable group. Prostitutes are such a group. The prostitution laws single prostitutes out for criminal stigmatization and punishment, insuring that all will have criminal records, and perpetuating the marginalization and exploitation to which prostitutes are subject.

MacLauchlan, supra, at p. 225-6

Boyle and Noonan, supra, at p. 248

4. It is submitted that the equality perspective gives context to the free association and privacy arguments which follow. In light of the equality perspective it is submitted that Parliament cannot use the criminal sanction as a substitute for appropriate social and economic measures to deal with the social and economic problems of prostitutes.

Freedom of Association and Privacy

5. It is submitted that Charter-protected freedom of association shields adult intimate relationships from government control. Decisions about with whom or how to court, love, cohabit, marry, experience sexuality, or bear children are matters to be regulated by individual private conscience. Intimate relationships are not matters to be regulated by government's homiletic, pious morality or by the coercion of those temporary majorities who motivate government's actions. John Stuart Mill (On Liberty, Penguin, 1984, p. 63) recognized the need to protect "against the tyranny of prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development and, if possible prevent the formation of any individuality not in

harmony with its ways, and compel all characters to fashion themselves upon the model of its own." Intervener submits that associational guarantees are the Charter's way of restraining society from imposing is putative wisdom about intimacy and sexuality upon questioning individuals who may wish to explore these matters for themselves.

> Roberts v. United States Jaycees, 104 S. Ct. 3244, 3249 (1984) ("Our decisions have referred to constitutionally protected 'freedom of association' ... choices to enter into and maintain certain intitmate human relationshipps must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty.")
>
> Gilmore v. City of Montgomery, Alabama, 417 U.S. 556, 575 (1974) ("Government may not tell a man or a woman who his or her associates must be. The individual can be as selective as he desires. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic governement and insures peaceful, orderly change.")

6. This Court has recognized the importance of a right of privacy -- a "right to be let alone by other people" -- as a central feature of Charter-protected personal liberty.

> Hunter v. Southam, [1984] 2 S.C.R. 145, 161-2 (Governmental intrusions into private life restricted to those situations only where government pursues a compelling

> interest or seeks to prevent harm to society: "The individual's right of privacy will be [justifiably] breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior".)
>
> Olmstead v. United States, 277 U.S. 438, 478 (1928)

It is submitted that the right of privacy is an important component of associational guarantees and enlarges the protection which free association gives to intimate personal relationships.

> NAACP V. Alabama, 357 U.S. 449, (1958) ("[The] Court has recognized the vital relationship between freedom to associate and privacy in one's associations. [Inviolability] of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident [beliefs]."
>
> M. Manning, Rights, Freedoms and the Courts (1983), p. 215 ("Freedom of association must necessarily include the right of privacy in one's associations.")

7. The critical principle is that society's moral approbation is never enough, without proof of harm, to justify government in dictating the terms of permitted intimacy to individuals. Government may not specify how Canadians must fashion their personal relationships, nor can it circumscribe their ways of loving, being intimate, exploring their sexuality, or experimenting with ways of having pleasure and being happy with others. Conduct that does not interfere with the rights and interests of others may not be prohibited by the state.

8. Courts have applied this principle to a multitude of intimate relationships. Courts have prohibited government from intruding into decisions about sexuality and contraception between married

persons (Griswold v. Conneticut, 381 U.S. 479 (1965)), sexuality and contraception between unmarried individuals (Eisenstadt v. Baird, 405 U.S. 438 (1972)), decisions whether to bear children (Eisenstadt, supra.), decisions how to raise and instruct children (Pierce v. Society of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972)); and decisions regarding the use of sexually explicit materials for pleasure (Stanley v. Georgia, 394 U.S. 557 (1969)).

Lower courts in both Canada and the United States have applied this principle to invalidate prostitution related laws.

> R. v. Gudbranson, B.C. Prov. Ct. (Collings, P.C.J.), June 12, 1985 (Code, s. 193 violative of Charter s. 2(d), but justifiable under s. 1)
>
> In re P., 400 N.Y.S. 2d 455 (1977)

In the New York decision, Judge Margaret Taylor reviewed extensive expert evidence introduced to establish that prostitution spreads venereal disease, leads to ancillary crimes, is linked to organized crime, injures the stability of the family and concluded:

> Society may find something offensive about having women perform sex for money. However offensive it may be, recreational commercial sex threatens no harm to the public health, safety or welfare and, therefore, may not be proscribed; (p. 468).

9. Intervener, CORP, frankly acknowledges that the U.S. Supreme Court recently retreated from its privacy and free association protection of intimate relationships. The results are instructive for this Court to consider. In Bowers v. Hardwick, 478 U.S. 186 (1986) the U.S. Supreme Court considered a Georgia statute which makes it a criminal offence, punishable by up to 20 years imprisonment, to commit sodomy, which the statute defines as performing or submitting to any sexual act involving the sex

organs of one person and the mouth or anus of another. In a 5-4 decision the Court upheld the statute in face of a privacy, free association and due process attack. The majority opinion gives no privacy, free association or due process protection to the intimate sexual lives of homosexual couples, and it upholds a statute which criminalizes oral and anal sex between married partners. It is hardly surprising therefore that the law review commentators were appalled, stigmatizing the decision as "unfortunate" (1987), 61 Tulane L.R. 907,923; "unjustifiable" (1987), 11 N.Y. U. J. L. & Soc. 973, 992; "troubling ... insensitive ... intolerant" (1986), 19 Conn. L.R. 129, 142; "improper ... incorrect ... mistaken ... a dangerous and improper intrusion into the most private and personal activity of adults" (1987), 31 J. of Urban and Contem. L. 403, 416-17.

10. Intervener submits that Bowers v. Hardwick indicates the futility and danger of this Court trying to reconcile government's temporary morality with free association and privacy rights. Intervener submits that there is no principled basis, other than proof of harm under s. 1, upon which this Court can allow government to approve certain sexual associations as "good" and prohibit other sexual relationships as "bad". This was the point of Justice Stevens conclusion, in dissent, that the majority excluded homosexuals from the Constitution's protection simply because it dislikes them (Bowers v. Hardwick, 106 S. Ct. at 2858-9).

If this Court interprets the Charter to allow government to impose its views about intimate relationships on justification no stronger than the putative wisdom of temporary morality, there will be no legitimate or principled basis upon which government can be restrained from, for example, prohibiting Blacks and Whites from marrying, or forbidding married or single couples from using contraception.

See generally Loving v. West

> Virginia, 87 S. Ct. 1817, 1819, 1821 (1967) which considered the constitutionality of miscegenation statutes. In 1967 16 American States prohibited and punished interacial marriages. The Virginia statute was challenged and upheld by three lower courts. The trial judge stated: "Almighty God created the races ... and he placed them on separate continents. ... The fact that he separated the races shows that he did not intend for the races to mix." The Supreme Court of Appeals concluded that the State's legitimate purposes were "to preserve the racial integrity of its citizens," and to prevent "the corruption of the blood", "a mongrel breed of citizens," and "the obliteration of racial pride."
>
> See Poe v. Ullman, 367 U.S. 497 (1961) where a Conneticut statute prohibiting the use of contraception was upheld in a 5-4 decision for justiciability reasons.

All the Court could do in such cases -- and this would soon become as transparent as it was in the Bork confirmation hearings -- is to uphold laws it likes and invalidate those it dislikes for ideological reasons alone. Americans overwhelmingly rejected that unprincipled approach to constitutional decision in the Bork confirmation hearings, and it is respecfully submitted that this Court should do likewise.

11. Intervener submits that the only principled approach to free association and privacy guarantees is to forbid government from dictating the terms of all intimate relationships unless government can demonstrate, within the terms of s. 1, that it is saving other individuals or society from some compelling harm. There is no other principled approach.

12. Intimate associations are the most important means of self

fulfillment in our society. The theory of our Charter leaves decisions about intimate relationships to the consciences of consenting adults. It is for individual Canadians to explore these matters, searching for more perfect forms of union and happiness. The purpose of constitutional fundamental freedoms is to expand opportunities for individuals to search for fulfillment and truth. "[J]udicial review should always attempt to maximize openness and the possibility of revision in social life. It should resist the impulse to freeze into place, through constitutional fiat, a particular set of economic, social or political arrangements."

Monahan, Politics and the Constitution (1987), p. 125

Freedom of Association and Privacy Applied to Secs. 193 and 195

13. Section 195.1(1)(c) attempts to eliminate street prostitution by criminalizing preliminary solicitations or communications. Section 193 (at issue in the Manitoba Reference) attempts to eliminate indoor prostitution by criminalizing use of premises for the purpose of prostitution. These provisions, taken together with the Code definitions at s. 179, virtually eliminate any possibility for adults to explore sexuality in the anonymous intimate exchanges prostitution offers.

14. Prostitution in its preliminary solicitation and in the act itself is overwhelmingly a private, consensual matter between consenting adults who wish to make their own decisions about how to control their sexual lives and how to use their bodies. Prostitution may be a choice different from the use of sexuality for the purposes of procreation or bonding, but it is a choice very similar to the use of sexuality for the purposes of pleasure. These are the individual's choices to make in a Charter based free and democratic society. Intervenor submits that the vice of secs. 193 and 195.1(1)(c) is that they remove this choice from individuals. The impugned sections criminalize virtually

all opportunity for a particu lar form of sexuality and intimacy and in so doing, intervenor respec ully submits, give offence to privacy and associational guarantees in the Charter. If government is to make these choices for individuals it must justify its actions within the terms of the Charter, secs. 1 or 33.

Section 1 Analysis

15. The seven governments urging s. 1 justification of the impugned secs. 193 and 195.1(1)(c) do so on the basis of "the public nuisance aspect of commercial sexual activities" (eg. Manitoba Factum, p. 32; Nova Scotia, p. 28; Alberta, p. 24). The A.G. Alberta asserts traffic congestion, accosting passers-by, noise, fighting, breaking bottles, deterioration of property values, associated violent crime and the effect upon children (Alta. Factum, pp. 25-7).

16. The "evidence" in support of these assertions is curious, at best. The "evidence" is a legislative record. The legislative record consists of testimony which is not given under oath, and is frequently little more than self-serving posturing by politicians and mayors with pressure group interests to advance. Parliament may assign weight to these assertions for its own political reasons. This Court must be more careful and circumspect.

17. Even this so-called "evidence" fails to support Alberta's assertions. Alberta relies on the Fraser Report, pp. 346-9 (Factum, p. 24). On these pages the Report contains conflicting testimony, some of which states that

> [The current concern over prostitution involves] a police campaign to try to toughen the solicitation laws, as well as the manipulation by the police and moral conservatives of legitimate concerns by residents; (p.348).

The Report also quotes The Elizabeth Fry Society (p. 348):

> There is little street prostitution in most urban centers outside of Vancouver, Calgary, Toronto and Montreal ... Prostitutes have unjustifiably been focused upon by powerful urban lobby groups and the media...

Alberta also relies upon the Proceedings of the Standing Committee on Justice and Legal Affairs (p. 24). These Proceedings fail to establish any significant urban decay caused by prostitution. For example, Mr. Allmand testified before the Committee:

> I am a member of Parliament from Montreal ... I have not received one letter of complaint with respect to this matter. I have not read anything in the Montreal papers complaining or discussing this issue as being an issue of public concern; in other words, I have not heard anything in Montreal about it ... Maybe there is a problem, but if there is one it is not an issue in Montreal politically, or in the press, or in the media of any kind that I know of. The only letters I have received, as a member of this committee, about this problem have been from Vancouver. ... I was in Vancouver four times in the last four weeks. ... I decided to walk along some of these streets late at night and I was approached. The question that was asked in most cases, in all cases, was: would I like some company? It was either: 'Sir, would you like some company?' Or, 'Buddy, would you like some company?'

18. It is very convenient for the Attorneys-General to assert that the alleged nuisances are caused by prostitution. However, assuming, without conceding, the existence of these nuisances, there is not a shred of evidence in the record before this Court,

as there was not a shred of evidence before Parliament when it considered Bill C-49, to establish that prostitution causes these alleged problems.

19. In the most ambitious study to date, Harvard University investigators attempted to document a cause and effect relationship between prostitution and urban decay and concluded that "the experience in Boston does not strongly support the theory that prostitution, by itself, causes neighborhood deterioration. No Boston neighborhood during the past decade was shown to have declined as a direct or indirect result of street prostitution." The investigators speculated that prostitution in a neighborhood may indicate that "the neighborhood is already in the process of deterioration from other causes."

> B. Milman, New Rules for the Oldest Profession: Should We Change Our Prostitution Laws? (1980), 3 Harv. Womans L.J. 1, 3-1

If this speculation is correct -- and nothing in the record or the factums of the seven governments casts a shred of doubt on it -- street solicitation and bawdy house laws like those at issue would be ineffective to control alleged public nuisances in run-down neighborhoods.

20. In any event, section 195.1(1)(c) does not address nuisance problems. The actus reus of the crime is public conversation. There is no requirement that the conversation be obtrusive, noisome or harmful. In Mr. Skinner's case, s. 195.1(1)(c) is used to support a prosecution where there was no nuisance. Skinner engaged in a private, quiet, short conversation which others could not overhear without electronic equipment.

If nuisance be the real concern, crowd control legislation is the appropriate response. Police should have the authority to clear the streets of people whose behaviour is bothersome in a way that creates the least liability and risk to those involved. Such laws already exist: eg. Criminal Code, s. 169 (indecent

acts), s. 171 (causing a disturbance, indecent exhibition, loitering), and s. 176 (nuisance). "The lesson of experience is that adequate enforcement of existing charges under the Criminal Code, such as causing a disturbance, exhibition, assault, and trespassing will likely solve criminal related activities. ... it is clear that making the soliciting offence more enforceable would not solve the basic [nuisance] problem."

> S. Boreham, Prostitution in Canada, M.A. Thesis, Univ. of Ottawa (1984), p. 148, 150

Ms. Boreham's survey of attitudes found that 74% of male and 59% of female respondents thought that nuisance, not soliciting laws was the right way to deal with the nuisance aspects of prostitution (p. 103).

21. Assuming, arguendo, that prostitution does cause urban nuisances in some as yet unknown way, it is hardly a proportionate response to control the nuisances by a regulatory regime which eliminates virtually all opportunity for commercial, recreational sex. Department stores substantially increase the incidence of larceny; automobiles substantially increase urban congestion and pollution. No serious law maker would contend that it was rational or proportionate to control the nuisance effects thereby created by abolishing department stores or automobiles.

22. While the Attorneys-General have not offered justification for the impugned provisions other than alleged nuisance, the Manitoba Court of Appeal presumed s. 1 justification, without evidence, in the following words (p. 13):

> It requires no evidence to establish that from the aspect of public health, the violation of the sensitivities of decent society, and the corrosive relationship between prostitution and drugs and violence, parliamentarians might rightfully conclude that

prostitution should be restrained.

23. The justice's assumptions underscore the dangers of deciding without evidence. The literature on this subject is voluminous and unequivocal.

Prostitution does not contribute to the spread of venereal disease, or otherwise constitute a public health hazard.

> Milman, New Rules for the Oldest Profession, supra., p. 28
>
> Privacy and Prostitution (1977), 63 Iowa L.R. 248,258
>
> In Re P. 400 N.Y.S. 2d 455, 466
>
> Fraser Report, vol. 2, p. 395 ("the public's strongly held belief (held by 69% of the survey respondents) that prostitutes are a major cause of the spread of such diseases, is not substantiated. Epidemiological studies indicate that prostitutes are not a prime factor in the spreading of STDs.")

There is no established correlation between prostitution and drug use.

> Fraser Report, vol. 2. p. 374-5
>
> Milman, supra, pp. 25, 35

There is no established correlation between prostitution and violence or serious crime.

> Milman, supra, pp. 18, 24, 34
>
> Re P, supra, p. 467

24. Oakes.

(1) Governmental objective.

The record before this Court is altogether too flimsy and ambiguous to establish the existence of any substantial nuisance sufficiently important to warrant overriding constitutionally protected freedom of association. At its highest, the record suggests some isolated nuisances, in some cities, some of the

time, and even this is a matter of dispute.

(2) Proportionality.

(a) Rationality. It is not rational to interdict nuisance by a statute whose actus reus is prohibiting quiet conversation (s. 195.1(1)(c)), or by a statute whose actus reus is owning or occupying premises where quiet, private sexual acts take place (s. 193).

(b) Least Restrictive Means. A crowd control statute targeted to offensive public behaviour would be equally (or more) effective to interdict nuisance, but less offensive to free association guarantees. Skinner's quiet, short, private conversation is swept up in the all embrasive reach of s. 195.1(1)(c).

(c) Effects. The effects of secs. 193 and 195.1(1)(c) on prostitutes as a class could hardly be more drastic. These provisions single prostitutes out for violent and fatal victimization, pervasive social stigmatization, and economic exploitation. The provisions also eliminate virtually all opportunity to explore intimate sexuality in the anonymous exchanges prostitution makes available. Even if the alleged nuisances exist, they do not justify this scale of intrusion into free association, viewed in an equality context, which these statutes perpetrate.

PART IV
ORDER SOUGHT

Intervener respectfully asks that this Honourable Court:

1. Allow Intervener to address twenty minutes of oral argument to the Court;
2. Dismiss the appeal;
3. Answer the constitutional questions posed as follows:

   Question 1: yes

   Question 2: yes

   Question 3: no

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at OTTAWA, Ontario
this 22nd day of November,
1988.

Joseph Eliot Magnet
Counsel, CORP

LIST OF AUTHORITIES

Factum of the Canadian Organization
for the Rights of Prostitutes
Authorities