

20381

IN THE SUPREME COURT OF CANADA

(On Appeal from the Court of Appeal for Manitoba)

IN THE MATTER OF: The Constitutional Questions Act,
being Chapter C180, C.C.S.M.;

AND IN THE MATTER OF: A Reference pursuant thereto by the
Lieutenant Governor in Council to
the Court of Appeal for Manitoba
for hearing and consideration of
questions relating to the Canadian
Charter of Rights and Freedoms,
being Part I of the Constitution
Act, 1982 and the Criminal Code of
Canada, being c-51, and Sections
193 and 195.1(1)(c) thereof.

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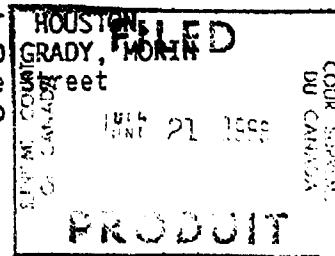
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PART I

STATEMENT OF FACTS

Respondent accepts the facts as set out at page one of the Factum of the Contradictor Added by Order of the Chief Justice of Manitoba.

In addition, Respondent submits that the material relied upon by the Attorney General of Manitoba in this appeal is set out in pages 35 through 502 of Part II of the Case on Appeal, which material constitutes a portion of the "Fraser Report" and the eighteen volumes of the Working Papers of that report, which report and papers were filed and relied upon by Respondent in the Court of Appeal for Manitoba.

PART II
POINTS IN ISSUE

The questions referred to this Honourable Court in this Reference are as stated in the Factums of the Contradictors.

PART III

ARGUMENT

SECTION 7

Is Section 193 of the Criminal Code of Canada inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms?

Is Section 195.1(1)(c) of the Criminal Code of Canada inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms?

Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(c) of the Criminal Code of Canada inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms?

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1. There are two contexts in which the word "purpose" appears in the course of a Canadian Charter of Rights and Freedoms ("Charter") case. First, the meaning of a right or freedom guaranteed by the Charter is to be ascertained by an analysis of the "purpose" of that right or freedom, that is, "... in light of the interests it was meant to protect". Secondly, in order to determine whether legislation is consistent with that Charter right or freedom, one must determine the purpose and effect of the impugned legislation. This secondary analysis enables the Court to measure the content of the legislation against the guarantees of that Charter right or freedom.

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R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at pp. 331, 344.

2. It is submitted that the purpose and effect of Sections 193 and 195.1(1)(c) of the Criminal Code is to minimize the public nuisance aspect of prostitution (Appendix A sets out the full text of these two provisions). Parliament has not outlawed prostitution per se, but, rather, has attempted to prevent the development of situations in which prostitution-related activities would amount to a public nuisance.

30

3. In particular, Section 195.1(1)(c) was designed to prohibit street solicitation and the social problems which arise in connection with it.

Hansard, September 9, 1985, page 6373; quoted in R. v. McLean (1986), 52 C.R. (3d) 262 at 267 (B.C.S.C.) and R. v. Jahelka (1987), 36 C.C.C. (3d) 105 at 109 (Alta. C.A.).

10 The purpose and effect of Section 193 is the same. While Section 193 does not prohibit a prostitute from attending at the home or other private dwelling (such as a hotel room) of the customer, it does prevent a prostitute from conducting prostitute-related activities in premises kept by the prostitute or a pimp for the purposes of prostitution. The effect of the legislation is to diffuse geographically the incidence of prostitution rather than allowing such activities to be concentrated in one location. Consequently, the convergence of customer and prostitute and the attendant public nuisance aspects that bawdy houses generate are avoided.

20 4. In examining whether Sections 193 and 195.1(1)(c) of the Criminal Code are consistent with Section 7 of the Charter, it is unnecessary to attempt an all-encompassing explication of this Charter right. In its primary sense, Section 7 proscribes legislation that deprives a person of life, liberty or security of the person other than in accordance with the principles of fundamental justice. That is, in order for Appellants to prove that the impugned legislation contravenes Section 7, they must meet both facets of Section 7. In other words, Section 7 does not encompass two general rights but only one.

30 R. v. Jones, [1986] 2 S.C.R. 284 at 302-3, per La Forest, J., holding that it was insufficient to establish only a loss of liberty in a successful challenge under Section 7 but, rather, that this loss of liberty must be coupled with the factor that it was not done in accordance with the principles of fundamental justice.

5. It is Respondent's submission that neither the purpose nor the effect of the impugned legislation contravenes Section 7 of the Charter. In particular, the Attorney-General of Manitoba refutes Appellants' argument that the right to carry on the business or the livelihood of prostitution is an entrenched right under Section 7 of the Charter. Assuming, per arguendo, that it is an entrenched right, however, the Criminal Code provides for a process consonant with the principles of fundamental justice. Finally, Respondent submits that Appellants' argument that the impugned legislation contravenes Section 7 on the ground of vagueness must fail. These arguments are dealt with seriatim.

10

Prostitution and Section 7 of the Charter

6. Respondent concedes that a conviction under the impugned legislation may involve a deprivation of the liberty of a person in the context of Section 7 of the Charter because the penalties for a conviction of either or both offences clearly provide for the power of imprisonment.

Criminal Code, Section 722 (Appendix B).

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at p. 515, per Lamer, J.

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7. Appellants have argued, however, that,

the suppression of the lawful profession of prostitution can be seen as both a violation of a prostitute's right to liberty, in the sense of not allowing her to exercise her chosen profession, and a violation of her right to security of the person, in that she is not allowed to exercise her profession to provide the basic necessities of life, such as food, shelter and clothing, for herself and her family.

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(Factum of the Contradictor Added by Order of the Chief Justice of Manitoba, at p. 25, lines 7-12.)

It is in this context that Respondent denies that the impugned legislation affects the liberty or security of the person within the meaning of Section 7 of the Charter.

8. The goal of Charter interpretation is to secure for all people the full benefit of the Charter's protection.

R. v. Big M Drug Mart Ltd., supra, at p. 344.

10 It is Respondent's position that Section 7 of the Charter does not protect the business or the livelihood of prostitution because the scope of Section 7 does not extend to include a free-standing right to carry on a particular business or to pursue a livelihood.

9. Before turning to the case law considering the question of whether Section 7 directly confers or protects property or economic rights and, in particular, the right to carry on a particular business, some general observations concerning Charter interpretation and Section 7 in particular are in order.

20 10. The Charter, like all constitutional documents, should be interpreted broadly and liberally. A generous interpretation does not, however, mean that the Charter must be given the widest interpretation available, as noted by Professor Hogg in the following passage:

30 A generous interpretation of the Charter means that the courts must avoid narrow interpretations of a kind that might be appropriate in construing a very detailed statute or a statute in derogation of individual rights. But it does not mean that the Charter must always be given the widest meaning that its language will bear. The task does not involve a mechanical acceptance of every plausible claim of right that is made under the Charter. The task is one of interpretation, which must be sensitive to the context and purpose of Charter language, and reasonable in the delineation of the language's scope. (footnotes omitted)

(Peter W. Hogg, *Constitutional Law of Canada* (2d ed.) at 659.)

11. Section 7 of the Charter is grouped with Sections 8 to 14 under the heading of "Legal Rights". This heading is an integral part of the Charter and, although not of controlling importance, may properly be considered as a guide to the intention of the makers of the document.

Law Society of Upper Canada v. Skapinker, [1984] 1
S.C.R. 357 at pp. 376-377.

10 A common characteristic of the legal rights guaranteed by the Charter is that all "... have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in the 'dignity and worth of the human person'".

Re B.C. Motor Vehicle Act, supra, at p. 503, per
Lamer, J.

20 12. Consistent with this view that legal rights in the Charter are derived from the administration of justice which is based on the belief in human dignity and worth is the notion that purely economic interests, such as a free-standing right to carry on a particular business or to pursue a livelihood, should fall outside the scope of Section 7 of the Charter. In particular, the right to carry on the business of prostitution or to pursue that livelihood has nothing to do with the administration of justice. Nor does it have anything to do with the promotion of those values which enhance human dignity and worth or which ameliorate the legal system.

13. The principle that the Charter is not concerned with purely economic rights was stated by McIntyre, J. in his concurring majority reasons in Re Alta. Public Service Employee Relations Act. In his reasons for judgment, His Lordship characterized the right to earn a livelihood as an economic right which has no constitutional protection other than possibly in the context of Section 6 of the Charter, viz.

30 Restrictions on strikes are not aimed at and do not interfere with the collective or associational character of trade unions. It is therefore my

conclusion that the concept of freedom of association does not extend to the constitutional guarantee of a right to strike. This conclusion is entirely consistent with the general approach of the Charter which accords rights and freedoms to the individual but, with a few exceptions noted earlier, does not confer group rights. It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights. Since trade unions are not one of the groups specifically mentioned by the Charter, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions. (emphasis added)

(Re Alta. Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at p. 412, per McIntyre, J.)

(i) "Liberty" and Prostitution

14. "Liberty" is a term capable of a very wide construction. As Wilson, J. stated in her reasons for judgment in *Operation Dismantle Inc. v. The Queen*: "There is no liberty without law and there is no law without some restriction of liberty". [*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441 at p. 489, quoting Dworkin, *Taking Rights Seriously* (1977) at p. 267.] In previous decisions of this Court, the term "liberty" has been interpreted in the context and purpose of Charter language:

In my opinion "liberty" in s. 7 of the Charter is not synonymous with unconstrained freedom. In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 524, Wilson, J. observed:

Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the Charter to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1.

Whatever the precise contours of "liberty" in s. 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.

(R. v. Edward Books, [1986] 2 S.C.R. 713 at pp. 785-6, per Dickson, C.J.C.)

15. The Courts of Appeal in Manitoba, Ontario, Saskatchewan, Alberta and British Columbia as well as the Federal Court of Appeal have all rejected the notion that the concept of liberty in Section 7 of the Charter protects purely economic interests.

10

See:

Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, [1987] 3 W.W.R. 189 at p. 311 (Man. C.A.).

R. v. Quesnel (1985), 53 O.R. (2d) 338 at p. 346 (Ont. C.A.); leave to S.C.C. denied (May 22, 1986).

Bassett v. Government of Canada (1987), 35 D.L.R. (4th) 537 at p. 567 (Sask. C.A.).

R. v. Neale, [1986] 5 W.W.R. 577 (Alta. C.A.); leave to S.C.C. denied (January 15, 1987).

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R.V.P. Enterprises Ltd. v. A.G.B.C., unreported, April 6, 1988 (B.C.C.A.), Suit. No. CA 007593.

Weyer v. The Queen, unreported, February 16, 1988 (F.C.A.), Suit. No. A-665-85.

30

16. The conclusion that "liberty" in the context of Section 7 does not extend to the protection of purely economic interests, such as a free standing right to work, is consonant with the position of this Court in Re B.C. Motor Vehicle Act, supra. That is, purely economic interests cannot be described as "essential elements of a system for the administration of justice which is founded upon a belief in the 'dignity and worth of the human person'", to borrow the language of Mr. Justice Lamer in that decision (supra, at p. 503).

(11) "Security of the Person" and Prostitution

17. Appellants have argued that the impugned legislation violates the prostitute's right to security of the person, "in that she is not allowed to exercise her profession to provide the basic necessities of life, such as food, shelter and clothing, for herself and her family."

Factum of the Contradictor Added by Order of the Chief Justice of Manitoba, at p. 25, lines 10-12.

18. The right in Section 7 not to be deprived of security of the person other than in accordance with the principles of fundamental justice has been considered by this Court principally in two decisions,

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Singh v. Minister of Employment and Immigration,
[1985] 1 S.C.R. 177; and

R. v. Morgentaler, [1988] 1 S.C.R. 30.

19. In neither case has this Court accepted the principle that "security of the person" entitles a person to necessities of life such that a person may not be deprived of these other than in accordance with the principles of fundamental justice. In *Singh v. Minister of Employment and Immigration*, Madam Justice Wilson referred to the Law Reform Commission of Canada definition of security of the person as including "the provision of necessities" but she herself found it unnecessary to determine whether such "an expansive approach to 'security of the person' should be taken."

20

Singh, supra, at p. 207.

20. Respondent refutes the notion that "security of the person" in Section 7 should be interpreted to include the "provision of necessities" for the reasons expressed earlier regarding purely economic interests and their exclusion from the term "liberty" in Section 7: purely economic interests, such as the free standing right to work, cannot be described as essential elements of a system for the administration of justice.

21. However, even if one accepts the principle that "security of the person" in the context of Section 7 includes "the provision of necessities", the impugned legislation cannot be construed as depriving someone of "security of the person". The legislation only attempts to preclude a person from engaging in certain aspects of prostitution. The logical extension of Appellants' argument that the legislation is a denial of the security of the person is to assert that any proscription of a profitable action would amount to such a deprivation. This would entrench in Section 7, for example, the right to live off the avails of prostitution, the right to bet and place bets on behalf of others and the right to traffic in narcotics, all profitable activities but ones proscribed by Parliament. Such an interpretation would give a very wide meaning to "security of the person" in Section 7 but surely one inconsistent and insensitive to the context and purpose of Charter language.

(iii) "The Principles of Fundamental Justice"
and Prostitution

22. Before examining the impugned legislation in light of the second branch of Section 7, it would be appropriate to review briefly the Court's role in examining legislation on a substantive level for constitutional compliance.

23. It is the prerogative of Parliament to determine what shall be a crime and, provided that it adheres to the Constitution, it may create such prohibitions, distinctions or exemptions as it sees fit.

Proprietary Articles Trade Association v. A.G.
Canada, [1931] 2 D.L.R. 1 (P.C.).

It is trite law that not all prohibitory legislation is criminal in nature. (Reference re Validity of Section 5(a) of the Dairy Industry Act (The Margarine Reference), [1949] S.C.R. 1 at 50). However, the power to control or prohibit prostitution is granted exclusively to

the federal government pursuant to its jurisdiction over criminal law, set out in Section 91(27) of the Constitution Act, 1867.

Westendorp v. The Queen, [1983] 1 S.C.R. 43.

24. With respect to examining legislation on a substantive level for compliance with the Charter, the jurisdiction of the courts has not been altered insofar as deciding the appropriateness of policies underlying legislation. That is, although the courts are required to measure the content of legislation against the guarantees of the Constitution, it has never been - nor is it now - their jurisdiction to decide upon the appropriateness of policies underlying legislative enactments. In particular, in reviewing legislation in light of the principles of fundamental justice in Section 7 of the Charter, reference should be made to the "basic tenets of our legal system" where those principles of fundamental justice are to be found.

Re B.C. Motor Vehicle Act, supra, at pp. 496, 503.

25. Respondent admits that the impugned legislation does not contravene the principles of fundamental justice in Section 7 of the Charter. In particular, the impugned legislation respects the basic tenets of our legal system, both in a procedural and substantive sense. An accused enjoys full opportunity to participate in his or her trial and the legislation does not restrict the accused's right to prepare and present a defence in accordance with the basic tenets of our legal system.

Vagueness and Section 7 of the Charter

26. Appellants have argued that the impugned legislation and, in particular, Section 193 is so vaguely worded as to offend Section 7 of the Charter. Specifically, Appellants have stated that "there is no certainty" with respect to the offence under Section 193 of the Criminal Code and that "this lack of certainty would certainly fail

to give a person of ordinary intelligence fair notice that his conduct is forbidden'...".

Factum of the Contradictor Added by Order of the Chief Justice of Manitoba, page 13, lines 23-26; page 20, lines 2-4.

10 27. If vagueness is available as a ground for invalidating legislation in the context of Section 7 of the Charter, Respondent submits the vagueness doctrine does not require that legislation be "certain". If this were the test for striking legislation then even the new Criminal Code recommended by the Law Reform Commission of Canada would not pass muster. The basis of drafting that Code was to "speak, as much as possible, in terms of general principles instead of needless specifics and ad hoc enumerations." [Law Reform Commission of Canada, Recodifying Criminal Law (Report No. 31; June 1987) at p. 2]

20 28. One of the principal decisions in Canada pertaining to the issue of vagueness and its applicability in the Charter is *R. v. Morgentaler* of the Ontario Court of Appeal [(1985), 52 O.R. (2d) 353]. Although this Court overturned the decision of the Court of Appeal and restored the appellants' acquittals [reported [1988] 1 S.C.R. 30], the comments of the Court of Appeal relating to the doctrine of vagueness appear to have been approved by a majority of this Court.

30 In particular, the issue of vagueness was dealt with in the reasons for judgment of Beetz, J. with whom Estey, J. concurred. Beetz, J. agreed with the language of the Court of Appeal and with McIntyre, J. (La Forest, J. concurring) who dissented in the result of the case. McIntyre, J. adopted extensive passages from the reasons of the Court of Appeal in its treatment of the application of vagueness to s. 251 of the Criminal Code. Dickson, C.J.C. (Lamer, J. concurring) also relied upon the ambiguity in the language of s. 251 as one of a number of flaws which, in their combined effect, led to the conclusion that s. 251 failed to comply with the principles of fundamental justice. Wilson, J. concurred in the result without touching on the question of vagueness.

29. The Ontario Court of Appeal in *Morgentaler* stated the following in reference to the issue of vagueness:

In this case, however, from a reading of s. 251 with its exception, there is no difficulty in determining what is proscribed and what is permitted. It cannot be said that no sensible meaning can be given to the words of the section. Thus, it is for the courts to say what meaning can be given to the words of the section. Thus, it is for the courts to say what meaning the statute will bear. Counsel was unable to give the court any authority for holding a statute void for uncertainty. (emphasis added)

(supra, at pp 87-88)

30. This standard of the Ontario Court of Appeal has since been applied by other appellate courts to dismiss constitutional challenges on the basis of vagueness.

Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, supra, at p. 306 (Man. C.A.).

R.V.P. Enterprises Ltd. v. A.G.B.C., supra, at p. 2 (B.C.C.A.).

See also:

R. v. Zundel (1987), 58 O.R. (2d) 129 at pp. 157-60.

R. v. LeBeau; R. v. Lofthouse (1988), 25 O.A.C. 1 (Ont. C.A.), dismissing a challenge to s. 157 of the Criminal Code on the basis that the phrase "an act of gross indecency" was unconstitutionally vague.

31. The issue of vagueness has been raised and dismissed by the Ontario Court of Appeal in respect of Section 193 prior to the coming into force of the Charter. That is, in *R. v. Hislop* (unreported, September 8, 1980; leave to S.C.C. denied [1980] 2 S.C.R. viii), Section 193 was challenged on the issue of vagueness and in particular on the basis that,

... the words "practice of acts of indecency" found in s. 179 of the Criminal Code are so vague and

indefinite as to offend the principles contained in the preamble to The British North America Act, 1867 and in the Canadian Bill of Rights. (p. 3)

32. In dismissing the challenge to the offence of keeping a common bawdy-house, the Court stated the following:

The words attacked have been in the Criminal Code since 1917 and have been interpreted and applied by our courts without difficulty for years. We do not think the words are vague, uncertain or arbitrary.

10

(p. 4, per MacKinnon, A.C.J.O.)

33. Respondent submits that whether or not the offence of keeping a common bawdy-house is difficult to interpret, it cannot be said that "no sensible meaning can be given to the words of the section", to borrow the test adopted by the Ontario Court of Appeal in *Morgentaler*, supra. Although the language used to create the offence allows for some flexibility in judicial interpretation, "flexibility and vagueness are not synonymous." (*R. v. Morgentaler*, supra, at p. 107, per Beetz, J.). It is submitted that the Manitoba Court of Appeal was correct in rejecting the argument that Section 193 is impermissibly vague.

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See Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, supra, at pp. 304-08.

SECTION 2(b)

Is Section 193 of the Criminal Code of Canada inconsistent with Section 2(b) of the Canadian Charter of Rights and Freedoms?

Is Section 195.1(1)(c) of the Criminal Code of Canada inconsistent with Section 2(b) of the Canadian Charter of Rights and Freedoms?

Is the combination of the legislative provisions contained in Section 193 and Section 195.1(1)(c) of the Criminal Code of Canada inconsistent with Section 2(b) of the Canadian Charter of Rights and Freedoms?

34. It is submitted that an analysis of these three questions is best approached in the following manner:

- i. By examining what is meant by "Freedom of Expression"; and
 - ii. By relating this to the impugned sections of the Code. This, it is submitted, will show that the legislation do not contravene Section 2(b) of the Charter because:
 - (a) The impugned legislation prohibits purely commercial activities;
 - (b) There are "powerful competing values" which necessitate the exclusion of this type of expression from the scope of Section 2(b) of the Charter.
- i. The meaning and purpose of "Freedom of Expression" [Section 2(b)']

35. In *R. v. Zundel*, supra, the Ontario Court of Appeal had occasion to discuss at length the purpose of Section 2(b) of the Charter. After conducting an extensive review of both Canadian and American authorities, the Court concluded that Section 177 of the Criminal Code of Canada, which prohibits the publication of false news, does not contravene Section 2(b) of the Charter.

36. While acknowledging that the wording of Section 2(b) is broad, the Court rejected the position that Section 2(b) gives an absolute or unrestrictive right of speech or expression. In this respect, it held that the following statement of Dickson, C.J.C. in *R. v. Big M Drug Mart Ltd.* (supra, at p. 337) is apposite:

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

10 37. The Court found that the purpose of freedom of expression is to protect and promote "the workings of a parliamentary democracy" (R. v. Zundel, supra, at p. 148) as well to encourage a "free and robust discussion of public issues". Those expressions which are the "antithesis of seeking truth through the free exchange of ideas" or those which "would appear to have no social or moral value which would merit constitutional protection" lie within "the permissibly regulated area which is not constitutionally protected".

See: R. v. Zundel, supra, at p. 155.

38. The Ontario Court of Appeal concluded in light of those principles that Section 177 of the Code does not constitute a violation of Section 2(b) of the Charter. Accordingly, recourse to Section 1 of the Charter was not necessary.

20 39. More recently, however, in Rocket et al v. The Royal Canadian College of Dental Surgeons of Ontario et al (unreported, April 19, 1988), the majority of the three member panel of the Ontario Court of Appeal (Dubin, A.C.J.O. dissenting) distinguished the decision in Zundel, supra, on the basis that while in Zundel "powerful competing values" necessitated the exclusion of certain expression from the scope of Section 2(b) an "all inclusive restriction on dentists' advertising contained in the impugned regulation" would not constitute such a "powerful competing value" so as to justify its exclusion from the scope of Section 2(b) (at p. 59 of unreported judgment).

30 40. The majority analyzed the role of advertising in Canadian society today and concluded at page 41:

So long as a free market for goods exists in our society then truthful and factual commercial

messages will have an important role to fulfil. They are important enough to warrant protection under s. 2(b) of the Charter subject, of course, to reasonable limitations to ensure that they are accurate, not false, deceptive or misleading. Such limitations as may be required could properly be exercised within the scope of s. 1 of the Charter. It remains to be seen whether the weight of authority is against this conclusion.

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41. In coming to this conclusion, the Court reviewed American authorities (pp. 41 through 48) and Canadian post-Charter authorities. In this context, it approved of the Quebec Court of Appeal decision in *Irwin Toy Ltd. v. Attorney General of Quebec et al* (1986), 32 D.L.R. (4th) 641 and *Skinner and The Queen* (1987), 35 C.C.C. (3d) 203 (N.S.C.A.) to the extent that the latter came to the conclusion that commercial or economic speech falls within the scope of Section 2(b).

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42. Furthermore, in this context the Court held that the decision of this Honourable Court in *Retail, Wholesale and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd. et al*, [1987] 1 W.W.R. 577 "seems to support this conclusion" (*Rocket et al v. The Royal Canadian College of Dental Surgeons of Ontario et al*, supra, at p. 64). Whether this Honourable Court's decision in *Dolphin Delivery*, supra, does support this conclusion will be addressed at a subsequent point in the argument.

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43. It is respectfully submitted that commercial or economic speech does not fall within the scope of Section 2(b) of the Charter. Such an interpretation overshoots the actual purpose of this freedom and includes interests which are beyond the philosophical and historical contents of freedom of expression.

44. Prior to the advent of the Charter, the scope of "free speech" did not extend beyond thoughts, ideas and beliefs related to political, social, religious, moral or ethical issues. Commercial or economic expression fell outside of the scope of this concept as it did not relate to governmental policies or matters of public concern essential to a democratic process.

Reference re Alberta Statutes, [1938] S.C.R. 100.

Boucher v. R., [1951] S.C.R. 265.

Switzman v. Elbling, [1957] S.C.R. 285.

Gay Alliance Toward Equality v. Vancouver Sun,
[1979] 2 S.C.R. 435.

Re Fraser and Public Service Staff Relations Board,
[1985] 2 S.C.R. 455.

ii. (a) Commercial or economic speech and Section
2(b) of the Charter.

10 45. It is submitted that commercial or economic speech does not fall within the scope of Section 2(b) not only for the reason that it contributes nothing to democratic government or matters of public concern essential to the democratic process but because it would displace the legislator's role of determining the economic fabric of our country.

46. While content of legislation may be measured by the courts against the guarantees of the Charter, the inclusion of commercial or economic speech within the scope of Section 2(b) would involve the courts in the unconstitutional task of deciding upon the appropriateness of policies underlying legislative enactments.

20 Reference Re Section 94(2) of the Motor Vehicle Act
(B.C.), [1985] 6 W.W.R. 481 at 496 (S.C.C.).

47. It is submitted that the majority decision in *Rocket, supra*, is an example of where the Court has not merely measured the content of legislation against the guarantees of the Charter but contrary to this Court's admonition in *Reference Re Motor Vehicle Act (B.C.), supra*, has adjudicated in respect of the appropriateness of the underlying legislative policies. This is evident in the Court's discussion of the importance of commercial messages to a "free market for goods" (*Rocket, supra*, at p. 41, pp. 53-54).

48. Instead of determining whether commercial messages "pertain to the rights of individuals" (Reference Re Motor Vehicle Act (B.C.), supra at p. 496), the Court has determined that commercial messages are important to the existence of a free market for goods in our society and therefore warrant protection under Section 2(b).

49. Furthermore, it is submitted that reliance upon the decision of this Honourable Court in Dolphin Delivery Ltd., supra, as authority for the proposition that economic or commercial expression is an interest which Section 2(b) of the Charter guarantees is erroneous.

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50. Respondent submits that the economic aspect of the form of expression considered in Dolphin Delivery, supra, was irrelevant to the findings of the Court; rather McIntyre, J.'s decision confirms that it is expression that is important for the functioning of a democracy which is Charter protected. Such expression is protected whether or not there is an economic or commercial component; it is not protected because it is economic or commercial in nature.

51. The relevant portion of McIntyre, J.'s judgment provides:

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On the basis of the findings of fact that I have referred to above, it is evident that the purpose of the picketing in this case was to induce a breach of contract between the respondent and Supercourier and thus to exert economic pressure to force it to cease doing business with Supercourier. It is equally evident that, if successful, the picketing would have done serious injury to the respondent. There is nothing remarkable about this, however, because all picketing is designed to bring economic pressure on the person picketed and to cause economic loss for so long as the object of the picketing remains unfulfilled. There is, as I have earlier said, always some element of expression in picketing. The union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of the picketing, and that it solicits the assistance of the public in honouring the picket line. (emphasis added)

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(R.W.D.S.U. v. Dolphin Delivery, supra, at p. 589)

52. In his concurring reasons in Reference Re Public Service Employees Relations Act (1987), 38 D.L.R. (4th) 161, McIntyre, J. confirms that economic matters are not protected by the Charter. At page 226 of the reported decision, he states:

There is, for instance, no Charter protection for the ownership of property, for general commercial activity or for a host of other lawful activities.

10 And further at page 231 he characterizes the right to earn a livelihood as an economic right which has no constitutional protection except in the limited context of Section 6 of the Charter which focuses on the mobility rights of Canadian citizens and residents. It is instructive to once again repeat those statements here:

20 It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights. Since trade unions are not one of the groups specifically mentioned by the Charter, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure and approach of the Charter to accord by implication special constitutional rights to trade unions.

53. Specifically, in respect of the significance of his judgment in Dolphin Delivery, supra, McIntyre, J. states at page 227:

30 Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. This second definition of freedom of association embraces the purposes and values of the freedoms which were identified earlier. For instance, the indispensable role played by freedom of association in the democratic process is fully protected by guaranteeing the collective exercise of freedom of expression. Group advocacy, which is at the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression directed at educating or

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informing the public would be protected from government interference: see the judgment of this court in Dolphin Delivery, supra. Indeed, virtually every group activity which is important to the functioning of democracy would be protected by guaranteeing that freedom of expression can be exercised in association with others.

10 Accordingly, Respondent submits that the "communication for the purpose of earning a livelihood" (R. v. Jahelka, supra) or the "expressive economic message" of the prostitute (R. v. Skinner, supra) engaged in the practice of prostitution is not an interest which is protected by Section 2(b) of the Charter.

ii. (b) Competing values and Section 2(b)

20 54. Per arguendo, if this Honourable Court determines that "communication for the purpose of earning a livelihood" or pure economic expression does fall within the scope of Section 2(b), the reasoning of the Ontario Court of Appeal in Rocket, supra, may be of assistance in determining whether "powerful competing values" necessitate the exclusion of the "expressive economic message" of a person communicating for the purposes of prostitution in the circumstances proscribed by the Code.

55. This appears to be the approach adopted by the American courts. Owing to substantially different constitutional provisions which recognize the protection of property rights, the American cases recognize some measure of constitutional protection for economic speech. However, even the most recent cases do not extend such protection to prostitution-related activities.

United States v. Moses (1975), 339 Atlantic Reporter (2d Series) 46 at p. 54 (Dist. of Columbia Court of Appeals)

30 Wood v. United States (1985), 498 Atlantic Reporter (2d Series) 1140 (District of Columbia Court of Appeals)

56. In *Morgan and the City of Detroit* (1975), 389 Federal Supplement 922 (U.S. Dist. Court), the Court rejected an argument that soliciting for the purposes of prostitution was constitutionally-protected speech notwithstanding that prostitution was not a criminal offence. On the issue of whether a law could prohibit speech which solicits conduct which is not unlawful, the Court cited with approval the statements of Chief Justice Berger in *Paris Adult Theatre I v. Slaton* 413 U.S. 49 where he held:

10 [c]ommercial exploitation of depictions,
descriptions, or exhibitions of obscene conduct on
commercial premises open to the adult public falls
within a State's broad power to regulate commerce
and protect the public environment. The issue in
this context goes beyond whether someone, or even
the majority, considers the conduct depicted as
"wrong" or "sinful". The States have the power to
make a morally neutral judgment that the public
20 exhibition of obscene material, or commerce in such
material, has a tendency to injure the community as
a whole, to endanger the public safety, or to
jeopardize in Chief Justice Warren's words, the
States' "right ... to maintain a decent society."

(*Morgan*, supra at p. 927)

57. In *R. v. Big M Drug Mart*, supra, the Chief Justice discussed the values which underlie the freedoms enunciated in Section 2 of the Charter. His comments are a propos this discussion:

30 It should also be noted, however, that an emphasis
on individual conscience and individual judgment
also lies at the heart of our democratic political
tradition. The ability of each citizen to make
free and informed decisions is the absolute
prerequisite for the legitimacy, acceptability, and
efficacy of our system of self-government. It is
because of the centrality of the rights associated
with freedom of individual conscience both to basic
beliefs about human worth and dignity and to a free
and democratic political system that American
jurisprudence has emphasized the primacy or
"firstness" of the First Amendment. It is this
40 same centrality that in my view underlies their
designation in the Canadian Charter of Rights and
Freedoms as "fundamental". They are the sine qua
non of the political tradition underlying the
Charter.

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

10 (Big M Drug Mart, *supra*, at p. 346; quoted with approval in *R. v. Morgentaler*, *supra*, at p. 177 per Wilson, J.)

58. It is submitted that the conduct proscribed by Section 193 or Section 195.1(1)(c) is conduct with considerable social harm and should therefore be excluded from the scope of Section 2(b) as it is destructive of the values which Section 2(b) was meant to protect.

See also:

20 Prostitution and Its Effects, excerpt from the Report of the Special Committee on Pornography and Prostitution ("Fraser Report").

R. v. McLean, *supra*, at pp. 265-266.

Kaplan, John - The Edward G. Donley Memorial Lecture: "Non-victim Crime and the Regulation of Prostitution", Vol. 79 West Virginia Law Review 593.

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SECTION 1

If Section 193 and 195.1(1)(c) of the Criminal Code of Canada or a combination of both or any part thereof are inconsistent with either Section 7 or Section 2(b) of the Canadian Charter of Rights and Freedoms, to what extent, if any, can such limits on the rights and freedoms protected by Section 7 or Section 2(b) of the Canadian Charter of Rights and Freedoms be justified under Section 1 of the Canadian Charter of Rights and Freedoms and thereby rendered not inconsistent with the Constitution Act, 1982?

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Introduction

59. Section 1 provides:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

60. If, per arguendo, the impugned legislation violates either Section 2(b) or Section 7 of the Charter, then Respondent's position is that such a violation is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

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General Principles to be Considered

61. Section 1, and the substantive right or freedom being considered, must be kept analytically distinct. In disapproving of a combined approach, which was adopted by the Ontario Court of Appeal in *R. v. Oakes*, Dickson, C.J.C. said this:

At the Court of Appeal level in the present case, Martin, J.A. sought to combine the analysis of section 11(d) and section 1. To my mind, it is highly desirable to keep section 1 and section 11(d) analytically distinct. Separating the

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analysis into two components is consistent with the approach this Court has taken to the Charter to date.

(*R. v. Oakes*, [1986] 1 S.C.R. 103 at p. 134.)

62. Accordingly, the Court is obliged to conduct an analysis of the legislation in the context of Section 1 only if it has previously determined that the legislation infringes a specific Charter right or freedom.

R. v. Oakes, *supra*, at pp. 134-138.

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R. v. Zundel, *supra*, at p. 155.

63. As a general rule, the onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation.

R. v. Oakes, *supra*, at p. 136-138.

64. It should be noted, however, that La Forest, J., expressing the majority view in the Supreme Court of Canada, stated in *R. v. Jones*, *supra*, at p. 299, an important qualification to the rule:

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Counsel for the appellant placed considerable reliance on Dickson J.'s (now C.J.C.) statement in *Meiorin v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169, that the onus of establishing that a limitation to a Charter right is justified is on the person who seeks to do so. But more recently, in *R. v. Oakes*, [1986] 1 S.C.R. 103, the Chief Justice made it clear that this is so only "[w]here evidence is required in order to prove the constituent elements of a s. 1 inquiry".

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65. If evidence is required in the context of Section 1 analysis, the type of evidence admissible is similar to that which is permitted on a reference brought before a court in respect of a constitutional division of powers issue. The concern that the Supreme Court of

Canada has expressed over the failure of counsel to present the appropriate factual underpinnings in various reference cases has led the courts to adopt a liberal attitude towards the admission of extrinsic evidence. In *R. v. Seo* (1986), 51 C.R. (3d) 1, the Ontario Court of Appeal examined the principles established by the Supreme Court of Canada governing the admissibility of extrinsic materials in "division of powers" cases and concluded that a similar approach is warranted in Charter cases.

10 66. A review of the material admitted by the Court in *Seo*, supra, demonstrates that this type of extrinsic "evidence" bears little, if any, resemblance to evidence generally admissible in the course of an ordinary trial. This material is submitted for the purpose of assisting the Court in determining the purpose of the Legislature or Parliament in enacting the legislation and for demonstrating social context and legislative effect.

R. v. Seo, supra, at pp. 303-306.

See also:

Reference Re section 94(2) of The Motor Vehicle Act (B.C.), supra at pp. 505-508 (S.C.C.).

20 *R. v. Hufsky*, unreported, April 28, 1988 (S.C.C.).

v. Thomsen, unreported, April 28, 1988 (S.C.C.).

67. Furthermore, as the decision of the Supreme Court of Canada in *R. v. Jones*, supra, points out, not every case requires this type of extrinsic material in order to prove legislative purpose. La Forest, J. stated:

I do not think such evidence is required here. A court must be taken to have a general knowledge of our history and values and to know at least the broad design and workings of our society. We are not concerned with particular facts.

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No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling,

interest of the state in the education of the young is known and understood by all informed citizens.

(R. v. Jones, supra, at p. 299.)

see also: Reference Re Section 193 and 195.1(1)(c), supra, per Monnin, C.J.M. and Huband, J.A.

10 68. Where evidence is required, the standard of proof under section 1 is the civil standard; that is, proof by a preponderance of probability. Having regard to the purpose of section 1, the "preponderance of probability" test must be applied rigorously.

R. v. Oakes, supra, at p. 137.

The Test to be Applied

69. In order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, the Supreme Court of Canada in Oakes, supra, applied two criteria.

20 First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom". R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

30 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test".

(R. v. Oakes, supra, at pp. 138-139.)

70. This test, however, must be seen in a very specific context: any alleged infringement must be measured against the very purpose for which the Charter was originally entrenched. As Dickson, C.J.C. states:

10 Inclusion of [free and democratic society] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (emphasis added)

20 (R. v. Oakes, supra, at p. 136.)

71. In *Edward Books and Art Limited*, supra, the Court warned against a narrow legalistic approach to the application of Section 1. At pp. 79¹, Mr. Justice La Forest stated:

30 Let me first underline what is mentioned in the Chief Justice's judgment, that in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan*, supra, at p. 524 calls "the practical living facts" to which a legislature must respond.

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That is especially so in a field of so many competing pressures as the one here in question.

10 By the foregoing, I do not mean to suggest that this Court should, as a general rule, defer to legislative judgments when those judgments trench upon rights considered fundamental in a free and democratic society. Quite the contrary, I would have thought the Charter established the opposite regime. On the other hand, having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

20 In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. ... (emphasis added)

72. The flexibility with which the Court must apply Section 1 is demonstrated in comparing and contrasting the approach of the Supreme Court of Canada in *R. v. Jones*, supra, (the education of young people) and *R. v. Oakes*, supra, (the role of a "reverse onus" clause in a penal proceeding).

The Test Applied

1. A Substantial and Pressing Concern.

30 73. The substantial interest, and indeed pressing concern, that society has in prohibiting prostitution related activities is acknowledged by all who have studied the problem. In support of this proposition, reference is made to the Report of the Special Committee on Pornography and Prostitution at Volume 2, Chapter 27 at p. 346 and following. It sets out the severe social and other problems that arise as a result of prostitution.

74. The learned Provincial Judge in *R. v. Cunningham et al* (1986), 31 C.C.C. (3d) 223 who reproduced a portion of that material, conceded:

10 ... I accept as notorious fact that the problem of street prostitution has given rise to great unrest and dissatisfaction among the residents of certain of our large cities. The government would be remiss in that situation if it did not attempt, in some manner, to reduce the aggravating public nuisance that street prostitution has created.

(at p. 237)

See also:

A.G. B.C. v. Couillard et al (1984), 14 C.C.C. (3d) 169 (B.C.S.C.)

R. v. McLean, *supra*.

Kaplan, John - The Edward G. Donley Memorial Lecture: "Non-victim Crime and the Regulation of Prostitution", *supra*.

United States v. Moses, *supra*.

20 *Wood v. United States*, *supra*.

75. Secondly, as emphasized by the American case law dealing with prostitution laws:

There is a legitimate national, state and community interest in maintaining a decent society ... and the stemming of commercialized sexual solicitations is an acceptable means of furthering this interest.

U.S. v. Moses, *supra*, at p. 54.

76. This is consistent with the decision of Dickson, C.J.C. in *Big M Drug Mart*, *supra*, in which he observes that freedom is "... subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others ..."

30 *R. v. Big M Drug Mart*, *supra*, at p. 337.

77. The studies, the case law and the notorious fact surrounding the practice of prostitution in Canada today clearly demonstrate the pressing and substantial concern of society to stem the activities prohibited by these sections of the Code.

ii. The Proportionality Test.

78. As indicated by Dickson, C.J.C. in *Oakes*, supra, the nature of the proportionality test will vary depending on the circumstances. However, the three components of the proportionality test identified by Dickson, C.J.C. serve as useful guides in balancing the interest of society with those of individuals and groups.

- a) Measures adopted must be rationally connected to the objective.

10 79. It is submitted that the connection in this case is self evident. The objective of Section 193 and Section 195 is to eliminate the public nuisance aspect of commercial sexual activities arising out of public solicitation and the running of common bawdy houses. The legislation does not purport to prevent prostitution related activities in such circumstances where no public nuisance would develop, or where the legitimate interest of the state in legislating in respect of concerns relating to the maintenance of a "decent society" is not advanced.

- b) Measures adopted must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations.

20 80. It is submitted that the use of the phrase "carefully designed" does not limit the legislator to the use of narrow and specific terms. The language of the statute may be as broad as necessary to achieve the objective in question, but not so broad as to encompass other matters which are otherwise constitutionally protected and the infringement of which does not further the objectives of the legislation.

81. The following passage is instructive:

... the infinite varieties and subtleties of language and other forms of communication make it impossible to construct a limitation upon expression in definite or precise terms. It is not easy to frame a prohibition against certain forms of conduct; but to formulate a prohibition which will embrace the multiplicity of words and meanings which might influence conduct can only be done through language exceedingly broad in scope. Men for generations have found ingenious ways to evade mechanical formulae of censorship. The allegory and the historical allusion are only two of the devices that have been used for such purposes. In order to accomplish what the framers of the limitation seek, the limitation must be couched in a sweeping generalization.

(Emerson, "Toward A General Theory of the First Amendment" (1962-63) 72 Yale L.J. 877.)

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82. The means employed in the impugned legislation impair as little as possible the prostitute's or customer's rights or freedoms. For example, if Section 195.1 was enacted without the impugned phrase "in any manner communicates ..." or without the definition of "public place" in Section 195.1(2), all the problems preceding the enactment of Section 195.1 would continue to exist.

c) The legislation is directly proportionate to its objective.

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83. The effect of the legislation is to attempt to eradicate the problem of public nuisance arising from commercialized sexual activities. It obviously addresses soliciting as might be practiced by a sole prostitute in a small town but, more importantly, it will abate the serious problems created by wide-scale prostitution practices that occur in Canada's major cities.

84. It is important to consider, when examining the effect of a legislative measure, "the nature of the right or freedom violated, the extent of the violation, and the degree to which the measure which

imposes the limit trenches upon the integral principles of a free and democratic society."

R. v. Oakes, *supra* at pp. 139-140.

85. It is submitted that if the legislation does violate some aspect of Section 2 or Section 7 of the Charter, it violates what could only be described as being on the periphery of the right or freedom and then only incidentally. The legislation is designed to protect other individual and societal rights in order to ensure respect for the inherent dignity of the human person and a commitment to social stability and justice - values and principles essential in a free and democratic society.

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R. v. Oakes, *supra*, at p. 136.

86. Applying the civil standard rigorously and bearing in mind the values in the context of which the analysis is conducted, it is submitted that the legislation meets the requirements of Section 1 of the Charter.

R. v. Jahelka, *supra*.

PART IV

NATURE OF ORDER REQUESTED

87. Respondent respectfully requests this Honourable Court to answer questions 1 through 6 in the negative but in the event that any one or more are answered in the affirmative, to answer question 7 in the affirmative.

All of which is respectfully submitted.

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V. E. Toews.

V. E. Toews
Donna Miller

PART V

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APPENDIX A

204

MARTIN'S CRIMINAL CODE, 1988

Bawdy-houses

KEEPING COMMON BAWDY-HOUSE—Landlord, inmate, etc.—Notice of conviction to be served on owner—Duty of landlord on notice.

193. (1) Every one who keeps a common bawdy-house is guilty of an indictable offence and is liable to imprisonment for two years.

(2) Every one who

(a) is an inmate of a common bawdy-house.

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house.

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served upon the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person upon whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person upon whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

1953-54, c. 51, s. 182.

APPENDIX A

208

MARTIN'S CRIMINAL CODE, 1988

Offence in Relation to Prostitution

OFFENCE IN RELATION TO PROSTITUTION—Definition of "public place".

195.1 (1) Every person who in a public place or in any place open to public view

- (a) stops or attempts to stop any motor vehicle.
- (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
- (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

(2) In this section, "public place" includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view. 1972, c. 13, s. 15; 1985, c. 50, s. 1.

NOTE: By virtue of s. 2 of 1985, c. 50, an Act to amend the Criminal Code (prostitution), three years after the coming into force of this section (December 20, 1985) a comprehensive review is to be undertaken of its provisions by a committee designated or established by the House of Commons for that purpose. Within one year of that review the committee is to submit a report to the House including a statement of any changes the committee recommends.

APPENDIX B

721-722 MARTIN'S CRIMINAL CODE, 1988

Punishment

GENERAL PENALTY—Imprisonment in default where not otherwise specified.

722. (1) Except where otherwise provided by law, every one who is convicted of an offence punishable on summary conviction is liable to a fine of not more than two thousand dollars or to imprisonment for six months or to both. 1985, c. 19, s. 170(1).

(2) Where the imposition of a fine or the making of an order for the payment of money is authorized by law, but the law does not provide that imprisonment may be imposed in default of payment of the fine or compliance with the order, the court may order that in default of payment of the fine or compliance with the order, as the case may be, the defendant shall be imprisoned for a period of not more than six months.

(3) to (11) [*Repealed*, 1985, c. 19, s. 170(2).]