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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PART I

STATEMENT OF FACTS

1. The facts for the purposes of this appeal are stated on page one of the Factum of the Contradictor Added by Order of the Chief Justice of Manitoba.

PART II

POINTS IN ISSUE

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

> 1. Is Section 193 of the Criminal Code of Canada inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms?
>
> 2. Is Section 195.1(1)(c) of the Criminal Code of Canada inconsistent with Section 7 of the Canadian Charter of Rights and Freedoms?
>
> 3. 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?
>
> 4. Is Section 193 of the Criminal Code of Canada inconsistent with Section 2(b) of the Canadian Charter of Rights and Freedoms?
>
> 5. 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?
>
> 6. 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?
>
> 7. If Sections 193 and 195.1(1)(c) of the Criminal Code of Canada or a combination of both or 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?

The Attorney General of Canada submits that Questions 1 to 6 should be answered in the negative, but in the event that any one or more of those Questions are answered in the affirmative, then the response to Question 7 should be that the challenged provisions are justifiable limits under s. 1 of the Charter.

PART III

ARGUMENT

3. Sections 193 and 195.1(1)(c) of the Criminal Code (reproduced in Appendix A hereto) are located in a Part of the statute containing offences which "contribute to public inconvenience or unrest".[1] Their specific purpose is to abate the public nuisance created by the activities of prostitutes and their customers. Parliament has not sought to "suppress" prostitution, as the Appellants allege, but has rather attempted to diffuse the activities associated with it in order to minimize their demonstrated adverse effects on others.

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1. Hutt v. R., [1978] 2 S.C.R. 475, per Spence J. at p. 484.

4. The object of s. 193 is to address the social nuisance generated by the "frequent and habitual"[1] use of premises for the purposes of prostitution. The harmful consequences which would flow from a failure to legislate in this area were summarized by the Criminal Law Revision Committee in the United Kingdom:

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> "In our Working Paper we rejected as facile the argument that brothels should be legalised. We thought that the evils of legalisation would be great. There are few who would want a brothel next door and from the evidence which we have received to live near a brothel can be unpleasant. Legalising brothels would remove the incentive to be discreet and would no doubt increase their number. It would increase demand for the services of prostitutes and attract more girls into prostitution. Further, some of our members were of the opinion that legalising brothels would lead to areas acquiring a reputation for vice, which would not be in the public interest."[2]

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1. Patterson v. R., [1968] S.C.R. 157, per Spence J. at p. 161.

2. "Prostitution: Off-street activities", Seventeenth Report of the Criminal Law Revision Committee, Cmnd. 9688 (1985), at p. 14.

5. The background to s. 195.1(1)(c) was reviewed by McKay J. in R. v. McLean; R. v. Tremayne,[1] who noted that uncontrolled street solicitation by prostitutes and pimps had produced "disastrous" consequences, and that "[t]remendous pressure was exerted on the federal government to do something about the situation - to put some teeth back into laws relating to street solicitation". His Lordship accepted, as have other courts examining s. 195.1(1)(c), that the purpose of the measure was as stated by the Minister of Justice in the House of Commons on September 9, 1985:

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> "The purpose of this Bill is to help the citizens of this country who live in certain of our major urban areas and the police forces of the country to regain the streets because they have lost control of the streets and neighbourhoods in certain urban areas of this country ...
>
> The legislation does not attempt to deal with all of the problems that prostitution creates or with the problems of prostitution generally, which of course is the sale of sexual services for pay. It only purports to deal with one aspect of the problems that prostitution can create, which is the nuisance to others created by street soliciting not only by the prostitute but by the customer of the prostitute ..."

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1. (1986) 52 C.R. (3d) 262 (B.C.S.C.), at pp. 265-267.

6. The overall effect of the two provisions is to prevent prostitutes and their potential clients from congregating and concentrating their activities in any

particular location. The net result is that the practice of prostitution must be transacted so as not to cause a nuisance, since it has been amply demonstrated that in the absence of regulation the "trade" would be carried on with a complete disregard for the rights and interests of other members of the public. The diffusion of prostitution-related activities addresses the root cause of the problems which they generate, as noted by the Criminal Law Revision Committee:

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> "Prostitutes go where they can expect to find clients and clients go where they can expect to find prostitutes. The more widely such an area is known the more it will attract prostitutes and clients and the more nuisance they will create."[1]

1. "Prostitution in the Street", Sixteenth Report of the Criminal Law Revision Committee, Cmnd. 9329 (1984), at p. 3.

Section 7 of the Charter

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

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

3. 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?

(i) Economic Rights

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7. The Appellants argue that the impugned provisions infringe prostitutes' right to liberty, in not allowing them

to exercise their chosen profession, and their right to security of the person, in not permitting them to exercise their profession in order tc provide the basic necessities of life. Both branches of the argument assume, incorrectly, that the law prohibits prostitution as such. The "liberty" argument equates the s. 7 right with unconstrained freedom. The "security of the person" submission assumes that any law with an economic impact is presumptively unconstitutional.

8. This Court has determined that the s. 7 guarantee of "liberty" is not "synonymous with unconstrained freedom", and that it does not extend to "an unconstrained right to transact business whenever one wishes".[1] In the same vein, other courts have concluded, by an overwhelming majority, that "liberty" does not generally embrace commercial or economic rights. Many of the authorities are reviewed by Lysyk J. in Re Wilson and Medical Services Commission,[2] in which the court adopted the following structural analysis of the Charter formulated by Professor Garant:

> "The liberty of the person envisaged by s. 7 must be distinguished from those liberties enumerated in s. 2, which is also concerned with the person, but from its moral, spiritual or psychological aspect.
>
> Certainly in a general sense one can conceive that the term "liberty" has a value with regard to all the rights and freedoms recognized by the Charter. However, the structure of the Charter requires us to give the concept a residual and restrictive sense in considering s. 7. Contrary to the Canadian Bill of Rights, which recognizes the right to liberty, in s. 1, in a broad and introductory way, s. 7 is concerned with the right to liberty following other dispositions which grant rights of a moral order, like the fundamental freedoms (s. 2), democratic rights (ss. 3 to 5), and mobility rights (s. 6). The "liberty" envisaged by s. 7 is found in a section consecrated to "legal rights" and precedes ss. 8 to 14, which deal with various aspects of the rights of the physical person."[3]

1. Edwards Books and Art Ltd. v. R., [1986] 2 S.C.R. 713, per Dickson C.J.C. at pp. 785-786.

2. (1987), 36 D.L.R. (4th) 31 (B.C.S.C.), at pp. 52-59.

3. Ibid., at p. 54.

9. In a very few instances, Canadian courts have interpreted "liberty" in the expansive sense given to that term by the United States Supreme Court in Meyer v. Nebraska,[1] for which the Appellants contend here. One such example appears to be the decision of the B.C. Court of Appeal in R. v. Robson,[2] but that Court has since indicated that its judgment has been misunderstood.[3] This illustrates, it is submitted, the difficulties inherent in attempting to apply principles developed under a provision of a constitution which differs from the Charter both in its wording and its historical foundations, as Strayer J. observed in Smith, Kline & French Laboratories Ltd. v. A. G. Can.:

> "Reference to the jurisprudence of 1923 of the United States Supreme Court on the subject of "liberty" must also be viewed with caution. The concept of "liberty of contract", originally founded on the Fourteenth Amendment, scarcely survived the Great Depression in the United States: see Tribe, American Constitutional Law (1978), at pp. 427-55. Admittedly, economic liberty has more recently enjoyed a mild revival in Fourteenth Amendment cases. But it must be kept in mind that the historical background and social and economic context of the Fourteenth Amendment are distinctly American. Further it must be noted that in the Fourteenth Amendment "liberty" is combined with "property" which gives a different colouration to the former through the introduction of economic values as well as personal values. This is not the case in s. 7 of the Canadian Charter of Rights and Freedoms."[4]

1. (1923), 262 U.S. 390.

2. (1985), 19 C.C.C. (3d) 137 (B.C.C.A.).

3. R.V.P. Enterprises Ltd. v. A.G.B.C., unreported, B.C.C.A., April 6, 1988.

4. (1985), 24 D.L.R. (4th) 321, at p. 364; appeal dismissed, [1987] 2 F.C. 359 (F.C.A.); leave to appeal refused, S.C.C., April 9, 1987.

10. The phrase "security of the person" has likewise been understood by the courts as not extending so far as to encompass economic interests. As expressed by Tarnopolsky J.A. for the Court in R. v. Videoflicks Ltd., "[t]he concept of life, liberty and security of the person would appear to relate to one's physical or mental integrity and one's control over these, rather than some right to work whenever one wishes".[1] In this regard, the concern of the courts has been to give sensible content to s. 7 as a whole, rather than to overshoot its purpose as a "Legal Right" by infusing it with meanings which have little or no connection with "the essential elements of a system for the administration of justice".[2]

1. (1984), 14 D.L.R. (4th) 10 (Ont. C.A.), at p. 48; appeal allowed in part on other grounds sub nom. Edwards Books, supra, para. 8, note 1.

2. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J. at p. 503.

11. While it is no doubt incorrect to say that the mere presence of some economic element immediately obviates any consideration of "security of the person", it is submitted that the protection of s. 7 of the Charter is only engaged at

the point where a direct and substantial connection can be made between the economic detriment and the Charter right. Otherwise, as McLachlin J.A. for the Court observed in **Whitbread v. Walley et al.**,[1] the ambit of s. 7 would be virtually unlimited:

> "It is difficult to conceive of a property or economic interest which does not arguably impact on the life, liberty or security of person. Liberty and security of person are flexible and expansive concepts, and the degree to which they can expand is intimately tied with the amount of money one has at his or her disposal. For example, a person who is barred by legislation from raising a claim for breach of contract or whose corporation is denied a licence, might claim that the resultant financial loss has affected his liberty and security of person because without money he cannot go where he wants to go, pursue the activities he wishes to pursue, or provide adequately for his future. To accept the plaintiff's second argument would be to make s. 7 applicable to virtually all property interests. Given the scheme of the Charter and the absence of any reference to the right of property, I cannot accept that this was the intention of its framers."

1. Unreported, B.C.C.A., May 13, 1988, at p. 15.

12. If the challenged legislation here did in fact proscribe prostitution as such, and if it were established (rather than postulated) that at least some prostitutes were thereby deprived of any means of earning a living, then there might be a case for saying that the economic burden had a direct impact upon the interests protected by s. 7. As submitted above, however, ss. 193 and 195.1(1)(c) limit rather than prohibit the practice of prostitution. They establish that prostitution may continue so long as it is not conducted in public places or other premises where it has been shown to produce adverse effects on others. In this respect, the impugned provisions ought properly to be

regarded as "time and place" regulations which do not implicate the rights to liberty or personal security.[1]

1. R. v. Videoflicks Ltd., supra, para. 10 note 1, per Tarnopolsky J.A. at pp. 46-48.

13. The Appellants ultimately moderate their claim of infringement of s. 7 by acknowledging that "all trades and business activities must be subject to government regulation which is in the public interest".[1] The case thus resolves itself into an assertion that prostitutes, as a class, have been subjected to a special legislative régime which is more onerous in its effect on them than the general rules under which any other business, trade or calling must operate. That is a claim of discrimination, which falls under s. 15(1), not s. 7, of the Charter.

1. Factum of the Contradictor Added by Order of the Chief Justice of Manitoba, p. 38.

14. If, notwithstanding the foregoing, "liberty" and "security of the person" extend to the point urged by the Appellants, then it is submitted that there has been no "deprivation" of those rights within the meaning of s. 7 of the Charter. To the extent that the law tolerates the practice of prostitution, it does not in any sense accord it the kind of recognition associated with a lawful trade. Even if it did, limiting the circumstances under which a particular business, trade or calling may be carried on is a matter of time and place regulation, not a denial of rights.[1]

1. R. v. Videoflicks Ltd., supra, para. 10, note 1, per Tarnopolsky J.A. at p. 48.

15. In any event, it is submitted that measures which are clearly designed to abate a demonstrated public nuisance

are not fundamentally unjust. It has not been one of the "basic tenets of our legal system"[1] to permit a business, trade or calling to occupy the public domain for its own commercial gain, or to operate at any private locale (such as in a residential neighbourhood) of its own choosing. As will be submitted below in connection with s. 2(b), this Court has recognized that while the Charter must be given full effect, it cannot operate so as to overwhelm the legitimate interests of "public safety, order, health or morals or the fundamental
10 rights and freedoms of others".[2] The challenged provisions serve interests of that order, and do so only by limiting, not "suppressing", the practice of prostitution.

1. Re B.C. Motor Vehicle Act, supra, para. 10, note 2.

2. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, per Dickson J. at p. 337.

(ii) Void for Vagueness

16. The "void for vagueness" doctrine, as developed in the United States, focusses on two evils: lack of fair
20 notice, and encouragement of arbitrary enforcement. Underlying both of these possible applications is the concern that the law must provide some comprehensible standard of conduct. Consequently, the vagueness challenger

> (i) who asserts lack of "fair notice" must establish that an enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all"[1]
> 30 (underlining added); or

(ii) who complains of the potential for arbitrary enforcement must demonstrate that the vagueness of the statute is so pervasive as to permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"[2] (underlining added).

1. Village of Hoffman Estates et al. v. Flipside, Hoffman Estates Inc., 455 U.S. 489 (1982), per Marshall J. at p. 495, note 7.

10 2. Kolender v. Lawson, 461 U.S. 352 (1983), per O'Connor J. at p. 358.

17. Canadian courts have accepted the principle that a statute which contains no standard is offensive to the "principles of fundamental justice" in s. 7 of the Charter. In conformity with the approach adopted in the United States, Canadian courts have examined a challenged measure in order to determine whether or not it is impermissibly vague in all of its applications.[1]

20 1. R. v. Rowley (1986), 31 C.C.C. (3d) 183 (B.C.C.A.), per Nemetz C.J.B.C. at pp. 187-188; R. v. Zundel (1987), 58 O.R. (2d) 129 (Ont. C.A.), per the Court at p. 158 [leave to appeal refused, S.C.C., June 4, 1987]; R. v. Piercey (1986), 60 Nfld. & P.E.I.R. 76 (Nfld. C.A.), per Mifflin C.J.N. at p. 78.

18. Here again, American authority on the subject must be approached with caution, and with an understanding of the unusual setting in which the doctrine operates. In practical terms, it appears that the United States Supreme Court will 30 rarely, if ever, invalidate a federal statute for vagueness. That is so because the Court has jurisdiction to interpret federal statutes, and prefers to use that "narrowing" power rather than to resort to the "annihilating" void for vagueness doctrine.[1] The situation is quite different where state legislation is concerned, as the Court lacks

jurisdiction to provide an authoritative construction,[2] and must "take the statute as though it read precisely as the highest court of the State interpreted it."[3] It appears that annihilation is more frequent in that unusual context.

1. A. Amsterdam, "The Void for Vagueness Doctrine in the Supreme Court", 109 U. Penn. Law Rev. 67 (1960), at p. 86. Professor Amsterdam points out, at p. 83, note 80, that apart from two instances "no federal statute has ever been declared unconstitutional for vagueness".

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2. U.S. v. Thirty-Seven Photographs, 402 U.S. 363 (1971), per White J. at p. 369.

3. Wainwright v. Stone, 414 U.S. 21 (1973), per curiam at pp. 22-23.

19. Since Canadian courts possess the authority to interpret legislation, the acceptance of the void for vagueness doctrine into our constitutional law ought not to result in the wholesale invalidation of statutes. While the Charter certainly expands the scope of judicial review, it does not alter the essential nature of the judicial function, and thus in the first instance "it is for the courts to say what meaning the statute will bear."[1] The precise import of a statute may not be clear as a matter of first impression, but difficulty of interpretation is not to be confused with vagueness.[2] Accordingly, the invalidation of a statute for impermissible vagueness should occur only in "extreme" cases,[3] where the court determines that "a provision simply has no core".[4]

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1. R. v. Morgentaler et al. (1985), 52 O.R. (2d) 353 (Ont. C.A.), per the Court at p. 388; appeal allowed on other grounds, [1988] 1 S.C.R. 30.

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2. *R. v. Rowley*, *supra*, para. 23, note 1, per Nemetz C.J.B.C. at p. 186.

3. *Reference Re Section 193 and 195.1(1)(c) Criminal Code*, [1987] 6 W.W.R. 289 (Man. C.A.), per Philp J.A. at p. 307.

4. *Smith v. Goguen*, 415 U.S. 566 (1974), per Powell J. at p. 578 (emphasis in original).

20. The Appellants' principal complaint appears to be that the words "act of indecency", "prostitution", "keeps", "communicate" and "public place", considered in isolation, are difficult to interpret. These are not terms of art but are rather words of common usage, and the fact that courts have been able to interpret and apply them in the past is strongly indicative, it is submitted, of an ascertainable standard of conduct.

21. Assuming for the sake of argument that the words complained of are broad in their respective meanings, the Appellants' submission addresses only the *actus reus* component of the offences, and says nothing about the "principal ingredient"[1] of *mens rea*. A conviction for keeping a common bawdy house contrary to s. 193(1) of the *Code* can only be obtained upon proof beyond a reasonable doubt of "guilty knowledge"[2]. Similarly, s. 195.1(1)(c) requires proof of a communication or attempted communication "for the purpose" of engaging in prostitution or of obtaining the sexual services of a prostitute. Consequently, even if

the actus reus of each offence is hypothetically broad, the requirement for proof of a specific intent in every case significantly narrows and clarifies the reach of the challenged provisions.

1. R. v. Ancio, [1984] 1 S.C.R. 225, per McIntyre J. at p. 247.

2. R. v. Baskind (1975), 23 C.C.C. (2d) 368 (Qué. C.A.); Durand v. R. (1951), 12 C.R. 293 (Qué. C.A.); Hopper v. Clark (1911), 40 N.B.R. 568 (C.A.).

22. In this regard, it is noteworthy that in the United States "the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea".[1] The presence of the latter element mitigates the possible vagueness of other terms "by helping to ensure that the defendant had adequate notice and by guarding against capricious enforcement through the requirement that he actually have intended the conduct which the statute seeks to guard against".[2] Here, the obligation imposed upon the Crown to prove intent obviates any concern that the challenged provisions might become "a trap for those who act in good faith".[3]

1. Colautti v. Franklin, 439 U.S. 379 (1979), at p. 395.

2. Wright v. New Jersey, 469 U.S. 1146 (1985), per Brennan J. (dissenting on other grounds) at p. 1151, note 5.

3. Colautti v. Franklin, supra, note 1.

Section 2(b) of the Charter

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

5. 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?

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6. 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?

23. As this Court has observed, freedom of expression was not created by the Canadian Charter of Rights and Freedoms.[1] Freedom of speech is a principle of the common law Constitution[2] which is necessary to the proper operation of the basic constitutional structure.[3] Generally speaking, common law freedom of speech has been characterized as a "political" civil liberty, as its recognition and protection

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tend to "make parliamentary democracy possible and tolerable".[4] The Charter, however, provides a broader protection to the freedom than is called for by the structural demands of the Constitution.[5]

1. R.W.D.S.U. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre J. at p. 583.

2. Fraser v. P.S.S.R.B., [1985] 2 S.C.R. 455, per Dickson C.J.C. at pp. 462-463.

3. O.P.S.E.U. v. A.G. Ont., [1987] 2 S.C.R. 2, per Beetz J. at p. 57.

4. Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights", 37 Can. Bar Rev. 77 (1959), at p. 80.

5. O.P.S.E.U. v. A.G. Ont., supra, note 3.

24. Clear indications of the broader coverage provided by the Charter emerge from a consideration of the wording of s. 2(b) and from an examination of its relationship with the other "fundamental freedoms". Both at common law and under the Canadian Bill of Rights[1] the freedoms of speech and press were recognized. The language of s. 2(b), however, not only entrenches and expands these methods of communication to include "expression" and "other media", it also emphasizes that the content of a communication -- the "thought, belief, opinion" -- is to enjoy constitutional protection. Further, s. 2(b) is inseparably linked with guarantees which, in addition to their concern with political values, also address "basic beliefs about human worth and dignity"[2]. These factors suggest that the s. 2(b) freedom, unlike its common law and statutory predecessors, is not merely a means to an end (i.e., it does not exist only to ensure that political institutions operate democratically), but is rather an end in itself.

1. R.S.C. 1970, Appendix III, ss. 1(d) and (f).

2. R. v. Big M Drug Mart Ltd., supra, para. 15, note 2, per Dickson J. at p. 346.

25. If that is indeed the broad purpose underlying s. 2(b), then it is submitted that it would be a mistake to attempt to locate the precise boundaries of the guarantee by a process of elimination, that is, by establishing categories

of ideas that are unprotected. Such an exercise would ultimately lead to value judgments about the relative merits of thoughts, beliefs or opinions, and neither the process nor the result would be reconcilable with a respect for the worth and dignity of the individual. Given the obvious concern of s. 2(b) with the content, and not just the form, of expression, there is no reliable basis upon which certain kinds of ideas might be immediately excluded from its ambit.

26. In this regard, the American experience under the First Amendment to the Constitution is instructive. At various times, the United States Supreme Court has attempted to identify categories of speech which fall outside the constitutional guarantee, such as obscenity, profanity, libel[1] and commercial speech.[2] But neither the categories themselves nor their extent have remained constant. For example, commercial expression is now accorded First Amendment protection,[3] and there has been a substantial subtraction from the libel exclusion where criticism of public officials and public figures is involved.[4] This strongly suggests that a "categorical" approach to the definition of s. 2(b) of the Charter will produce, at best, an undesirable degree of uncertainty in the law.

1. <u>Chaplinsky v. New Hampshire</u>, 315 U.S. 568 (1942), per Murphy J. at pp. 571-572.

2. <u>Valentine v. Christensen</u>, 316 U.S. 52 (1942).

3. <u>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</u>, 425 U.S. 748 (1976).

4. <u>New York Times v. Sullivan</u>, 376 U.S. 254 (1964).

27. In its initial consideration of the scope of the s.2(b) guarantee in R.W.D.S.U. v. Dolphin Delivery Ltd., this Court noted that the freedom of expression "would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct."[1] This approach does not attempt to remove categories of ideas from the ambit of s. 2(b), but instead focusses on the point at which an effort is made to manifest a thought, whatever it may be, by word or by expressive conduct. The concern is not with the validity of a thought, belief or opinion, but with the obvious harm to others that would be occasioned by the expression of some words or deeds. In this respect, the Dolphin Delivery appreciation of the extent of s. 2(b) conforms entirely with the general definition given to s. 2 "freedom" by this Court in R. v. Big M Drug Mart Ltd.:

> "Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. 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.
>
> * * *
>
> 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."[2]

1. Supra, para. 23, note 1, per McIntyre J. at p. 588.

2. Supra, para. 15, note 2, per Dickson J. at pp. 337 and 346.

28. Taken together, Dolphin Delivery and Big M Drug Mart establish that the scope of the fundamental freedoms in general, and s. 2(b) in particular, is necessarily very broad, but that there comes a point at which protection against "the tyranny of the majority" can be subverted and can be used to impose the tyranny of the minority. Such a result would of course be incompatible with democratic principles, hence at that point the limits of the constitutional protection have been reached. While the mere fact that expression might produce certain harmful consequences would not take the case out of s. 2(b) -- for example, the economic injury inflicted by the picketing in Dolphin Delivery was prima facie tolerable, subject to a consideration of s. 1 of the Charter -- an obvious threat to "public safety, order, health, or morals or the fundamental rights and freedoms of others" would be an abuse beyond the contemplation of the Constitution.

29. The Alberta Court of Appeal, in R. v. Keegstra,[1] has rejected the suggestion that a consideration of harm to others enters into the determination of the scope of s. 2(b), as that would involve balancing, which is "the office of s. 1 of the Charter". The Court of Appeal did not refer to the statements of this Court, noted above. It appears that the views of the Court of Appeal rest on the comments of Kerans J.A. in Re Grier and Alberta Optometric Assn.[2], to the effect that s. 2(b) protects expression at least when uttered in the context of a "valued" activity. This approach, it is

submitted, simply substitutes a value judgment about the worth of an activity for one about the merits of an idea, and it does not recognize that at least some activities are not "valued" precisely because they are unduly harmful to others.

1. Unreported, June 6, 1988.

2. (1987), 42 D.L.R. (4th) 327 (Alta. C.A.), at pp. 335-336.

30. Again, the emphasis placed by s. 2 as a whole on "the centrality of individual conscience"[1] suggests that the range of thoughts, beliefs and opinions, the communication of which may be prohibited without constitutional objection, will be narrow. Any such prohibition will inevitably be based upon the nature of the <u>content</u> of the message sought to be transmitted, and will implicate concerns which lie at the heart of the s. 2(b) guarantee. Accordingly, while it has long been recognized that constitutional free speech may be cut back in respect of seditious, blasphemous or similar messages,[2] additions to this list for Charter purposes would be confined to matters which clearly have a prejudicial effect on the public interests referred to in <u>Big M Drug Mart</u> ("public morals", etc.).

1. <u>R. v. Big M Drug Mart Ltd.</u>, <u>supra</u>, para. 15, note 2, per Dickson J. at p. 346.

2. <u>Fraser v. P.S.S.R.B.</u>, <u>supra</u>, para. 23, note 2, per Dickson C.J. at pp. 467-468.

31. On the other hand, as this Court has recognized in connection with s. 2(a) of the Charter, not every burden on a fundamental freedom will be found to be constitutionally offensive.[1] Most laws, in one way or another, have some incidental effect upon freedom of expression, broadly construed, but they are not, on that account alone, inimical

to the interests served by s. 2(b). The burden which they impose on the freedom may be "trivial or insubstantial",[2] and that will particularly be so where their impact is more upon the means, rather than upon the content, of the communication. As Tarnopolsky J.A. put it, in considering whether a regulation of the hours of operation of retail business would be inconsistent with s. 2(b):

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> "For a whole number of public policy reasons of health or noise abatement or hours of rest, entertainment is regulated as to time and place. One may not be able to buy or rent books or records or attend public entertainment at just any time. Mere regulation as to time and place, however, cannot be considered an infringement of freedom of expression, unless there is evidence that such regulation in intent or effect adversely impacts upon content or adversely interferes with production, availability and use or determines who can be involved in these."[3]

1. Jones v. The Queen, [1986] 2 S.C.R. 284, per Wilson J. at p. 314; Edwards Books and Art Ltd. v. The Queen, supra, para. 8, note 1, per Dickson C.J. at p. 759.

2. Ibid.

3. R. v. Videoflicks Ltd. et al., supra, para. 10, note 1, at p. 47.

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32. In the same vein, other courts have held that so-called "content neutral" (as opposed to "content based") regulations enacted in the furtherance of some readily identifiable public interest do not conflict with s. 2(b) merely because they have some discernible effect on expression. For example, neither the licencing sections of

the *Broadcasting Act*[1] nor the provisions of municipal by-laws controlling the use of public thoroughfares[2] have been regarded as being inherently suspect on constitutional grounds. In this connection, Canadian courts have generally adopted the same view as that of the United States Supreme Court: restrictions of time, place and manner are permissible as long as they are content neutral, and narrowly tailored to serve a significant government interest, and leave open alternative channels of communication.[3]

1. *Re New Brunswick Broadcasting Co. Ltd. and C.R.T.C.* (1984), 13 D.L.R. (4th) 77 (F.C.A.), per Thurlow C.J. at p. 898.

2. *Canadian Newspaper Company Ltd. v. City of Victoria*, [1988] 2 W.W.R. 221 (B.C.S.C.); *Canadian Newspaper Company Ltd. c. Ville de Montréal*, [1988] R.J.Q. 482 (C.S.). But see *contra*: *Canadian Newspaper Company Ltd. v. Directeur des services de la voie publique*, [1987] R.J.Q. 1078, 36 D.L.R. (4th) 641 (C.S.).

3. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

33. On the basis of the foregoing, it is submitted that freedom of thought, belief, opinion and expression is a constitutional value in its own right. For this reason, any law which has as its *purpose* the suppression of free expression is *prima facie* inconsistent with s. 2(b), save only where such a measure is necessary in order to protect the public interests identified in *Big M Drug Mart*. Equally, any law which in its *effect* places a burden on the exercise of free expression offends the guarantee, save where the burden is trivial or insubstantial, as where it arises only from a "content neutral" regulation of time, place and manner.

The Impugned Legislation

34. The Appellants do not appear to make any serious suggestion that s. 193 of the Criminal Code is, by itself, inconsistent with s. 2(b) of the Charter. Rather, the point seems to be that a prohibition on keeping a common bawdy house necessarily requires a prostitute to resort to a public place in order to conduct business, at which point s. 195.1(1)(c) may be engaged.

35. While the predecessor to s. 195.1(1) was intended "to abate the social nuisance and inconvenience caused by the practice of soliciting for prostitution in public",[1] it failed in its purpose because it was interpreted as only reaching conduct involving "persistence or pressure".[2] Consequently, Parliament attempted a better definition of the nature of the conduct which was at the root of the nuisance. As appears from the present s. 195.1(1) on its face, it is the active interference by prostitutes and their customers with other persons using the public thoroughfares and other public places which is the problem being addressed.

1. R. v. Whitter; R. v. Galiot, [1981] 2 S.C.R. 606, per McIntyre J. at p. 612.

2. Ibid.

36. In dealing with the specific situation, Parliament also remedied the extended harm -- the "secondary effects" on the surrounding community -- created by street soliciting. As summarized in the Alberta Court of Appeal,[1] uncontrolled solicitation had produced numerous ill effects beyond the harassment, intimidation and general disregard for the rights of other users of the streets. In addition, area residents

and businesses were forced to suffer all night noise, traffic congestion, trespass, reduced property values and other adverse consequences. The transaction of the "business" of prostitution, unlike the conduct of any other activity or commercial undertaking, had assumed a position of paramountcy over the rights and interests of others.

1. R. v. Jahelka; R. v. Stagnitta (1987), 43 D.L.R. (4th) 111 (Alta. C.A.), at p. 115 [under appeal to this Court].

10 37. To remedy the situation, Parliament did not seek to suppress solicitation, but only to remove it from the public areas where it was creating the obvious harm. The predominant concern of s. 195.1(1) as a whole is not the message passed between prostitute and prospective client, but rather the "secondary effects" resulting from the activities of prostitutes in public places. The law is not concerned with the reaction which a specific message might produce in listeners, but only with the adverse consequences to the surrounding community which inevitably flow from this kind of

20 conduct. In this respect, s. 195.1(1) should properly be regarded as a "content neutral" form of time, place and manner regulation which does not impose any significant burden on freedom of expression.[1]

1. City of Renton v. Playtime Theatres Inc., 475 U.S. 41 (1986), per Rehnquist J. at pp. 46-47.

38. The fact that the point of reference in subparagraph 195.1(1)(c) is a communication or an attempted communication for the purposes of prostitution does not immediately signal that the legislation is "content based".

30 Rather, since the clear source of the harm to be prevented is only the public bartering over sexual services, this

reference serves to limit the extent of the regulation, so as to avoid catching unrelated conduct. The obvious purpose, it is submitted, is not to stop the dissemination of offensive speech, but to address the "markedly different effects upon their surroundings"[1] produced by the particular activities of prostitutes and their customers. Like the zoning ordinance considered in City of Renton v. Playtime Theatres Inc., the statute here does not raise constitutional concerns because it is

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> "...designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighbourhoods, commercial districts, and the quality of urban life', not to suppress the expression of unpopular views."[2]

1. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976), per Powell J. at p. 82, note 6.

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2. Supra, para. 37, note 1, at p. 48. Note, however, that where a regulation "targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech" -- that is, where the law focusses on the reaction of the listener to a specific message rather than on the detrimental effects to the surrounding community irrespective of the message -- then the provision is indeed content based: Boos et al. v. Barry, 99 L Ed 2d 333 (1988), per O'Connor J. at pp. 344-345.

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39. The business of prostitution had effectively asserted a priority of place in the affected public areas. The problem was an on-going one, and not merely transitory. Although most attempts to pre-empt the public domain for a particular use can usually be prevented by means of municipal

regulation, constitutional limitations stood in the way of any such solution to the nuisance here.[1] The proper, and effective, response lay in the exercise by Parliament of its jurisdiction over the criminal law.

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

40. As submitted above, the exercise of that power here does not impact in any significant way upon the expression of whatever "thought, belief or opinion" might be said to be involved in the regulated activity. In any event, it is submitted that the impugned measure, both in its purpose and in its effect, merely seeks to restore order in public places, that is, to redress the imbalance that had been created by the aggressive public pursuit of the business of prostitution. The guarantee of s. 2(b) of the Charter, like that of s.7, is not a constitutional licence to transact business wherever and whenever one pleases,[1] and in this respect prostitution stands on no different footing from any other undertaking. As was observed by Forget, J.C.S. in response to the argument that s. 2(b) would prevent any attempt to prohibit the placement of newspaper distribution boxes on public sidewalks:

> "En effet, la demanderesse ne cherche pas à utiliser le domaine public, comme tous les citoyens, pour y exercer sa liberté d'expression; elle désire que lui soit attribuée en propre une partie de ce domaine public, pour y opérer son négoce. Par ce fait même, elle nie aux autres citoyens l'accès à une partie du domaine public. En effet, si une partie plus ou moins grande du domaine public était 'concédée' de façon quasi permanente à des entreprises de presse, des libraires ou autres personnes, le public en général serait privé de son droit d'utiliser ces espaces."[2]

1. Edwards Books and Art Ltd. v. The Queen, supra, para 8, note 1, per Dickson C.J.C. at p. 786.

2. Canadian Newspaper Company Ltd. c. Ville de Montréal, supra, para. 32, note 2, at p. 489.

41. Even if, then, it can be said that s. 195.1(1)(c) is not merely a "content neutral" regulation of time and place, it is nevertheless the type of measure which clearly envisages the protection of the public interests itemized by
10 this Court in R. v. Big M Drug Mart Ltd.. Its net effect is only to remove the transaction of the business of prostitution from public places, a result which is entirely unremarkable having regard to the regulations under which any other business must operate. The paramount rights here are those of the public to use the streets and sidewalks free from harassment, intimidation and interference, and those of adjoining residents and businesses not to be subjected to the adverse secondary effects generated by street soliciting. A measure which protects these interests, and which prevents
20 what Forget J.C.S. termed "une expropriation inversée" of the public domain,[1] does not make any inroads upon the freedom guaranteed by s. 2(b) of the Charter.

1. Supra, para. 32, note 2, at p. 490.

Section 1 of the Charter

7. If Sections 193 and 195.1(1)(c) of the Criminal Code of Canada or a combination of both or 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
30 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?

42. The test for determining whether the requirements of s. 1 of the Charter have been fulfilled "was formulated in R. v. Oakes, [1986] 1 S.C.R. 103, and restated by Dickson C.J. in R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713".[1] The restatement, at pp. 768-69, is as follows:

> "Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. The Court stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards."

1. R. v. Thomsen (1988), 84 N.R. 347 (S.C.C.), per Le Dain J. at p. 361.

(i) Objective of Sufficient Importance

43. The Appellants concede that the public nuisance aspect of prostitution and the mischief caused by street

soliciting are pressing and substantial concerns.[1] The court below,[2] and the other two appellate courts that have considered s. 195.1(1)(c),[3] agreed that the first branch of the test had been met. As well, the United States Supreme Court has determined that "vital governmental interests" are served by regulations aimed at preventing the kind of "secondary effects" discussed above.[4]

1. Factum of the Contradictor Added by Order of the Chief Justice of Manitoba, p. 59. Factum of Smordin, Gindin, Soronow, Ludwig, p. 32.

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2. [1987] 6 W.W.R. 289 (Man. C.A.), per Huband J.A. at p. 300.

3. R. v. Jahelka; R. v. Stagnitta, supra, para. 36, note 1, per Kerans J.A. at p. 116; R. v. Skinner (1987), 58 C.R. (3d) 137 (N.S.C.A.), per MacKeigan J.A. at p. 161.

4. City of Renton v. Playtime Theatres Inc., supra, para. 37, note 1, per Rehnquist J. at p. 50.

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(ii)(a) Proportionality: Rational Connection

44. The predecessor to s. 195.1(1)(c), as judicially construed, had proved to be completely ineffective in abating the nuisance caused by the activities of prostitutes and their customers:

> "By any standard street solicitation is a problem in many Canadian cities today, whereupon sexual commerce has turned some business and residential areas into noisy, congested, and (some would say) dangerous places, where innocent residents are accosted and harassed by prostitutes and their potential clients; and where violence is incipient."[1]

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1. Seventh Report of the Standing Committee on Justice and Legal Affairs (March 24, 1983) [reproduced in the Appeal Case in Lina Maria Stagnitta v. R., No. 20497, Exhibits, Vol. 2, p. 275].

45. The source of the problem of course was that the law, as interpreted, was cast too narrowly. The scope of the offence had to be broadened if the adverse effects were going to be addressed in any meaningful way. The focus placed by
10 the impugned subsection on communications for the purpose of prostitution reaches the precise activity from which all the harm flows, as pointed out by the Criminal Law Revision Committee in the United Kingdom:

> "What the law should be concerned with are offers, whether made by men or women, in circumstances which can cause a nuisance. We say 'can cause a nuisance' because an act of soliciting by a single prostitute or kerb crawler does not necessarily amount to a nuisance; but when prostitutes and
> 20 clients congregate in numbers, as commonly occurs, there is no doubt that this does amount to a nuisance. In this sense every act of soliciting has in it the potential for causing a nuisance"[1] (underlining added)

1. "Prostitution in the Street", Sixteenth Report of the Criminal Law Revision Committee, Cmnd. 9329 (1984), at p. 4.

46. Similarly, s. 193 aims at the public nuisance created by the frequent and habitual use of premises for
30 prostitution purposes. While the Fraser Committee recommended a very limited exception to the prohibition, it recognized that even this proposal was not an "ideal solution":[1]

"We recognize that there is the potential in this recommendation for friction between the prostitute and neighbours. We do not wish to underemphasize the neighbours' interest in quiet enjoyment of their premises. However, we think that the landlord and tenant law of the provinces rather than criminal law, is the more appropriate vehicle for dealing with conflict problems. Initially, we recognize, it may be necessary to monitor closely the provincial law to see that it is sufficiently responsive."[2]

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In the result, the Fraser Committee recommended retention of s. 193, subject to a new and limited exception. The Committee did not view s. 193 as being unconnected with the control of a nuisance, but rather suggested only that there might be another method by which one aspect of the problem could be regulated.

1. Report of the Special Committee on Pornography and Prostitution, Volume 2, p. 538.

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2. Ibid., p. 549.

47. In both their purpose and their effect the challenged provisions do not impose on the practice of prostitution any more serious limitations than those to which a lawful trade would be subjected. No enterprise is free to pre-empt a public place for its own commercial gain, or to operate on private premises without regard to the nuisance it may create in the surrounding community. Given the manifest harm created by prostitution-related activities, it was open to Parliament to restrict those activities in the public

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interest:

"...in regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy ... Legislative choices

regarding alternative forms of business regulation do not generally impinge on the values and provisions of the Charter, and the resultant legislation need not be tuned with great precision in order to withstand judicial scrutiny."[1]

1. R. v. Edwards Books and Art Ltd., supra, para. 8, note 1, per Dickson C.J.C. at p. 772.

(ii)(b) Proportionality: Impair As Little As Reasonably Possible

10 48. The challenged measures attempt to diffuse the activities associated with the practice of prostitution. Prostitutes and their clients, like retailers and consumers, must conduct their activities on private premises and in a way which does not create a nuisance. To the extent that constitutional "liberty", "security" or "expression" may be implicated, it is only their commercial manifestations which have been reached. These manifestations ought, it is submitted, to be more susceptible to regulation, particularly where they have been shown to entail adverse secondary
20 effects.[1]

1. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 92 L Ed 2d 267 (1986).

49. On the subject of street soliciting, Parliament was provided with a spectrum of views by both the Fraser Committee and the Justice and Legal Affairs Committee, and it had to make a choice from policy options which involved different balances of the competing interests. With respect to bawdy houses, the Fraser Committee suggested a limited change in the mode of regulation of one aspect only. It is
30 submitted that, on the whole, the differences between the

various proposed alternatives and the régime that was enacted are relatively slight, and that comparisons between them do not point to any principled basis upon which it might be determined that one combination of provisions would be "reasonable" while the other is constitutionally unacceptable.

50. Given the range of views and interests that had to be accommodated, it is submitted that Parliament "must be given reasonable room to manoeuvre to meet these conflicting pressures".[1] A measure which neither restrains physical liberty nor strikes at the content of expression, but which only removes activity from the particular place where it was causing harm to others, is one which should be recognized as fitting within a scale of reasonable responses to a demonstrated problem.

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1. R. v. Edwards Books and Art Ltd., supra, para. 8, note 1, per La Forest J. at p. 795. See also Dickson C.J.C. at p. 779.

(ii)(c) Proportionality Between Effects and Objective

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51. Again, ss. 193 and 195.1(1)(c) seek only to prevent the congregation of prostitutes and their customers in the interests of avoiding the creation of a public nuisance. The activity is not proscribed, and the focus of the regulation is conduct which generates adverse secondary effects on the surrounding community. The objective is far from trivial, the interference with commercial conduct is limited and there is little, if any, trenching "upon the integral principles of a free society".[1]

1. R. v. Oakes, [1986] 1 S.C.R. 103, per Dickson C.J.C. at p. 136.

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52. In this regard, it is submitted that the sanctions employed to curtail the nuisance are not unusual in comparison with the laws of other "free and democratic" societies. As noted by the Fraser Commission in its review of foreign legislation,[1] some jurisdictions have adopted régimes which are draconian by Canadian standards, and overall there is a wide range of legal responses to prostitution.

1. Report of the Special Committee on Pornography and Prostitution, Volume 2, pp. 471-509.

53. Weighing the serious social nuisance caused by prostitutes and their clientele against what is at best a limited interference with unrestrained commercial activity, it is submitted that the challenged provisions are not disproportionate in their effect. It is "in the general social interest"[1] to restrain conduct which is obviously harmful to a large number of persons who are not involved in the activity. Further, it should not be forgotten that a comprehensive review of s. 195.1 is to be undertaken by a committee of the House of Commons three years from the date on which the provision came into force[2] (December 20, 1985), at which time any imbalances identified from actual experi[illegible] may be addressed.

1. <u>R.W.D.S.U. v. Dolphin Delivery Ltd.</u>, <u>supra</u>, para. 5, note 1, per McIntyre J. at p. 591.

2. S.C. 1985, c. 50, s. 2(1).

PART IV

ORDER SOUGHT

54. The Attorney General of Canada submits that Questions 1 to 6 should be answered in the negative, but in the event that any one or more of those Questions are answered in the affirmative, then the answer to Question 7 should be that the challenged provisions are justifiable limits under s. 1 of the Charter.

ALL OF WHICH is respectfully submitted.

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PART V

AUTHORITIES

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42.	<u>R. v. Rowley</u> (1986), 31 C.C.C. (3d) 183	13
43.	Sev[illegible]n Report of the Standing Committee on Justice and Legal Affairs (March 24, 1983) [reproduced in the Appeal Case in <u>Lina Maria Stagnitta v. R.</u>, No. 20497, Exhibits, Vol. 2, p. 275]	31, 33
44.	<u>Smith v. Goguen</u>, 415 U.S. 566 (1974)	14

45.	<u>Smith, Kline & French Laboratories Ltd. v. A.G. Can.</u> (1985), 24 D.L.R. (4th) 321; appeal dismissed, [1987] 2 F.C. 359 (F.C.A.) leave to appeal refused, S.C.C., April 9, 1987	8
46.	<u>R. v. Thomsen</u> (1988), 84 N.R. 347	30
47.	<u>U.S. v. Thirty-Seven Photographs</u>, 402 U.S. 363 (1971)	14
48.	<u>Valentine v. Christensen</u>, 316 U.S. 52 (1942)	19
49.	<u>R. v. Videoflicks Ltd.</u> (1984), 14 D.L.R. (4th) 10	9, 11, 23
50.	<u>Village of Hoffman Estates et al. v. Flipside, Hoffman Estates Inc.</u>, 455 U.S. 489 (1982)	13
51.	<u>Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council</u>, 425 U.S. 748 (1976)	19
52.	<u>Wainwright v. Stone</u>, 414 U.S. 21 (1973)	14
53.	<u>Westendorp v. R.</u>, [1983] 1 S.C.R. 43	28
54.	<u>Whitbread v. Walley et al.</u>, unreported, B.C.C.A., May 13, 1988	10
55.	<u>R. v. Whitter; R. v. Galjot</u>, [1981] 2 S.C.R. 606	25
56.	<u>Wright v. New Jersey</u>, 469 U.S. 1146 (1985)	16
57.	<u>Young v. American Mini Theatres, Inc.</u>, 427 U.S. 50 (1976)	27
58.	<u>R. v. Zundel</u> (1987), 58 O.R. (2d) 129	13

APPENDIX A

Criminal Code, R.S.C. 1970, c. C-34, as amended:

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.

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.