Appeal No. 20581

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF 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 Section 193 and 195.1(1)(c) thereof.

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PART I

STATEMENT OF FACTS

1. As Intervenor, the Attorney General of Alberta, takes no position with respect to the parties' statements of facts.

PART II

POINTS IN ISSUE AND POSITION OF INTERVENOR WITH RESPECT THERETO

2. By order of this Court dated March 3, 1988 the following constitutional questions were 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 s. 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?

3. It is the position of the Intervenor that the questions should be answered as follows:

1. No

2. No

3. No

4. No

5. No

6. No

7. To the extent of any inconsistency with Section 2(b) of the Canadian Charter of Rights and Freedoms Section 195.1(1)(c) of the Criminal Code is justified under section 1 of the Canadian Charter of Rights and Freedoms and is thereby not inconsistent with the Constitution Act, 1982.

PART III: ARGUMENT

A. SECTION 7 OF THE CHARTER

4. The first three constitutional questions call for consideration of s. 7 of the Charter which provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

5. As stated in the majority judgment of this Honourable Court in Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J. at p. 500:

> It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice.

Thus in order to establish that a legislative provision is inconsistent with s. 7 of the Charter it must be shown firstly, that there is a deprivation of a right protected in the "rights clause" and secondly, that the deprivation is not in accordance with the principles of fundamental justice.

> Also see: Jones v. The Queen, [1986] 2 S.C.R. 302, at p. 302 per La Forest J. (Dickson C.J. and Lamer, J. concurring)
>
> Lyons v. The Queen, [1987] 2 S.C.R. 307, at p. 327 per LaForest J. (Dickson C.J., and Estey, McIntyre and LeDain JJ. concurring)

(a) Whether the circumscription of the carrying on of a chosen occupation offends s. 7 of the Charter?

6. With respect to the Charter generally, there exists some debate as to whether it extends protection to economic rights:

See: Reasons for judgment of McIntyre, J. in Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at pp. 405, 412 and 413

Reasons for judgment of Dickson, C.J.C. in dissent in Re Public Service Employee Relations Act, supra at pp. 367, 368

7. With respect to s. 7 of the Charter, it is submitted that the rights clause does not protect a right to engage in an occupation. See:

British Columbia

R.V.P. Enterprises Ltd. v. Minister of Consumer and Corporate Affairs (1987), 12 B.C.L.R. (2d) 244 (B.C.C.A.) - selling liquor by restaurant

Milk Board v. Clearview Dairy Farm Inc. et al, [1987] 4 W.W.R. 279, at p. 288 (B.C.C.A.) dismissing an appeal from (1986), 69 B.C.L.R. 220 (S.C.) - sell industrial milk

Wilson et al v. Medical Services Commission, [1987] 3 W.W.R. 48, at pp. 69-77 (B.C.S.C.) - practise medicine

Saskatchewan

Re Bassett and Government of Canada et al (1987), 35 D.L.R. (4th) 537, at p. 567 (Sask. C.A.) - pharmacist

Sebastian v. Saskatchewan Securities Commission et al (1985), 39 Sask. R. 253, at p. 256 (Q.B.) - trading in securities

Spence v. Spencer (1986), 44 Sask. R. 135, at pp. 138, 139 (Q.B.) - police officer

Pinehouse Plaza Pharmacy Ltd. v. The Queen, [1988] 3 W.W.R. 705, at pp. 716-719 (Sask. Q.B.) - pharmacist

Manitoba

Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, [1987] 3 W.W.R. 189, at pp. 308-313 (Man. C.A.) - prostitute

Home Orderly Services Ltd. et al v. Manitoba (1987), 49 Man. R. (2d) 246, at pp. 250-251 (Man. C.A.); leave to appeal refused Jan. 26, 1988 (S.C.C.) - business of providing home orderly services.

Ontario

R. v. Quesnel (1985), 52 O.R. (2d) 338, at pp. 346-347 (C.A.); leave to appeal refused May 22, 1986 (S.C.C.) - chicken producer

Charbonneau et al v. College of Physicians and Surgeons (1985), 22 D.L.R. (4th) 303 (Ont. H.C.J.) - practise medicine

New Brunswick

Berteit v. Carlisle (1987), 80 N.B.R. (2d) 153, at pp. 162-163 (Q.B.) - police officer

Federal Court

Weyer v. The Queen (unreported, Feb. 16, 1988, Fed. C.A.) - research scientist employed by government

Sylvestre v. Canada (1986), 72 N.R. 245, at pp. 2[illegible], 247 (Fed. C.A.) employee of armed forces

Contra

Re Mia Medical Services Commission of B.C. (1985), 17 D.L.R. (4th) 385 (B.C.S.C.)

Re D & H Holdings Ltd. and City of Vancouver et al (1985), 21 D.L.R. (4th) 230 (B.C.S.C.); yet see, Green v. A.G.B.C. (1986), 29 C.R.R. 35 (B.C.S.C.)

Re Branigan and Yukon Medical Council et al (1986), 26 D.L.R. (4th) 268 (Y.T.S.C.)

Stoffman et al v. Vancouver General Hospital et al, [1986] 6 W.W.R. 23 (B.C.S.C.); appeal dismissed without dealing with issue: [1988] 2 W.W.R. 708 (B.C.C.A.)

R. v. Cunningham et al (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.)

8. It is submitted that on the basis of the case law cited and the reasoning contained therein (in particular, Wilson et al v. Medical Services Commission, supra, at pp. 69-77), s. 7 of the Charter does not protect a right to engage in an occupation of choice; in particular the occupation of prostitution which has been substantially regulated, as it is now, throughout the history of Canada.

See: J. McLaren, Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917 (1986), 1 C.J.L.S. 125

9. Furthermore, it is submitted that even if the "rights clause" does protect the right to engage in any occupation of choice, a law which is properly passed pursuant to Parliament's legislative competence granted by section 91(27) of the Constitution Act, 1867 and which seeks to proscribe certain aspects of that activity, effects any such deprivation in accordance with the principles of fundamental justice.

(b) Whether provisions offend section of the Charter by reason of "vagueness"?

10. Both section 193 and section 195.1(1)(c) of the Criminal Code create offences punishable by imprisonment, inter alia. Thus, the impugned provisions may result in a deprivation of liberty: Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486.

11. A statutory provision which deprives one of "liberty" infringes the right guaranteed by s. 7 of the Charter if such deprivation is not in accordance with the principles of fundamental justice. Thus, at issue is the scope of the words "principles of fundamental justice". In particular, is it a principle of fundamental justice that criminal statutes must not be "vague or uncertain"? And, if so, are the impugned provisions "vague or uncertain"?

12. It is the position of the Intervenor that, assuming that it is a principle of fundamental justice that criminal statutes must not be vague or uncertain, neither section 193 nor section 195.1(1)(c) are vague or uncertain.

(i) vagueness as a principle of fundamental justice

13. Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, rationale and essential role of that principle within the judicial process and in our legal system, as it evolves. Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at 513

14. With respect to municipal bylaws it is stated in Halsbury's Laws of England, 4th ed (Vol. 28, para 1329) that:

> A bylaw must provide a clear statement of the course of action to be followed or avoided, and must contain adequate information as to the duties and identity of those who are to obey, although all the information need not be apparent on the face of the bylaw. However, if the words of the bylaw are ambiguous but their meaning can be resolved to give a reasonable result the courts will give effect to that result...

Also see: Fawcett Properties Ltd. v. Buckingham County Council, [1961] A.C. 636 (H.L.) per Lord Denning at p. 677 and per Lord Cohen at p. 662.

15. In Canada, it is a generally accepted principle that municipal bylaws which are too vague can be annulled: City of Montreal v. Arcade Amusements Inc. et al, [1985] 1 S.C.R. 368. The vagueness must be so serious that the judge concludes that a reasonably intelligent man is unable to determine the meaning of the bylaw and govern his actions accordingly. However, "mere uncertainty as to the scope of a bylaw will not suffice to make it void". Furthermore, difficulties in interpretation is not sufficient reason for declaring the bylaw void.

16. With respect to penal statutes it is a fundamental principle that such enactments are to be strictly construed. Thus,

> ...if the words of an enactment which is relied upon as creating a new offence are ambiguous the ambiguity must be resolved in favour of the liberty of the subject, but whether or not such ambiguity exists is to be determined after calling in aid the rules of construction. (Per Cartwright, J. in R. v. Robinson or Robertson, McKenna, Cuthbert and Beatt, [1951] S.C.R. 522 at p. 536.)

Also see: Marcotte v. Deputy A.G. Canada, [1976] 1 S.C.R. 108, at p. 115; Paul v. The Queen, [1982] 1 S.C.R. 621; Abbas v. The Queen, [1984] 2 S.C.R. 526 per Lamer J., Dickson C.J.C. concurring; R. v. Pare, [1987] 2 S.C.R. 618; R. v. Goulis (1981), 33 O.R. (2d) 55 (C.A.); R. v. Budget Car Rentals (Toronto) Ltd. (1981), 121 D.L.R. (3d) 111, at p. 117-118 (Ont. C.A.); Kloepfer, Stephen, The Status of Strict Construction in Canadian Criminal Law (1983), 15 Ottawa L. Rev. 553; Cote, Pierre-Andre, The Interpretation of Legislation in Canada (1984) Les Editions Yvon Blais Inc.

17. Although it is difficult to establish that the "void for vagueness" doctrine which is applicable to municipal bylaws (as distinguished from the doctrine of strict construction) is also applicable to penal statutes, several appellate courts have assumed or adopted such a principle for the purposes of s. 7 of the Charter: R. v. Red Hot Video (1985), 18 C.C.C. (3d) 1 (B.C.C.A.); R. v. Rowley (1986), 31 C.C.C. (3d) 183 (B.C.C.A.); R. v. Howlett (unreported, Dec. 17, 1987, B.C.C.A.); R. v. Demeyer (1986), 72 A.R. 100 (C.A.); leave to appeal refused Oct. 27, 1986 (S.C.C.); R. v. Morgentaler et al (1985), 48 C.R. (3d) 1 (Ont. C.A.); R. v. Piercey (1986), 60 Nfld. & P.E.I.R. 26 (Nfld. C.A.); R. v. Zundel (1987), 31 C.C.C. (3d) 97 (Ont. C.A.); R. v. LeBeau; R. v. Lofthouse (1988), 62 C.R. (3d) 157 (Ont. C.A.)

18. Having regard to the nature of the Charter, and in particular ss. 32 and 52, arguments extending the application of a vagueness principle to penal statutes in the context of s. 7 are certainly forceful. Further support is gained from the apparent acceptance of such a principle in Morgentaler et al v. The Queen, [1988] 1 S.C.R. 30. Implicit in the reasoning of Beetz J. (Estey, J. concurring), at pp. 106-109 is the position that the principles of fundamental justice require that penal statutes affecting one's liberty must not be so uncertain or vague that persons are unable to determine whether their conduct is prohibited or not and that enforcement officials should be able to ascertain whether or not certain conduct is proscribed.

19. Assuming that the principles of fundamental justice do require such a degree of certainty it is submitted that both impugned provisions satisfy such a requirement.

(ii) Whether section 193 is vague

20. Section 193 of the Criminal Code provides as follows:

> 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,
>
> (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 peson 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.

21. The Appellant has taken issue with the words "keeps" and "common bawdy-house". It is submitted that these words are not vague or incapable of reasonable interpretion.

Keeps

22. Section 179 of the Criminal Code defines a "keeper" as follows:

> 179 "keeper" includes a person who
>
> (a) is an owner or occupier of a place,
>
> (b) assists or acts on behalf of an owner or occupier of a place,
>
> (c) appears to be, or to assist or to act on behalf of an owner or occupier of a place,
>
> (d) has the care or management of a place, or
>
> (e) uses a place permanently or temporarily, with or without the consent of the owner or occupier;

23. However, not every "keeper" of a place which is a "common bawdy-house" is one who "keeps a common bawdy-house" for the purposes of subsection 193(1). Instead, upon considering this provision in the context of the relevant legislation as a whole, the offence requires that there be "some act of participation in the wrongful use of the place". c.f. R. v. Kerim, [1963] S.C.R. 124; also see: R. v. McLellan (1980), 55 C.C.C. (2d) 543 (B.C.C.A.). For an example of such participation

see: R. v. Woszczyna; R. v. Soucy (1983), 6 C.C.C. (3d) 221 (Ont. C.A.).

24. As well with respect to the word "kept" as used in the definition of "common bawdy-house", such requires "frequent or habitual use" of the premises: Patterson v. The Queen, [1968] S.C.R. 157; R. v. Evans et al (1973), 11 C.C.C. (2d) 130 (Ont. C.A.); R. v. King, [1965] 2 C.C.C. 324 (Ont. C.A.) and c.f. Rockert et al v. The Queen, [1978] 2 S.C.R. 704.

Common Bawdy-house

25. Section 179 of the Criminal Code defines a "common bawdy-house" as follows:

> "common bawdy-house" means a place that is
>
> (a) kept or occupied, or
>
> (b) resorted to by one or more persons
>
> for the purpose of prostitution or the practice of acts of indecency;

26. In order to be a "common bawdy-house" there need not be direct proof of actual prostitution taking place at the relevant time, but only that the premises were kept for the purpose of prostitution: R. v. Sorko, [1969] 4 C.C.C. 241 (B.C.C.A.); Also see: Theirlynck v. The King, [1931] S.C.R. 478; adopting Rex v. Roberts (1921), 36 C.C.C. 381 (Alta. Sup. Ct. App. Div.).

27. Prostitution has been defined as the offering by a person of his or her body for lewdness for payment in return: R. v. Lantay, [1966] 1 C.C.C. 503 (Ont. C.A.), adopting the English

case of R. v. DeMunck, [1918] 1 K.B. 635 (C.C.A.), which in the opinion of the Ontario Court of Appeal, "...succinctly states the general meaning of prostitution...". As noted in the Report of the Special Committee on Pornography and Prostitution (Fraser Committee) CASE, VOL. I, at p. 427, fn. 12:

> A much broader definition which would catch all sexual relations between unmarried men and women, was used in the two earlier decisions: Dube v. R. (1948), 94 C.C.C. 164 (Que. C.A.) and R. v. Turkiewich (1962), 38 C.R. 220 (Man. C.A.). It seems unlikely, however, that this broader definition would garner much support today.

28. As well a "common bawdy-house" is a place which is kept, etc. for "the practice of acts of indecency". The word indecency and variations thereof are used in a number of provisions of the Criminal Code, eg. section 157 (gross indecency), section 163 (immoral, indecent or obscene performance, etc.), section 164 (mail obscene, indecent, immoral or scurrilous matter), section 169 (indecent act), subsection 170(2) (public decency), subsection 171(1)(b) (indecent exhibition) and subsection 303(2) (indecent telephone call).

29. It would appear that the appropriate test to apply is the "community standard of tolerance".

> Reference: R. v. Popert et al (1981), 58 C.C.C. (2d) 505 (Ont. C.A.)
>
> R. v. Giambalvo (1982), 70 C.C.C. (2d) 324 (Ont. C.A.)
>
> R. v. McLaren (1982), 1 C.C.C. (3d) 573 (Ont. Co. Ct.)
>
> R. v. Mason (1981), 59 C.C.C. (2d) 461 (Ont. Prov. Ct.)

R. v. Laliberte; R. v. Lizotte et al (1973), 12 C.C.C. (2d) 111 (Que. C.A.)

Report of the Special Committee on Pronography and Prostitution CASE, VOL. I, at p. 408.

30. It is submitted that the community tolerance standard, which is not an objective test, is not so vague or uncertain as to infringe section 7 of the Charter.

cf. R. v. Red Hot Video Ltd. (1985), 18 C.C.C. (3d) 1 (B.C.C.A.) - re: obscenity

R. v. Saint John News Co. Ltd. (1984), 17 C.C.C. (3d) 234 at pp. 237-239 (N.B.Q.B.) - re: obscenity

R. v. Ramsingh et al (1984), 14 C.C.C (3d) 230 (Man. Q.B.) - re: obscenity

R. v. Wagner (1985), 43 C.R. (3d) 318 (Alta. Q.B.) - re: obscenity

R. v. Mood Video Ltd. (1987), 33 C.C.C. (3d) 221 (Nfld. S.C.) - re: obscenity

Also see R. v. LeBeau; R. v. Lofthouse (1988), [illegible] C.R. (3d) 157 (Ont. C.A.) - re: "gross indecency"

Yet see: Re Luscher and Deputy Minister Revenue Canada, Customs and Excise (1985), 15 C.R.R. 167 (Fed. C.A.)

(iii) Whether section 195.1(1)(c) is vague

31. It is submitted that the section is clear and unambiguous. Those seeking to contract for sexual services are not to do so in public places. A reasonably intelligent person can readily determine the meaning of this law and govern his/her actions accordingly. Further, there is no built in discretion granted to enforcement officials such as in the case of Kolender

v. Lawson 461 U.S. 352 (1983), nor is there the problem of this being a status offence such as the old vagrancy offence and the offence struck down in Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

B. SECTION 2(b) OF THE CHARTER

32. Questions 4, 5, and 6 call for consideration of section 2(b) of the Charter.

33. This appeal will in all likelihood be heard together with the appeal of Lina Maria Stagnitta v. The Queen, appeal no. 20497. Accordingly, with respect to section 195.1(1)(c) of the Criminal Code and section 2(b) of the Charter, the Intervenor herein relies upon the submissions made in its factum to be filed contemporaneously in the Stagnitta v. The Queen appeal.

> See: FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ALBERTA, filed in Stagnitta v. The Queen, appeal no. 20497, paragraphs 1-43 (copy of factum to be delivered to Appellants herein).

34. With respect to section 193 of the Criminal Code it is submitted that the purpose of this provision, which is essentially to address the harm to the interests of the community, does not infringe the fundamental freedom of expression. Such harm would include not only the endangering of the public peace but also the corruption of morals. cf. Rockert et al v. The Queen, [1978] 2 S.C.R. 704, at p. 712. Furthermore, it is submitted that to the extent that the effect of the impugned provision is to proscribe certain sexual conduct, such

does not infringe the fundamental freedom of expression: see obiter in R. v. LeBeau; R. v. Lofthouse (1987), 62 C.R. (3d) 157, at pp. 170-171 (Ont. C.A.).

C. SECTION 1 OF THE CHARTER

35. This appeal will in all likelihood be heard together with the appeal of Lina Maria Stagnitta v. The Queen, appeal no. 20497. Accordingly, with respect to the justifiability under section 1 of the Charter of section 195.1(1)(c) of the Criminal Code, the Intervenor herein relies upon the submissions made in its factum, to be filed contemporaneously in the Stagnitta v. The Queen appeal.

> See: FACTUM OF THE RESPONDENT, THE ATTORNEY GENERAL OF ALBERTA, filed in Stagnitta v. The Queen, appeal no. 20497, paragraphs 58-111 (copy of factum to be delivered to Appellants herein).

PART IV

NATURE OF ORDER SOUGHT

1. That the constitutional questions be answered as follows:

1. No

2. No

3. No

4. No

5. No

6. No

7. To the extent of any inconsistency with section 2(b) of the Canadian Charter of Rights and Freedoms section 195.1(1)(c) of the Criminal Code is justified under section 1 of the Canadian Charter of Rights and Freedoms and is thereby not inconsistent with the Constitution Act, 1982.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

R. F. Taylor

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PART V

LIST OF AUTHORITIES

(To be referred to)