

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 Attorney General of Saskatchewan accepts the statement of facts as set out in the Factum of the Respondent, the Attorney General for Manitoba, at p. 1.

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PART II

POINTS IN ISSUE

2. The points in issue in this appeal are set out in the constitutional questions stated by Dickson C.J.C., as follows:

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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?

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3. Is the combination of the legislative provisions contained in sections 193 and 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?

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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 sections 193 and 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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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?

10 3. The position of the Attorney General of Saskatchewan is that Questions 2 and 5 should be answered in the negative. If it becomes necessary to answer Question 7, any limitation on a guaranteed right consequent upon the operation of section 195.1(1)(c) or section 193 of the Criminal Code is justified under
20 section 1 of the Charter.

4. The Attorney General of Saskatchewan does not intend to make submissions with respect to questions 1, 3,
30 4 and 6.

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PART III

ARGUMENT

QUESTION 2: IS SECTION 195.1(1)(c) OF THE CRIMINAL
CODE INCONSISTENT WITH SECTION 7 OF THE CHARTER?

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(1) The "Void for Vagueness" Doctrine

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5. In alleging a violation of section 7 of the Charter, the Contradictor places reliance on the "void for vagueness" doctrine. Regarding this issue, the Attorney General of Saskatchewan relies on the submissions made at paragraphs 19 to 32 of the factum which he filed in Stagnitta v. R. (Appeal No. 20497).

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(2) The Right to Work

(a) The Right to Liberty and Security of the
Person Does not Include the Right to Work

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6. In his submissions regarding the "void for vagueness" doctrine, the Attorney General of Saskatchewan conceded that the right to liberty guaranteed by section 7 of the Charter is engaged because, if convicted, an accused may be sentenced to a term of incarceration.

See: Factum filed by the Attorney General of Saskatchewan in Stagnitta v. R. (Appeal No. 20497), at paragraph 20.

10 7. However, this concession does not apply where the challenge under section 7 is based on "the right to work". In this context, the alleged infringement of liberty does not relate to the potential for imprisonment consequent upon a conviction under section 195.1(1)(c) of the Criminal Code. Rather, the focus of the liberty or
20 security of the person interest is the interference with the right to engage in a particular occupation.

30 8. Given that focus, it is submitted that section 7 does not guarantee prostitutes the right to ply their trade because life, liberty and security of the person does not encompass the right to pursue one's occupation or profession. This conclusion has been adopted by Courts of Appeal across the country. The essence of these decisions is that economic and commercial rights, particularly of
40 the kind at issue in this Appeal, do not fall within the scope of application of section 7.

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

Zutphen Brothers Construction Ltd.
v. Dywidag Systems International,
Canada Ltd. (1987), 35 D.L.R.
(4th) 433 (N.S. C.A.), at pp.
438-439.

Re Church of Scientology et al.
and The Queen (No. 6) (1987), 31
C.C.C. (3d) 449 (Ont. C.A.), at p.
549.

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Reference Re Sections 193 and
195.1(1)(c) of the Criminal Code,
[1987] 6 W.W.R. 289 (Man. C.A.),
at pp. 308-312.

Re Gershman Produce Co. Ltd. and
Motor Transport Board (1985), 22
D.L.R. (4th) 520 (Man. C.A.), at
p. 528.

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9. This interpretation of section 7 is consistent with
McIntyre J.'s statement in Reference Re Public Service
Employee Relations Act, [1987] 1 S.C.R. 317 at p. 405,
that:

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For obvious reasons, the Charter does not give
constitutional protection to all activities
performed by individuals. There is, for
instance, no Charter protection for the
ownership of property, for general commercial
activity, or for a host of other lawful
activities.

And further, at p. 412:

40

It is also to be observed that the Charter, with
the possible exception of section 6(2)(b) (right
to earn a livelihood in any province) and
section 6(4), does not concern itself with
economic rights.

10. Further, it is respectfully submitted, the British Columbia Court of Appeal decision in Wilson et al. v. Medical Services Commission of British Columbia, (unreported, B.C.C.A., August 5, 1988), is not persuasive authority for the proposition that section 7 guarantees the right to pursue a particular livelihood. The decision stands alone in stark contrast to judgments of other courts of appeal, and is difficult to reconcile with recent decisions of the same court.

See: Paragraph 8, above.

20 R.V.P. Enterprises Ltd. v. Attorney General of British Columbia, [1988] 4 W.W.R. 726 (B.C. C.A.).

11. The error in reasoning in Wilson, it is respectfully submitted, results from an attempt to draw a distinction between "the right to work [a purely economic question]", and "the right to pursue a livelihood or profession [a matter concerning one's dignity and sense of self-worth]".

40 See: Wilson et al. v. Medical Services Commission of British Columbia, supra, at pp. 21-22.

12. It is a distinction without a difference; one of semantics which cannot be supported and applied in

10 reality. Economic and commercial components are, in fact,
intrinsic to the pursuit of a livelihood. While a
person's dignity and self-worth may also be involved, such
concerns cannot be determinative because they are relevant
in almost all human endeavour. To use dignity and self
20 worth as the critical yardstick for determining whether
life, liberty and security of the person is engaged would
overshoot the purpose of section 7. The logical
conclusion would be, for example, the inclusion of
property rights even though such rights were specifically
excluded when the provision was drafted.

30 13. Further, it is submitted, the distinction drawn by
the British Columbia Court of Appeal between "the right to
work" and "the right to pursue a livelihood or
profession", on the basis that the former interest is
purely economic in nature, is neither persuasive nor
realistic. Surely every occupation is comprised of both
an "economic" and a "quality of life" component. To draw
the distinction suggested by the British Columbia Court of
40 Appeal would lead to one of two results: (i) a general
guarantee under section 7 of the "right to work", an
extravagant and overly broad interpretation of the
provision, and one which even the British Columbia Court

of Appeal has not adopted; or (ii) a virtually impossible assessment to determine whether a particular individual is engaged in a purely economic or business enterprise bereft of an attendant "quality of life" component which would raise the occupation to the level of a guaranteed right.

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14. Neither possibility would be consistent with a purposive interpretation of section 7. Accordingly, it is submitted that any distinction between a "right to work" and a "right to pursue a livelihood" must be rejected.

20

15. The prohibition in section 195.1(1)(c) of the Criminal Code does not infringe the prostitute's right to life, liberty or security of the person. As with any other "occupation or business", the prostitute's right to ply her or his trade is not protected by section 7.

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See: Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code, supra, at pp. 293, 295 and 308-312.

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(b) Regulation, Not Prohibition of the Activity

16. If this Honourable Court should determine, contrary to the foregoing submissions, that liberty and security of

the person encompasses the right to work, it is submitted that, in the context of this Appeal, the right guaranteed by section 7 is not triggered because section 195.1(1)(c) merely regulates soliciting for the purpose of prostitution in particular circumstances. The objective of section 195.1(1)(c) of the Criminal Code is to eliminate the nuisance associated with street prostitution.

See: Report of the Special Committee on Pornography and Prostitution, Vol. 2 (The Fraser Report), (Ottawa: Canadian Government Publishing Centre, 1985), at pp. 345 to 400; 419 to 430.

House of Commons Debates, September 9, 1985 at pp. 6373 to 6387, and 6407 to 6421.

House of Commons Debates, November 9, 1985, at pp. 8610 to 8612.

R. v. McLean; R. v. Tremayne (1986), 52 C.R. (3d) 262 (B.C. S.C.), at pp. 265-266, and 272.

17. The fact that regulating business activity does not amount to an infringement of liberty within the meaning of section 7 of the Charter has been recognized by this Honourable Court in Edwards Books and Art Ltd. et al. v. R. et al, [1986] 2 S.C.R. 713. In this regard, Dickson C.J.C. said, at pp. 785-786:

In my opinion "liberty" in section 7 of the Charter is not synonymous with unconstrained freedom. ... Whatever the precise contours of "liberty" in section 7, I cannot accept that it extends to an unconstrained right to transact business whenever one wishes.

See also: Wilson et al. v. Medical Services Commission of British Columbia, supra, at pp. 25-31.

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18. In a similar vein, in R.V.P. Enterprises Ltd. v. The Attorney General of British Columbia, supra, the Court said, at p. 733:

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Before us, counsel for the Appellant submitted that the right to obtain a [liquor] licence, because of the enormous impact the loss of such an existing right can have upon the personal well being of the licence holder, should be held, despite its economic aspects, to be a "liberty" within section 7. I cannot accept that the potential impact from the loss of the interest renders that interest a liberty within section 7. I agree with Oppal J. that the Petitioner's right to hold a licence is not a "liberty" within section 7, and is not otherwise constitutionally protected.

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19. It is submitted that this statement applies by analogy to the regulation of prostitution through the prohibition of street solicitation. Prostitution per se remains a legal activity which can be engaged in providing the participants comply with the limited restrictions set out in the Criminal Code.

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20. Accordingly, it is submitted, section 195.1(1)(c) of the Criminal Code does not engage the right to liberty or security of the person guaranteed by section 7 of the Charter. It is therefore unnecessary to proceed to the second stage, an analysis of the principles of fundamental justice.

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(3) The Principles of Fundamental Justice

21. If this Honourable Court should determine, contrary to the foregoing submissions, that section 195.1(1)(c) engages the right to life, liberty and security of the person, it is submitted that any deprivation of the right is made in accordance with the principles of fundamental justice.

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22. Parliamentary power to regulate prostitution, even to the point of elimination, would not infringe the basic tenets of our legal system which comprise the principles of fundamental justice.

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See: Reference Re Section 94(2)
of the Motor Vehicle Act,
R.S.B.C., 1979, c. 288, [1985] 2
S.C.R. 486, at p. 503.

23. Those principles do not preclude the legislators from criminalizing activities, such as prostitution or gambling, in part, or in total, provided the requirements of section 91(27) of the Constitution Act, 1867, are satisfied. Parliament must be free to determine which activities are to be defined as criminal. Section 7 of the Charter does not transfer that role to the courts.

24. Further, it is submitted, the proposition that prostitution is a lawful activity, and therefore, cannot be regulated in such a way as to suppress it is fallacious. It is true that there is no law prohibiting prostitution per se. Nonetheless, it is illegal to engage in certain activities relating to prostitution, such as, keeping or attending at a common bawdy house (section 193), procuring (section 195), and soliciting in a public place (section 195.1). It would be an odd result indeed if the legislature was required, by section 7 of the Charter, to specifically criminalize such activities as prostitution and gambling before being in a position to legislate in respect of them.

25. Further, it is submitted, the administrative law principle that an activity cannot be regulated out of

existence has no application in this context. The principle applies where the legislative foundation is a statutory authorization to regulate a particular trade or business.

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See, for example: Re Bajor et al. and the Queen in Right of Ontario et al. (1985), 50 O.R. (2d) 705 (Ont. H.Ct.), at pp. 712-713.

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26. Such a limitation on the right to regulate clearly does not apply in the context of Parliament determining what conduct will be defined as criminal. In enacting provisions in the Criminal Code which have a regulatory effect, Parliament is not acting pursuant to a statutorily authorized regulation-making power.

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27. Further, whether or not particular legislation amounts to complete suppression of a "business or occupation" may well depend on the ingenuity of those who wish to engage in the activity in ways which do not run afoul of the specified prohibitions. Indeed, legislation which does not criminalize the activity per se is quite likely to be enacted in relation to such matters as prostitution or gambling because it is the nuisance or some other limited component that is of concern to the

legislators. In these cases, Parliament may draft legislation in order to deal with identified problems and, at the same time, refrain from enacting a comprehensive prohibition.

10 28. Accordingly, it is submitted, if section
195.1(1)(c) of the Code engages the right to life, liberty
and security of the person, the provision is consistent
with the principles of fundamental justice. There is no
infringement of section 7 of the Charter.

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QUESTION 5: IS SECTION 195.1(1)(c) OF THE CRIMINAL CODE INCONSISTENT WITH SECTION 2(b) OF THE CHARTER?

10 29. The issues raised in this Appeal with respect to the application of section 2(b) of the Charter to section 195.1(1)(c) of the Criminal Code are similar to those considered in Stagnitta v. R. (Appeal No. 20497). The Attorney General of Saskatchewan relies on the submissions made at paragraphs 4 to 18 of the Factum which he filed in the Stagnitta appeal.

20 QUESTION 7: SECTION 1 OF THE CHARTER

30 30. Justification of a limitation on a Charter-guaranteed right consequent upon the operation of section 195.1(1)(c) of the Criminal Code has been dealt with in detail in the factum filed by the Attorney General of Alberta in Stagnitta v. R. The Attorney General of Saskatchewan agrees with those submissions.

40 See: Factum of the Respondent, the Attorney General of Alberta, filed in Stagnitta v. R., Appeal No. 20497, paras. 58 to 111.

PART IV
NATURE OF ORDER SOUGHT

10 31. The Attorney General of Saskatchewan respectfully
requests that the constitutional questions be answered as
follows:

- (a) Question 2: no;
- (b) Question 5: no;
- (c) Question 7: any limitation on a guaranteed
right consequent upon the operation of
20 section 195.1(1)(c) or section 193 of the
Criminal Code is justified under section 1 of
the Charter.

30 ALL OF WHICH IS RESPECTFULLY SUBMITTED.

30 Dated at Regina, Saskatchewan, this 15th day of
November, 1988.

40 

B. Gale Welsh

Counsel for the Attorney General
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LIST OF AUTHORITIES

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4. <u>R. v. McLean; R. v. Tremayne</u> (1986), 52 C.R. (3d) 262 (B.C. S.C.).	10
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7. <u>Re Bassett and Government of Canada et al.</u> (1987), 35 D.L.R. (4th) 537 (Sask. C.A.).	5
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10. <u>Reference Re Public Service Employee Relations Act,</u> <u>[1987] 1 S.C.R. 313.</u>	6
11. <u>Reference Re Section 94(2) of the Motor Vehicle</u> <u>Act, R.S.B.C., 1979, c. 288</u> , [1985] 2 S.C.R. 486.	12
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