

20581

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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FOR THE APPELLANT RE: S. 195.1(1)(c)

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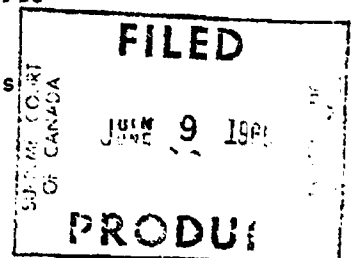
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P A R T I

EXPLANATORY NOTE

This being a constitutional reference pursuant to the Constitutional Questions Act, no evidence was presented.

This factum will concentrate on the Constitutional validity of s. 195.1(1)(c) of the Criminal Code of Canada. The other factum will deal with the Constitutional validity of s. 193 of the Criminal Code of Canada. Counsel adopts the argument filed by M. J. Bennett regarding s. 193 of the Criminal Code of Canada particularly with respect to Constitutional Questions 1 and 4.

P A R T I I

POINTS IN ISSUE

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

P A R T I I I

A R G U M E N T

INTERPRETATION OF THE CHARTER GENERALLY.

The determination of whether legislation offends a section of the Charter involves a two step process.

FIRST: The Court must analyze the meaning and scope of the Charter provisions in question. In making this analysis the Court must adopt a purposive approach as outlined by Dickson C.J.C. in R. v. Big M. Drug Mart, (1985) 1 S.C.R. 295 at p. 344.

"This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter, in Hunter et al v. Southam Inc. (decision rendered Sept. 17, 1984, (since reported 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641 (1984) 2 S.C.R. 145), this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee: it was to be understood, in other words, in the light of the interests it was meant to protect.

In my view, this analysis is to be undertaken and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. This interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to

recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984) 1 S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and historical contexts."

In applying the test outlined above, the Court is to consider the linguistic, historical, and philosophical underpinnings of the right in question in relation to the other rights with which it is associated and the larger aspects of the Charter itself.

SECOND; The purpose and effect of the statute in question must be determined. This analysis allows the Court to measure the content of the legislation against the Charter freedom or right in order to determine whether the legislation is consistent with that right. The importance of this analysis has been underscored by the Supreme Court of Canada in R. v. Big M. Drug Mart:

"...both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively in the sense of the legislation's object and its ultimate impact are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity. Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the Courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violate of Charter of rights. It will also allow

courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact".

ANALYSIS OF SECTION 195.1 (1)(c) OF THE CRIMINAL CODE OF CANADA.

Section 195.1(1)(c) of the Criminal Code of Canada states:

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

(c) stops or attempts to stop 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."

S. 195.1(2) Enlarges upon the definition of public place, stating "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."

It is submitted that the context of the within reference requires that several aspects of this legislation be examined closely:

a). The legislation imposes no definitional limits on the meaning of the phrase "in any manner communicate or attempt to communicate". The phrase is sufficiently broad to encompass every conceivable method of human expression, including speaking (by telephone or in person), writing, waving, nodding, smiling, winking, perhaps just looking at another in a certain way. In short, any action used by individuals to convey their thoughts, wishes or intentions to another may be classified as communication for the purposes of this section. Attempting to do any of these things is also included.

b). The section is not restricted to conversation between prostitutes and their customers. Any two or more people may commit the offence in question, whether or not a prostitute ever becomes involved or is even spoken to.

c). The phrase "in a public place or in any place open to public view", is sufficiently broad to include a variety of places. For example, two people talking about engaging the services of a prostitute while sitting on their porch or in front of their livingroom window have committed an offence. This is so whether or not any member of the public actually hears the communication or indeed is even capable of hearing the communication.

d). There is no requirement, in s. 195.1(1)(c) that any public nuisance be proven, or even be shown to be a possibility. For example, an individual who speaks to or stops (or even attempts to stop) a friend for the purpose contemplated, in a public place or private place open to public view, is guilty, whether or not any member of the public at large is or could be offended, annoyed or inconvenienced in any way.

Given the breadth of s. 195.1(1)(c) the following examples fall within the scope of activity which is criminal:

a). Two residents of Vancouver, (Named Fred and Harold) who are old friends, are sitting on a park bench in Stanley Park. Their conversation is as follows:

Fred: "I've been thinking about hiring a prostitute to celebrate my birthday tomorrow night, but I'm broke. Can you lend me \$60.00?"

Harold: Yes, I certainly will".

(R. v. Tremayne, unreported, per: Lemiski, J., April 10, 1986 (B.C.P. Ct.) at page 17).

- (b) A tourist from Australia attends at the Public Visitors Bureau in downtown Vancouver to obtain a map of the City and to enquire as to sandy beaches. His conversation with the bureau assistant is as follows:
TOURIST: By the way is prostitution legal in Canada?
Assistant: Yes, it is.
TOURIST: Well then, how do I go about engaging the services of a prostitute?
Assistant: I'm afraid I can't assist you there. You'll just have to look around."

(R. v. Tremayne, supra).

- (c) "Under this Bill it would be unlawful for a passenger in a taxi to ask a driver how to contact a prostitute. It would be unlawful for a hotel guest in an elevator to ask such questions of a bell-hop or for a customer to ask it of his pharmacist in a drug store, no matter how inconspicuous or discrete such communications might be. In fact, there are no limitations whatever in this bill in the scope of it in terms of communication. A wink, a nod, a smile could trigger a criminal prosecution."
(Hansard, November 20, 1985, P. 8645, Per: Svend J. Robinson (Burnaby)).
- (d) "A 'public place' according to this Bill, includes any place to which the public has access as of right or by invitation that would include, of course, shopping malls, bars, lobbies of office buildings, any place where the public has the right of access express or implied, and any motor vehicle located in a public place or in any place open to public view. If one has his car parked in his driveway, someone from the street could look to see what is happening in his car, or if the curtains of a home were open, a pedestrian walking by could look into that home to see if there was an attempt to communicate or direct communication for the purpose of prostitution. In that case, a police officer could lay a charge."
(Hansard, November 20, 1985, page 8650, Per: John Nunziata (York South-Weston)).

(e) "Two young, unemployed, single mothers in a restaurant discussing their inability to support themselves over a cup of coffee:

Jane: I thought about it very carefully, and I have no choice. I'm going to start prostituting myself tonight and I wonder if you could look after my kids and maybe lend me some money to get started?

Diane: No. Are you crazy?"

R. v. Doonanco et al, (unreported) per: Chisholm J., Alta. P. Ct., Sept. 1986, at P. 13 - 14).

In determining the purpose of this section Huband J.A. stated that the:

"Without doubt these restrictions if effectively enforced would make it difficult if not impossible for a prostitute to carry on the trade. I think this is precisely what parliament intended." (Case on Appeal P. 517, Vol. II).

It is respectfully submitted that Huband, J.A. erred in his conclusion. Philp J. A. stated, referring to both s. 193, and 195.1(1)(c) at p. 303;

"both of these sections are directed at the public nuisance problem associated with prostitution related activities."
(Case on Appeal, p. 529, Vol. II).

It is submitted that a historical examination of this section indicates that the purpose is to control the nuisance caused by public prostitution.

From 1869 until 1972 there appeared in the Criminal Code the offence of vagrancy. Then section 195.1 was enacted. It stated that "every person who solicits any person in a public place for the purpose of prostitution is guilty of an offence". In Hutt v. The Queen, the Supreme Court ruled that the conduct required to support a

conviction under this section was conduct that was pressing and persistent. Concerned about the certainty of this, Parliament reacted by passing the current s. 195.1. Parliament was aware that the Court had ruled that the purpose of this section was to regulate prostitution and not to prohibit it. It is respectfully submitted that if Parliament's intention was to prohibit it they would have used clear wording. Since Parliament did not pass legislation specifically prohibiting prostitution Parliament only intended to regulate it.

Moreover, this purpose can be seen by reference to the other provisions in section 195.1, (i.e. prohibiting impediment of pedestrian or vehicular traffic and access to premises).

It is submitted, that given the purported objective of the legislation, s. 195.1(1)(c) exceeds the purposes for which the law was enacted. It is readily conceivable that an individual could communicate with another person for the purposes of prostitution, a trade which is not in itself unlawful, in a manner which does not in anyway cause a nuisance. Accordingly, it is submitted that section 195.1(1) (c) has the effect of prohibiting communication concerning an essentially legal activity in circumstances which do not give rise to the mischief which is the object of the legislation.

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

Language Chosen; Historical Analysis

S. 7 states that 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.

It is significant, it is submitted, that the word "liberty" is included in s. 7 as opposed to some other phrase, as there has been much discussion of the concept by both authors and Judges.

The English philosopher John C. Mill in On Liberty wrote:

"The only end for which society is warranted in infringing the liberty of action of any individual is self protection. Power should be exercised to prevent the individual from doing harm to other, but that is the only part of his conduct for which he should be answerable to society. In every other way he should have freedom. Freedom of thought and feeling, freedom of opinion and sentiment on all subjects, practical and speculative, freedom to publish and express and express any opinion, freedom of tastes and pursuits; freedom also for a number of people to combine for any purpose not involving harm to others not society in which these liberties are not on the whole respected is free, whatever may be its form of government and none is completely free in which they do not exist, absolute and unqualified."

Such concepts have been identified in the decision of the courts of the United States in Mayer v. Nebraska, 262 U.S. 390 at 399, McReynolds J. stated:

"While the Court has not attempted to define with exactness the liberty....guaranteed (by the 14th amendment), the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life..."

Similar to this, in Bolling v. Sharpe, 347 U.S., 497, 74 Supreme Court, 693, Warren, C.J. stated:

"Although the Court has not assumed to define liberty with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

In the Manitoba Reference, Philp, J.A., stated;

"The question as to whether or not economic rights are encompassed in the guarantee of liberty under s. 7 of the Charter has not been decided by the Supreme Court of Canada. However, I think that there has been overwhelming acceptance by courts in Canada that economic rights are not protected."
(Case on Appeal p. 543, Vol. II).

Such a broad interpretation of the definition of "liberty" as contained in s. 7 of the Charter has been applied by Courts in Canada. In Re Mia and Medical Services Commission of British Columbia (1985) 16 C.R.R. 233 (B.C.S.C.) McEachern, C.J. S.C. considered the concept of liberty in the following way:

"Liberty, as Finch, J. said in R. v. Robson, (1984) 11 C.R.R. 206, 14 C.C.C. 3d, 56, B.C.L.R. 194 at P. 199, is, "so grand a concept that it may not be possible to capture its meaning in words ...(P. 260), and further:

"At the very least, liberty must include those freedoms of lawful conduct always enjoyed by Canadians and our predecessors in the Anglo-Saxon Heritage. If we have enjoyed a right for many centuries then it must surely be included in "liberty" whether specifically stated or not." (P. 261) (emphasis added)

Dealing with economic rights, McEachern, C.J.S. observed:

"After all, this is Canada where freedom of movement for any lawful purpose has always been one of the hand-maidens of liberty.

In view of this history I have no doubt that freedom of movement within the Province for the purpose of lawful employment or enterprise... is indeed a right properly embraced within the rubric of liberty. Practices which purport to limit or restrict that right are invalid and must be struck down unless permitted by the Charter." (P. 263) (Emphasis added).

In R. v. Jones (1986) 2 S.C.R. 284 Wilson J. stated at P.

318 - 319:

"I believe that the framers of the Constitution in guaranteeing liberty as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be nonconformist, idiosyncratic and even eccentric - to be, in today's parlance, "his own person" and accountable as such. John Stuart Mill described it as pursuing our own good in our own way". This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it".

Moreover, Wilson J. accepted the American Jurisprudence on this subject in R. v. Morgentaler (Supreme Court of Canada, January 28, 1988) where she stated:

"Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state to respect them.

This conception of the proper ambit of the right to liberty under our Charter is consistent with the American Jurisprudence on the subject."

As it is submitted, that the purpose of S. 195.1(1)(c) is to regulate the nuisance caused by prostitution and not to make prostitution itself illegal Parliament was adhering to this notion of liberty. That is, an individual has the right to conduct oneself any manner he chooses, so long as such conduct does not significantly infringe upon the equal right to liberty guaranteed to other members of the same society. It is submitted that right includes the right to engage in a lawful occupation.

Liberty: In Relation to the Charter

It is submitted that the right to life, liberty and security of the person under s. 7 of the Charter is not to be considered as one right which may be breached only if a person is in jeopardy of the deprivation of all three, but rather as three rights each of which if deprived would constitute a violation under s. 7. In Re: Singh and Minister of Employment and Immigration, (1985) 1 S.C.R. 177, at p. 204, Wilson, J. addresses this issue as follows:

"As I understand the "single right" theory, it is not suggested that there must be a deprivation of all three of these elements before an individual is deprived of his "right" under S. 7. In other words, I believe that it is consistent with the "single right" theory advanced by counsel to

suggest that a deprivation of the Appellants' "security of the person", for example, would constitute a deprivation of their "right" under s. 7...."

The scope of Section 7 is commented upon by Lamer J. in Ref:
Re: S94(2) of the Motor Vehicle Act (British Columbia), (1985) 18
C.R.R. 30, at P. 502:

"Sections 8 to 14 are illustrative of deprivations of those rights to live, liberty, and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the 'right' to life, liberty and security of the person;.. To put matters in another way, s. s. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections, the oft-utilized provisions of our statutes, 'and without limiting the generality of the forego' (s.7), the following shall be deemed to be in violation of a person's rights under this section"

In the Manitoba Reference Philp, J.Á., stated at p. 312, that "liberty under s. 7 of the Charter... is concerned with physical liberty of the person", (Case on Appeal, p. 543-44, Vol. II). However, it is submitted that this view is inconsistent with the approach adopted by Lamer J. in Mill v. The Queen, 1986, 1 S.C.R. 863 at p. 919 - 920 where he stated:

"...security of the person is not restricted to physical integrity; rather, it encompasses protection against "overlong subjection to vexations and vicissitudes of a pending criminal accusation"... These include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs, uncertainty as to the outcome and sanction."

It is submitted, that the concept of liberty which includes the right to work in a lawful occupation as articulated and in relation to the Charter itself is a guaranteed right.

Character and Objects of the Charter

In determining that the right to liberty included the right to work in a lawful occupation and that this concept was consistent with the character and objects of the Charter, Kopstein Prov. Ct. J. in R. v. Cunningham (supra) stated at p. 231:

"Is the concept of "liberty" here proposed consistent with the larger objects of the Charter? In Hunter v. Southam, supra at p. 106, Mr. Justice Dickson, as he then was, speaks of the purpose of the Charter (which I am unable to distinguish in this context from its object). he says:

I begin with the obvious. The Canadian Charter of Rights and Freedoms a purposive document. Its purpose is to guarantee and to protect within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms;

In my opinion, one need not go further than that statement to articulate the larger objects of the Charter, and there is nothing inconsistent between the s. 7 concept of liberty herein proposed and the statement of purpose set out in Hunter v. Southam."

It is submitted that an activity such as pursuing a trade or engaging in a lawful occupation is a right enjoyed by all Canadians and is protected by s. 7 of the Canadian Charter of Rights and Freedoms.

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

S. 2 - Everyone has the following fundamental freedoms...

(b) freedom of thought, belief, opinion and expression...

In the Manitoba Reference, Huband, J. stated at P. 297:

".....When freedom of expression was incorporated as a fundamental freedom in the Charter of Rights and Freedoms, I do not think that some new interpretation was intended...."
(Case on Appeal, P. 513, Vol. II).

However, it is submitted that the Charter does not merely affirm existing rights. In Big M. Drug Mart (supra) Dickson, C.J.C. stated:

"...it is certain that the Canadian Charter of Rights and Freedoms does not simply recognize and declare existing rights as they were circumscribed by legislation current at the time of the Charter's entrenchment. The language of the Charter is imperative. It avoids any reference to existing or continuing rights...the Charter is intended to set a standard upon which present as well as future legislation is to be tested."

It is submitted that Huband J.A. erred when he stated that he did "not think soliciting sex for money on a street corner is an exercise of freedom of speech...or expression". (Case on Appeal, p. 508, Vol. II).

It is submitted that the words of the section are sufficiently broad to offer protection to the simple communication of a price from a lawful seller to a lawful buyer. In Irwin Toy v. A. G. of Quebec, (1986), 32 D.L.R. (4d) 641 at p. 651 Jacques J. stated:

"There are, however, no rules of interpretation which exclude commercial expression from freedom of expression. The wording of s. 2(b) does not limit freedom of expression to certain types of expression, for example, political, artistic, cultural and others."

It is conceded that commercial expression may be subject to regulation and restrictions particularly where the expression in question is causing the general public mischief or nuisance as may arise from the commercial dialogue involved in the solicitation or practice of prostitution.

Nonetheless, it is submitted that where as with prostitution, the commercial activity is not itself an unlawful one, the restraints imposed should go no further than is necessary to achieve the protection which is sought. Therefore, it is submitted that Huband J. A. erred when he stated after a discussion on freedom of expression:

"It is qualified and restricted by the laws of defamation, sedition, incitement to riot and criminal conspiracy. Parliament has added to that list by making it an offence to solicit in public contrary to s. 195.1(1)(c) of the Code but that restraint does not diminish the freedom envisaged by the Charter any more than does the Criminal Code provision touching upon criminal conspiracies."
(Case on Appeal, p. 516 - 17, Vol. II).

It is respectfully submitted that this legislation is different than the law against conspiracy because it has the effect of prohibiting an individual from communications in pursuit of a lawful act or occupation. Conspiring to do something illegal is illegal because doing that act is also illegal.

It is submitted that freedom of expression in the broadest sense has long been recognized and protected as a hallmark of a free and democratic society. in Boucher v. The King, [1951] S.C.R. 265 Rand J. stated at p. 288:

"Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as a mere subjective condition be so? Controversial fury is used constantly by differences in abstract conceptions; hearsay in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility; and subjective incidents of living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the truth of things generally."

In addition, it is submitted that such broad concepts are not limited to only those forms of expression considered to be sufficiently lofty as to serve higher moral and societal interests. To the contrary, it has been recognized that a generalized freedom of expression of itself and whatever its purpose, has a value intrinsic to the concept of freedom and democracy.

After reviewing the history of freedom of expression in Dolphin Delivery v. R.W.D.S.U., [1987] 1 W.W.R. 77, this Court held that picketing of a company by striking union workers was a form of expression. McIntyre, J., writing for the Court, considered the economic aspect of picketing to be a legitimate component of the guaranteed right to expression.

The scope of the right to freedom of expression, as guaranteed by s. 2(b) of the Charter, was the subject of comment by this Court in Dolphin Delivery v. R.W.D.S.U., (supra). There a majority of the Court held that the picketing of a company by striking union workers, though in many ways amounting to "conduct", was nonetheless a form of expression. This view was held even though the "message" which the picketers sought to convey was more than mere communication, but had as one of its primary goals the bringing to bear of economic pressure upon and to cause economic loss to the party picketed. To the contrary, McIntyre J. considered the economic aspect of the picketing to be a legitimate component of the guaranteed right to expression. Equally significant, McIntyre, J. was of the opinion that the Freedom of expression enshrined in section 2(b) of the

Charter did not extend to only "those forms of expression that warrant such protection", holding instead that the right applied so long as it was not relied upon to protect threats or acts of violence, destruction of property, assaults on others, or clearly unlawful acts.

Therefore, it is submitted that Monnin, C.J.M. erred when he stated:

"I agree that it demeans the concept of freedom of opinion and expression to relate it or equate it to the bargaining or haggling process between a prostitute and her customer."
(Case on Appeal, p. 506, Vol. II).

Clearly this contention was rejected by McIntyre. The protection of section 2(b) is not limited to those forms of expression which "warrant such protection".

Furthermore, it is submitted that Huband, J. A. erred when he stated at P. 296:

"When a customer propositions a prostitute what is said between them does not intrude the realm of thought, ideas or beliefs".
(Case on Appeal p. 513, Vol. II).

It is submitted that the Court should adopt the reasoning of MacKeigan, J. in R. v. Skinner (1987) 79 N.S.R. (2d) 9, where he stated at pages 14 - 15:

"Freedom of expression is a right of everyone and is not limited to debate of high principles or policy. It extends to expression by conduct and not merely words, spoken or written. It extends to expression in labour negotiations and, by necessary

inference, to negotiations between buyers and sellers of goods and of services other than labour."

Similar to this, Kerans J.A. in R. v. Jahelnska 36 C.C.C.

(3d) 105 at P. 167 states:

"I am of the view that s. 2(b) extends, at the very least, to protect communication made for the purpose of earning a livelihood because this is an activity of fundamental importance in our society."

The right of freedom of expression including expression in the commercial sense as well as the political is an essential part of the Charter which has its origins deeply rooted in Canadian society.

It is submitted that Huband, J.A. erred in determining that the communication between a prostitute and a client does not involve the dissemination of factual information and thereby should not be afforded Charter protection. It is submitted that the following analysis is correct:

In Grier v. Alberta Optometric Association (1987), 79 A.R. 36 (C.A.) the Court was asked to determine whether the law which prohibited optometrists from advertising was a violation of the freedom of expression as guaranteed by s. 2(b) of the Charter. In determining the character and larger objects of the Charter the Alberta Court of Appeal made reference to the preamble of the Charter:

"Canada is founded upon principles that recognize...the rule of law", which suggests to me that the larger objects of the Charter are to recognize those "socio-ethical convictions" that

are at once solidly established in Canadian tradition and are consistent with ideas associated with democratic life."

Is the quotation of a price a valued activity? In Irwin Toy (supra), Jacques J.A. stated at p. 652:

"It is not for the Court to accord more prestige to political, artistic, or cultural expression than to commercial expression, or to find that the nature and scope of one is greater than that of another since the Charter makes no such distinction....

The economic choices of the citizens are just as important, as their artistic and cultural choices. These choices depend on what information is available and they cannot be enlightened choices unless such information circulates as freely as possible."

The valued activity engaged in here, is the dissemination of services for a stipulated price. The fact that the communication originates from a prostitute and is transmitted to a customer should not alter the situation. The communication of a price from a lawful vendor to a lawful purchaser is a valued activity. It is respectfully submitted that the Charter of Rights and Freedoms is not an elitist document providing protection only for the sophisticated.

Considered in the context of this purposive interpretation of s. 2(b) of the Charter, it is submitted that s. 195.1(1)(c) imposes an unwarranted restriction on the right of freedom of expression since notwithstanding its object of preventing a nuisance, it also encompasses within its parameters a prohibition on forms of

communciation and expression from which no nuisance could arise. In essence, it makes a conversation about an activity which is lawful to perform unlawful to discuss.

It is therefore, submitted, that s. 195.1(1)(c) of the Criminal Code of Canada is inconsistent with s. 2(b) of the Canadian Charter of Rights and Freedoms.

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

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

It is conceded that prostitution, as with any other occupation or means of earning income which is not unlawful, should be subject to such restrictions and regulations as may be necessary to ensure that it's practice does not interfere unduly with the rights enjoyed by other Canadians.

Notwithstanding, it is submitted that it is inconsistent with the broad definition accorded to the phrase "liberty" in s. 7 of the Charter to pass legislation which effectively prohibits the practice of a lawful occupation under the guise of regulating it.

See Re Mia and Medical Services Commission of British Columbia (supra)

The provisions of s. 193 make it unlawful for a prostitute to resort to his or her own residence (or any other place) on a regular basis as a place to carry on the business of prostitution. Accordingly, in order to avoid prosecution under s. 193, it is

necessary for an individual involved in prostitution to resort to a variety of different locations to practice the occupation, lest he or she be charged with "keeping" any one specific place as a common bawdy house.

However, given that the law prohibits prostitutes from carrying on their business in a fixed location, enabling their prospective customers to locate them without having to resort to meetings outside the premises, it therefore, becomes necessary for the prostitutes plying the occupation to seek out the prospective customers, arranging to perform the services in varying locations. Such initial meetings would, inevitably, take place in an area open to the public or at least open to public view, since such locations are the places where customers might be found. However, by virtue of the enactment of s. 195.1(1)(c), such public meetings are now themselves criminalized, however discreet and unobtrusive they may be. Even should the prospective prostitute do nothing more than wait in a public place until a prospective customer approached, the provisions of s. 195.1(1)(c) would still apply to prohibit even the minimal (possibly even nonverbal) communication necessary for prostitutes and customers to identify one another as such, prior to their reaching the legally unobjectionable privacy of some other location to do a legally unobjectionable act.

It is submitted that the combination of s. 193 and 195.1(1)(c) are such that neither the prospective customer nor the prostitute can in any way meet one another without breaking either one

or both of the statutory prohibitions, notwithstanding that the act contemplated by both customer and prostitute is itself legal. In the combination of s. 193 and 195.1(1)(c) effectively stifles the practise of prostitution. By following such a legislative course, it is submitted, Parliament has accomplished indirectly that which it has explicitly refrained from doing directly. It is therefore, submitted that the combination of the legislative provisions contained in section 193 and 195.1(1)(c) of the Criminal Code of Canada accomplish an end inconsistent with section 7 and section 2(b) of the Canadian Charter of Rights and Freedoms and therefore, ought to be declared unconstitutional.

If section 195.1(1)(c) of the Criminal Code of Canada is 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?
(Question 7 of the Appellant's Case on Appeal, p. 19)

INTRODUCTION

S. 1 of the Canadian Charter of Rights and Freedoms states:

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

It should be noted that the Supreme Court of Canada has stated that a consideration of the Charter right alleged to be infringed must be kept distinct from any argued exception of the right pursuant to section 1 of the Charter. In R. v. Oakes, [1986] 1 S.C.R. 103, Dickson C.J.C. stated at page 134:

"To my mind it is highly desirable to keep section 1 and section 11(d) [the right alleged there to have been infringed] analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the Charter to date."

In order to establish that a limit is reasonable and demonstrably justified in a free and democratic society, the Supreme

Court of Canada in Oakes, (supra) applied two criteria. Dickson C.J.C. stated at pp. 138 - 139:

OBJECTIVE TEST:

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

PROPORTIONALITY TEST:

"Although the nature of the proportionality test will vary depending on the circumstances in each case the Courts will be required to balance the interest of society with those of individuals and groups. There are, in my view, three important elements of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question, they must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question: R. v. Big M. Drug Mart Ltd. (supra) at page 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'."

The purpose of s. 195.1(1)(c) of this legislation, as previously stated, is to control the public nuisance caused by street prostitution. It is submitted that the comments of the Honourable John Crosbie are of assistance. He stated: (September 19, 1985):

"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.

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.

...what are some of the problems the public feels that we must resolve for them in connection with street soliciting? These problems range from the slowing down or blockage of motor vehicle traffic as can be observed in Halifax, Vancouver, Calgary, Niagara Falls and Toronto as well as slowing down or blockage of pedestrian movement on the sidewalk." (Hansard, Monday, September 9, 1985, at 6373-6374).

In response, Monnin, C.J.M. stated:

"It is dangerous to use quotations,....or speeches from Hansard in order to interpret the plain and ordinary language of a statute."
(Case on Appeal p. 507, Vol. II).

However, it is submitted that this is inconsistent with the approach of Chief Justice Laskin in Reference Re: Anti Inflation Act [1976] 2 S.C.R. 373. He stated at p. 389:

"...no general principles of admissibility or inadmissibility can or ought to be propounded by this Court, and the question of resort to extrinsic evidence and what may be admitted must depend on the constitutional issues on which it is sought to adduce such evidence."

Therefore, it is submitted that what extrinsic evidence is admissible will depend on the circumstances of each case.

The Test Applied

a. A Substantial and Pressing Concern;

It is conceded that section 195.1(1)(c) as a whole attempts to address a substantial and pressing societal concern, specifically, the mischief which is caused by street soliciting.

b. The Proportionality Test

It is submitted that s. 195.1(1)(c) is incapable of satisfying the second criteria enunciated in Oakes, (supra).

In R. v. Skinner, (supra) MacKeigan, J. in considering the Oakes test as it applied to s. 195.1(1)(c) stated at p. 16:

"In my opinion, s. 195.1(1)(c) fails the Oakes test on all counts. It has not been shown that street prostitution is a substantial evil which must be suppressed despite the resulting disregard to Charter freedoms. Disorderly conduct, especially near residences, should indeed be clearly criminal but, so far as that was the objective of s.

195.1(1)(c) the means chosen of completely banning street prostitution are not reasonable and demonstrably justified. The section goes far beyond what was reasonably necessary. It attacks not only the disorderly prostitutes but also those who quietly and discreetly stroll or stand around non-residential areas."

Similar to the above statement is that of Cioni, Provincial Court Judge in R. v. Bear (1986), 54 C.R. (3d) 68 at page 84:

"The Crown encounters difficulty with the 'means test', in all three stages. As discussed above, the scope of the proscription affects persons well outside the stated 'evils'. Although Parliament may have wished to carefully design a strict and broad control, I find the effect to be arbitrary, unfair and irrational to the objective. It is capable of being a "gag law" to eliminate prostitution when prostitution itself has not been proscribed. There is no rational reason that the established freedom to speak of prostitution under quiet circumstances should fall to disturbance, nuisance and violence on the street. The two, in fact, would seem to be antithetical. I cannot then conclude proportionality between the effects and the objective. Rather than impair as little as possible the freedom in question, the means here seem directed at elimination of prostitution per se, as distinct from simply a wide approach to deal with street problems..."

Where I to proceed to the third test, I would find unreasonable limitation in the severe and deleterious effect of the legislation in producing consequences and charges outside the scope of the stated objective."

In contrast to section 195.1(1)(c), subsections "(a) and (b)" address directly the issue of nuisance, i.e. stopping the flow or otherwise impeding the general flow of vehicular or pedestrian traffic or interfering with the public's ingress to or egress from public

places or motor vehicles. These restrictions clearly address the concerns of the legislation by restricting activities which interfere with the rights of others, while still making permissible the discreet activities of prostitutes and their customers.

Section 195.1(1)(c), on the other hand, by virtue of the broad definitions attributable to 'public place', 'open to public view' and particularly 'in any manner communicates or attempts to communicate...' renders the provision so wide that the object of the legislation (prevention of public nuisance) is greatly exceeded by its effect.

Although such broad phraseology make section 195.1(1)(c) capable of preventing nuisance, it is submitted, that the mere fact that a law can achieve its stated purpose does not render it justifiable under section 1 of the Charter, if by its scope it also prohibits activities, which do not result in the evil sought to be suppressed. It is therefore, not a reasonable limit demonstrably justified in a free and democratic society.

It is submitted that the severe effect of rendering criminal, the actions of individuals involved in a lawful activity and who cause no harm or nuisance directly or indirectly to the public cannot be justified under the "proportionality" test enunciated in Oakes (supra) notwithstanding that the original objective of the

legislation may be of considerable importance.

It is submitted that the same principles apply with respect to section 193 of the Criminal Code of Canada. Given the legality of prostitution in Canada, and given also the highly desirable objective of removing the nuisance factor of prostitution from public streets and areas open to public view, it would seem to be both expedient and desirable to permit prostitutes and their customers a private location in which they may conduct their activities with discretion and without inconvenience to the public in a manner that is regulated and licensed by local governments. Instead, the section prohibits absolutely and without restriction, the keeping of a private house or place for the purpose of prostitution.


It is submitted that, as with section 195.1(1)(c), the absolute prohibition against the keeping of a common bawdy house, without specific reference to public nuisance or other public interest to be served, exceeds the proportionality test laid down in Oakes (supra).

It is therefore, submitted that the infringement of Constitutional Rights occasioned by both section 193 and 195.1(1)(c) of the Criminal Code of Canada individually and collectively, cannot be justified under section 1 of the Charter.

All of which is respectfully submitted.

SMORDIN, GINDIN, SORONOW, LUDWIG

Per: _____


J. J. GINDIN, Counsel for
the Appellant.

P A R T I V

NATURE OF ORDER REFERRED TO

That sections 193 and 195.1(1)(c) of the Criminal Code of Canada be declared unconstitutional.

P A R T V

LIST OF AUTHORITIES REFERRED TO

1. R. v. Big M. Drug Mart, (1985)1 S.C.R.;
(referred to on p. 5)
2. R. v. Tremayne, Unreported, 1986 (B.C.P.C.);
(referred to on p. 9)
3. R. v. Doonanco et al, (unreported) (Alta. P.C.) Sept. 1986;
(referred to on p. 10)
4. Hutt v. R., (1978) 1 C.R. (3d);
(referred to on p. 10)
5. Mayer v. Nebraska, 262 U.S., 390;
(referred to on p. 13)
6. Bolling v. Sharpe, 347 U.S. 497, 74 Sup. Crt. 693 (1954);
(referred to on p. 13)

7. Re Mia and Medical Services Commission of British Columbia
(1985) 16 C.R.R. 233 (B.C.S.C.);
(referred to on p. 13)
8. R. v. Jones (1986) 2 S.C.R. 284;
(referred to on p. 14)
9. R. v. Morgentaler, (Sup. Crt. Canada, January 28, 1988);
(referred to on p. 14)
10. Singh and Minister of Employment and Immigration (1985) 1
S.C.R. 177;
(referred to on p. 15)
11. Re: s94(2) of the Motor Vehicle Act (B.C.), (1985) 18 C.R.R.
30;
(referred to on p. 16)
12. Mill v. The Queen, 1986 1 S.C.R. 863;
(referred to on p. 16)
13. R. v. Cunningham, (P.J.C.) Man. unreported Nov. 3/86;
(referred to on p. 17)

14. Irwin Toy v. A. G. of Quebec, (1986) 32 D.L.R. (4d) 641;
(referred to on p. 19)
15. Boucher v. The King [1951] S.C.R. 265;
(referred to on p. 20)
16. Dolphin Delivery v. R.W.D.S.U. [1987] 1 W.W.R. 77;
(referred to on p. 21)
17. R. v. Skinner (1987) 79 N.S.R. (2d);
(referred to on p. 22)
18. R. v. Jahelnska and Stagnitta; 36 C.C.C. (3d) 105;
(referred to on p. 23)
19. Grier v. Alberta Optometric Association (1987) 79 A.R. 36
(C.A.);
(referred to on p. 23)
20. R. v. Oakes [1986] 1 S.C.R. 103;
(referred to on p. 29)
21. Re: Anti Inflation Act, [1976] 2 S.C.R. 373;
(referred to on p. 31)

22. R. v. Bear (1986) 54 C.R. (3d) 68;
(referred to on p. 33)