THE PROSTITUTION REFERENCE: SEXUAL COMMUNICATION AND THE STREETS

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Prostitution continues to be a vexing question for communities across Canada. The solicitation provisions of the Criminal Code proved ineffectual in outlawing or regulating street prostitution. Courts demanded proof that an accused was "pressing and persistent" in soliciting customers in order to convict.[1] Neighbourhood pressure tactics, such as "shame the johns" protests, and civil injunctions were used to inhibit the business of both prostitutes and their clients.[2] In the wake of the limited success of these tactics, and in spite of the recommendations of the Fraser Committee on Prostitution and Pornography that the government partially decriminalize prostitution,[3] the Mulroney Government, in its first term, amended the Criminal Code to restrict street prostitution further. The Code section 195.1(1)(c) prohibits every person "in any public place or in any place open to public view" from stopping persons or traffic, or communicating or attempting to communicate "in any manner", "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute".

Constitutional questions regarding this provision, as well as related Code provisions prohibiting the keeping of a common bawdy house, were referred to the Manitoba Court of Appeal and, ultimately, to the Supreme Court of Canada. The Supreme Court decision on the reference also resolved appeals from the conflicting Court of Appeal decisions in Nova Scotia and Alberta on these issues.[4] In upholding the law as a reasonable limit, the Court clarified the scope of both freedom of expression under section 2(b), and the liberty and security interests protected in section 7, of the *Charter*.

FREEDOM OF EXPRESSION

The Court was unanimous in holding that the provision respecting communications *prima facie* infringed the *Charter*'s guarantee of freedom of expression. Here, the Court reiterated the test it had developed in the *Ford* and *Irwin Toy* cases. The form and content of the expression were distinguished. Section 2(b) of the *Charter*, it was held, protects all content of expression "irrespective of the meaning or message sought to be conveyed".[5] Lamer J., as he then was, alone discussed the forms of expression which could fall outside the scope of the guarantee. Often, form and content are intimately connected, as in art, dance, or language. Threats, or acts, of violence, however, could not be invoked as forms of protected expression. But any law that "makes it an offence to convey a meaning or message, however distasteful or unpopular, through a *traditional* form of expression like the written or spoken word or art must be viewed as a restriction on freedom of expression."[6] Therefore, even though the communication provisions were framed as criminal prohibitions, the Court found that they were aimed at restricting the content of speech, albeit commercial, offending section 2(b) of the *Charter*.

Turning to the section 1 analysis, Justice Lamer characterized the legislative objective as directed at curbing not only the nuisance to residential communities and business neighbourhoods, but also associated criminal activities such as drug use, trafficking, and violence, and the attendant victimization and degredation of the prostitutes themselves. The majority of the Court, Chief Justice Dickson, Justices La Forest and Sopinka concurring, and Justices Wilson and L'Hereux-Dubé in dissent, more narrowly characterized the legislative objective as one directed at addressing solicitation in public places and eradicating the social nuisance accompanying street soliciting.

On the ensuing question of whether the law was a reasonable limit, the division of the Court is unremarkable, unless one examines that division along gender lines.[7] All of the men on the Court agreed that the law was reasonable: that the legislative concern was a pressing one, and that the means chosen were proportionate to the objective. The majority was willing to give Parliament greater "flexibility" in limiting commercial expression where the communication took place in public and, essentially, the prohibited speech was that between only prostitute and customer. The two women, in a dissent, held that while the legislative concern was pressing and substantial, the means employed were not sufficiently tailored to that objective.

The minority found that the prohibition was drafted too broadly as it criminalized any act of communication designed to engage the services of a prostitute, irrespective of whether it contributed to the "social" nuisance. Nor was the prohibition confined to places where people were most likely to be inconvenienced or offended by the expression. The minority would not condone unneccessarily over-broad laws which infringed fundamental freedoms. At the time the amendment was being debated in Parliament, commentators feared that holding hands in the park may be sufficient to trigger the criminal process. Justices Wilson and L'Heureux-Dubé similarily feared that the "proverbial nod or wink may be enough".[8]

Concerns about the law's overbreadth were confirmed within months after the release of the Court's decision. Toronto's alternative weekly newspaper *NOW* was charged with communicating for the purposes of prostitution in relation to the newspaper's business personals section, which was a notorious vehicle for advertising by prostitutes.[9] The virtue in advertising, according to *NOW*, was that women and men did not have to submit themselves to the danger and public degredation of street soliciting, also avoiding the public nuisance which accompanies those activities. The charges were dropped a few weeks later. Based upon the majority's characterization of the legislative objectives, *NOW*'s prosecution would have been beyond the scope of those objectives and unjustifiable.

FUNDAMENTAL JUSTICE

Although all of the justices acknowledged the inherently degrading nature of prostitution, only Lamer J. characterized the objectives of the solicitation provisions as being designed to eradicate the dangerous and dehumanizing act of prostitution.[10] Prostitutes reply, however, that their "trade" is simply another form of wage labour; contracts for sexual services performed by "professionals".[11] As such, they argue, the state has no business putting prostitutes out of business. Section 7 of the *Charter*, they argued in these cases, protected their interest in lawfully pursuing their livelihood.

Economic Liberty

It has long been feared in some quarters that section 7 might be available to unravel a host of social-welfare statutes which affect "liberty" interests; those matters which traditionally have been regarded as in the realm of the "private". These fears were heightened considerably by the earlier judgments of Justices Lamer and Wilson,[12] suggesting that section 7 had not only a procedural, but a substantive, reach. On this cue, the British Columbia Court of Appeal in *Wilson*,[13] held that a medical practitioner's section 7 liberty interest was infringed when the government limited the numbers of doctors that could practice in certain geographic areas. Lamer J. took the opportunity in this case to clarify section 7's reach, condemning the reasoning in *Wilson* in the process.

Characterizing the act of communicating for the purpose of prostitution as a commercial one, Justice Lamer held that the section 7 did not protect economic interests. He reaffirmed that the section set out, in a more general fashion, the kinds of legal rights which are specified in sections 8 to 14. Therefore, "the restrictions on liberty and security that section 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration".[14] Lamer J. took pains to point out that section 7 was concerned only with state invocation of the judicial system and not general or "pure" public policy. What is at issue in the area of public policy are "political interests, pressures and values that no doubt are of social significance, but which are not "essential elements of a system for the administration of justice"".[15] Lamer J. acknowledged, however, that there are a myriad of regulatory activities engaged in by the state, many entrusted to administrative tribunals, which affect section 7 liberty interests. He thereby left the door to greater substantive review significantly open, despite this more narrow reading of section 7.

Chief Justice Dickson, writing for the majority, held that liberty interests were affected in these cases where the judicial system was being invoked and a person's liberty was threatened by imprisonment. But he found it uneccessary to deal with the broader "economic" arguments which were raised. And, even though the sections were designed to curtail a certain economic activity through very circuitous routes, this alone was insufficient to offend the principles of fundamental justice.

In dissent, Justices Wilson and L'Heureux-Dubé held that liberty was affected — absent fundamental justice — because it was accomplished by infringing another *Charter* right, namely, freedom of expression. Rather than confining the section 7 interests to the types of matters covered in sections 8 to 11, as the majority proposed, the minority extended the principles of fundamental justice to include all *Charter* rights. This was the same argument Wilson J. employed in *Morgentaler*, holding there that the Code provisions in question offended the principles of fundamental justice because they also infringed section 2(a) *Charter* guarantees of "freedom of conscience and religion".[16] The trouble with this argument is that it means section 7 can be successfully invoked whenever the combination of a potential deprivation of liberty or security of the person attaches to the infringment of another *Charter* right. It can conflate many *Charter* infringements into section 7 claims, expanding section 7's substantive range and requiring, arguably, a parallell section 7 jurisprudence. As Justice Wilson herself acknowledged, the nature of the justification required under section 1 may differ depending upon the *Charter* right being infringed. Elsewhere, Wilson J. had written that section 7 infringements must be difficult, if not impossible to justify as a reasonable limit.[17] In this case, Justice Wilson found the section 1 evidence wanting, as imprisoning people for the excercise of their constitutionally-protected freedom of expression was not proportionate to the social nuisance the legislation was designed to curtail.

Void for Vagueness

It was also argued that section 7 was offended if a law prohibiting certain conduct was overly vague. Two rationales

(Continued on page 16)

have been offered for this "void for vagueness" doctrine: (1) to provide fair notice of conduct that is prohibited by law, and (2) to more narrowly confine the discretion of law enforcement officials. The doctrine has achieved constitutional status in the United States but so far it has been questionable whether it applied also in Canada, and to what extent, under either sections 7 or 1. The decision of the Court makes clear that it applies at either stage of the interpretive process. The majority read this requirement of clarity into section 7 but, at the same time, restricted its scope substantially by preserving vague laws which have been clarified by judicial interpretation. Considering that much legal language lacks certainty, the Court was prepared to uphold vague laws if the impugned language had been clarified by courts. Lamer J. went so far as to uphold vague language as long as it "can be or have been given sensible meanings by courts".[18] Therefore, the citizen concerned about running afoul of the law must check not only existing judicial interpretations, the earnest citizen must also determine whether the vague law "can be" given a sensible interpretation by judges.

CONCLUSION

Underlying the judgment is a tension prevalent in the debate over prostitution: decriminalization versus prohibition. For many, prostitutes are seen as victims of a male-dominated consumerism which vulgarizes and exploits female sexuality. Legalizing prostitution reinvigorates the "sexual contract" of female submission,[19] contributing to a general atmosphere which condones sexual violence as does pornography. After all, the word 'pornography', derived from the ancient Greek, simply means "the depiction of whores".[20] For others, prostitutes are also victims, but ones for whom outlawing or criminalizing their behaviour contributes further to their victimization and oppression.[21] The Code provisions, and civil injunctions, have had the effect of driving prostitution to other areas, sometimes abandoned and unlit streets, making women more vulnerable to sexual abuse and violence from johns and pimps.[22] Rather than empowering women, these laws push them further into male submission.

Although not clearly articulated along these lines, the judgments of the majority and minority could be seen as falling within the terms of this larger debate. A debate over which Canadian society remains, as the Court was on the constitutional question, deeply divided.

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1. *Hutt* v. *R.*, [1978] 2 S.C.R. 476.
2. *Attorney-General for British Columbia* v. *Couillard* (1984), 11 D.L.R. (4th) 567 (B.C.S.C.).
3. Canada, *Report of the Special Committee on Pornography and Prostitution, Pornography and Prostitution in Canada*, vol.2 (Ottawa:Supply and Services Canada, 1985) (Chairman: Paul Fraser).
4. *Reference re Criminal Code, ss. 193 & 195.1(1)(c)* (1990), 77 C.R. (3d) 1. The related judgments are *R.* v. *Skinner* (1990), 77 C.R. (3d) 84 from Novas Scotia and *R.* v. *Stagnitta* (1990), 74 Alta.L.R. (2d) 193 from Alberta. The Court in the *Skinner* appeal also dismissed the argument that the *Criminal Code* prohibitions offended the *Charter's* guarantee of freedom of association.
5. Per Lamer J., *supra*, note 4 at 49.
6. *Supra*, note 4 at 52.
7. For a discussion of how gender could be relevant in these circumstances see excerpts from Justice Wilson's Fourth Annual Barbara Betcherman Memorial Lecture in (1989) 6 Cndn. Human Rights Advocate 1 at 3.
8. *Supra*, note 4 at 75.
9. "Sex ads in paper bring charges" *Globe & Mail* (1 September 1990) 1.
10. I am paraphrasing the Fraser Committee at *supra*, note 2 at 378.
11. See *Good Girls/Bad Girls: Sex Trade Workers and Feminists Face to Face* (Toronto: Women's Press, 1987).
12. In *Reference re Section 94(2)*, [1985] 2 S.C.R. 486 and *R.* v. *Morgentaler* (1988), 44 D.L.R. (4th) 385 at 482 ff., respectively.
13. *Wilson* v. *Medical Services Commission*, [1989] 2 W.W.R. 1 (B.C.C.A.).
14. *Supra*, note 4 at 43.
15. *Supra*, note 4 at 45.
16. *Supra*, note 10 at 494.
17. *Supra*, note 4 at 82. Justice Wilson likely was referring to her judgment in *Reference Re Section 94(2)*, *supra*, note 10 at 565.
18. *Supra*, note 4 at 30.
19. Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988) c.7.
20. Andrea Dworkin, *Pornography: Men Possessing Women*. (New York: Perigee Books, 1981) at 200.
21. H. Wade MacLauchlan, "Of Fundamental Justice and Society's Outcasts: A Comment on *R.* v. *Tremayne* and *R.* v. *McLean* (1986) 32 McGill Law J. 213.
22. See Canada, Department of Justice, Research Section, *Street Prostitution: Assessing the Impact of the Law (Synthesis Report)* (Ottawa: Department of Justice, 1989) at 89.