



Alan Young

4700 Keele Street
Toronto, ON
Canada M3J 1P3
Tel: 416-736-5595
Fax: 416-736-5736
ayoung@osgoode.yorku.ca

Memo

Thank you for taking time to speak with my assistant about the upcoming constitutional challenge to various prostitution-related offences in the Criminal Code. I have decided to write this brief note so that all prospective participants have a clear idea of the nature of the challenge.

Legal Arguments:

The argument to be advanced is relatively straightforward. It is not unlawful to work as a prostitute yet the accompanying criminal prohibitions make it virtually impossible for a prostitute to pursue this lawful trade in a safe and secure environment. Specifically, we intend to challenge s. 210 (bawdy house) and s. 212(1) (j) (living on the avails). It is the presence of these provisions which prevent prostitutes from operating in a safe and secure environment. The bawdy house prohibition denies the sex-trade worker a safe haven for pursuing this lawful trade and the living on the avails provision prevents the sex-trade worker from hiring the services of a manager, a driver or a bodyguard etc.

From 1991-2001, 73 prostitutes have been murdered while working the streets and 70 out of 73 victims were women (Statistics Canada, Juristat, Homicide In Canada, 2001). In addition, the entire country has been shocked by the discovery of mass graves on the property of Robert Pickton in British Columbia. With Pickton's trial commencing in January 2007, the time is ripe for bringing this challenge.

The "safety argument" will be brought under s.7 of the Charter of Rights. The argument is based upon the right to be free from arbitrary laws as guaranteed by s.7. The Supreme Court of Canada has recently held that the test for arbitrariness is one of "gross disproportionality" - i.e. that the harms created by the law are grossly disproportionate to any benefits gained by the law. I believe that we can easily demonstrate this form of arbitrariness; however, it is absolutely necessary to collect the relevant empirical data, which will demonstrate how the law adversely impacts upon sex-trade workers. To a certain extent, the notion of adverse impact is a matter of common sense; however, a court of law requires compelling legislative facts, and not common sense, before it will be inclined to invalidate a law that has a solid historical pedigree.

Although the focus of the challenge will be on provisions which place sex-trade workers into harmful scenarios, a challenge will also be brought to the "communication for the purpose" offence in s.213 (1)(c). It will be more difficult to challenge this offence as the government will

assert that it still serves a valid, pressing state objective as found by the Supreme Court of Canada in 1990.

In 1990, the Supreme Court of Canada upheld both the "communication" law and the bawdy house law (*Reference re. s.193 and s.195 (1) (c) of the Criminal Code* (1990) 56 C.C.C. (3d) 65). This holding does not prevent the revisiting of the issue for two reasons. First, this case was argued in the absence of any empirical data regarding the practical operation of the law. Second, the case was argued on the basis of violations of s.7 (economic liberty and vagueness) and s. 2(b) (freedom of expression). These were novel arguments and the Court had little difficulty dismissing the appeal.

Since this decision there have been a number of developments which warrant a revisiting of the constitutional challenge (beyond the statistical evidence demonstrating the rising murder rate for prostitutes). First, the Supreme Court of Canada was not apprised of numerous studies which had been commissioned by the Federal Department of Justice in 1987. These studies have confirmed that the prostitution-related offences in the *Criminal Code* are largely ineffective in achieving their stated purpose. In December 1998, the Report of the *Federal/Provincial/Territorial Working Group on Prostitution* was released, and the Working Group reached the following conclusion about the impact of these commissioned studies:

The research results indicated that the law was not meeting its objectives as its main effect in most centres has been to move street prostitutes from one downtown area to another, thus merely displacing the problem. However, as mentioned in the previous paragraph, the Supreme Court of Canada had already ruled that the communicating law was a justifiable infringement because its strengths (reducing the street nuisance associated with street prostitution) outweighed the infringement on freedom of expression. Had the research results been made available prior to the Supreme Court decision, the question whether s.213 is a justifiable infringement on freedom of expression might have been considered differently (emphasis added)

In other words, because the Supreme Court of Canada found that s.213 violated freedom of expression, it is incumbent on the state to show that this violation is justified, and a violation can only be justified if the law is effective in serving or achieving its stated objective. Due to the post-1990 studies it is now clear that the law is not effectively serving its stated objective and thus the Supreme Court of Canada would be in a position to overrule their 1990 decision upholding the law.

Students and Participants:

This challenge is being prepared entirely by law student volunteers working under my supervision. The case is being brought on a shoe-string budget with just enough resources to pay for disbursements (primarily relating to bringing experts to Toronto for cross-examination). The students are responsible for preparing the evidentiary record to demonstrate the harms flowing from the law (i.e. primarily the safety concerns). To that end, the students need to speak with all

prospective participants to determine the type of evidence participants can provide in relation to the safety issue.

All evidence will be provided to the Court in affidavit form. Students will conduct an interview(s) to collect the relevant information from the participant and the student will draft the affidavit. Beyond reading, approving and/or editing the draft affidavit, all participants must be aware that the Crown will, in all likelihood, wish to cross-examine the deponent of the affidavit. All cross-examinations take place outside of the courtroom in a special examiner's office (i.e. a court reporter's office). Once all cross-examinations are completed a date will be set for a hearing for argument on the challenge. I am trying to complete the evidentiary record for January 2007 with the expectation that cross-examinations will take place from Jan-March 2007. It is hoped that the hearing will be conducted in May 2007. I wish to fast-track this challenge as I believe it is important to have this challenge heard contemporaneously with the Pickton trial to ensure that there is a great deal of public and political discussion of this important issue.

I am often asked what the future will be if the challenge is successful but I am not in a position to answer this speculative question. A successful challenge will lead to the de facto decriminalization of prostitution but it is unclear whether or not provincial government would then step in to regulate the industry. I assume that some regulation will arise but I cannot predict whether or not the regulations will be draconian or fair. At this point, the only objective of the challenge is to remove the threat of criminal law for people engaged in the sex-trade.

I thank you for taking time to consider assisting us with this project. I hope that you are able to participate and that we can make this an easy and pleasant experience. If you have any questions for me do not hesitate to contact me at either (416) 736-5595 or ayoung@osgoode.yorku.